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THE LABOUR RELATIONS ACT, 66 OF 1995: A ROADMAP TO AVOID UNFAIR DISMISSALS

It is a sad reality that employers are often faced with the unenviable task of terminating an employee's employment. Whether termination is as a result of misconduct, retrenchment or performance, it is always a step many hope to avoid.

If, however, termination becomes inevitable, it is extremely important that employers resolutely stick to the straight and narrow path outlined by the Labour Relations Act, 66 of 1995 ("the Act") and to the procedures applicable to the specific situation. As tempting as it may be (especially when emotions run high as a result of a dispute) to stray from this path and take a short cut across the veld, this would be ill-advised. It is often here where employers stumble and fall foul of the requirements of the Act, resulting in legal costs and penalties.

We aim, in the coming months, to touch on the various types of dismissals governed by the Act as well the procedures to be followed. Having a good grasp of procedure will most definitely equip you in navigating day to day labour relations crossroads, however, these publications are by no means an exhaustive guide nor should it be seen as legal advice. We merely hope to touch on issues which are important to ensure all parties in the workplace are protected.

As employers, you are urged to contact an attorney should any topic discussed in this series seem applicable to your specific situation.

This, the first article in the series, will look at **Dismissal for Misconduct** and the procedures to be followed.

Dismissal for Misconduct is one of the three grounds allowed by the Act in terms of which an employer may terminate an employee's employment (the other two being Incapacity and Operational Requirements).

Misconduct is different to the other two grounds in that it relates to the employee's misconduct (the other two grounds are regarded as "no fault" dismissals). It is exactly because the proposed dismissal relates to the employee's misconduct that employers step into most of the pitfalls when they stray off the narrow path mapped out by the Act. The reason is that often there is either a long history leading up to the dismissal (and many frayed nerves) or that there is one incident that is so upsetting that employers act in haste.

Cases relating to Employee conduct are probably the easiest to get wrong when it comes to substantive and procedural fairness. More often than not, this is because due HR Processes were not employed from the onset of Employee conduct coming into question and corrective disciplinary actions were not taken to "rehabilitate" acceptable behaviour.

The first step to take as an employer in order to adhere to the Act when dismissing an employee for misconduct is to establish disciplinary rules and acceptable standards of conduct within the workplace. In the event of misconduct, the employer should pursue corrective disciplinary procedures to rectify the situation.

Employers must consider the following when determining whether a dismissal for misconduct is fair:

1. Whether the employee contravened a rule or standard code of conduct in the workplace; and
2. If so, whether or not-
   - 2.1 the rule was valid or a reasonable rule or standard;
   - 2.2 the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
   - 2.3 the rule or standard has been consistently applied; and
   - 2.4 dismissal was an appropriate sanction for the contravention of the rule or standard.

For ANY dismissal to be fair in law, it must be substantially and procedurally fair. Substantive fairness depends on the following:

- Was the employee guilty of the offence charged?
- Did the gravity of the offence justify the penalty of dismissal?

Procedural fairness in respect of the disciplinary hearing depends on the following:

- Adequate notice;
- The hearing must precede the decision;
- The hearing must be timeous;
- The employee must be informed of the charge;
- The employee must be present at the hearing;
- The employee must be allowed to be represented (fellow employee of union member);
- The employee must be allowed to call witnesses;
- Minutes must be kept by the presiding officer; and
- The presiding officer must be impartial.

It is important to keep the following regarding onus in mind when an employee challenges the fairness of a dismissal:

1. The **employee** bears the onus of establishing the existence of the dismissal.
2. Once the existence of the dismissal is established, the **employer** bears the onus of proving the dismissal is fair.

When it comes to compensation to be awarded to an employee due to an unfair dismissal, the Act vests a relatively wide degree of discretion in an arbitrator or judge but affixes the maximum amount of compensation at 12 months' salary.

Disputes over a dismissal are subject to strict time periods within which it should be referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA")/Bargaining Council. Although applications for condonation of late referrals may be brought, it could be difficult to succeed if a long period of time has passed or in the absence of good reasons for the late referral.

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The next instalment in this series shall deal with dismissal for incapacity or poor work performance.

Should you require any assistance, please do not hesitate to contact MLR Attorneys on 021 469 9705 or info@mlrattorneys.co.za.

This article does not constitute legal advice, as all cases are different. It is therefore important to seek the advice of an attorney, with specific reference to your matter. Please contact MLR Attorneys for comprehensive advice.