

Examples of allegations of misconduct

Examples of allegations that are made against employees and the elements that must be proved

<p>Any tampering with, wilful damage to, or negligent handling of any property of the employer, supplier or customers.</p>	<p>The employee’s actions must be consciously directed towards the destruction of the employer, supplier or customer’s property.</p>
<p>Any physical or verbal assault, threatening or intimidating behaviour.</p>	<p>The unlawful and intentional application of force to a person or a threat that such a force will be applied. This includes verbal insults and use of language that has the effect of humiliating another.</p> <p>Unlawfulness: The employee accused of assault may claim that s/he acted in self-defence. If the employee can indeed prove that s/he was defending him/herself from an attack, it may mitigate (lessen) against a finding of gross misconduct. It then becomes a matter of degree – did the amount of force the victim used in response exceed the amount needed to defend him/herself?</p> <p>Another defence that is commonly raised in the context of assault is provocation. Where an employee can show that s/he acted on the basis of provocation, it may also mitigate against a finding of gross misconduct.</p> <p>Intention: Assault requires some evidence that the employee concerned intended to apply force to the victim, or in the case of verbal assault, intended to humiliate or insult him/her.</p>
<p>Insubordination / failure to carry out reasonable and lawful instructions.</p>	<p>Disregarding or flouting an employer’s authority by refusing to obey a lawful and reasonable instruction.</p> <p>An employee is insubordinate if the instruction which s/he refuses to obey is a reasonable and lawful instruction.</p> <p>Employees sometimes try to justify insubordination by saying that the instruction was to do something that is <i>not in their job description</i>. The test is not whether the instruction falls within the employee’s job description, but whether it was reasonable and lawful. In other words, an employee cannot refuse to comply with a lawful instruction simply because it does not relate to his/her function or does not come from his/her immediate superior.</p>
<p>Displaying insolent behaviour towards supervisors or managers.</p>	<p>Where an employee fails to show respect to his/her employer or supervisor. Insolence includes conduct that is offensive, disrespectful in speech or behaviour, impudent, cheeky, rude, insulting or contemptuous on the part of the employee. Insolent behaviour also includes all forms of written communication, electronic or otherwise.</p> <p>A strict approach is taken when the offence involves an inferior showing disrespect for a superior, but disciplinary action could also be taken against co-employees who do not treat each other with respect in the workplace and use abusive language in their dealings with one another.</p> <p>The context in which the exchange takes place and the nature of what has been said must be considered. For example, provocation may also be a relevant factor in the context of insolence – an employee may be heard to make a disrespectful statement after being provoked by another employee or by a manager.</p> <p>Acts of mere insolence do not justify dismissal unless they are serious, wilful, and impact on the reputation of the employer and the future of the trust relationship.</p>

Being in possession of, or under the influence of alcohol, or any other illegal substances while on duty.

In terms of the Occupational Health and Safety Act, 85 of 1993 (OHSA), an employer may not allow any person to enter or remain in the workplace if s/he appears to be under the influence of alcohol or drugs, or to be in possession of, or partake or offer other people alcohol or drugs. The OHSA sets particular restrictions on drivers and operators of machinery, stating that they may not have a concentration of alcohol in their blood greater than 0.02 grams per 100 ml (0,02%).

This offence ordinarily occurs when it takes place during working hours. However, where the employee has consumed the alcohol or drugs outside of working hours, it will be seen to be an offence if s/he attends work while drunk or under the influence of drugs. Subject to any applicable legislation or regulations, an employee is “under the influence of alcohol or drugs” if s/he is unable to perform the tasks entrusted to him/her with the skill expected of a sober person.

A breathalyser or blood test may not be necessary, as normal observations in respect of speech, red eyes, the smell of alcohol on breath and the like, could be used to determine alcohol / drug use.

Note, that taking alcohol / drugs during the course and scope of employment is prohibited. Subject to each employer’s requirements, if an employee consumes alcohol/drugs off the premises, while on call, an offence will have been committed.

It is important to consider the context in which the alleged offence is seen to be committed. For example, an employee who is invited to a drinks party in the mid afternoon by his/her superior may assume that s/he has the necessary authorisation to drink, although where limitations have been set these need to be considered.

The question often arises as to when alcohol/drug abuse is misconduct and when it is incapacity:

- If an employee has a drinking or a drug problem and needs help, then this must be dealt with as incapacity.
- If an employee is not an alcoholic, but has breached a rule relating to alcohol, the appropriate approach would be to discipline the employee.

Any dishonest or fraudulent action in relation to any aspect of the employee’s work or of relevance to the workplace.

Fraud

The commission of a fraudulent act includes unlawfully making a misrepresentation, with the intent to defraud, which causes actual prejudice, or which is potentially prejudicial to another.

Offences such as falsifying sick notes, clock cards, or documents recording targets that have been reached for performance purposes may constitute fraudulent behaviour.

Making a misrepresentation - the employer must prove that the employee deliberately misrepresented certain facts.

With intent to defraud - the employee must intend to cause the employer some loss when making the misrepresentation.

The misrepresentation must cause actual or potential loss to the employer - the employer will have to show that as a result of the misrepresentation, it actually suffered some loss (monetary or otherwise) and produce proof of the loss, or show that it could have suffered some loss.

Theft

The act of theft includes taking property belonging to another with the intention of permanently depriving the owner of the use and possession of that property.

“Theft” requires proof of intention to deprive the owner of use and possession and knowledge that the act was unlawful.

The difficult part in proving that the employee committed “theft” is proving that the employee had the necessary intent and that the employee intended to permanently deprive the owner of the use and possession of that property.

A mere suspicion is not enough. Employers will be required to present evidence in support of their claim that the employee is guilty of theft

Shrinkage of stock

This is when the employer’s stock gradually decreases. Two lines of justification for a fair dismissal in such circumstances exist:



	<ul style="list-style-type: none"> • the first is where an employee, who is part of the group of perpetrators, is under a duty to assist the employer in bringing the alleged perpetrators to book; • the second is where an employee has, or may reasonably be supposed to have, information concerning the alleged perpetrators, his/her failure to come forward with the information may itself amount to misconduct.
	<p>The relationship between employer and employee is one of trust and confidence and conduct clearly inconsistent with that may lead to termination of employment. The context in which this 'silence' takes place must be considered, especially where the employee may have been threatened in some way to not tell anyone.</p>
<p>Any unauthorised removal or possession of any property of the employer, supplier or customers of the employer.</p>	<p>This offence looks a lot like theft, but it is worth noting that the essential element of intention (as contained in the definition of theft) is missing. It may be easier to prove than theft.</p> <p>All that has to be proved is:</p> <ul style="list-style-type: none"> • that the employee was in unauthorised possession of property, at a time when he or she should not have been in possession of it; • the employee did not have a valid reason for his possession of the item; the item was the property of the employer, a co-employee ,supplier or customer of the employer. <p>The seriousness of an offence related to dishonesty is not limited to the monetary value of the item taken by the employee, but relates to the risk that such dishonesty imposes on the employer.</p>
<p>Any unauthorised use of company property</p>	<p>The following elements make up this offence and would need to be proved:</p> <ul style="list-style-type: none"> • the property being used belongs to the employer • the employee is using the property for a purpose other than the one for which the property is intended • the employee did not have the necessary permission or authority to use the property, and • the use of the property has caused the employer some prejudice or loss – or potential prejudice and loss.
<p>Unauthorised absence from work</p>	<p>This is where an employee fails to tender services in terms of his/her contract of employment and the absence is not permitted or justified.</p> <p>Each case must be treated on its own merits and, unless the circumstances are exceptional, a dismissal on these grounds if it is a first offence, may be viewed as too harsh. The length of the absence and the circumstances surrounding it is relevant.</p> <p>For an example, if an employee was in a car accident and was not able to contact the employer as a result, the length of the absence may be irrelevant and the employee should not be disciplined for being absent.</p> <p>Where a medical certificate is required and the employee fails to produce this without good reason, such failure to produce a medical certificate could lead to a finding of</p>



	<p>unauthorised absence.</p> <p>A failure to contact the employer while the employee is absent without permission may be regarded as a separate offence and the duty will be on the employee to prove that there was good cause for failing to contact the company.</p>
Failure to contact the company when absent from work	<p>To satisfy this allegation, the employee would have to have been absent from work without contacting the employer. It is important to note that this transgression is made worse if the employer has clear standards in place in this regard or has previously advised the employee what is required in this regard.</p>
Desertion (also referred to as abscondment)	<p>Where an employee is away from work for an extended period without contacting the employer, s/he will be deemed to have deserted. Desertion occurs when an employee leaves employment with the intention of not returning.</p> <p>An employer cannot assume that an employee has deserted without investigating whether the employee has left employment with the intention of not returning. Thus, where an employee is prevented from returning to work due to circumstances beyond his/her control (for example, an employee who is imprisoned and therefore cannot return to work or communicate with his employer) the employee will not be regarded as having deserted.</p> <p>An employer will not be expected to keep a position open indefinitely if an employee is absent for an extended period, even though the employee keeps in regular contact with the employer.</p>
Sexual harassment	<p>Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. Sexual attention becomes sexual harassment if:</p> <ul style="list-style-type: none"> • The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or • The recipient has made it clear that the behaviour is considered offensive; and/or • The perpetrator should have known that the behaviour is regarded as unacceptable.

See Information Sheet: What is the difference between managing conduct and capacity [3.2A]

See CCMA Information Sheet: Misconduct [3.4K]

See CCMA Information Sheet: Ill health and Injury [3.6F]

See CCMA Information Sheet: Drunkenness and drug-induced conduct on duty [3.2E]

See Information Sheet: Who may sign and issue medical certificates [3.6B]