



## COMPLIANCE BULLETIN

# The rules of the employment relationship – Part 1: Substantive and procedural fairness requirements for dismissals

### Dear Compliance Client

At the core of each employer/employee relationship is an expectation of trust that is normally set out in an employment contract. Often, when the relationship goes awry because of an employee's misconduct and incapacity, or as a result of operational requirements, an employer may choose to dismiss an employee or terminate the employment contract.

Item 8(1) of the Code of Good Practice regarding Dismissal per Schedule 8 of the Labour Relations Act (as amended) lays down several guidelines that dictate the requirements for a dismissal to be substantively and procedurally fair.

Regarding misconduct, for a dismissal to be substantively fair, there must be:

- a rule/policy or practice that is valid and fair,
- the rule/policy or practice must have been consistently applied,
- the employee must be aware of the rule/policy or practice, and
- the employee broke the rule/policy or practice.

In terms of procedural fairness, there must be:

- an investigation into the facts,
- the employee must be informed of the allegations against him/her in a format and language that the employee can reasonably understand,
- the employee must be given the opportunity to put his/her case in reply to the allegations,
- the employee should be given a reasonable period in which to prepare,
- the employee may be assisted by a colleague or a trade union representative employed at the same workplace,
- the decision/finding should be conveyed to the employee after the investigation, and
- the findings, together with reasons, must preferably be provided to the employee in writing.
- If a trade union representative is the subject of disciplinary action, the trade union should be informed and consulted.
- The reasons for the dismissal must be explained (that is, the sanction and reasons).
- The employee must be reminded of his/her right of appeal to the CCMA/relevant council/tribunal.

These substantive and procedural fairness requirements are typically crystallised within a company's internal disciplinary policy and procedures and the interrelated policies – that is, the social media policy, privacy policy, data retention policy, sexual harassment policy, and IT policy.

This might hit a nerve. In my experience, employers and employees hardly ever read all their internal company policies and procedures; irrespective the size of the company and the checks and balances put in place by Human Resources to ensure this does not happen.

Whether it is during the drafting of an interrelated employment policy or procedure, facilitating training, conducting a due diligence, or assisting with an employment matter, this unfortunate reality always surfaces. This can lead to wasteful expenditure through an unnecessary redraft to replace an assumed ineffective HR Workbook, high employee turnover due to low levels of trust within the company because of inconsistency, resources being spent on misconduct matters, or resources being spent on templates to add to the list of policies in the hope of addressing all potential compliance needs.

In my experience, when it comes to the substantive fairness side of misconduct, the leading cause of less serious employee misconduct (transgressions that are typically not dismissible on a first offence and fall within the scope of rehabilitative discipline) is non-compliance with company policies and procedures.

Equally, and with regards to the procedural fairness of misconduct, the main reason disciplinary sanctions are successfully challenged at either an internal appeal or at the CCMA/relevant council/tribunal is non-compliance with procedural legislative requirements written into company procedures which are not adhered to by the company's internal representative.

The reason for substantive and procedural non-compliance is employees not knowing their internal policies and procedures.

Company policies and procedures play a vital role in creating certainty and consistency. Consistency is one of the building blocks for creating a culture of trust within a company and is an important substantive fairness requirement for both misconduct and incapacity matters.

Along with communication, if your employees trust you as a result of your willingness to apply your internal policies consistently, they will be more willing to communicate non-compliance by other employees to you (such as sexual harassment or discrimination).

Join us for the next Compliance Bulletin where we will clarify some of these requirements and provide some practical considerations for implementing sound policies and procedures.

Sincerely,

**Andrea de Jongh**

*POPIA and Employment Law Specialist*



## MOONSTONE COMPLIANCE NOW OFFERS EMPLOYMENT LAW SERVICES

As part of our focus to offer value-added services to our clients, Moonstone Compliance is excited to announce that **Andrea de Jongh** will head our Employment Law Service offering and will guide you through your employment law and industrial relations requirements.

Our service will ensure that your workplace procedures comply with legislation, from recruitment and selection (incorporating your employment equity plan) to dismissal for misconduct, incapacity, or operational requirements, and includes the following:

- General industrial relations services, which include the drafting or review of employment agreements, codes, policies and procedures.
- Disciplinary matters and disputes: Investigation and chairing of misconduct and incapacity hearings, together with drafting the outcomes, assisting with preparing matters to appear at the CCMA, Bargaining Council or Statutory Council, and advising on misconduct and incapacity matters.
- Assisting with debarment matters, including preparation of debarment notices, representation at debarment hearings and independent chairing of debarment hearings, ensuring that a financial services provider's debarments conform to the Financial Advisory and Intermediary Services Act and the FSCA's Guidance Notice 1 of 2019.
- Employment equity services, such as designing and implementing employment equity strategies, policies and procedures, and the implementation of an employment equity committee.
- Ongoing support and training.

**For expert guidance on Employment Law requirements, contact us at 021 883 8000 or enquire [here](#).**

**MOONSTONE**  
COMPLIANCE AND RISK MANAGEMENT

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