Discipline and termination procedure

Employers must have clear disciplinary standards. Keep records of and evidence that employees were given notice of all policies and procedures. These standards must be applied uniformly.

One of the most uncomfortable and least understood aspects of managing is how to discipline employees, and if necessary, how to terminate the employment relationship.

Remember that discipline is a corrective measure, not a punitive one. You should always administer discipline fairly and consistently. Ensure that your senior employees understand your company's policies and procedures so that they also make informed choices regarding workplace behaviours and performance.

Disciplining employees often results in employment litigation. Here are some guidelines for dealing with disciplinary problems in a way that may help you avoid litigation and maintain a genial and productive work environment.

Labour law

Labour law regulates the employment relationship. It consists of individual employment law (between employer and employee) and collective employment law (between employer and employee organisations such as trade unions).

The employment relationship forms the basis of all labour law and begins with an employment contract. When employers and employees enter an employment relationship, their rights and duties are determined by the terms of their contract, the common law collective agreements and applicable labour legislation.

The law requires employees to make their services available, be competent, respectful and obedient, and act in good faith and refrain from misconduct. Employers must accept the employee into service, remunerate the employee and ensure safe working conditions.

The disciplinary procedure

The purpose of a disciplinary code and procedure is to regulate standards of conduct and incapacity of employees within a company or organisation. The aim of discipline is to correct unacceptable behaviour and adopt a progressive approach in the workplace. This also creates certainty and consistency in the application of discipline.

Parties' obligations

The employer needs to ascertain that all employees are aware of the rules and the reasonable standards of behaviour that are expected of them in the workplace.

The employee needs to comply with the disciplinary code and procedures at the workplace. The employee also needs to ensure that he/she is familiar with the requirements in terms of the disciplinary standards in the workplace.

Counselling versus disciplinary action

There is a difference between disciplinary action and counselling. Counselling will be appropriate where the employee is not performing to a standard or is not aware of a rule regulating conduct and/or where the breach of the rule is relatively minor and can be condoned.

Disciplinary action will be appropriate where a breach of the rule cannot be condoned, or where counselling has failed to achieve the desired effect.

Before deciding on the form of discipline, management must meet the employee to explain the nature of the rule he/she is alleged to have breached. The employee should also be allowed to respond and explain his/her conduct. If possible, an agreed remedy on how to address the conduct should be arrived at.

Forms of discipline

Disciplinary action can take several forms, depending on the seriousness of the offence and whether the employee has breached the particular rule before. The following forms of discipline can be used (in order of severity):

- Verbal warning
- Written warning
- Final written warning
- Suspension without pay (for a limited period)
- Demotion, as an alternative to dismissal only
- Dismissal

The employer should establish how serious an offence is, with reference to the disciplinary rules. If the offence is not very serious, informal disciplinary action can be taken by giving an employee a verbal warning. The law does not

specify that employees should receive any specific number of warnings, for example, three verbal warnings or written warnings, and dismissal could follow as a first offence in the case of serious misconduct.

Formal disciplinary steps would include written warnings and the other forms of discipline listed above. A final written warning could be given in cases where the contravention of the rule is serious or where the employee has received warnings for the same offence before. An employee can appeal against a final written warning and the employer can hold an enquiry if the employer believes that it is only through hearing evidence that the outcome can be determined.

Written warnings will remain valid for 3 to 6 months. Final written warnings will remain valid for 12 months. A warning for one type of contravention is not applicable to another type of offence. In other words, a first written warning for late coming could not lead to a second written warning for insubordination.

Employees will be requested to sign warning letters and will be allowed to state their objections, should there be any. Should an employee refuse to sign a warning letter, this does not make the warning invalid. A witness will be requested to sign the warning, stating that the employee refused acceptance of the warning.

Dismissal is reserved for the most serious offences and will be preceded by a fair disciplinary enquiry unless an exceptional circumstance results in a disciplinary enquiry becoming either an impossibility (e.g., the employee absconded and never returned) or undesirable (e.g., holding an enquiry will endanger life or property).

When can an employer hold a formal enquiry?

An employee may be suspended on full pay pending a hearing, especially in instances when the employee's presence may jeopardise any investigation.

The employer must also allow the employee to make representations. The employer should give the employee not less than three days' notice of the enquiry and the letter should include:

- The date, time and venue of the hearing
- Details of the charges against the employee
- The employee's rights to representation at the hearing by either a fellow employee or shop steward.

Note: If the employer intends to discipline a shop steward, the employer must consult with the union before serving notice to attend the enquiry on the intention to discipline the shop steward including the reasons, date and time.

Who should be present at the enquiry?

- A chairperson
- A management representative
- The employee
- The employee representative
- Any witnesses for either party
- An interpreter if required by the employee

How should a hearing be conducted?

The employer should lead evidence. The employee is then allowed to respond. The chairperson may ask any witnesses questions for clarification. At the ending, the chairperson decides whether the employee is guilty or not guilty. If guilty, the chairperson must ask both parties to make submissions on the appropriate disciplinary sanction. The chairperson must then decide what disciplinary sanctions to impose and inform the employee accordingly.

The employee should be informed that he/she has the right to appeal. If the employer does not provide for an appeal procedure, the employee must be reminded that he/she could take the case further to the CCMA or bargaining council.

The failure to attend the hearing cannot stop the hearing from continuing except if good cause can be shown for not attending.

Note: This procedure should not substitute disciplinary procedures subject to collective agreements.

Parties can also request, by mutual consent, the CCMA or a bargaining council to appoint an arbitrator to conduct a final and binding disciplinary enquiry. The employer would be required to pay a prescribed fee.

Labour legislation is not specific in terms of the steps to follow when conducting a disciplinary enquiry. These procedures should therefore merely serve as guidelines for parties.

Termination of employment

Every employee has the right not to be unfairly dismissed. If an employee can show that she has been dismissed, the employer must show that the dismissal was fair. To be fair a dismissal must be for a fair reason and in terms of a fair procedure.

Fair reasons for dismissal are those that relate to the employee's conduct or capacity or the employer's operational requirements. Some reasons can never be fair reasons for dismissal. In these cases, the employee is seen as automatically unfairly dismissed.

These rules on termination of employment do not apply to employees who work less than 24 hours per month.

Notice periods

The length of employment determines the notice period:

- Where an employee has worked for six months or less: 1 weeks' notice
- Where an employee has worked for more than six months but less than 12 months: 2 weeks' notice
- Where an employee has worked for 12 months or more: 4 weeks' notice
- Where an employee is a farm worker or domestic worker and has worked less than six months: 1 weeks' notice
- Where an employee is a farm worker or domestic worker and has worked six months or more: 4 weeks' notice

The notice period may be reduced by a collective agreement from four weeks to not less than two weeks for an employee who has worked for 12 months or more.

Notice must be given in writing. However, illiterate employees may be given notice verbally. Notice may not be given during leave or run concurrently with leave, except sick leave.

Payment instead of notice

An employer may pay the employee for the notice period without requiring work. The employee must be paid for the notice period unless both parties agree otherwise.

Accommodation provided by employer

If the employer terminates employment before the end of the required notice period or gives payment instead of notice, the employer must continue to

provide accommodation for a month, or until the contract could legally be ended, whichever is longer.

If the employee remains in the accommodation under such circumstances, the agreed value of the accommodation for that period may be deducted from the money owed to the employee.

Payments on termination

The employer must pay for time off accumulated but not taken (e.g., overtime worked in terms of an agreement, for example, Sunday work etc) and leave accumulated, but not taken.

Severance pay

Severance pay only applies in cases of retrenchment. Severance pay must equal at least one week's pay for each completed year of continuous service. Previous employment with the same employer, but broken by periods of less than one year, is still regarded as continuous service (unless there was a previous retrenchment). Payment includes the cash value of any payment in kind but excludes:

- Gratuities ('tips')
- Allowances paid to allow the employee to work (for example, a uniform allowance)
- Discretionary payments not related to hours of work or work performance (for example, a birthday bonus)
- An employee who unreasonably refuses an offer of alternative employment is not entitled to severance pay. Payment of severance pay does not affect an employee's right to any other payments, such as notice pay (if relevant), leave pay and outstanding remuneration.

Certificate of service

The employer must give the employee a certificate of service which states:

- The employee's full name
- The name and address of employer
- A description of a council (for example a bargaining or statutory council) or Sectoral Determination where applicable
- Dates of commencement and termination of employment
- Title of job, or a brief description of work
- Remuneration at date of termination
- Reason for termination (only if the employee requests this)

General

If an employee absconds, he/she should still be paid for leave and time off accumulated and is still entitled to a Certificate of Service. No deductions may be made for notice not given by the employee. The employer may take civil legal action against the employee to recover this money.

The CCMA

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA). It is an independent body, does not belong to and is not controlled by any political party, trade union or business. The CCMA signals a shift from a highly adversarial model of labour relations to one based on promoting greater co-operation, industrial peace and social justice.

Because of its relative informality and the greater variety of approaches and solutions which may be adopted, those groups who may be considered ill-served by the old legislature often regard the new dispensation as especially suitable for use. The premise being that it is a more co-operative model based

on collective bargaining, greater participation, organisational rights, effective resolution of conflict and higher levels of co-operation resulting in greater flexibility and improved productivity outcomes.

The CCMA will:

- Conciliate workplace disputes
- Arbitrate disputes that remain unresolved after conciliation
- Facilitate the establishment of workplace forums and statutory councils
- Compile and publish information and statistics about its activities
- Consider applications for accreditation and subsidy from bargaining councils and private agencies

The CCMA may:

- Supervise ballots for unions and employer organisations
- Give training and advice on
    - the establishment of collective bargaining structures
    - workplace restructuring
    - consultation processes
    - termination of employment
    - employment equity programmes
    - dispute prevention
    -

CCMA dispute resolution process

1. If you have a labour problem, you must take steps immediately. In the case of an unfair dismissal dispute, you have only 30 days from the date on which the dispute arose to open a case. With discrimination cases, you have six months.
2. If you have decided to lodge a dispute, you need to complete a CCMA case referral form, also known as LRA Form 7.11. These

forms are available from the CCMA offices, DOL offices and the CCMA website. (www.ccma.org.za).

3. Once you have completed the form, you need to ensure that a copy is delivered to the other party. You must be able to prove that they received a copy. Acceptable methods include faxing a copy (keep the fax transmission slip), sending it by registered mail (keep the postal receipt), send it by courier (keep proof) or deliver in person (ask the person receiving it to sign for it).
4. You do not need to bring the referral form to the CCMA in person. You may also fax the form or post it. Make sure that a copy of the proof that the form had been served on the other party is also enclosed.
5. The CCMA will inform both parties as to the date, time and venue of the first hearing.
6. Usually, the first meeting is called a conciliation hearing. Only the parties, trade union or employer organisation representatives (if a party to the dispute is a member) and the CCMA Commissioner will attend. The purpose of the hearing is to reach an agreement acceptable to both parties. Legal representation is not allowed.
7. If no agreement is reached, the Commissioner will issue a certificate to that effect. Depending on the nature of the dispute, the case may be referred to the CCMA arbitration or the Labour Court as a further step.
8. To have an arbitration hearing, you have to complete a request for an arbitration form, also called a LRA Form 7.13. A copy must be served on the other party (same as in step 3). Arbitration should be applied for within three months from the date on which the Commissioner issued the certificate.
9. Arbitration is a more formal process and evidence, including witnesses and documents, may be necessary to prove your case.

Parties may cross-examine each other. Legal representation may be allowed. The commissioner will make a final and binding decision, called an arbitration award, within 14 days.

10. If a party does not comply with the arbitration award, it may be made an order of the Labour Court.

Provided by the Commission for Conciliation, Mediation and Arbitration (CCMA)

Where to go for help

There are several websites that provide useful and in-depth information on South African labour law. Here are some of the most popular:

Paralegal Advice: https://www.paralegaladvice.org.za

Labourwise: https://www.labourwise.co.za

Labour Law Advice: https://www.labourlawadvice.co.za/

Resources:

- Disciplinary Procedures
- Dispute Management Overview
- Parliamentary Portfolio Committee For Labour
- Code of Business Conduct
- Termination Of Employment
- Disciplinary procedures
- Steps for referring Disputes at the CCMA
- Commission for Conciliation, Mediation and Arbitration (CCMA)
- NCV 3 Management Practice Hands-On Support Slide Show - Module 2
- The CCMA's History