

## **What is the difference between managing conduct and capacity at the workplace?**

The main distinction between managing misconduct and incapacity at the workplace is that while both entail a breach on the part of the employee with regard to the fulfilling of their employment obligations, misconduct involves an element of culpability or blameworthiness where the employee intentionally or negligently broke a workplace rule. With incapacity culpability and blameworthiness are not alleged, but there is a lack of ability on the part of the employee.

Schedule 8 to the Labour Relations Act 66 of 1995, the Code of Good Practice: Dismissal (the Code), deals with two broad types of incapacity – poor work performance and illness or ill health. Incapacity implies that the employee's poor work performance is due to conduct which is neither intentional nor negligent.

### **Incapacity**

In some instances, employers may feel that an employee failed to reach the expected performance standard precisely due to some sort of intentional or negligent behaviour on his or her part. This is where misconduct and incapacity may become a bit blurred, and it is important for employers to be very clear on the perceived cause of the problem at hand so as to follow the correct path towards managing the problem.

A good example of incapacity (poor performance) is a salesperson that may have a perfectly clean disciplinary record: s/he is always on time and does his/her work diligently. Despite their best efforts, the salesperson just does not reach his/her monthly sales targets due to their target sales audience having cut its spending patterns because of the depressed state of the economy. Quite simply, the employee may be a poor salesperson, but they may be an excellent administrator.

The lack of fault on the part of the employee is perhaps the main reason why employees are not disciplined for poor work performance – an employee cannot be disciplined for something he or she cannot be blamed for. However, that inability to perform remains a ground upon which the employment relationship may be terminated as the employee is unable to do the job.

Incapacity due to poor performance requires a corrective, performance managed approach (a poor performance procedure) prior to dismissal. Prior to dismissing an employee for ill health or injury, a separate procedure must be followed to determine the extent of the ill health or injury and the extent to which the employer is able accommodate the employee.

### **Incompatibility**

Incompatibility is a third category of incapacity that is not referred to in the Code. It arises in a situation where there has been a breakdown in the employment relationship because inter-personal relationships are tense, conflictual, or lacking in harmony.

In *Edcon Limited v Padayachee and Others (J331/16) [2018] ZALCJHB 307 (20 September 2018)* the Labour Court said in respect of incompatibility as a form of incapacity that “the golden rule is that prior to reaching a decision to dismiss, an employer must make some sensible, practical and genuine efforts to effect an improvement in inter-personal relations when dealing with a manager whose work is otherwise perfectly satisfactory.”

In *Wright v St Mary's Hospital* [1992] 13 ILJ 987 (IC) the court said: "The offending employee has to be advised what conduct allegedly causes disharmony, who is upset by the conduct, and what remedial action is suggested to remove the cause of the disharmony. A reasonable period must be allowed for the employee to make amends. Dismissal may be appropriate only where the employee's eccentric behaviour is of such a gross nature that it causes consternation and disruption in the workplace. The employee must have been properly warned or counselled. The incompatibility must be one that is irremediable"

In *SA Quilt Manufacturers (Pty) Ltd v Radebe* [1994] 15 ILJ 115 (LAC), the court said that: "Whilst the employer may well have good grounds to terminate the employment of its employee on account of the unrest that developed in its workforce as a result of the animosity towards the employee, the employer should adopt an adequate and fair procedure to avoid the unfair dismissal". The court pointed out that "there must be a proper inquiry to establish that the fault lies with the worker. Mere incompatibility caused by other workers does not justify the unfair treatment of the worker who cannot get on with the others..."

## **Misconduct**

An example of misconduct is when the salesperson fails to meet the sales targets due to persistent late coming and non-attendance at work without a valid reason.

The essence of misconduct lies in the fact that the employee breached a rule or standard governing conduct in the workplace (or conduct relevant to the workplace). The employee is held to blame for his/her wrongful conduct and may be disciplined by the employer.

Misconduct includes deliberate or negligent conduct. Negligence, in the context of the workplace, means that the employee failed to do what a reasonable employee in his or her position should have done. The employee's acts (or, more usually, omissions) are measured against an objective standard – to see if the employee's conduct differs from the standard expected from another employee in the same position.

## **How does an employer distinguish between the misconduct and incapacity?**

According to the Labour Court, the distinction between poor performance and misconduct (in the form of negligence) can be determined by asking two simple questions:

- **Did the employee try, but could not? and**
- **Could the employee do it, but did not?**

If the answer to the first question is 'yes' then one is probably dealing with a case of incapacity or poor performance, because an employee that honestly seeks to achieve what is expected of him/her but is unable to do so is incapacitated and is not behaving wilfully or indifferently.

If the answer to the second question is 'yes', then it is probably a case of misconduct, as this would be a situation where the employee is fully able to do what is required but failed to do so. Such failure could therefore only be because of indifference or wilfulness or failure to care (negligence).

[See Checklist: Misconduct v Poor Performance](#)

See How to Guide: Is the abuse of sick leave, misconduct, or incapacity

See How to Guide: Is the abuse of alcohol misconduct or incapacity