

Code of Good Practice: Dismissal

Worklaw Webinar

Alan Rycroft and Tanya Venter

16 October 2025

Worklaw

Labour Law at Work



Worklaw

Contents

Background

The Content of the new Code

How it differs from the Old Code

Case law demonstrating principles of application



Worklaw

Background

- Old Code:
 - Schedule 8 to the LRA: Code of Good Practice: Dismissal
 - Last amended in 2002
- New Code:
 - A Code of Good Practice gazetted in terms of section 203(2A) of the LRA
 - Repeals Schedule 8, and the Code of Good Practice Based on Operational Requirements (GN1517, GG20254 of 16 July 1999)
- Can a Code of Good Practice replace a Schedule to the LRA?

Interpretation of the new Code

- “Provides guidance”
- “... treat one another with mutual respect” *[same as old Code]*
- “places a premium on workplace justice, the efficient operation of an employer’s business and the expeditious resolution of disputes”
- Deviation from norms in the Code “may be justified in proper circumstances”, citing “number of employees ... may warrant a different approach” *[same as old Code]*
- Doesn’t “alter the rights and obligations created under a collective agreement” *[simplified version of old Code]*

New Section: Small businesses

- Small businesses not required to comply if not practical or feasible for their operation.
- Take into account how the small business operates.
- Time-consuming investigations or pre-dismissal processes not expected

However, the new Code doesn't define what a small business is!

Worklaw

New Code: Fair Procedure (General)

- Recognises the “most common” form of dismissal is employer terminates “with or without notice”.
- Other forms of dismissal are not dealt with in the Code [wasn't in the old Code either, but clearly stated here]
- Fairness is simplified and put into positive language – “A dismissal is fair if it for a fair reason and in accordance with a fair procedure.” Code [Old Code – “A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure...”]

Misconduct: Disciplinary measures

- More simplified, easier to follow description of disciplinary measures short of dismissal, compared to old Code, but same content largely.
- Discipline is there to understand standards required.
- Corrective, and done through “graduated disciplinary measures”.
- Disciplinary rules and procedures vary according to size and nature of employer’s business.
- Disciplinary procedures to be clear, and should be in writing for medium to large employers to create certainty and consistency.
- Need not be formal.
- Can depart from these rules and procedures if justified.

Misconduct: Fair reason for dismissal

- Serious misconduct
- If misconduct renders the continuation of the employment relationship intolerable
- May be single instance or repeated misconduct, judged on the merits

[same as old Code, just simplified]

Misconduct: Guidelines for Fair Sanction

- **Heading for this section seems incorrect?**
- List of factors to consider when deciding a sanction for misconduct is fair [section 7 of old Code]:
 - Whether rule or standard was contravened, and if so
 - Whether the rule was valid and reasonable
 - Whether aware, or reasonably expected to be aware
 - The importance of the rule/standard [addition from old Code]
 - Actual or potential harm [addition from old Code]
 - Consistently applied
 - Whether dismissal appropriate sanction.

Misconduct: Sanction of dismissal

- Factors to consider are –
 - Nature and requirements of the job
 - Nature and seriousness
 - effect on business [not in old Code]
 - Whether progressive discipline might prevent recurrence [not in old Code]
 - Acknowledgement of wrongdoing and willingness to comply in future
 - Employee's circumstances (incl. length of service, disciplinary record and effect of dismissal on employee)

No guidance in the new Code (or the old) on how to balance these factors!

Worklaw

Misconduct: Consistency

- Should apply the sanction of dismissal in the same way as applied to other employees in the past
- Consistently applied between two or more employees who participate in the misconduct under consideration [identical to old Code]

Van Tonder v Sibanye Stillwater Ltd and Others (JR 651/20)

[2023] ZALCJHB 265 (19 September 2023) - Where an employer has a disciplinary procedure, the use of an **informal alternative procedure** by a manager will be misconduct because it impacts on an employer's obligation to act consistently.

Misconduct: Fair Procedure

- “genuine dialogue and an opportunity for reflection”
- “employee given an adequate and reasonable opportunity to respond to allegation”
- “An **investigation or enquiry** does not have to be formal.” Appropriate to circumstances including type of allegation and nature and size of employer.”
- Before decision taken to dismiss [similar but better structured to old Code]:
 - Notified, preferably in writing / explained in sufficient detail;
 - Reasonable time to prepare;
 - Assistance of fellow employee or trade union representative;
 - Where reasonably possible, provided with the opportunity to converse in a language that the employee is comfortable with.

Misconduct: Fair Procedure Case Law

- **EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA4/18) [2019] ZALAC 57 (15 August 2019)** - the **charges** must be specific enough for the employee to be able to answer them. It normally will be sufficient if the employee has adequate notice and information to ascertain what act of misconduct s/he is alleged to have committed. The categorisation by the employer of the alleged misconduct is of less importance.
- **Engen Petroleum Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union and others [2023] 1 BLLR 18 (LAC)** - there is no need to try to 'label' or compartmentalise a misconduct charge. All that needs to be done is for an employer to set out the facts and explain the complaint or issue arising from the facts, and which will be the subject of the disciplinary enquiry.

Misconduct: Fair Procedure

- In “exceptional circumstances”, if employer cannot reasonable be expected to comply with these guidelines, the employer may dispense with some or all of them. [similar to old Code]
- Will have to justify non-compliance [not in old Code]
- Discipline against trade union representative – office bearer or trade union official – discipline not to be instituted without first informing and consulting the trade union [identical to old Code]

Fair Procedure: Case Law

Avril Elizabeth Home (LC) - The LRA 1995 does away with a formalistic, 'criminal justice' model approach to disciplinary hearings.

“When the code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against the employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.”

Nitrophoska (LC) - Allowing an employee to state a case in response to allegations need not be a formal enquiry; there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.

Ngutshane (LC) - If an employee's **misconduct is not disputed**, a less formal process than a full disciplinary hearing may suffice. The LRA does not require an elaborate hearing for every dismissal.

Majola (LAC) - Where a disciplinary hearing is offered and is **refused**, where the exigencies of the case require immediate dismissal, it may be fair to dispense with a hearing.

Dismissals and Industrial Action

- Participation in a strike that does not comply with Chapter IV is misconduct.”
- **What about industrial action that does comply with Chapter IV?**
- Dismissal doesn't always follow, and determined based on the following facts:
 - Seriousness of the contravention (taking into account conduct of parties, legitimacy of strikers demands, duration and timing of the strike and harm caused by the strike)
 - Attempts made to comply with the Act
 - Whether the strike was in response to “unlawful, unfair or unreasonable” conduct by the employer” [old Code – “unjustified conduct by the employer”]

Dismissals and Industrial Action: Procedure

- The process to follow is:
 - Employer should contact trade union official to inform them of strike and afford them opportunity to consult with the striking employees
 - Consider representations by official and discuss course of action
 - If no trade union involved, engage with leaders or representatives of striking employees [\[not in old Code\]](#)
 - Issue ultimatum
 - Employees given time to reflect on ultimatum
 - May not be fair to dismiss employees who return after ultimatum
 - Dismissal may follow consideration of conduct and representations from striking employees (including collective representations)
 - May dispense if cannot reasonably comply

Worklaw

Probation

- Opportunity to evaluate “performance and suitability”
- Not to be used to deprive an employee permanent employment
- Period of probation to be reasonable
- Employee to be given “reasonable guidance” appropriate to size and nature of employer, and the job
- “Decision not to confirm appointment” – can only dismiss or extend probation period after employee given opportunity to make “representations” and these are considered by employer
- Reason for dismissal “may be less compelling”

[Cosmetic changes to the old Code]

Incapacity: Poor Performance

- Before dismissing for poor work performance –
 - Employer must give employee appropriate evaluation, instruction, training, guidance or counselling; and
 - Reasonable period for improvement.
- Before dismissing, “the employer should give the employee an opportunity to respond to the allegations of unsatisfactory performance.”

[Old Code had an investigation in the process, and a requirement to consider options short of dismissal, and right to be assisted by a fellow employee or union rep]

Incapacity: Poor Performance

- Any person determining whether dismissal unfair, should consider –
 - Whether failed to meet performance standard
 - If employee didn't meet performance standard –
 - Whether employee aware or reasonably aware of standard
 - Employee given fair opportunity to meet the standard
 - Required performance reasonably achievable [not in old Code]
 - Dismissal appropriate sanction
- No need to warn an employee in certain circumstances, such as case of senior employees who are able to judge that their performance not adequate, and departure from high standard would have severe consequences.

Worklaw

Poor Performance

Damelin (Pty) Ltd v Solidarity obo Parkinson and Others (JA48/15) [2017] ZALAC 6 (10 January 2017) - Although a senior employee is expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an employee with resources that are essential for the achievement of the required standard or set targets.

Dismissal will be unfair if the period provided to achieve targets was too short or if the target was incapable of being achieved, or if the employee was set up to fail.

Worklaw

Incapacity: Ill Health

- Temporary – should investigate extent, and if extensive, should consider options short of dismissal, taking into account – nature of job, period of absence, seriousness of the injury/ill health and temp replacement.
- Employee to make representations at investigation and representation by fellow employee / union representative
- Permanent – alternative employment or adapt duties to accommodate employee
- Degree and cause of incapacity relevant
- Consideration of work-related illnesses – greater duty to accommodate

[Cosmetic changes to the old Code]

Why did they leave out the guidelines in the old Code?

Incapacity: Other

- Other “factors preventing the employee from performing the applicable duties of the job”.
- E.g. imprisonment
- “Employer should assess the extent of the incapacity, and investigate all possible alternatives short of dismissal.”
- “An employee’s incompatibility, as manifested by an inability to work in harmony with an employer’s business culture or with fellow employees, can constitute a form of incapacity which may justify dismissal.”

Worklaw

Incompatibility

Edcon Limited v Padayachee and Others (J331/16) [2018] ZALCJHB 307 (20 September 2018) - To prove incompatibility, independent evidence is required to show that an employee's intolerable conduct was primarily the cause of the disharmony.

Dismissal: Operational Requirements

- Recognise that retrenchments could happen for many reasons – economic, technological, restructuring.
- To be for a fair reason, it must relate to the company's operational reasons.
- Dismissal a measure of last resort, and employers required to “take steps to avoid retrenchments where reasonably possible”.

Worklaw

Dismissal: Operational Requirements – fair procedure

- Written notice – Annexure A provided
- Consulting parties – section 189(1) / send to union and if no union, each of the employees affected
- Consult – with a view to reach consensus, and in good faith
- What consultations should cover
- Selection criteria – fair and objective & cannot be discriminatory
- Disclosure of information – “relevant information” to be disclosed
- Period of consultation – depends on nature/size of employer and complexity of retrenchment
- Preference of re employment

Why did they leave out some of the good stuff from the old Code for Ops Req?

Worklaw

Code has clear headings..

- Clearly distinguishes between misconduct, incapacity and operational requirements.
- The new Code (and the old) doesn't give guidance on distinguishing these categories, particularly misconduct and incapacity?

Worklaw

www.worklaw.co.za

case law

news updates

Same day advice

digital labour law library

Legislation

model procedures, forms and checklists

[Webinars / workshops](#)

FREE 3 DAY TRIAL – bruce@worklaw.co.za

Labour Law at Work