

Employee Termination

EMPLOYMENT

Key Updates to the Code of Good Practice on Dismissal: A Comparison of the 2025 Draft and the Original Framework

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On 22 January 2025, the Department of Employment and Labour issued a draft update to the Code of Good Practice on Dismissal (“**Draft Code**”) under the Labour Relations Act 66 1995 (“**LRA**”). The Draft Code appears to build on Schedule 8 to the LRA and certain aspects of the LRA itself. This article explores the key differences between the two codes and notable additions included in the Draft Code.

The Old

The Code and the Draft Code both envisage mutual respect between employers and employees as a key principle. Both documents act as a guideline for employers and employees in a manner that is accessible and intentionally general to foster flexibility.

The Draft Code seeks to provide clearer guidelines for fair and lawful dismissals for misconduct, incapacity, and operational restructuring. However, the contents of both codes are largely similar. What is clear is that the Draft Code is more user friendly and offers a welcome guide to better navigate the LRA.

What's New?

Small Businesses: The first new feature of the Draft Code is the direct reference made to small businesses and recognition of the fact that simplified expectations regarding disciplinary and dismissal procedures may be more feasible for these role players. Whilst this principle is not foreign to the existing labour regime, including a reference to small businesses in the Draft Code highlights the importance of flexibility according to the size and functionality of an employer's business.

Sanction of Dismissal: Both codes set out factors to consider in deciding whether to impose the penalty of dismissal for misconduct. The Draft Code takes these factors a step further by including considerations such as (1) the impact of the misconduct on the business and (2) whether there is any acknowledgement on the part of the employee and willingness to comply with the employer's rules and standards.

Probation and Performance Dismissal: The Draft Code identifies both "performance and suitability" as the purposes behind requiring a new hire to serve probation. The Code only referred to performance.

Poor Work Performance: Both codes include what should be considered when determining a dismissal for poor work performance. The Draft Code now includes whether the required performance standard was reasonably achievable as a factor for consideration as well. The Draft Code also records that in certain circumstances an employer may not be required to warn an employee that they will be dismissed if their performance does not improve. The Draft Code identifies that this may apply specifically to managers and senior employees "*whose knowledge and experience enables them to judge whether their performance is adequate*" and employees with a high degree of professional skill.

Incapacity: The Code and the Draft Code remain largely the same with respect to incapacity for ill health and injury. However, the Draft Code acknowledges that incapacity may be unrelated to ill health or injury (for example, imprisonment). The Draft Code further provides that incompatibility, caused by an inability to work in harmony with an employer's business culture or with fellow employees, can constitute a form of incapacity justifying dismissal.

Operational Requirements: The Code made no reference to dismissals for operational requirements. All guidelines in this regard were found in the LRA itself and the Code of Good Practice on Dismissal Based on Operational Requirements. The Draft Code on the other hand provides guidelines on the nature of operational requirements, as well as what constitutes "fair reason" and "fair process" for these types of dismissals. Whilst this addition is welcome, the Draft Code simply records aspects of information already in the LRA. The Draft Code also includes a template that should be used when preparing written notices to alert employees of the possibility of retrenchments in terms of section 189(3). This template mirrors the content of section 189(3).

Invitation for Public Comment

Stakeholders are invited to submit comments on the Draft Code within 60 days of its publication. This period expires on 22 March 2025. Submissions can be made via email or post, with details available in the Draft Code [[found here](#)].



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