

How to manage the employment relationship where the employee's behaviour requires addressing (misconduct)?

Employers and employees must treat each other with mutual respect to ensure fairness in the employment relationship and the efficient operation of a business.

An employment relationship requires the employer to treat the employee fairly. It also requires the employee to obey lawful and reasonable instructions and rules in the workplace. The employer is entitled to expect that the employee conducts him/herself in a satisfactory manner.

Employers need to establish rules or standards of conduct

All employers should be clear about the rules and standards of conduct that are expected of employees. This may be done through the employment contract, through a separate disciplinary code, through communication with employees and through managing behaviour in the workplace.

The type of rules and how they are communicated will vary depending on the size and the nature of the business.

The rules must be reasonable, should create certainty and must be applied consistently. The standards of conduct must be clear and made available to employees in a manner that is easy to understand.

Some standards need not be communicated for the employee to know that they are wrong, for example dishonesty or sexual harassment, where all employees should know that such conduct is unacceptable.

Where an employee contravenes a rule or standard of conduct, an employer may take disciplinary steps against an employee for misconduct.

What is misconduct?

"Misconduct" relates to unacceptable conduct which breaks the rules or standards established by the employer or commonly known to be unacceptable in the workplace, or conduct which amounts to a criminal offence.

Misconduct involves an element of wilfulness and blameworthiness (the employee should have known) on the part of the employee.

A rule or standard is usually contained in a contract of employment, disciplinary code, collective agreement or written policy. A rule is also any basic rule of conduct applicable in all workplaces and any special rule that may flow from the sector or the nature of the employer's operations. It may also relate to an instruction.

Employers may have rules clearly outlined in "disciplinary codes" or if there is no code, in a contract of employment. However, there are some offences, which are so universal, well-known or obvious, that they do not necessarily need to be written down.

Universal, often unwritten, rules include:

- Duties relating to performance, e.g. the duty to work, to keep time, and to comply with lawful and reasonable instructions.
- Duties relating to good order, e.g. the duty to co-operate, to respect co-workers, not to assault or harass co-workers and not to disrupt the business.

- Duties relating to trust, e.g. the duty not to be dishonest or to undermine the employer's business or reputation.
- Duties relating to respect of co-workers, and those of suppliers and customers of the employer e.g. the duty not to harass, assault or racially insult others in the workplace.
- Duties relating to good hygiene and safety in the workplace.

What are examples of misconduct?

The following list is not exhaustive, but covers the more common examples of misconduct:

- Theft;
- fraud;
- unauthorised possession of company property;
- unauthorised use of company property;
- deliberate damage to company property;
- negligence;
- late-coming;
- unauthorised absenteeism;
- reporting or working under the influence of intoxicating substances, consuming, or possessing, illegal substances;
- insubordination or failure to comply with a lawful and reasonable instruction given by a person who has authority to give such an instruction;
- insolence;
- assault;
- sexual harassment;
- bringing the reputation of the employer into disrepute.

See Information Sheet (other): Examples of common allegations of misconduct

How to manage an employee's conduct in a fair manner in the case of less serious misconduct

An employer does not have to resort to formal disciplinary procedures every time an employee breaks a rule or does not meet a standard unless the offence is very serious. The starting point of discipline will depend on the seriousness of the offence.

Progressive or corrective discipline

One of the purposes of progressive discipline is to make an employee understand what standards are expected of him/her. An employer should try to change or correct behaviour and not just to punish employees for offences committed. Where discipline is applied only with the purpose of punishing employees, healthy labour relations, motivation and productivity levels in an organisation are undermined. Discipline should have a positive effect.

Correcting an employee's behaviour through a graduated system of counselling and warnings will assist the employee to understand what standards of behaviour are expected of him/ her.

The employer does not have to use formal procedures every time an employee breaks a rule. An employer can talk to an employee informally to try to correct his or her behaviour in the case of minor misconduct.

Where misconduct is repeated, progressive sanctions from verbal, to written, to final warnings may be used to pressurise an employee to change his or her behaviour. Improved behaviour should be encouraged and supported.

Warnings

A first minor offence will generally warrant a verbal warning (perhaps after discussion and counselling has proved ineffective), whereas a more serious offence may warrant a written or final written warning for a first offence. Every warning given should have a stated period of validity, during which any further breach of the rule will result in more serious disciplinary action.

Where an employee's behaviour fails to improve in spite of discussion and direction and other forms of discipline, he or she may ultimately be dismissed.

[See Guideline to Disciplinary sanction](#)

Disciplinary records

Employers should keep a record for each employee which captures disciplinary transgressions and the actions that the employer took and what the reasons were for taking such actions. The record may include active warnings as well as disciplinary records that document a history of transgressions.

What procedure should an employer follow when administering progressive discipline?

In cases of less serious misconduct, a less formal process may be followed:

1. Advise the employee of the allegations against him or her and ensure that the employee understands the allegations.
2. The allegations should be specific; for example, an employer should not simply confront the employee about his/her "attitude".
3. Invite the employee to discuss the allegations.
4. In the case of a minor misconduct where an employee may only need to be given informal advice and a formal warning is not warranted, it may not be necessary for the employee to have a representative at the meeting. However, if there is a possibility that a verbal or written warning may be issued (in the case where an offence has been repeated and a previous discussion has proved ineffective or in the case of a more serious misconduct), advise the employee that s/he may bring a representative to the meeting.
5. The employee may be represented by a fellow employee or a trade union representative (shop steward). Assistance by a trade union official only applies if a trade union has been granted organizational rights

to have elected shop stewards for this purpose. A trade union representative who does not satisfy this criterion may only assist an employee if s/he is a fellow employee.

6. Where an employee does not understand English well, arrange for an interpreter to be present, or advise the employee that he or she may bring a fellow employee to assist as an interpreter.
7. If applicable, advise the employee that the employer will be taking notes and/or recording the proceedings.
8. Go through the allegations against the employee.
9. Provide hard evidence to back up the allegations - avoid general observations.
10. Explain to the employee what rule or standard of conduct he or she has contravened (where appropriate, refer to the employee's contract of employment or a disciplinary code, policy or collective agreement if there is one).
11. Explain what impact the employee's conduct has on the business.
12. Give the employee the opportunity to comment and respond.
13. Listening actively and open up the discussion.
14. Listen and respond to the employee's concerns.
15. The employee may have a valid reason for why a rule or standard was contravened.
16. In case of a minor misconduct or a first offence where a warning is not warranted, explain to the employee that if the offence is repeated it could result in a warning.
17. In the case where an offence has been repeated and a previous discussion has proved ineffective or in the case of a more serious offence an employee may be issued with a verbal, written or final written warning.
18. Where a final written warning is issued, explain to the employee that if the offence is repeated it could lead to dismissal.
19. A written record of sanction should ideally be handed to the employee and a copy kept by the employer.
20. The employee should be requested to sign the employer's copy of the sanction as acknowledgement of receipt and not acceptance of the sanction
21. If the employee refuses to sign, a witness should be asked to sign as confirmation that the sanction was handed to the employee.
22. The employer must keep a record of the counselling sessions and any disciplinary sanctions that were issued to the employee. These may be required to justify a subsequent dismissal by showing that progressive/corrective disciplinary process has been followed by the employer.
23. Dismissal should be the last resort (although may be applied for a first offence in cases of serious misconduct).

See Template: Disciplinary sanctions

Dismissal should be reserved for cases of serious misconduct or in the case of repeated offences.

Examples of serious misconduct are:

- gross dishonesty or wilful damage to the property of the employer;
- wilfully or recklessly endangering the safety of others;
- physical assault, racial or sexual abuse/harassment of an employee, client or customer; and
- gross insubordination;
- gross negligence.

This is subject to the rule that each case should be judged on its merits.

In the case of very serious misconduct which has the effect of making a continued employment relationship intolerable, progressive discipline may be dispensed with and the employee dismissed summarily, without the need to serve a notice period, after holding a hearing.

See Guideline: Termination of Services with or without notice

How to manage an employee's conduct in a fair manner in the case of serious misconduct

Preventative or precautionary suspension

Where it is suspected that the employee has committed a serious offence and there is good reason to believe that his or her presence at the workplace could disrupt or interfere with any investigation or cause harm to the employer's property or to any individual, it may be necessary to suspend the employee on full pay as a precaution while the matter is being investigated and up until the disciplinary enquiry has been finalised. Precautionary suspension is usually on full pay and without interruption of employment-related benefits.

The Constitutional Court has held that it is not necessary to give the employee an opportunity to make representations prior to being placed on precautionary suspension by the employer, unless this step is specifically included in the employer's disciplinary procedures [see *Long v South African Breweries (Pty) Ltd & others* (2019) 40 ILJ 965 (CC)].

The employee should be served with notice of paid suspension

See Template: Precautionary notice of suspension

See Guideline: Preventative/precautionary suspension

Conduct an investigation

If an employer suspects that an employee has committed a serious offence that may warrant disciplinary action that could result in dismissal, the matter should first be investigated before drafting allegations (also referred to as 'charges') for an employee to respond to.

The purpose of the investigation is to determine whether there are grounds for taking action against the employee, to find facts which support the allegations against the employee and to determine whether the facts are likely to stand up at a disciplinary enquiry. Allegations made against the employee must be based on facts. One may not act simply on the basis of assumptions.

A proper investigation could reveal that there may not be a case of misconduct against an employee or that what appeared to be serious misconduct may not be so serious.

Where an investigation confirms alleged serious misconduct where dismissal might be an outcome, a disciplinary enquiry should be convened. This could be a formal or informal enquiry, but it is not a legal requirement to hold a formal disciplinary hearing unless the employer's disciplinary policy or a binding collective agreement requires this.

See How to Guide: How to terminate based on conduct

See Table: Steps to follow when conducting an investigation for misconduct

See CCMA Information Sheet: Misconduct

See CCMA Information Sheet: Disciplinary Procedures