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EMPLOYMENT

Counselling employees who perform below expectation for a fair dismissal

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Employee underperformance is a valid ground for dismissal in SA labour law, but as always, the process which is followed by an employer to ensure that the dismissal is fair, is all important. Not only can an employee who is dismissed for incapacity (due to the employee's poor work performance) challenge the reason for the dismissal, but the employee can also claim that the process followed was not fair. What would generally be regarded as a fair counselling process is considered below.

Counselling is a pro-active process in which an employee's supervisor is actively involved in exploring and understanding the underlying causes of the employee's failure to meet the required performance standards. The supervisor and the employee must actively seek ways to ensure that the required standards are met. The number of counselling sessions will depend on the circumstances of each case. The employer will not be required to do more than what is reasonable and fair.

In the counselling process, the employer should explain to the employee what he/she is concerned about giving details of the concerns about the employee's performance and explain why he/she is concerned about the employee's performance. After explaining why there is a problem, the employee should be allowed to provide an explanation for the underperformance. The employee can also be encouraged to suggest solutions that will result in the expected performance standards being met. The employer and employee should then agree on solutions to the problem and steps to be taken to resolve the problem – if the employee does not agree, the employer can set reasonable and fair steps to address the problem. It is also critical that the employer allow the employee a reasonable period within which to show an improvement.

If after the counselling the employee still fails to meet the required performance standards, the supervisor must convene a follow up meeting to consider further appropriate action, including dismissal or some other lesser action, for example, final written warning. This can take the form of an incapacity enquiry, or some other forum within which the employee can be allowed to make representations as to why he should not be dismissed, which the employer must take into account before making a final decision in this regard. In making a decision, the employer must consider whether or not the employee failed to meet a performance standard; and if the employee did not meet a required performance standard whether or not the employee was aware, or could reasonably be expected to have been aware, of the required performance standard. It is also important to assess whether the employee was given a fair opportunity to meet the required performance standard; thereafter the employer can consider the employee's personal circumstances as well as their length of service and any other mitigating circumstances.

Provided that a fair counselling procedure has been undertaken, and there is objective evidence of the under-performance, the dismissal of the employee would ordinarily be defensible and fair.



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