

MISCONDUCT



INTRODUCTION

Misconduct is one of the grounds recognised by the law that may give reason for the dismissal of an employee. The law promotes the principle of progressive discipline.

This means there should be efforts by the employer to correct employee's behaviour by means of disciplinary actions. An example will be the issuing of advice and correction of minor problems on the part of an employee, and written warning for consistent misconduct followed by a final written warning for persistent misconduct. Dismissal should be considered as a last resort when enforcing workplace discipline.

Employers should also set out clear disciplinary rules that stipulate how employees should behave at work. All employees should be informed about these rules, through induction, notice boards, meetings etc.

The Code of Good Practice on dismissal sets out guiding principles when instituting fair and reasonable procedures. The following broad standards should be adhered to when dealing with a fair dismissal —

- ◆ Substantive fairness — there must be a valid reason for the termination of the contract of employment, for example, theft.
- ◆ The reason for dismissal must not be classified as automatically unfair, for example, dismissal based on pregnancy.
- ◆ Procedural fairness — dismissals should be effected in a procedurally fair manner, for example, following the disciplinary procedure of a company, allowing the employee to call witnesses, etc.

SUBSTANTIVE FAIRNESS

The person who is to decide on the fairness of a dismissal should consider whether or not —

- ◆ The employee broke a rule of conduct in the workplace;
- ◆ The rule was valid or reasonable;
- ◆ The employee knew about the rule or should have known about the rule;
- ◆ The employer has been consistent in applying the rule; and
- ◆ Dismissal is the appropriate step to take against the employee for breaking the rule, instead of less severe steps such as a final written warning or suspension.

Repeated offences could constitute grounds to justify a dismissal. On the other hand, dismissal for a first offence may be appropriate if an employee has committed a serious offence, which makes his/her employment intolerable and which has broken the trust relationship.

The following are some examples of serious misconduct —

- ◆ Gross dishonesty, for example fraud.
- ◆ Physical assault.
- ◆ Sexual harassment, persistent and unwanted sexual advances.

Offences such as those mentioned above should, however, be judged on their merits and the employer should take into account the nature of the job and the circumstances surrounding the offence itself.

PROCEDURAL FAIRNESS

In addition to good substantive reasons for a dismissal, an employer is required to follow a fair procedure when dismissing an employee. The employer needs to make an investigation into the alleged misconduct and the following requirements should be met—

- ◆ The employee must be informed about the charges in a manner she/he can understand. The employee should be given sufficient time to prepare for the hearing.
- ◆ The union should be consulted before commencing an inquiry into an employee who is a shop steward or office bearer of the union.
- ◆ The employee must be given a chance to state his/her case.
- ◆ The employee has the right to be assisted by a shop steward or a fellow employee at the hearing.
- ◆ After the inquiry, the employer should notify the employee in writing of the decision with clear reasons.
- ◆ If the employee is not satisfied after being dismissed, the employer has to inform the employee of his/her right to appeal and thereafter to refer the matter to the relevant council or CCMA within 30 days or, if it is a later date, within 30 days of the making of a final decision to dismiss or uphold the dismissal.

AUTOMATICALLY UNFAIR DISMISSALS

Participation in a lawful strike or refusal to do the work of a striker or refusal to comply with a collective bargaining demand of the employer are now expressly permitted by the law. Any dismissal based on the conduct mentioned above, will now be deemed to be automatically unfair.

In addition to this, a transfer, or reason related to a transfer, contemplated in section 197 or 197A or a contravention of the Protected Disclosure Act, 2000 by the employer, on account of an employee having made a protected disclosure defined in that Act, have been included in the meaning of automatically unfair dismissal

RELEVANT LEGISLATION

Labour Relations Act, s37 (6)(a), s187, s188 (2), 19 (1) (b) (i) Schedule 8,