EMPLOYMENT LAW

Dismissals

A dismissal is when a contract of employment between an employer and employee is terminated by the employer. In other words, against the will of the employee. Get an overview of the law surrounding labour practice and unfair dismissals by reading this QuickLaw guide.

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For all your labour practice and dismissal answers, follow our guide below:

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1. What is a dismissal?

- An employment relationship comes into existence when one person (“employee”) assists or places his/her services at the use and control of another person (“employer”) in exchange for compensation (for example, money or something else). Usually, the terms and conditions of that employment relationship are contained in a contract of employment.
- A dismissal is when a contract of employment between an employer and employee is terminated by the employer. In other words, against the will of the employee.
- The Labour Relations Act (“LRA”) provides every employee with the right not to be unfairly dismissed.
- This means that an employer may not just willy-nilly dismiss an employee whenever s/he feels like it, the employer must have a *fair reason* for making the decision to dismiss and must follow a *fair*

procedure.

2. When may an employee be dismissed?

The LRA permits an employer to dismiss his/her employee for one of the following reasons:

- *misconduct* by the employee, for example, if the employee is guilty of theft, being absent without authorisation, refusing to obey the employer's instructions and so on;
- *incapacity* of the employee, for example, when an employee fails to meet the employer's performance standard or when an employee fails to perform the work s/he was employed to do because of his/her ill health; or
- *operational requirements* of the employer, for example, if the employer had a drop in sales and cannot afford the employee any longer. Please see the Quicklaw on Retrenchments for more information.

3. What is misconduct?

- Misconduct is considered to be the unacceptable or improper behaviour of an employee.
- Not all misconduct will justify the sanction of a dismissal, only serious misconduct will. In determining the seriousness of misconduct, the following factors must be considered:
- Is there a rule in the workplace about the misconduct? A rule may be set out in the employer's disciplinary code and procedure, policies and procedures, or any other evidence proving that the rule is in place; and
- If there is a rule about the misconduct, is the rule:
- valid or reasonable? A rule must be based on facts and not just a rumour of a rule;
- known to the employee? A rule will be known to the employee if it was brought to his/her attention or if it was made available to the employee; if the rule is common knowledge to all the employees working for the employer; or if the rule is part of the employer's past practice;
- consistently applied by the employer towards all employees? The same sanctions were given in respect of the same or similar misconduct in the past; and
- serious enough to justify dismissal as an appropriate sanction? There must be a breakdown of the trust relationship between the employer and the employee in order for a dismissal to be an appropriate sanction.

4. What is incapacity?

- Incapacity is considered to be the inability or the incompetence of an employee to do the work that s/he was employed to do.
- Incapacity as a result of poor performance:
    - The employer may set performance standards for employees. If the employee is not meeting the performance standards of the employer, the following factors must be considered:
        - is the employee aware of the performance standards? Performance standards are usually contained in the employee's key performance areas; industry norms; explained to the employee in writing or verbally; or obvious;
        - has the employee been given a chance to meet the employer's performance standard or to improve? This must be done through guidance, monitoring, training and then evaluation; and
        - will dismissal be an appropriate sanction for the employee's underperformance? If the employee still underperforms despite the employer giving him/her a chance, dismissal will be an appropriate sanction.

- Incapacity as a result of ill health:
    - This is when the employee's health makes him/her incapable of performing the work s/he was employed to do. Ill health may take many forms, for example, illnesses, injuries, diseases, disabilities and/or conditions.
    - Once the employer identifies that the employee is suffering from ill health, the following factors must be considered:
        - what is the extent of the employee's ill health? An employee's ill health can either be permanent or temporary;
        - what are the results of the employee's medical examination by a medical practitioner or assessment by an occupational therapist? The employee cannot be forced to undergo an assessment or medical examination;
        - can the needs of the employee with ill health be accommodated by adapting his/her existing work, workplace, working equipment and so on? An employer

will not have to accommodate the employee if it will suffer unjustified hardship. For example, if the business of the employer cannot sustain the employee being absent for a long period; and

- are there any alternatives to dismissal? For example, appointing an employee in a different position, such as a filing clerk can now become a switchboard operator.

5. What is the procedure leading up to dismissal?

- The general procedure for misconduct related dismissals are:
- conduct an investigation to determine whether there is proof of the suspected misconduct;
- make clear charges in respect of the suspected misconduct so that the employee has enough information to prepare for the disciplinary hearing;
- give reasonable notice of the disciplinary hearing. Notice may be given orally or in writing, usually 48 hours before the disciplinary hearing. If the employee is absent on the day of the disciplinary hearing, without a valid reason, the chairperson may proceed with the hearing in the employee's absence;
- provide the employee with an opportunity to respond to the suspected misconduct at the disciplinary hearing and to lead evidence. The chairperson must first consider the evidence of both the employer and the employee before deciding whether the employee is guilty or not of the suspected misconduct;
- grant the employee the right of representation by his/her trade union (with organisational rights) or a colleague at the disciplinary hearing (legal representation is not a right, but can be applied for);
- provide the employee with an opportunity to provide evidence in mitigation in response to the employer's evidence in aggravation. If the chairperson decides that the employee is guilty, the chairperson must consider the mitigating and aggravating circumstances before deciding on dismissal or some other sanction; and
- provide the employee with the chairperson's decision, preferably in writing.
- The procedure leading up to dismissal need not be formal or labelled as a disciplinary hearing, however, the employee must get an opportunity to state his/her case prior to being dismissed.

- The procedure for incapacity related dismissals are usually similar to the procedure in misconduct related dismissals, however, it is longer and a counselling process must be adopted. This means that the employee must be involved with the procedure and give his/her input from the investigation stage to the dismissal.

6. What remedy does an employee have if s/he has been unfairly dismissed?

- If an employee is of the opinion that his/her dismissal was an unfair dismissal, the employee must refer a dispute to the CCMA or relevant Bargaining Council within 30 days from date of dismissal. The referral is done by completing a form.
- Should the employee be out of time, s/he may still refer the dispute, but s/he will have to make an application for condonation confirming the reasons for his/her delay.
- An employee may choose to claim:
- For the employer to reinstate him/her on the same terms and conditions of employment before his/her dismissal.
- For the employer to re-employ him/her, which may be on new terms and conditions of employment.
- For the employer to pay compensation to him/her (based on the monthly compensation received at the time of the dismissal). The employee may be given compensation, depending on the circumstances, of 12 months or less.
- However, just because an employee referred a dispute to the CCMA does not mean that the CCMA will award the employee's claim for reinstatement, re-employment and/or compensation. An employee will have to prove that there was a dismissal and the employer will then have to prove that the dismissal was fair (failing which the dismissal will be consider it an unfair dismissal). The Commissioner then has to decide to either dismiss the employee's claim or grant it in full or partly.

7. The Code of Good Practice: Dismissal ("Code")

The Code of Good Practice: Dismissal ("Code") deals with the fundamental aspects of dismissal in relation to conduct and capacity. It is couched in generic terms due to the fact that each case is unique and a deviation from the norm may be justified in certain circumstances. However, the Code does not serve as a substitute for disciplinary codes and procedures that form part of collective agreements or decisions made jointly by employers and workplace forums. One of the principles established by the Code is mutual respect between employers and employees. For the efficient conduct of business and employment integrity, emphasis is placed on the protection of employees from arbitrary disciplinary action and deference to employers through satisfactory work performance and conduct from their employees.

8. How can LegalWise assist you?

If you are a LegalWise Member and require more information or advice please contact your nearest LegalWise Branch, call, e-mail or WhatsApp us. For more information about our membership options visit our legal services page or to join visit our join now page.

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