

An overview of how to manage conduct and capacity in the workplace

It is essential for employers to fully understand all aspects of disciplinary and incapacity procedures, and the legal requirements and the rights involved.

The manner in which an employer handles challenges in respect of an employee's conduct and capacity in the workplace can impact on a case right up to the arbitration, Labour Court, Labour Appeal Court and Constitutional Court stages, should the employee decide to challenge it.

Since workplace discipline and incapacity enquiries form part of the broader dispute resolution system, it cannot be examined in isolation. In order to manage workplace discipline effectively, as a first step, employers need to have a big picture view of the various components of the dispute resolution system that impact on workplace relationships, namely:

- the sources of South African Labour Law;
- the main pieces of employment legislation (statutes);
- the South African labour dispute resolution institutions and their roles.

See Information Sheet (other): Law governing the employment relationship

See Information Sheet (other): Labour legislation

See Information Sheet (other): Labour Institutions

See Flow Diagram: SA Dispute Resolution Institutions

An overview of discipline at the workplace

While the focus of this section is dealing with workplace challenges once they have already arisen, it is important to stress the value of building positive relationships within the workplace.

The ultimate goal should be to get to a position in a workplace where sound work relationships and adherence to workplace rules and procedures stems from the internal motivation of the employees concerned. This is more likely in a workplace where there is respect between managers and the employees and where the contribution of the employees is valued.

Employees have a right to fair disciplinary action

The right to fair disciplinary action comes from:

- Section 23 of the Constitution: “*Everyone has the right to fair labour practices*”; and
- Section 185 of the Labour Relations Act 66 of 1995 (the LRA): “*Every employee has the right not to be unfairly dismissed and not to be subjected to unfair labour practices.*”

The right to 'fairness' also extends to employers

The Constitutional Court has found that the reference to 'everyone' in section 23 of the Constitution extends to employers as well and that the concept of fairness extends to both employers and employees. This principle is reflected and reaffirmed in Schedule 8 to the LRA, the Code of Good Practice: Dismissal (the Code).

In terms of item 3 of the Code:

"...employers and employees should treat each other with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees."

The LRA recognises three grounds or reasons on which termination of employment might be legitimate. These grounds are -

- The conduct of the employee (behaviour related dismissal);
- The capacity of the employee (poor performance, ill health, incompatibility);
- The employer's operational requirements (retrenchment).

Employers and employees both have rights and obligations within the workplace. These include the need to exercise fair labour practices on the part of employers and the duty to further the employer's business interests on the part of employees.

These rights and obligations may arise from:

- statutes (for example the Basic Conditions of Employment Act 75 of 1997);
- collective agreements reached between trade unions and employers;
- individual contracts of employment; or
- employer imposed policies and procedures.

The contract of employment

The employment relationship is established by an agreement entered into by an employer and an employee. This agreement is known as a contract of employment. In terms of the contract of employment the employer and the employee have certain rights and obligations.

If one of the parties does not carry out his/her obligations or duties in terms of the employment contract that party is said to be in breach of the contract. The breach of contract may result in the employee taking legal action against an employer or the employer taking disciplinary (or other) action against the employee, which could result in the employee being dismissed.



Disciplinary and incapacity procedures

- The employer should deal with the breach by following the procedures that are set out in the Code or the company's own policies and procedures.
- The Code sets out guidelines for substantive and procedural fairness in respect of dismissals for misconduct and incapacity (poor performance and ill-health/injury).
- Disciplinary procedures are used to deal with misconduct by the employee and incapacity procedures are used to deal with incapacity.
- If an employer has a disciplinary procedure, it should comply with the minimum standards as set out in the Code.
- Although the Code is a guideline only, CCMA and bargaining council arbitrators are obliged to take the provisions of the Code into account when determining whether an employer has acted fairly or not.

'Over proceduralism'

Some company disciplinary codes and procedures are detailed and formalistic. Following the judgement in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ, where the Court commented that "*the rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model*", it is not necessary for an employer to follow such complex procedures. Bear in mind, however, that an employer is always required to follow its own procedures, and especially so when these procedures are contained in a collective agreement with a trade union.

What are the most important factors that should be considered when applying discipline at the workplace?

The following factors should be considered when applying discipline at the workplace:

- The importance of the rule breached;
- The circumstances of the offender; and
- The interests of the employer and employee.

Discipline should have a positive effect

The purpose of disciplinary action should be to modify or correct behaviour and not solely to penalise employees for offences.

The same applies to matters of incapacity. Incapacity proceedings should have a corrective approach to enable the employee to "get back on track" and to determine whether external sources may be the cause of the poor performance.

[See Information Sheet \(other\): The goals of workplace discipline](#)