

JUST DISMISSAL - UNPACKING EMPLOYMENT LAW IN SOUTH AFRICA

Fair and Just Dismissal

When considering disciplinary action that may lead to an employee's dismissal, an employer has to wrestle with questions of both fairness and "just reasons" in order to successfully exercise their authority over that employee. Generally speaking, employers are viewed as having more bargaining power than employees and so the law places a greater duty on them to compensate for the disparity. Employees should reach out to attorneys, unions and bargaining councils for assistance and insight but often aren't well informed of these options. The key principle of "fairness" is important across all labour law but is uniquely central to the issue of unfair dismissal and the labour litigation it could lead to.

What is a Fair Dismissal?

A fair dismissal has two basic requirements, substantive and procedural fairness. While substantive fairness refers to whether the employee violated a workplace rule or standard, procedural fairness focuses on the actual process used in the employee's dismissal. Failing to meet either requirement allows for a dispute and creates the possibility of compensation or reinstatement being awarded to an aggrieved employee¹.

Substantive fairness is the initial factual enquiry that asks whether the employee violated a standard set in the workplace, or a rule communicated to its employees. It is then asked whether the rule itself is legitimate. To do this the decision-maker answers the question of whether the rule is valid and reasonable. Proper evidence must be present that an employee contravened the rule before the decision-maker moves to the question of legitimacy. If both answers are yes, the dismissal can be said to be substantively fair, and one can proceed to the requirement of procedural fairness.

Procedural fairness is the requirement that the process used to arrive at the decision to discipline, retain or dismiss an employee is in itself fair. It operates as the set of rights an employee is entitled to when faced with the above. The eight steps which ought to be followed in reaching a workplace administrative decision, are;

1. Notice must be given of the claims against the employee,

¹ S193 of The Labour Relations Act 66 of 1995

2. Sufficient chance should be given to reply to the claims against the employee,
3. The employer may then decide to denounce the response of the employee,
4. Sufficient notice of a disciplinary hearing should be given to the employee at least 48 hours before the hearing,
5. A satisfactory time should be given to the employee to both examine the claims against him and to prepare a valid response to those claims,
6. The employee's rights must be stated in the notice given to the employee, such as to the right to an interpreter, to call witnesses, present evidence and ask a shop steward to be present,
7. An unbiased party must preside over the disciplinary hearing and explain both the employee's rights and the process clearly, and
8. The employee must be provided with the outcome of the hearing in writing which includes the reasons for the outcome and whether any appeal is available to them.

Each company is free to form its own disciplinary code and policy on how to deal with issues of discipline and conduct, but these basic rules must be followed to qualify as a fair procedure in the eyes of the law. Should both substantive and procedural requirements be met, the dismissal would be seen as fair and no award could be granted to the employee.

Some dismissals are viewed as automatically unfair as was in the case of *Mashava v Cuzan & Woods Attorneys (2000) 21ILJ 402 (LC)*². In the given case the employee was dismissed for not disclosing her pregnancy, the courts found that the dismissal was discriminatory against women. Pregnancy and maternity leave are set out in section 9(3) of the Constitution³ and are found in the Employment Equity Act of 1998 (EEA)⁴.

Conclusion

An employer must be able to prove a breach of a workplace rule and have an acceptable reason for the employee's dismissal. It's important for employees to familiarise themselves with their workplace rights, and guard themselves against unfair dismissals

If you would like assistance either as an employer or employee, our attorneys at SchoemanLaw Inc. are available to advise you on dismissals, discipline and your other labour law needs, simply contact us at www.schoemanlaw.co.za

² *Mashava v Cuzan & Woods Attorneys (2000) 21 ILJ 402(LC)*.

³ The Constitution of South Africa 1994

⁴ Employment Equity Act of 1998.

SCHOEMANLAW^{INC}

Attorneys, Conveyancers and Notaries Public