

What is a dismissal?

- A dismissal is when a contract of employment between an employer and employee is terminated by the employer.

When may an employee be dismissed?

- In terms of the Labour Act, an employee cannot be dismissed, whether notice is given or not, without a lawful, valid and fair reason and without following a fair procedure.
- A fair reason for dismissing an employee depends on the kind of reason and the seriousness of the reason(s), which would include employee's misconduct related to employment.

What is misconduct?

- Misconduct is when an employee does something wrong either by doing something, not doing something, or through their behaviour. This may justify some disciplinary action being taken by the employer
- An employer's response to misconduct must be fair and reasonable in all of the circumstances. For example, some lesser misconduct may lead to a warning whereas more serious misconduct may lead to a dismissal.
- When deciding how to respond to misconduct, an employer must ensure they conduct a fair investigation and disciplinary process.
- Misconduct can be at two different levels: misconduct and serious misconduct. (gross and general)
- Misconduct is described as 'serious' because it can have the effect of destroying or undermining the relationship of trust and confidence between an employee and employer. Without this trust and confidence, an employment relationship cannot continue.
- Because the law is subject to interpretation, it is important to outline examples of most serious misconduct that lead to dismissal. While the list may not be complete, it should cover the most common acts of gross misconduct.
 - Theft and Fraud: this offense includes stealing anything that is office property, merchandise or stock. It could also be stealing from customers or co-workers.
 - Intentionally violating nondisclosure agreements and releasing confidential information for public use are also examples of theft and fraud.
 - Damage to Property: accidents happen, but if an employee intentionally and aggressively damages company property, the action is considered gross misconduct. This also covers gross negligence to property.
 - Breach of Safety Protocol: failure to follow protocol to ensure the health and safety of all employees is a breach of protocol. This might include failure to lock up prescription medications or smoking near flammable items.
 - Offensive Behaviour: this includes behaviour such as threats to self and others, physical fights, bullying, harassing and stalking.

- Drug and Alcohol Use: buying and selling drugs during work shifts and on company property as well as being under the influence of drugs and alcohol leading to serious impairment are reasons for potential dismissal.
- If an employee has violated the rules and is found to be in gross misconduct of company or legal policies, the dismissal needs to be "fair," which means that the employer has reasonable grounds, investigated the matter, and genuinely believes there has been misconduct of this nature.

What is incapacity?

- Incapacity refers to the situation where an employee is unable to carry out or perform to his/her contracted obligations due to the inability on the part of the employee.
- Incapacity is different from misconduct and discipline in that in the case of incapacity the employer does not have to prove 'fault' or 'blame' on the part of the employee.
- Illness and accidents do not automatically signify termination of the contract of employment; they merely give rise to suspension of its performance.
- It is only if the nature of the incapacity is such that it is definitely impossible for an employee to resume work can *force majeure* be invoked or used as legal justification for termination of the contract of employment.

What is the procedure leading up to dismissal?

- In terms of the Labour Act to be fair, a dismissal that is not automatically unfair, must be for a fair reason and in accordance with a fair procedure.
- The procedure is as follows.
 - The employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need a formal inquiry.
 - Employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.
 - The employee should be allowed the opportunity to state a case in response to the allegations.
 - The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee.
 - The presiding official at the hearing should be unbiased and should make a fair ruling on the matter and determine an appropriate sentence.
 - The presiding official and any other members of the tribunal should not have been involved in the investigation of the matter.
 - After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

What remedy does an employee have if she/he has been unfairly dismissed?

- Any party to the dispute may refer the dispute in writing to the Labour Commissioner.
- The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all other parties to the dispute.
- The Labour Commissioner must refer the dispute to an arbitrator to resolve the dispute through arbitration in accordance with Part C of Chapter 8 of the Labour Act.

Glossary of terms:

ARBITRATION: means arbitration proceedings conducted before an arbitration tribunal.

EMPLOYEE: means an individual, other than an independent contractor, who works for another person and who receives, or is entitled to receive, remuneration for that work; or in any manner assists in carrying on or conducting the business of an employer.

EMPLOYER: means any person, including the State and a user enterprise who employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or permits an individual to assist that person in any manner in carrying on or conducting that person's business.

FORCE MAJEURE: events or factors that are beyond the control of the parties to a contract and which prevents the enforceability or performance of a contract. They may include 'Acts of God' such as natural disasters, fires etc.

NON-DISCLOSURE AGREEMENTS: A non-disclosure agreement, also known as a confidentiality agreement, confidential disclosure agreement, proprietary information agreement or secrecy agreement, is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to. Examples are doctor–patient confidentiality, attorney–client privilege, bank–client, employer–employee business confidentiality etc.

PROTOCOL: protocol refers to a set of rules, official plan or a set of guidelines to be followed in certain situations.

STALKING: means persistent threatening behaviour by one person against another person. This includes unwarranted following or surveillance by an individual or group toward another person against such person's wishes. Stalking is an offense.

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Dismissals

