

## Chapter 9

# Dismissals

An employer can dismiss employees for reasons of misconduct or incapacity. An employer can also dismiss employees for business-related reasons. A fair procedure must always be followed even in circumstances where there is a good reason for the dismissal.

## What is a dismissal?

Under the Act an employee is regarded as dismissed when:

- an employer ends a contract of employment with or without notice to the employee;
- an employee has a reasonable expectation that the employer will renew a fixed-term contract on the same or similar terms but the employer offers to renew it on less favourable terms, or does not renew it;
- an employer refuses to allow an employee to return to work after maternity leave;
- an employer selectively re-employs some employees after dismissal for the same or similar reasons but fails to re-employ others;
- an employer makes the working environment impossible for the employee to tolerate, which forces the employee to leave (this is known as a constructive dismissal); or
- there is a transfer of a business as a going concern (see chapter 10) and the new employer provides the employee with substantially less favourable terms and conditions of employment than the old employer, and as a result the employee resigns.

A dismissal may be unfair or fair depending on the circumstances.

## Some types of dismissals can never be legally justified

The Act states that certain reasons for dismissal will always be unfair. Dismissal for one of the following reasons will be regarded as 'automatically unfair':

- an employee takes part in the activities of a union or workplace forum;
- an employee takes part in a protected strike or protest action;

- employees refuse to accept an employer's offer on a matter of mutual interest between the employer and employees, such as a wage increase;
- an employee refuses to do the work of someone who is on a protected strike or a lock-out, unless the work is necessary to prevent danger to life, personal safety and health;
- an employee's pregnancy or any reason related to her pregnancy;
- the employee takes (or intends to take) action against an employer by exercising any right or by participating in any proceedings contained in the Act;
- an employer dismisses an employee for a reason related to a transfer of the employer's business;
- an employee makes a disclosure in terms of the Protected Disclosures Act 2000; or
- the employee is dismissed on arbitrary grounds, such as the employee's race, age, religion, sex, sexual orientation or family responsibilities.

However, there are two exceptions to this last class of automatically unfair dismissal:

- an employer may retire someone who has reached the normal or agreed retirement age; and
- an employer may fairly dismiss someone if the reason for the dismissal is based on an inherent requirement of the job. For example, a teacher in a religious college who changes his or her faith could be justifiably dismissed.

## When is an employer legally permitted to dismiss an employee?

An employer can dismiss an employee for a fair reason (this means the dismissal is 'substantively' fair) and only if the employer has followed a fair procedure (this means the dismissal is 'procedurally' fair).

There are three kinds of fair reason for dismissal. These are:

- for **misconduct** (if an employee intentionally or carelessly breaks a rule at the workplace, for example, steals company goods);
- for **incapacity** (if an employee cannot perform duties properly owing to illness, ill health or inability); and
- for **operational** reasons (if a company has to dismiss employees for reasons which are related to purely business needs and not because of some failing on the part of the employee).

A code of good practice (Schedule 8 in the Act) sets out the principles of substantive and procedural fairness to be followed in the case of dismissal for misconduct or incapacity. The principles of a fair dismissal for operational reasons are contained in the Act itself and in a code of good practice on dismissals based on operational requirements, issued by NEDLAC. If there is a collective agreement on disciplinary procedures, the employer must comply with the procedures in the agreement.

## Dismissal for misconduct

Dismissal for misconduct is the last resort of an employer, when other measures to correct misconduct have failed or are pointless. Principles of a proper disciplinary procedure are summarised below.

### Substantive fairness

The code of good practice on dismissals says that any person who has 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 of the rule or should have known of the rule;
- the employer applied the rule consistently; and
- dismissal is the appropriate step to take against the employee for breaking the rule instead of less serious action like a final written warning or a suspension.

Repeated offences could justify the final step of dismissal.

Dismissal for a first offence may be appropriate if the misconduct is very serious and makes the continued employment of that person intolerable.

Examples of serious misconduct are:

- gross dishonesty (for example, theft);
- deliberate damage to the property of the employer;
- deliberate endangering of the safety of others;
- physical assault of the employer, a fellow employee, client or customer; and
- gross insubordination (for example, swearing at a supervisor in front of other employees).

Each case should be judged on its merits and the employer should also take into account other factors such as:

- the employee's circumstances (for example, length of service, previous disciplinary record and personal circumstances);
- the nature of the job; and
- the circumstances of the infringement itself (for example, if an employee was justifiably provoked to assault a colleague).

## Procedural fairness

Even if there are very good substantive reasons for a dismissal, an employer must follow a fair procedure before dismissing an employee. This requires the employer to conduct an investigation into the alleged misconduct. This need not be a formal enquiry, but these requirements should be met:

- the employer must inform the employee of the allegations in a manner the employee can understand;
- the union should be consulted before commencing an enquiry into the conduct of an employee who is a shop steward or union office-bearer;
- the employee should be allowed reasonable time to prepare a response to the allegations;
- the employee must be given an opportunity to state his or her case; and
- the employee has the right to be assisted by a shop steward or other employee.

After the enquiry, the employer should inform the employee of the decision, preferably in writing. If the employer dismisses the employee, the employer must give reasons and inform the employee of his or her right to refer the dispute for resolution to a council or the CCMA.

If the employee wishes to challenge the fairness of the dismissal by using a council or the CCMA the matter must be referred to the correct body within 30 days of the dismissal.

Employers should keep records of disciplinary action for each employee, stating the nature of the misconduct, the disciplinary action, and the reasons for the action.

## Minimum requirements for fair disciplinary rules

Employers should adopt disciplinary rules that set out how employees must behave at work. The rules must be clear. All employees should be informed of them, unless they are so well known that everyone can be expected to know them.

The Act promotes the principle of progressive discipline. This means efforts should be made to correct employees' behaviour by means of graded disciplinary action. The most effective way for an employer to deal with minor problems is by informal advice and correction. Repeated misconduct will justify repeated and more severe warnings until a final warning is issued.

## Dismissals during unprotected strikes

Although employees may not be dismissed for participating in a procedural strike, they can be dismissed if they participate in an unprocedural strike. Such action is regarded as misconduct. However, it will not always justify dismissal. Employers need to consider whether a dismissal would be substantively fair. Factors to be taken into account include:

- how serious the breach of the Act was;
- whether attempts were made to comply with the Act; and
- whether or not the strike was in response to unjustified conduct by the employer.

Before dismissing striking employees, an employer should:

- contact the union to discuss the employer's intention to dismiss strikers;
- give the striking employees a clear ultimatum which should state what is required of the employees and what will happen if they do not comply with the ultimatum;
- give employees enough time to consider the ultimatum; and
- allow the employees an opportunity to make representations which the employer must consider.

The employer can ignore these steps if it is not reasonable to follow them. For example, if an unprocedural strike is accompanied by extreme violence, the employer might be forced in the interests of safety and security to dispense with these steps.

## Dismissal for incapacity

The code of good practice on dismissals sets out guidelines on what is necessary for a dismissal for incapacity to be substantively and procedurally fair.

### Substantive fairness

#### *Poor work performance*

Before an employer can dismiss an employee for poor work performance the employer must first give the employee appropriate evaluation, training or guidance and a reasonable time for improvement. The employer must hold an investigation into reasons for the poor performance. Only if the employee still continues to perform poorly thereafter and the problem cannot reasonably be solved without dismissing the employee, will dismissal be fair.

#### *Bad health or injury*

If temporary incapacity will cause an employee to be away from work for an unreasonably long time, it will be unfair to dismiss the employee unless the employer first investigates all possible ways of avoiding this step. If the incapacity is permanent, the employer should try to find alternative work for the employee, or adapt the work so that the employee is able to do it. The employer must make a greater effort to accommodate the employee if the employee was injured while at work.

### Procedural fairness

In investigations relating to poor work performance and incapacity, the employee should be given an opportunity to state his or her case and to be assisted by a shop steward or co-worker. This applies to employees on probation too.

## Pre-dismissal arbitration

Instead of holding an internal hearing prior to dismissing an employee for misconduct or incapacity, the employer and employee can agree to hold a pre-dismissal arbitration paid for by the employer. This arbitration is conducted by a council, the CCMA or an accredited agency and is final and binding and subject only to review by the Labour Court.

Employees may agree to a pre-dismissal arbitration after receiving the charges brought against them. Higher-paid employees may agree to pre-dismissal arbitration in their contracts of employment.

The possibility of pre-dismissal arbitration was introduced by the 2002 amendments to the Act. Its purpose is to avoid the duplication that often occurs when you have an internal hearing conducted at the workplace prior to dismissal, followed by an arbitration conducted by the CCMA or a council after the dismissal has taken place.

## Dismissal for operational reasons (retrenchment)

An employer may dismiss employees for operational reasons, but only if the employer has first attempted to avoid such an event by reaching an agreement with recognised representatives of employees.

In terms of the 2002 amendments to the Act, a distinction is made between retrenchments of individuals, retrenchments at small scale businesses, and retrenchments at large scale businesses. The main changes introduced by the amendments are that:

- individuals who are retrenched may refer a dispute either to arbitration by the CCMA or a council or to the Labour Court for adjudication;
- the consultation process in large scale retrenchments may be facilitated by a person appointed by the CCMA;
- employees involved in a large scale retrenchment may either strike or may refer a dispute over the substantive fairness of the retrenchments to the Labour Court.

## The Process in respect of small-scale and large-scale retrenchments

### *The consultation hierarchy*

If an employer is considering dismissing employees for operational reasons, the employer must consult (in this order of preference) one of the following:

- any person whom the employer is required to consult in terms of a collective agreement;
- a workplace forum and a registered trade union whose members are likely to be affected by the proposed dismissals;
- any registered trade union whose members are likely to be affected by the proposed dismissals; or
- the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

### *The joint consensus-seeking process*

The employer and consulting parties must engage in a joint consensus-seeking process and attempt to reach consensus on:

- appropriate measures to avoid or minimise or change the timing of the dismissals;
- means to mitigate the adverse effects of the dismissals;
- the method for selecting employees; and
- the severance pay for dismissed employees.

### *The written notice*

When an employer contemplates a dismissal for operational reasons, the employer must issue a written notice inviting the other consulting parties to consult with it and must disclose all relevant information including –

- the reasons for the dismissals;
- the alternatives considered;
- the number of employees likely to be affected;
- the proposed method for selecting which employees to dismiss;
- when the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to the employees likely to be dismissed;
- the possibility of future re-employment;
- the number of employees employed by the employer; and
- the number of employees that the employer has dismissed for reasons based on its operational requirements in the last 12 months.

The employer must allow the other consulting parties to make representations about these matters and any other matters. The employer must consider and respond to any representations that are made. If they were made in writing, the employer must respond in writing.

## The process for large-scale retrenchments

The 2002 amendments to the Act introduced a new section to improve the effectiveness of consultations in large-scale retrenchments. This new section (s189A) applies to work places where an employer employs more than 50 employees and where the number of retrenchments contemplated meet a certain minimum threshold. This threshold is reached if the employer contemplates the retrenchment of more than the specified minimum, or if the number of retrenchments that have taken place in the preceding 12 months plus the number contemplated exceed the specified minimum.

For example, if an employer employs 240 employees but only contemplates dismissing 16 then s189A is not applicable. However, if the same employer is contemplating 25 dismissals, s189A would be applicable. Table one summarizes these provisions.

TABLE ONE

| No. of employees employed by the employer | Min no of. dismissals contemplated for s189A to be applicable |
|-------------------------------------------|---------------------------------------------------------------|
| 50-200                                    | 10 or more                                                    |
| 201-300                                   | 20 or more                                                    |
| 301-400                                   | 30 or more                                                    |
| 401-500                                   | 40 or more                                                    |
| 500 or more                               | 50 or more                                                    |

*The appointment of a facilitator*

The employer or the consulting parties may request the appointment of a facilitator from the CCMA to assist the parties during the consultation process. If the employer makes the request, the request must accompany the notice calling on the other parties to consult (s189(3)). If the other consulting parties make the request, the request must be within 15 days of the employer issuing the notice to consult.

The minister has made regulations dealing with the facilitation process. The facilitator may chair the meetings of the parties or direct them to meet on their own. The facilitator must assist the parties to resolve disputes over the disclosure of information and can arbitrate unresolved issues on this matter. The facilitator may meet up to four times with the parties. The Director of the CCMA may extend the number of facilitation meetings.

When a facilitator is appointed, the employer may not issue notices of termination for 60 days after giving the notice to consult. If 60 days have passed from the date on which notice to consult was given, the employer may give notice terminating the contracts of employment and the registered trade union or the employees concerned may either give notice of a strike or may refer a dispute to the Labour Court concerning whether there is fair reason for the dismissal.

### *If there is no facilitator*

If neither party requests the CCMA to appoint a facilitator, a party may not refer the dispute to a council or the CCMA for 30 days from the date of the notice to consult. Once the period for conciliation is finished (30 days or a when a certificate is issued), the employer can give notice of termination and the union or employees can give notice of a strike.

### *The election to strike or to refer a dispute to the Labour Court*

In large-scale retrenchments, employees may elect to strike over their dismissals or to have the Labour Court adjudicate the substantive fairness of the dismissals. Employees may not do both – ie refer a dispute to the Labour Court and strike.

### *The test for substantive fairness*

If a consulting party chooses to challenge the substantive fairness of the dismissals in the Labour Court then the test for substantive fairness is limited to whether-

- the dismissal was to give effect to an operational requirement;
- the dismissal was justifiable on rational grounds;
- there was a proper consideration of alternatives; and
- the selection criteria were fair and objective.

### *Disputes over procedural fairness*

In a large-scale retrenchment, disputes over the procedural unfairness of a dismissal are dealt with separately from disputes over the substantive fairness of a dismissal. Whether employees choose to strike or to refer a dispute on the substantive fairness of a dismissal, does not effect their right to approach the Labour Court if an employer does not comply with a fair procedure. The Labour Court can compel an employer to comply with fair procedures and can grant an interdict preventing an employer from dismissing until it has complied with a fair procedure. A challenge to the employer's procedure must be brought on application (affidavit) no later than 30 days after the employer gave notice of termination.

## The referral of a dispute by employees at a small-scale operation

Employees may refer a dispute over the substantive and/or procedural fairness of retrenchments to the Labour Court, if section 189A, which deals with large-scale retrenchments, is not applicable. This is the case if the employer has less than 50 employees or if the number of dismissals contemplated is less than the threshold figure set out above.

## The referral of a dispute by a single employee

A single employee who has been retrenched may choose to refer a dispute either to arbitration or to the Labour Court. This was introduced by the 2002 amendments to the Act and is likely to significantly reduce the case load of the Labour Court. Prior to the amendment, about 50% of cases that went to trial dealt with individual retrenchments.

## Selection criteria

If one or more employees are selected for dismissal from a number of employees, the criteria for selection must be either agreed between the consulting parties or, if no criteria have been agreed, be fair and objective. Criteria that infringe a fundamental right protected by the LRA would be unfair – for example criteria based on union membership or pregnancy. Selection criteria that are generally considered to be fair include - length of service, skills and qualifications. With regard to length of service, generally the last-in-first-out principle is regarded as fair but in some circumstances, this principle may undermine affirmative action programmes.

## Severance pay

Employees who are retrenched must receive at least one week's remuneration for every year of completed service from the employer. The consulting party may reach agreement on a higher amount.

An employee who unreasonably refuses to accept an employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay.<sup>12</sup>

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<sup>12</sup> Refer to section 41 of the Basic Conditions of Employment Act, 1997 for further details. An important innovation is that the workers of employers that go insolvent (bankrupt) are now entitled to severance benefits.

## Disputes over dismissals

An employee may refer a dispute about a dismissal to the CCMA or a council for conciliation. If a dispute remains unresolved, the employee may refer the dispute to arbitration by the CCMA or a council or to adjudication by the Labour Court. The following dismissal disputes may be referred to arbitration:

- dismissals for misconduct or incapacity; or
- constructive dismissals<sup>13</sup> or where an employee resigns after being given less favourable terms and conditions of employment following a transfer of a business as a going concern or the transfer of an insolvent business.

An individual employee who has been dismissed for operational reasons may refer a dispute either to the CCMA (or council) for arbitration, or to the Labour Court for adjudication.

Automatically unfair dismissals, dismissals for participating in an unprotected strike, and operational requirement dismissals (other than those that only involve one employee) may be referred to the Labour Court for adjudication.

## Remedies for unfair dismissals

Reinstatement is the first choice of remedy for an unfair dismissal, unless special circumstances exist.

These circumstances exist if:

- the dismissed employee does not wish to return to work;
- the dismissal was only procedurally unfair;
- the working relationship between the parties has become intolerable; or
- it is not practical to do so. For example, it may be excessively costly for an employer to adapt the workplace to the needs of an employee who was unfairly dismissed for incapacity.

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<sup>13</sup> An employee resigns because the employer has made continued employment intolerable

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An employee who is not reinstated is usually given compensation. Compensation must be just and equitable and not more than the equivalent of 12 months remuneration. If the dismissal is automatically unfair, the maximum compensation that may be awarded is the equivalent of 24 months remuneration. Evidence will need to be led on, for example, an employee's loss of earnings, to enable the court or arbitrator to decide what will be just and equitable compensation.

The compensation award is additional to monies owing for other reasons, such as outstanding holiday pay or bonuses.

In cases of automatically unfair dismissal or dismissal based on operational requirements the Labour Court can make additional orders apart from reinstatement or compensation.

### Further information

#### Relevant sections in the Act

|                                                                       |                                              |
|-----------------------------------------------------------------------|----------------------------------------------|
| Section 185:                                                          | Right not to be unfairly dismissed           |
| Section 186:                                                          | Meaning of dismissal                         |
| Section 187:                                                          | Automatically unfair dismissals              |
| Section 188:                                                          | Other unfair dismissals                      |
| Section 188:                                                          | A Pre-dismissal arbitration                  |
| Section 189 and 189A:                                                 | Dismissals based on operational requirements |
| Section 190:                                                          | Date of dismissal                            |
| Section 191:                                                          | Disputes about unfair dismissals             |
| Section 192:                                                          | Onus in dismissal disputes                   |
| Section 193:                                                          | Remedies for unfair dismissal                |
| Section 194 – 195:                                                    | Compensation                                 |
| Schedule 8:                                                           | Code of good practice on dismissals          |
| Code of good practice on dismissals based on operational requirements |                                              |

#### Forms to fill in

|           |                                                  |
|-----------|--------------------------------------------------|
| Form 7.11 | Referring a dispute to the CCMA for conciliation |
| Form 7.13 | Request for arbitration                          |
| Form 7.19 | Request for pre-dismissal arbitration            |
| Form 7.20 | Request for facilitation                         |

