

MISCONDUCT

INTRODUCTION

An employee's unacceptable conduct or behaviour may give reason for an employer to dismiss the employee. However, certain conduct such as lawful participation in a strike should not lead to dismissal as this may be an automatically unfair dismissal.

For a dismissal to be fair there must be a fair reason for dismissal and a fair procedure must be followed. Each case should be judged on its own merits.

The Code of Good Practice on Dismissal promotes a progressive approach to discipline. This means that the employer should first try to correct an employee's behaviour by using disciplinary action as an alternative to dismissal. This could include counseling, verbal warnings and written warnings. Dismissal should always be the last resort or used for serious offences or repeated acts of misconduct.

Employers should set out clear workplace rules and standards that regulate conduct, together with the recommended sanction for breaking the rules so that there is no confusion. This will also help to address claims of ignorance of the rules and standards and will maintain consistency at the workplace.

Employees should be made aware of the standard of conduct or behavior that is expected of them. This can be done through induction, notices, employment contracts, copies of collective agreements or meetings. Certain rules arise out of common sense and do not need to be spelt out formally - for example rules against theft, use of drugs and alcohol at the workplace or physical assault. In some instances, the employee's conduct outside the workplace can also lead to dismissal if it bears a relationship in a significant way to the employer's business.

SUBSTANTIVE FAIRNESS

It is generally not appropriate to dismiss an employee for a first offence except where the misconduct is serious and it makes a continued employment relationship intolerable.

Examples of serious misconduct are -

- gross dishonesty, theft and fraud
- willful damage to property belonging to the employer
- physical assault on the employer, a fellow employee, client or customer
- gross insubordination
- gross negligence

An employee may also be dismissed for less serious misconduct such as late coming or absenteeism, if such behaviour is repeated and corrective action (such as warnings) has failed.

The person deciding whether to dismiss an employee for misconduct should consider the following questions:

- Did the employee break a relevant workplace rule or standard?
- Is the rule or standard valid or reasonable?
- Was the employee aware of the rule or standard or should he or she have been reasonably aware of the rule or standard?
- Has the employer consistently applied the rule or standard to all employees?
- Is dismissal the appropriate or correct sanction?

Before deciding to dismiss an employee, an employer should also consider other factors. These are called mitigating (justifying) or aggravating (worsening) factors, and may include the employee's disciplinary record, length of service and personal circumstances. An example of personal circumstances could be domestic violence that is causing the employee to miss work or to fail to concentrate on his or her work.

PROCEDURAL FAIRNESS

In addition to a valid reason, the employer must follow a fair (but simple) procedure before dismissing an employee and obey its own disciplinary code and procedure (if one exists). The following requirements should be met:

- The employer needs to investigate the alleged misconduct. The employer needs to inform the employee about the allegations in a simple, but clear manner. The employee should be given a

reasonable chance to respond and be given the opportunity to be assisted by a trade union representative or a co-worker.

- After both sides have been provided with a chance to give their versions, the employer should notify the employee, preferably in writing, of the decision.
- If the employee is dismissed, the employer needs to tell the employee of his or her right to refer the matter to the relevant Bargaining Council or CCMA within 30 days of receipt of the final decision to dismiss.
- Discipline against a trade union representative or an employee who is an office bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

In exceptional circumstances, for example in a crisis situation where there is danger to life and property and where the employer can't reasonably be expected to follow these guidelines, the employer may dispense with pre-dismissal procedures.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended
- Schedule 8 of the Labour Relations Act 66 of 1995 - Code of Good Practice: Dismissal