

DISMISSAL

Basic Information

It is the prerogative of management to maintain discipline, to caution those not complying with the conditions and, if necessary, to take disciplinary action. The aim of discipline is to correct unsatisfactory behaviour or performance instead of punishing it. The specific procedures that need to be followed depend on the nature of the unsatisfactory behaviour or performance. The onus is on the employer to prove that the dismissal was based on a fair reason and that a fair procedure was followed.

Not all dismissals are fair. According to the Labour Relations Act of 1995 (“the Act”), the following dismissals can be seen as automatically unfair dismissals when the reason for the dismissal is:

- ❖ Based on unfair discrimination;
- ❖ Due to the employee being pregnant or for any reason relating to the employee’s pregnancy; or
- ❖ Participation in a lawful strike.

The Act refers to the following categories of dismissal cases, namely:

- a) Misconduct
- b) Incapacity: poor work performance
- c) Incapacity: ill health or injury
- d) Operational requirements

The following section will deal with dismissals based on misconduct.

1.2. Dismissal based on Misconduct

1.2.1. Principles

According to the Code of Good Practice, there are certain principles to consider in determining whether dismissal for misconduct is fair. These principles form the basis for all disciplinary matters at the workplace. These principles are:

- ❖ Whether or not the employee contravened an existing rule or standard regulating conduct in, or of relevance to, the workplace;
- ❖ If a rule or standard was contravened, whether or not:
 - The employee was aware, or should reasonably have been aware, of the rule or standard
 - The rule or standard has been consistently applied

- It was a valid rule or standard
- The penalty was appropriate for the contravention of the rule or standard.

There must be a rule or standard

Rules, standards, policies and procedures are usually contained in the Company's Human Resources Manual and are specific to the particular company. The relevant labour legislation forms the basis of these company documents. The purpose of these rules, standards and policy documents are to direct behaviour and to ensure uniformity, fairness and consistency in the workplace. Certain rules are unwritten and refer to legislation that needs to be complied with. Although rules have to be relevant to the workplace, it can be direct or indirect. For example a staff member posting an unpleasant comment about her supervisor on Facebook would be seen as breach of a rule that is of indirect relevance to the workplace.

The rule must be valid

The word "valid" refers in this case to lawful and reasonable. If a work instruction falls outside a staff member's agreed job description, it is seen as unlawful and thus invalid. For example if it is expected of the cleaner to draft letters in the absence of the secretary. The reasonableness of a rule depends on the circumstances. For example a pilot being dismissed (first offence) for sleeping on duty versus a secretary being dismissed (first offence) for sleeping on duty.

The rule must be consistently applied

Consistency means that the same rule applies to all staff members irrespective of their seniority levels or years of service. What applied in the past must also apply in the future.

Although the rule of consistency should take priority, the merits and circumstance of a case should also be considered.

The employee must be aware of the rule

It is important that employers communicate the rules and standards to the employees either via the employer's Human Resources Manual or other company documents such as job descriptions, memorandums, contracts of employment, performance assessments, etc. Any changes to the existing rules and standards or new rules need to be communicated to the employees. Certain rules and standards are not formalised and become the norm such as racial discrimination/comments.

Corrective approach

As mentioned before, the aim of discipline is to correct behaviour by means of progressive discipline, instead of punishing the employee. Disciplinary action should also follow shortly after the misconduct became known in order to prevent it to rankle or develop. The so called "Red Hot Stove" principle applies, namely:

- ❖ No matter who touches the hot stove – you are going to burn

- ❖ The longer you touch, the more severe the burn (progressive discipline)
- ❖ The moment you touch it – you will burn (disciplinary action to follow shortly after the incident)
- ❖ Whenever you touch the hot stove – you will burn (consistency)

1.2.2. Procedural and Substantive Requirements

According to the Code of Good Practice, a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure.

“Fair reason” refers to the extent to which the allegations against the employee have been proved, as well as the appropriateness of dismissal as a penalty. This entails at least the following:

Proof: The allegations of misconduct must be proved on a balance of probabilities;

Seriousness/Gravity: The misconduct must be so serious and of such gravity that it makes a continued employment relationship intolerable;

Circumstances: Consideration must be given to the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances); the nature of the job and the circumstances of the infringement;

Consistency: The penalty of dismissal must be applied consistently, i.e. what applies to one employee, must apply to other employees and what applied in the past, must apply in future.

“Fair procedure” refers to the procedural guidelines outlined in the Code of Good Practice. Save for exceptional circumstances, where the employer cannot reasonably be expected to comply, these are:

Notification: The employee must be notified of the allegations and the Hearing in a form and language that he/she can reasonably understand;

Reasonable time: The employee must be given a reasonable time to prepare the response to the allegations against him/her and to engage the assistance of a trade union representative;

Representation: During the Hearing the employee is entitled to be assisted by a trade union representative;

Discipline against trade union representative: If the employee is a trade union representative, office bearer or official of the Trade Union, no disciplinary action may be instituted without first informing and consulting with the Trade Union;

Stating a case: The employee must be allowed to state a case in response to the allegations against him/her;

Communication of decision: After the Hearing the decision must be communicated to the employee, preferably in writing;

Dismissal: If the employee is dismissed, the employee must be given the reason for the dismissal and reminded of any rights to refer the matter to the appropriate dispute resolution body.

1.2.3. The Disciplinary Hearing

(a) Aim of the Disciplinary Hearing

A disciplinary hearing is held to:

- ❖ Establish all the facts of the matter
- ❖ Give the employee an opportunity to state his/her case
- ❖ Ensure that the disciplinary action/sanction is fair
- ❖ Correct the employee's conduct
- ❖ Ensure fairness

(b) Obtain the facts

An informal investigation should be conducted by an objective person who will not be involved at the hearing. Facts or information can be obtained through discussions, written statements by the complainant, accused and witnesses. The manager of a small business will deal with this stage simultaneously at the inquiry or formal hearing.

(c) Determine what action to take

Based on the information/facts obtained, a decision needs to be made whether to institute formal disciplinary action or whether informal advice/counselling is appropriate. The following approach can be followed in order to determine what action to take:

- ❖ Establish whether the alleged behaviour amounts to misconduct. Is the employee unable or unwilling to perform according to agreed standards? If the employee is unable to meet the required performance standards it is regarded as incapacity and the employee should be given proper instruction, training, guidance or counselling and feedback in terms of his/her performance. If the employee is unwilling or negligent it is regarded as misconduct and may be treated as such.
- ❖ Establish whether the misconduct is serious enough to institute disciplinary action or whether informal discussion would be a more appropriate measure.
- ❖ Establish whether the misconduct is serious enough to warrant a formal disciplinary hearing. A formal disciplinary hearing's outcome may lead to dismissal. If a finding of guilty will definitely not lead to dismissal, it may be appropriate to issue a warning. Note that the issue of a warning must be

preceded by disciplinary interview/discussion whereby the accused is offered the opportunity to state his/her case.

- ❖ Prepare for a formal disciplinary hearing in instances where the misconduct is serious and a finding of guilty may lead to dismissal or where the employee is already on a final warning for a similar offence.

(d) Notification of a Disciplinary Hearing

If the employer has decided that serious disciplinary action may be warranted against an employee, a disciplinary hearing has to take place. The employee should be notified:

- ❖ About the hearing in a way and manner that he/she understands (if the employee is literate, in writing; if the employee is not literate, or does not understand the language used by the employer, it should be explained to the employee in a language and manner that he understands).
- ❖ In a manner that the employer is certain that he/she received the notification. If circumstances exist where the employee cannot be handed a written letter or verbal notification cannot be given, an email, fax or registered letter should be sent to the employee's address.
- ❖ About the date, time and venue of the hearing.
- ❖ About the charge(s) against him/her in sufficient detail that the employee can prepare a case against the charge(s).
- ❖ That the employee has a right to be assisted or represented at the hearing by a fellow employee. No legal representation will be allowed.
- ❖ So that reasonable time exists for the employee to prepare for the hearing, which is understood to mean forty-eight (48) hours or more.
- ❖ That if he/she requires an interpreter at the hearing, the employer should be notified thereof at least twenty-four (24) hours before the hearing.
- ❖ Of the employee's right to bring his own witnesses and/or other evidence.

(e) Suspending the accused

Suspension means that the employee is not required to come to work, nor is there an obligation on the employer to allow the employee to work. The employer must explain the reason for the proposed suspension to the accused employee – offering the employee an opportunity to motivate why he/she should not be suspended. Suspension should be on full remuneration, unless a collective agreement with the recognised Trade Union or an agreement with the employee concerned provides differently, or if the hearing is delayed at the request or due to the fault of the employee. Suspension is often proposed where the relationship with the employer and/or fellow employees has been seriously damaged or where the alleged offences contain aspects of dishonesty.

(f) People present at the hearing

Parties to the disciplinary hearing should be neutral. It is therefore advisable for the owner/manager of a small business to appoint an independent chairperson to conduct the hearing.

At the hearing, the following people will be present:

- ❖ the employee charged with misconduct (the accused);
- ❖ the representative of the accused (if he/she chooses to have one);
- ❖ an independent chairperson (senior manager/supervisor or a competent external party);
- ❖ the representative of the employer, putting the charges to the employee (prosecutor);
- ❖ witnesses from both parties (if required);
- ❖ disciplinary committee member (May be an employee or competent external person such as a consultant. The role of a Committee member is to advise the chairperson. The appointment of a Committee member is not a requirement.)
- ❖ advisor (To give advice to the Committee on the procedures and administrative duties that need to be taken care of. The advisor does not necessarily have to be present during the hearing. The advisor's input, however, is vital in that it ensures a fair outcome and no unnecessary disputes.)
- ❖ observer (depends on the Company policy whether observers will be allowed or not)
- ❖ a note-keeper (optional); and
- ❖ interpreter (optional).

(g) Representation

The Code of Good Practice provides that an employee is entitled to the assistance of a Trade Union representative or fellow employee during a formal disciplinary hearing. A Trade Union representative is defined as a member of a Trade Union who is elected to represent employees in a workplace (i.e. a shop steward). A disciplinary hearing is an internal matter of the business and outside representation should, as a general rule, not be allowed. There are however circumstances where serious consideration should be given to allowing outside representation. These circumstances include:

- ❖ where the accused employee is unable to defend himself/herself properly due to complicated nature of the case; or

- ❖ where the accused employee is the only Trade Union representative at the workplace and he/she wishes to be represented by a Trade Union Official who was not an employee; or
- ❖ where the accused employee is very senior, no other employee of equal seniority is willing or able to represent him/her and he/she does not feel it appropriate for a more junior fellow employee to represent him/her.

Although the chairperson does not have to allow legal representation, there is at least an obligation to consider the representations made by the accused employee in this regard.

(h) Non-compliance with procedures

The Code of Good Practice recognises that in exceptional circumstances, if the employer cannot reasonably be expected to comply with the procedural guidelines, the employer may dispense with all or some of the procedures.

Exceptional circumstances include the following:

- ❖ crisis situations (e.g. threat to life or property, or extreme cases of intimidation of witnesses);
- ❖ waiver of the right to a hearing (e.g. desertion, or where the employee seriously and continuously disrupts the proceedings); and
- ❖ collective misconduct (e.g. participation in unprocedural industrial action, where it would be impractical to hold individual disciplinary hearings).

(i) Record keeping

The proper recording of all facts before and during the hearing is of paramount importance since it supports the employer's "burden of proof" in the event of a dispute arising as a result from the disciplinary action. It is recommended to appoint a record keeper/scribe instead of having the chairperson chairing the hearing and recording the facts. It is advisable to make use of electronic recordings where complicated, high profile cases are concerned. The accused is entitled to a copy of the disciplinary record.

(j) Relevant/Irrelevant evidence

If a question or evidence is relevant, it can contribute to proving or disproving the allegations against the employee. A question or evidence is irrelevant if it does not have any direct or indirect impact on the allegations against the accused. The chairperson should not entertain irrelevant questions or evidence since it is time consuming and it can create distraction from the real issues.

The accused should only be confronted with charges listed on the charge sheet, which he/she received in the notification. New issues should not be raised, as the employee would not have had an opportunity to prepare for these.

(k) Conducting the Disciplinary Hearing

The order of proceedings is as follows:

At the beginning of the hearing, the prosecutor will put the charge to the employee. The employee will have the opportunity to plead guilty or not guilty. If the employee pleads guilty, the chairperson may continue to determine an appropriate penalty (after hearing submissions from parties about mitigating and aggravating factors). If the employee pleads not guilty, evidence should be presented.

The prosecutor has to present the case of the employer with the aim of proving on a balance of probability that the accused is guilty. The employee (or his representative) will then get an opportunity to cross-examine (question) the witnesses of the employer. Hereafter, the prosecutor has an opportunity to re-examine the Company witnesses to clear up any confusion.

The employee then gets an opportunity to state his/her case. The employee testifies first and may then be cross-examined by the prosecutor. The employee's representative may ask him/her some questions in re-examination to clarify any uncertainties, which arose during cross-examination. The employee's witnesses are allowed to testify next. They may also be cross-examined by the prosecutor and may then be re-examined by the employee or his/her representative.

At the end of the hearing, the chairperson decides whether the employee is guilty or not guilty. Should the decision be that the employee is not guilty, it is the end of the matter. Should the verdict however, be that the employee is guilty, the chairperson should state his/her decision and then allow both parties (the employee or his/her representative) and the prosecutor an opportunity to state mitigating (factors that may reduce the severity of the disciplinary measures to be taken) or aggravating factors and what the sanction should be in their view. The chairperson then has to decide on the sanction (penalty). This may be given there and then, after a short break or within reasonable time (not more than five days). The chairperson's decision should be given in writing, with reasons for his/her decision.

The employee should be informed that he/she has a right to appeal. If the Company does not provide for an appeal (which is not compulsory by law), the employee must be reminded that he/she could take the case further in a bargaining council, the CCMA or in another agreed way (e.g. private arbitration).

1.2.4. Principles that will apply to Disciplinary Hearings:

- **Respect**

Parties will treat each other and the process with respect.

- **Employer bound by its disciplinary code**

The employer will follow its own disciplinary procedures and code and if a case is later referred to a bargaining council, CCMA or Labour Court, the employer's

procedure will be regarded. The employer is allowed to set the standards expected of its employees and these will not be interfered with easily by the Courts or other tribunals.

- **Postponements**

Postponements will only be granted when applied for timeously, where a good reason is presented and will only be granted in exceptional circumstances.

- **Failure to attend**

Should the employee and/or his/her representative not attend the hearing, the procedure may continue in their absence.

- **Information required**

The employer will make information reasonably required by the employee in order to state a case, available to the employee or his representative upon request, within a reasonable period of time.

- **Chairperson**

- ❖ The chairperson will remain impartial, independent and exercise his/her judgement in a fair and objective manner.
- ❖ The chairperson will be either an independent outsider to the workplace or alternatively, a more senior person than the accused.
- ❖ Generally, the chairperson should not be involved as the discoverer of the misconduct, as a witness or in the presentation of the charge.
- ❖ The chairperson, being independent, is not allowed to discuss either the verdict (guilty/not guilty) or the penalty with any other person.
- ❖ Decisions about the sanction (outcome of the hearing) should not be made prior to the hearing, as this prejudices the process and the accused.
- ❖ Normally, the chairperson should not become involved in the evidence by actively participating. Participation should be restricted to rulings about the order of events and questions of clarity.

1.2.5. Proof on a balance of probabilities

The standard of proof required in disciplinary enquiries is a conclusion on a balance of probabilities after giving consideration to the facts that have been established. Proof on a balance of probabilities will be established if, after the analysis of the

evidence, the Committee concludes that “We believe that it is more probable than not, that the employee is guilty of the allegations against him/her”.

Proof beyond reasonable doubt requires that the inference sought to be drawn must be consistent with all the proven facts. It must be the only reasonable inference. If there are other reasonable inferences to be drawn, it cannot be said that a case has been made out beyond reasonable doubt.

1.2.6. Record keeping and administration after the hearing

It is required of an employer to keep employee records specifying the nature of any disciplinary transgression, the actions taken by the employer and the reasons for these actions. If the sanction is a:

- ❖ Warning:
 - It must be in writing and given to the employee (except for a verbal warning which should be issued in the presence of another member of management and then be placed on the employee’s personal file).
- ❖ Final warning:
 - The severity of the matter needs to be explained to the employee, namely the possibility of dismissal in the event of future misconduct. Final warning to be placed on the employee’s personal file.
- ❖ Alternative penalty:
 - For example demotion or suspension should be noted and records thereof kept on the employee’s personal file.