



Dear Members

As we dive into the depths of winter, we wish you warmth and inspiration during this season. This month, we're turning our spotlight on the latest advancements in Labour Law, and we'll also share significant updates and news about HASEA. Stay tuned as we delve into these important topics, providing you with valuable insights and keeping you connected with our community!

LABOUR NEWS

The following article was received by Labour Guide, regarding the fairness in dealing with employee misconduct and poor performance. Should you have any questions or require advice, please do not hesitate to contact us.

Fairness in dealing with employee misconduct and poor performance

Section 23 of the Constitution states that everyone is entitled to fair labour practices. This right is guaranteed for everyone – employees as well as employers

By Talita Laubscher, Partner at Bowmans

The Labour Relations Act, 1995 (LRA) gives effect to this right and provides, among other things, that every employee is entitled to a fair dismissal and the right not to be subjected to an unfair labour practice.

Fair dismissals and fair labour practices are permitted.

With reference to dismissals, fairness means that there must be a fair reason for the termination (substantive fairness), and the employer must follow a fair process before terminating (procedural fairness). The reasons are trite: employee misconduct, employee poor performance, employee ill health or injury and the operational requirements of the employer. This article focuses on misconduct and poor performance.

The Code of Good Practice: Dismissal as contained in Schedule 8 to the LRA provides additional guidelines for what constitute fair reasons and a fair process. Insofar as misconduct is concerned, the requirements for substantive fairness are that the employee must have acted in breach of a legitimate workplace rule that is consistently applied. What must be established are the following:

- there exists a rule – some rules are so basic that they do not need to be written down in a policy, such as the prohibition against theft and assault, or competing with the employer's business;
- that the employee knew about the existence of the rule, or should reasonably have known that the rule exists;
- that the rule is legitimate/ valid/ reasonable;
- that the employer has consistently applied the rule;
- that the employee acted in breach of the rule; and
- that dismissal is the appropriate employer-response to the breach of the rule.

As regards poor work performance, substantive fairness will be established if the employee has failed to meet a performance standard, and:

- the employee was aware or could reasonably have been expected to be aware of the standard;



HASEA

- the employee was given a fair opportunity to meet the standard; and
- dismissal is the appropriate response to the employee's poor performance.

Where the employer cannot satisfy these requirements, a dismissal will be substantively unfair and the employer will be at risk of a reinstatement order as the primary remedy, or compensation in an amount of up to 12 months' remuneration.

In our experience, employers take good care to comply with the requirements for substantive fairness.

Where they experience great challenges, however, is what process ought to be followed.

Again, Schedule 8 of the LRA provides guidance. With reference to misconduct, item 4 states:

'Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. **This does not need to be a formal enquiry.**'

Rather, Schedule 8 suggests that the employer should:

- notify the employee of the allegations using a form and language that the employee can reasonably understand;
- provide the employee with an opportunity to state a case in response to the allegations;
- provide the employee with reasonable time to prepare the response;
- provide the employee with the opportunity to be represented by a trade union representative or a fellow employee;
- afterwards, the employer must communicate the decision taken and furnish the employee with written notification of the decision. If the decision is dismissal the employer must provide the employee with the reasons for the dismissal.

With reference to poor performance, Schedule 8 states that the employer should not dismiss an employee for poor performance unless it has:

- given the employee appropriate evaluation, instruction, training, guidance or counselling; and
- after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

This procedure 'should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter'.

No-where in Schedule 8 does it state that the employer must convene a formal misconduct or poor performance hearing. Yet, it has become the norm that adversarial, criminal law style inquiries are adopted in Codes of Conduct to meet the procedural fairness requirements.

Curiously, nearly 20 years ago, the Labour Court, in *Avril Elizabeth*, held that a criminal style inquiry is not what is required to ensure procedural fairness under the LRA, yet we see such requirements in employers' Codes of Conduct and consistently insisted on by CCMA commissioners.

Is this really what is required in workplaces, where ultimately, it is management who determine what conduct can and cannot be tolerated given the impact on its operations? And are we genuinely treating employees as adults when subjecting them to adversarial, criminal style processes when they show disregard for workplace rules?

At Bowmans, we believe that there are alternative ways to ensure procedural fairness, such as for example:

- notice and comment processes, where the issues in dispute are ventilated in writing; or
- by way of thorough investigations, careful statement taking and considered decision-making by properly trained managers.



HASEA

In our view, such alternative processes ensure fairness to both parties – the right of the employer to deal effectively, expeditiously and fairly with breaches of its workplace rules, and the right of the employee to be heard and dismissed fairly. Of course, there may be circumstances where the requirements of procedural fairness cannot be met but through a formal inquiry process. This might be the case where there are complex disputes of fact. Nevertheless, we think that even in such circumstances, well-trained investigators can apply the alternative methods with efficiency and fairness.

What is critical, is that the employer's Code of Conduct should not be drafted prescriptively so that the holding of a disciplinary or poor performance inquiry is a pre-condition to dismissal. Employers would accordingly be well-advised to review their Codes of Conduct (and collective agreements with unions, where applicable) and ensure that this is drafted with sufficient flexibility regarding the processes that must be followed prior to termination.

Another critical factor would be for CCMA commissioners to properly assess the existence of the procedural fairness requirements as set out in Schedule 8, as interpreted by the Labour Court, and to guard against insisting on criminal style court proceedings in meeting these requirements.

<https://labourguide.co.za/poor-performance/incapacity-procedures/fairness-in-dealing-with-employee-misconduct-and-poor-performance>

ORGANISATIONAL NEWS

As HASEA is a National Organisation with branches in various provinces, we are very proud to announce the following members that have been added to the HASEA family:

JULY:

EasyAs! Business Software (Stephan Pretorius – Western Cape)

Gomes Sand (Pty) Ltd (Julie Beukes – Gauteng)

Lavender Gardens Body Corporate (Alan Mengel – Gauteng)

Sajaro Projects (Nic Kruger – Gauteng)

Atlantic Forest (Pty) Ltd t/a Val de Vine (Mark Siddons – Western Cape)

At HASEA, we prioritise growth and have also selected organisers in various provinces to ensure our service level remains exceptional!

For more information regarding our services, you can visit our website www.hasea.co.za or email us: admin@hasea.co.za / accounts@hasea.co.za