

## Managing Incapacity: Poor Work performance

### Webinar outline

#### 1. Importance of categorising the type of dismissal you are dealing with.

The Dismissal Code of Good Practice has different procedural and substantive fairness requirements for dealing with misconduct and incapacity, which dismissals will ultimately be judged against. There is a separate Code dealing with retrenchments.

#### 2. Categorising incapacity

- Ill health
- Poor work performance
- Other?

Cases have recognised various circumstances that could constitute a fair dismissal for incapacity, other than ill health or poor work performance.

##### Examples

- **Imprisonment / military call up**  
[\*Samancor Tubatse Ferrochrome v MEIBC & others \(LAC\) 2010\*](#)  
[\*NUM v Samancor \(SCA\) 2011\*](#)
- **Loss of a security clearance**  
[\*Solidarity v Armscor \(LAC\) 2018\*](#)
- **Refusal to be vaccinated**  
[\*Mulderij v Goldrush Group \(CCMA\) 2022\*](#)
- **Workplace incompatibility**  
[\*Zeda Car Leasing t/a Avis Fleet v Van Dyk \(LAC\) 2020\*](#)

How to treat these cases? – follow the incapacity ill health guidelines, adapted to suit the circumstances of the case.

Example: for someone in prison, evaluate how long the absence is going to be, and whether you can accommodate the absence through means other than dismissal - eg employing a temporary replacement whilst the employee is trying to arrange bail, or serving a 1 month sentence.

In the *Zeda Car Leasing* case, the LAC confirmed that procedural fairness in incompatibility cases requires the employer to inform the employee of the conduct causing disharmony and to propose remedial action to remove the incompatibility. The employee should be given a reasonable opportunity to resolve issues.

### 3. Distinguishing poor work performance misconduct from incapacity.

[Gold Fields v CCMA & Others \(LAC\) 2014](#) distinguished between these:

Incapacity - employee fails to meet performance standards due to a lack of skills, knowledge or competence.

Misconduct – employee has the capacity to do the job, but intentionally or negligently fails to meet the required performance standards.

The distinction is critical, as it will impact on the procedural and substantive fairness requirements in the Code that a dismissal will be judged against.

### 4. Key requirements of the Dismissal Code of Good Practice:

#### a. Did the employee fail to meet a performance standard?

In some types of work this is easy to identify, eg number of sales made, but for others it may be much more difficult to quantify. Important that it doesn't depend just on the subjective opinion on a manager – it should be evaluated against some measurable objective criteria.

[CAPAB v Schuster \(LAC\) 1994](#) said that fairness demands that employment should not be terminated unless a proper evaluation procedure is followed (employee was the principal trumpeter in the orchestra)

[Human and Santam Ltd \(CCMA\) 2005](#) said there must be a factual base before an employee can be accused of incapacity or poor work performance.

#### How do you prove the required standard was reasonable?

Examples of possible evidence to prove this – other employees doing similar work all meet their targets, the previous incumbent met the targets, or the employee met them in the past.

[Sun Couriers \(Pty\) Ltd v CCMA & Others \(LC\) 2002](#) said that an employer is entitled to set performance standards, and unless they are patently irrational or unrealistic, a court will not interfere.

[Old Mutual Group Schemes v Dreyer \(LAC\) 1999](#) found that insurance advisors who had received warnings about their poor work performance and who claimed that their sales targets were unreasonable, could not claim constructive dismissal based on their employment relationship having become intolerable. They should have used internal procedures to debate the reasonableness of the targets. An employer is entitled to

evaluate an employee's performance and this can constitute part of progressive discipline.

**b. Was the employee aware of the required standard (or ought to have been aware)?**

Lead evidence that the required standards were clearly communicated – written communications, employment contracts etc.

**c. Was the employee given a fair opportunity to meet the required standard?**

Often the key issue in incapacity poor work performance disputes. Merely placing the poor performing employee on terms to improve by a specified date is not enough.

**i. What's required ITO "*evaluation, instruction, training, guidance or counselling*"?**

Each case has to be assessed on its merits. The key question to ask is whether management have sufficiently equipped the employee to perform at the required level?

This requires management to take the underperforming employee through a performance management process, in terms of which feedback is provided on a regular basis and remedial action taken, in an attempt to improve performance. Regular meetings should be scheduled for this purpose.

**ii. Do you have to retrain completely?**

No. [SATAWU and Spoornet, Orex, Saldanha \(ARB\) 2001](#) found that an employer is entitled to assume that a qualified employee does not require the same level of counselling and guidance as a novice who has to be trained into a complex job.

Presuming that an employee on appointment has represented he/she has the required skills and competencies to do the job required, the intention would be to focus on any specific key areas in which the employee may be lacking and may require assistance.

Employment circumstances change over time, and whilst an employee may have coped with work requirements in the past, new technology or new market requirements may for example be posing a problem to an employee in specific areas.

This may be different to the case of an existing employee promoted into a more senior position. In those situations there may be a greater obligation on management to ensure the employee is adequately equipped to perform in that more senior role.

**iii. How much time should be allowed?**

[\*Damelin v Solidarity obo Parkinson \(LAC\) 2017\*](#) said that 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.

Each case should be judged on its merits, but as a general guideline we suggest a performance evaluation period of between 3 to 6 months.

**iv. Is the employee's seniority/level a factor?**

Yes, it can be. [\*Damelin v Solidarity obo Parkinson \(LAC\) 2017\*](#) said a senior employee does not need the same degree of training that lower skilled employees require to perform their functions, but an employer must still provide essential resources to achieve targets.

**v. Can a single incident of poor performance justify dismissal?**

Depending on the facts of the case, yes it can. [\*Somyo v Ross Poultry Breeders \(Pty\) Ltd \(LAC\) 1997\*](#) said that where the degree of professional skill required of an employee is high, and the potential consequences of the smallest departure from that high standard are serious, a single failure to perform in accordance with those standards is enough to justify dismissal. Warnings are not required where a manager or senior employee is involved whose knowledge and experiences qualify him to judge for himself whether he is meeting the standards set by the employer.

**d. Was dismissal the appropriate sanction for not meeting the required standard?**

Paragraph 8(3) of the Dismissal Code states that the employer should consider other ways, short of dismissal, to remedy the matter. This places a clear obligation on the employer to consider other remedies.

### **i. What other options need to be considered?**

We suggest options the employer should consider –

- (a) re-allocating certain key functions the employee is having trouble with;
- (b) providing on the job assistance (eg a supervisor) in dealing with key functions the employee is having trouble with;
- (c) any suitable alternative positions that may exist at the same level or at a lower level.

### **ii. Can you demote unilaterally?**

No. You would normally have to get the employee's consent to a demotion, as it would otherwise constitute a unilateral change to terms and conditions of employment.

If the employee declines a demotion and challenges a subsequent dismissal as being unfair, you would lead evidence to show the employee rejected an alternative to dismissal that may have resolved the situation.

### **iii. If you move the employee in to another opposition, are you not just 'transferring a problem'?**

You would have to consider if this will be the case – ie make sure the employee is equipped to handle the new position being considered, and that the same problems won't crop up in the new position.

## **5. Procedural fairness – the need for an incapacity hearing.**

Whilst the whole process of ongoing evaluation and counselling is part of procedural fairness, if this hasn't solved the problem and there are no suitable alternatives to resolve it, we recommend that an incapacity hearing be held, chaired by a suitably appointed chairperson, once dismissal for incapacity poor performance is now being considered.

The reason for this is that as many disputes of fact can arise as in a misconduct case, but in this scenario the disputes might centre around issues such as whether –

- the performance requirements were achievable / reasonable?
- the employee met them or not?
- the employee was given sufficient assistance or time to achieve them?
- other alternatives to dismissal should have been contemplated?

## 6. Managing performance during probation.

Paragraph 8(1)(j) of the Dismissal Code states as follows:

*“Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.”*

The practical application of this clause means that it will effectively be ‘easier’ to dismiss for poor performance during probation than would be the case after probation has expired. The employer would not have to spend as much time and energy “*evaluating, instructing, training, and giving guidance and counselling*” before dismissing a probationary employee.

For example, [Ubuntu Education Fund v Paulsen NO \(LAC\) 2019](#) found that whilst a probationary employee is still entitled to substantive and procedural fairness, arbitrators should hesitate to interfere with employer's decisions on whether probationary employees have attained the required performance standard.

## 7. Having the right attitude in managing performance – being fair / ‘human’.

In conclusion, it's important that managers engaging in performance management processes adopt the right problem-solving attitude, in an attempt to give the process every chance of succeeding. It should not be a ‘checklist designed’ approach that sets the employee up for failure, and the sole purpose of which is to provide evidence that the employer adopted a procedurally fair approach before resorting to dismissal.