

## ANNEXTURE L

### THE CODE OF GOOD PRACTICE

#### INTRODUCTION

- (1) This *code of good practice* deals with some of the key aspects of *dismissals* for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of *employees* employed in an establishment may warrant a different approach.
- (2) *This Act* emphasises the primacy of *collective agreements*. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of *collective agreements*, or the outcome of joint decision-making by an employer and a *workplace forum*.
- (3) The key principle in this Code is that employers and *employees* should treat one another 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*.

#### 2. FAIR REASONS FOR DISMISSAL

- (1) A *dismissal* is unfair if it is not affected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a *dismissal* is for a fair reason is determined by the facts of the case, and the appropriateness of *dismissal* as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.
- (2) *This Act* recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the *employee*, the capacity of the employee, and the operational requirements of the employer's business.
- (3) *This Act* provides that a *dismissal* is automatically unfair if the reason for the *dismissal* is one that amounts to an infringement of the fundamental rights of *employees* and *trade unions*, or if the reason is one of those listed in section 187. The reasons include participation in a lawful *strike*, intended or actual pregnancy and acts of discrimination.

- (4) In cases where the *dismissal* is not automatically unfair, the employer must show that the reason for *dismissal* is a reason related to the *employee's* conduct or capacity or is based on the *operational requirements* of the business. If the employer fails to do that or fails to prove that the *dismissal* was effected in accordance with a fair procedure, the *dismissal* is unfair.

### **3. DISCIPLINARY MEASURES SHORT OF DISMISSAL**

#### *Disciplinary procedures prior to dismissal.*

- (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their *employees*.
- (2) The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to *employees* in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.
- (3) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for *employees* to know and understand what standards are required of them. Efforts should be made to correct *employees'* behaviour through a system of graduated disciplinary measures such as counselling and warnings.
- (4) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of *dismissal*. Dismissal should be reserved for cases of serious misconduct or repeated offences.

#### *Dismissals for misconduct*

- (5) Generally, it is not appropriate to dismiss an *employee* for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be

judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow *employee*, client or customer and gross insubordination. Whatever the merits of the case for *dismissal* might be, a *dismissal* will not be fair if it does not meet the requirements of section 188.

- (6) When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.
- (7) The employer should apply the penalty of *dismissal* consistently with the way in which it has been applied to the same and other *employees* in the past, and consistently as between two or more *employees* who participate in the misconduct under consideration.

#### **4. FAIR PROCEDURE**

- (1) Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The 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 the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably furnish the *employee* with written notification of that decision.

- (2) Discipline against a *trade union representative* or an *employee* who is an office-bearer or *official* of a *trade union* should not be instituted without first informing and consulting the *trade union*.
- (3) If the *employee* is dismissed, the *employee* should be the reason for *dismissal* and reminded of any rights to refer the matter to a *council* with jurisdiction or to the Commission or to any *dispute* resolution procedures established in terms of a *collective agreement*.

- (4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

## 5. DISCIPLINARY RECORDS

Employers should keep records for each *employee* specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

## 6. DISMISSALS AND INDUSTRIAL ACTION

- (1) Participation in a *strike* that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve *dismissal*. The substantive fairness of *dismissal* in these circumstances must be determined in the light of the facts of the case, including

- (a) the seriousness of the contravention of *this Act*;
- (b) attempts made to comply with *this Act*; and
- (a) whether or not the *strike* was in response to unjustified conduct by the employer.

- (2) Prior to *dismissal* the employer should, at the earliest opportunity, contact a *trade union official* to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the *employees* and what sanction will be imposed if they do not comply with the ultimatum.

The *employees* should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the *employees* in question, the employer may dispense with them.

## 7. GUIDELINES IN CASES OF DISMISSAL FOR MISCONDUCT

Any person who is determining whether a *dismissal* for misconduct is unfair should consider-

- (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
  - (i) the rule was a valid or reasonable rule or standard;
  - (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer

and

(iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.

## 8. PROBATION

- (1) (a) An employer may require a newly-hired *employee* to serve a period of probation before the appointment of the *employee* is confirmed.
- (b) The purpose of probation is to give the employer an opportunity to evaluate the *employee's* performance before confirming the appointment.
- (c) Probation should not be used for purposes not contemplated by this Code to deprive *employees* of the status of permanent employment. For example, a practice of dismissing *employees* who complete their probation periods and replacing them with newly-hired *employees*, is not consistent with the purpose of probation and constitutes an unfair labour practice.
- (d) the period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the *employee's* suitability for continued employment.
- (e) During the probationary period, the *employee's* performance should be assessed. An employer should give an *employee* reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.
- (f) If the employer determines that the *employee's* performance is below standard, the employer should advise the *employee* of any aspects in which the employer considers the *employee* to be failing to meet the required performance standards.
- If the employer believes that the *employee* is incompetent, the employer should advise the *employee* of the respects in which the *employee* is not competent. The employer may either extend the probationary period or dismiss the *employee* after complying with sub items (g) or (h), as the case may be.

- (g) the period of probation may only be extended for a reason that relates to the purpose of probation.

The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

- (h) An employer may only decide to dismiss an *employee* or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A *trade union* representative or fellow *employee* may make the representations on behalf of the *employee*.

- (i) If the employer decides to dismiss the *employee* or to extend the probationary period, the employer should advise the *employee* of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.

- (j) 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.

- (2) After probation, an *employee* should not be dismissed for unsatisfactory performance unless the employer has -

- (a) given the *employee* appropriate evaluation, instruction, training, guidance or counselling; and

- (b) after a reasonable period of time for improvement, the *employee* continues to perform unsatisfactorily .

- (3) The procedure leading to *dismissal* 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.

- (4) In the process, the *employee* should have the right to be heard and to be assisted by a *trade union representative* or a fellow *employee*.

## 9. GUIDELINES IN CASES OF DISMISSAL FOR POOR WORK PERFORMANCE

Any person determining whether a *dismissal* for poor work performance is unfair should consider-

- (a) whether or not the *employee* failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not-
  - (i) the *employee* was aware, or could reasonably be expected to have been aware, of the required performance standard;
  - (ii) the employee was given a fair opportunity to meet the required performance standard; and
  - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.

## 10. INCAPACITY: ILL HEALTH OR INJURY

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an *employee* is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the *employee* is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of *dismissal*. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured *employee*. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the *employee* to accommodate the *employee's* disability.
- (2) In the process of the investigation referred to in subsection (1) the *employee* should be allowed the opportunity to state a case in response and to be assisted by a *trade union representative* or fellow *employee*.
- (3) The degree of incapacity is relevant to the fairness of any *dismissal*. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example

alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

- (4) Particular consideration should be given to *employees* who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the *employee* is more onerous in these circumstances.

## **11. GUIDELINES IN CASES OF DISMISSAL ARISING FROM ILL HEALTH OR INJURY**

Any person determining whether a *dismissal* arising from ill health or injury is unfair should consider-

- (a) whether or not the *employee* is capable of performing the work; and
- (b) if the *employee* is not capable-
  - (i) the extent to which the *employee* is able to perform the work;
  - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the *employees* duties might be adapted; and
  - (iii) the availability of any suitable alternative work.