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*This guide outlines the basics of the Code of Good Practice regarding Dismissal as per Schedule Eight of the Labour Relations Act 1995. It also refers to, and goes into further detail of, specific sections of the Labour Relations Act where relevant. **It must be remembered that each dismissal case is unique, and therefore departures from the norms established in the Code of Good Practice may be justified in proper circumstances.** If you feel that you have been unfairly dismissed from your employment, or want further clarification on your rights as an employee, come in and speak to us in our office or call us on 021 762 0322.*

- A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure
 - The LRA recognises three grounds on which termination of employment might be legitimate: issues surrounding the conduct or capacity of the employee, or those regarding the operational requirements of the employer's business

Automatically Unfair Dismissals (Section 187 of the LRA 1995)

The following grounds for dismissal are automatically unfair:

- Supporting, participating or indicating an intention to participate in a strike or protest action that complies with the provisions outlined in Chapter IV of the LRA (giving 48 hours notice to the employer before a proposed strike or lock out takes place or seven days notice if the employer is the state, any action that conforms with procedures in a collective agreement, actions in receipt of a certificate stating that the dispute remains unresolved) [Section 64, LRA]
- Refusing, or indicating an intention to refuse, to do work normally performed by an employee who at the time was participating in a strike or lock out that complied with Chapter IV, unless the work is necessary to prevent an actual danger to life, personal safety, or health
- The employee took, or indicated that they were going to take, action against the employer by exercising rights conferred by the LRA, Basic Conditions of Employment Act, Employment Equity Act or any other relevant legislation, or participating in any proceedings in terms of such acts
- Pregnancy, intended pregnancy or any reason related to an employee's pregnancy
- Unfair discrimination directly or indirectly based on, but not limited to, Race, Gender, Sex, Ethnic or Social Origin, Colour, Sexual Orientation, Age, Disability, Religion, Conscience, Belief, Political Opinion, Culture, Language, Marital Status or Family Responsibility
- Transfer of a contract of employment (transferring a business from one employer to another e.g. the sale of a business to new owners)
- A contravention of the Protected Disclosures Act 2000, by the employer, on account of an employee having made a protected disclosure defined in that act

In a dispute, the accusing party must prove the facts of their conduct, and the employer must show that the reason for dismissal is related to the conduct or capacity of the employee, or the operational requirements of the employer.

Incapacity - Conduct

Disciplinary measures prior to dismissal

- Employers should adopt disciplinary rules that establish the standard of conduct required of their employees
- Employers should keep disciplinary records for their employees
- Generally it is **not** appropriate to dismiss an employee for a first disciplinary offence or misdemeanour unless the misconduct is of such gravity that it makes a continued employment relationship intolerable, for example instances of:
 - Gross Dishonesty
 - Wilful damage to the property of the employer
 - Wilful endangering of the safety of others
 - Physical assault on the employer, co-workers, or clients/customers
 - Gross insubordination
- **The penalty of dismissal must be applied consistently with the way it has been applied in the past by the employer, with reference to the employment and disciplinary history (with the current employer) of the employee**

Fair Procedure

- In a case of an accused misdemeanour, the employer should conduct an investigation and notify the employee that an investigation has been initiated into their conduct
 - The employee should be given sufficient and reasonable time to build a case/response, allowing for representation from a Trade Union or fellow employee
 - The decision/outcome of the investigation ought to be relayed to the employee in a language and terms that they understand, and preferably in writing
- If the employee is to be dismissed, they should be given full details of the reason for their dismissal, and be reminded of their rights to refer the matter to a council with appropriate jurisdiction, or reminded of any dispute resolution procedures established in terms of any collective agreement the employee is subject to
- **Misconduct does not always deserve dismissal!**
 - The seriousness of the contravention of standards of conduct or relevant legislative acts must be taken into account
 - The validity of the rule broken, expectation of reasonable awareness of the rule and the ability of the employee to comply with it must be taken into account as well as whether dismissal is an appropriate/proportionate sanction

Probation

- New employees may be placed on a probationary period in order to allow their employer to adequately assess and evaluate their performance
 - Probation must not be used to deprive employees of the status of permanent employment
- Reasonable training and guidance ought to be given to new employees to ensure the employee can meet expected standards of performance
 - If the employer determines that the performance of an employee on probation is below standard, they ought to advise the employee on areas for improvement, ways to improve and where they are considered to be failing to meet standards of performance and advice on appropriate means to achieve standards
- The employer may only extend a period of probation, or dismiss an employee on probation, after inviting the employee to make representations and have them considered
- If the probation period is extended, or the employee dismissed, the employer should advise the employee of their rights to refer the matter to a council with appropriate jurisdiction
- After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has:
 - Given the employee appropriate evaluation, instruction, guidance or counselling AND
 - If after a reasonable period of time the employee still performs unsatisfactorily
- Procedure leading to dismissal should include an investigation and **always** consider other ways, short of dismissal, to remedy the matter, affording appropriate representation from a Trade Union or fellow employee to the employee under investigation

Incapacity – Ill Health or Injury

- Incapacity through ill health or injury may be temporary, or it may be permanent
- The employer should investigate the extent of the incapacity and all possible alternatives to dismissal
- In cases of permanent incapacity, the employer should look at the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to account for their disability
 - The employee should be allowed representation in such an investigation
- In cases such as alcoholism or drug abuse, counselling and rehab may be appropriate steps to be considered by the employer

For further information on labour rights, or to discuss problems with your employer, PASSOP is here to help. You can contact us via our office phone number (021 762 0322) or by coming in to see us at the address at the top of this guide.