



EMPLOYMENT

New Code of Good Practice: Dismissal

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On 4 September 2025, the new Code of Good Practice: Dismissal ("**New Code**") came into effect.

The New Code repeals and replaces the old Code of Good Practice: Dismissal and the Code of Good Practice Based on Operational Requirements, consolidating dismissals for misconduct, incapacity and operational requirements into one code.

The purpose of the New Code is to provide guidance on how the legal obligations under the Labour Relations Act 66 of 1995 ("**LRA**") regarding these dismissals apply to employers and employees.

The New Code largely expands on principles from the repealed codes while also introducing several modifications. This article outlines some of the more noteworthy developments.

1. Small businesses

The New Code acknowledges that it may not be feasible or practical for small businesses to comply with formal procedures such as time-consuming investigations or pre-dismissal processes and that small businesses may not have human resource departments staffed by people with the relevant skills and experience.

Accordingly, the circumstances in which small businesses operate are relevant to the fairness of a dismissal.

2. Misconduct

The New Code emphasises that the purpose of a fair procedure is to enable genuine dialogue and allow for reflection before a decision is taken.

Acknowledging that an investigation or enquiry need not be formal, the New Code clarifies that the nature of an investigation or enquiry should be appropriate to the circumstances, including the type of allegation as well as the nature and size of the employer.

The New Code encourages employers, especially medium and larger employers, to adopt written disciplinary procedures. However, an employer may justifiably depart from these procedures. It also recognises that rules or standards need not always be recorded in writing and, in the case of deeply established and well-known rules or standards, these need not necessarily even be communicated.

While acknowledging that the sanction of dismissal should be applied consistently by an employer, the New Code notes that inconsistency does not necessarily render a dismissal unfair in circumstances where the misconduct renders the continuation of the employment relationship intolerable.

3. Industrial action

The New Code expands on the process to be followed by an employer before any dismissal relating to industrial action and acknowledges that, in the event of collective misconduct and depending on the circumstances, employers may call for collective representations.

In addition, factors relevant to assessing the contravention of the LRA in an unprotected strike, which in turn are relevant to the substantive fairness of any consequent dismissal, have been introduced.

4. Probation

Probation has long been the proverbial square peg in the round hole when it comes to procedural fairness. Consequently, the New Code seeks to relax the guidelines in relation to probation.

For example, less compelling reasons may justify the fairness of the dismissal of an employee during or on completion of the probation where the dismissal relates to the employee's conduct or capacity, including poor work performance. Previously, less compelling reasons were only accepted when the dismissal related specifically to poor work performance.

In addition, the purpose of probation now includes the evaluation of the employee's suitability for employment. This expands on the purpose of probation which was previously limited to evaluating the employee's performance.

5. Incapacity

The New Code codifies various case law principles relating to incapacity, specifically, it is acknowledged that incapacity is not limited to poor work performance, ill health and injury and may arise due to other factors, for example imprisonment.

The inability to work in harmony with fellow employees or the culture of the business, commonly referred to as incompatibility, is now formally recognised as a possible form of incapacity.

The New Code confirms that, depending on the circumstances, an employer need not warn an employee that they may be dismissed should their performance not improve. Examples of such circumstances include managers and senior employees able to judge the adequacy of their own performance as well as highly-skilled employees whose poor performance would have severe consequences for the employer.

6. Retrenchment

The New Code largely reflects and clarifies existing principles in relation to retrenchments, specifying the process to be followed and the principles that guide the process.

However, a notable development is the inclusion of an annexure reflecting the form and content of the notice of possible retrenchment to be given to employees at the onset of the process.

What does the New Code mean for employers?

The New Code seeks to expand on and clarify principles in the repealed codes, introduces new developments and codifies relevant judicial precedent, without compromising on the principles of fair labour practice.

The New Code also provides a welcome reprieve to small employers which may have historically struggled to meet the previous thresholds for fair labour practice.

With immediate effect, employers should be guided by the New Code to ensure that they have a fair reason and follow a fair procedure before dismissing any of their employees.

Employers who currently have disciplinary codes in place are encouraged to review their pre-existing codes to assess whether these are in line with the New Code. However, in the case of employers whose codes impose additional obligations and restrictions on themselves, these additional obligations and restrictions cannot be disregarded simply on the basis that they are not captured in the New Code.



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