



## Code of Good Practice: Essential Adherence for South African Employers

[The Code of Good Practice](#) (Code) serves as a foundational guide for employers in South Africa, focusing on fair practices regarding dismissal relating to employee conduct, poor performance and incapacity. Understanding this Code is critical for employers to navigate the complexities of [employment law](#) while ensuring compliance with fair procedures. This article provides a thorough overview of the key aspects of the Code, emphasising the importance of fair procedures in dismissal cases, disciplinary actions, performance management, incapacity and maintaining mutual respect between employers and employees.

### Understanding the Code of Good Practice

The Code outlines the principles that must be adhered to when dealing with dismissals. It applies to both conduct-related dismissals and cases involving performance and incapacity. While it offers general guidelines, each situation is unique, and there may be circumstances that justify a deviation from the norms set by the Code. The primary aim of this Code is to balance the need for employment justice with the operations of businesses. This ensures that while employees are protected from arbitrary actions, employers maintain the right to expect satisfactory performance and conduct.

The Code of Good Practice on Dismissals is issued in terms of the [Labour Relations Act](#).

### Fair Reasons for Dismissal

### Criteria for a Fair Dismissal

A dismissal is considered fair if it is based on a legitimate reason and through fair process. The Labour Relations Act identifies three primary grounds for fair dismissal: conduct, capacity, and operational requirements. For a dismissal to be fair, it must be both substantively and procedurally fair. Substantive fairness refers to the validity of the reason for dismissal, while procedural fairness relates to the process followed in implementing the dismissal.

### **Automatically Unfair Dismissals**

Certain dismissals are classified as automatically unfair. These include cases where the dismissal is based on discriminatory grounds such as participation in lawful strikes, pregnancy, or other protected activities. When a dismissal is deemed automatically unfair, the employer may face legal consequences requiring the employer to reinstate or compensate the employee.

### **Disciplinary Procedures Prior to Dismissal**

#### **Progressive Discipline**

The Code encourages progressive discipline. Employers are advised to adopt disciplinary rules that set clear standards of conduct expected from their employees. Progressive discipline aims to correct behaviour through a series of graduated measures, such as counselling and warnings. These methods provide employees with opportunities to improve their conduct before dismissal is pursued.

Progressive discipline may, however, not always be appropriate, especially if the misconduct is serious or repeated, and makes the continued employment relationship intolerable.

Each case must be assessed on its own merits.

Whatever the merits of the case are, a dismissal will not be fair if it does not meet the requirements of Section 188 of the Labour Relations Act, which provides that a dismissal must be both substantively and procedurally fair.

#### **Informal Disciplinary Actions**

While formal disciplinary procedures are necessary in some cases, the Code recognises that informal measures, such as advice and correction, can be effective in handling minor misconduct.

#### **Dismissals for Misconduct**

## **When is Dismissal Appropriate?**

Dismissal should generally not be the first response to an employee's misconduct, except in cases where the misconduct is of such severity that it undermines the employment relationship. Examples of serious misconduct include gross dishonesty, wilful damage to property, and physical assault. When determining whether dismissal is appropriate, factors such as the employee's previous disciplinary record, length of service, and the specific circumstances of the misconduct should be considered.

## **Consistency in Disciplinary Action**

Consistency is crucial when applying disciplinary measures, including dismissal. Employers must ensure that similar cases of misconduct are treated in the same manner. This principle prevents claims of unfair treatment and contributes to a fair workplace. An inconsistent approach to discipline can lead to disputes and undermine the integrity of the disciplinary process.

## **Fair Procedure for Dismissal**

### **Investigation and Notice**

Before proceeding with dismissal, an employer should conduct an investigation to establish whether grounds for dismissal exist. This does not always require a formal enquiry.

Employees must be informed of the allegations in a form and language that they reasonably understand. The employee must be given an opportunity to respond to the allegations, with adequate time to prepare. Employers should also allow employees the right to representation by a trade union or a colleague during disciplinary processes.

### **Communication of the Decision**

After the enquiry, the employer should clearly communicate their decision to the employee, ideally in writing. This communication should include the reasons for the decision and inform the employee of their rights to challenge the decision through appropriate channels, such as the Commission for Conciliation, Mediation, and Arbitration (CCMA).

## **Dismissals and Industrial Action**

### **Handling Unprotected Strikes**

Participation in a strike that does not comply with legal requirements constitutes misconduct, though it may not always justify dismissal. The Code advises employers to assess the circumstances of the strike, such as its severity and whether attempts were made to comply with the LRA. Before dismissing employees for participating in such actions, employers should engage with trade union representatives as soon as possible and provide a clear ultimatum outlining the consequences of continued participation.

### **Issuing Ultimatums**

An ultimatum should be presented in clear terms, specifying what is expected of the employees and the consequences of failing to comply. Sufficient time should be given for employees to consider the ultimatum and respond. In cases where immediate action is required, such as safety concerns, employers may bypass some procedural steps, but these actions must be justifiable.

### **Guidelines for Dismissal for Poor Performance**

#### **Probation and Performance Assessment**

The Code of Good Practice allows employers to place new employees on probation to assess their suitability for the role. During the probation period, the employer should provide feedback, training, and guidance to help the employee improve. If an employee fails to meet performance standards after a reasonable opportunity for improvement, dismissal may be considered.

#### **Fair Dismissal for Poor Work Performance**

For dismissals related to poor performance, the employer must show that the employee was aware of the required standards and was given a fair chance to meet those standards. The employer should also consider alternative measures before resorting to dismissal, such as additional training or adjustments to the employee's role. A fair procedure includes allowing the employee to be heard and to be represented during the process.

#### **Incapacity Dismissals Due to Ill Health or Injury**

##### **Temporary and Permanent Incapacity**

In cases of incapacity due to illness or injury, the employer must assess whether the incapacity is temporary or permanent. For temporary incapacity, the employer should explore alternatives such as temporary replacements. For permanent incapacity, efforts should be made to

accommodate the employee's condition by adjusting duties or finding alternative roles within the company.

### **Consultation and Adaptation**

The employer has a duty to consult with the affected employee and explore reasonable adaptations to accommodate their condition. This includes evaluating the possibility of modifying work duties or providing suitable alternative employment. In cases where the incapacity is due to work-related injuries, the employer's responsibility to accommodate the employee is even more significant.

### **Conclusion: Navigating the Code of Good Practice**

The Code of Good Practice plays a vital role in guiding South African employers through fair and lawful dismissal processes. By adhering to the principles outlined in the Code, employers can maintain a balanced approach that respects both the rights of employees and the operational needs of the business. Understanding and applying these guidelines helps foster a respectful and fair workplace, reducing the risk of disputes and ensuring compliance with South African employment laws.

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**NB: Please note that this information does not constitute legal advice.**