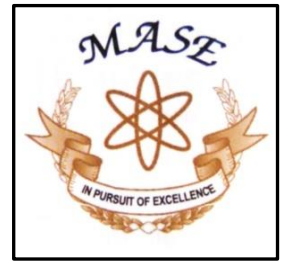




Mokopane English Combined School

EMIS 991102504
Umalusi Registration 18SCH01 00585 PA



POLICY ON EMPLOYEE MISCONDUCT

Misconduct in the employment context is a broad concept and refers to the **blameworthy breach of rules or standards** in, or of relevance to, the workplace, and for which the employee can be **faulted/blamed**.

Such rules and standards are not limited to the examples of misconduct as may be contained in an employer's disciplinary code, but include other policies, procedures, the laws of the country as well as the South African common law. The standard of conduct which is really at issue, is that of diligence and good faith that every employee owes his/her employer. Any conduct that goes against this (irrespective of the label it is assigned in a particular disciplinary code) could potentially lead to disciplinary action or a dismissal for misconduct.

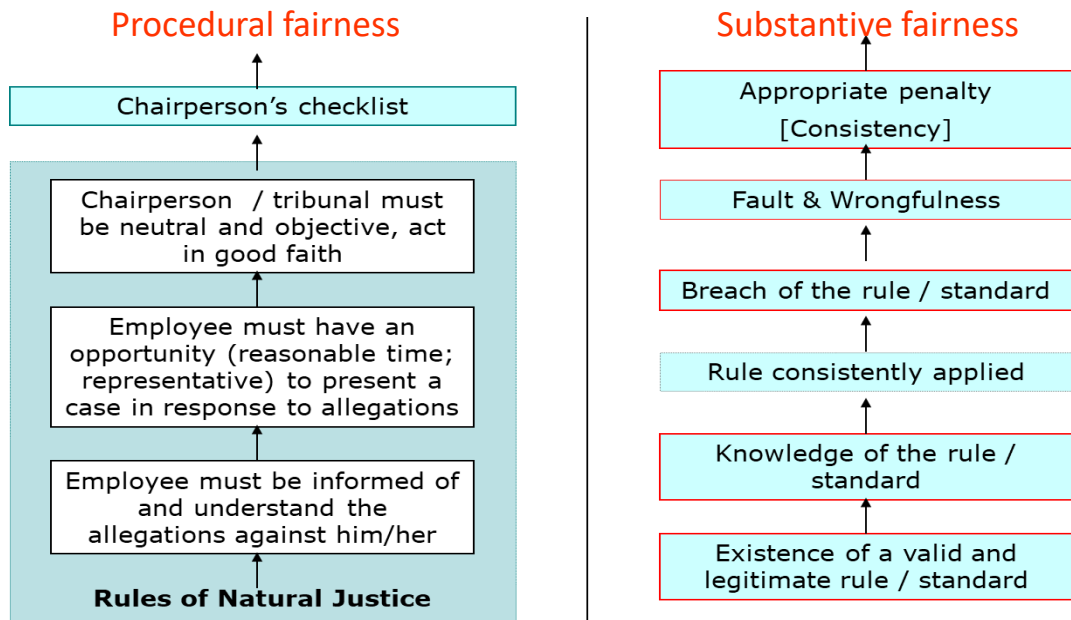
Schedule 8 of the Labour Relations Act mentions three grounds on which a termination of employment might be legitimate – including dismissal 'for a reason relating to the conduct of the employee'. Although the LRA does not create an offence labelled 'misconduct', the reason for **all conduct-related breaches, discipline or dismissals would ultimately resort under the misconduct banner**. Howsoever these might be sub-categorised into different species of misconduct by an employer in their disciplinary code (insubordination / 'negligence' / unauthorised absence, etc.), such arbitrary labels do not create specified criminal-style offences, and also cannot have pre-determined outcomes.

Different from criminal trials, a disciplinary enquiry/hearing is a process or tool to determine whether misconduct has been committed, and if so, to consider an appropriate operational response to that particular misconduct by the employer. The appropriate response in each individual case will depend on the severity of the particular misconduct and surrounding circumstances.

FAIRNESS PRINCIPLES

All disciplinary proceedings and actions must be both **(1) Procedurally** and **(2) Substantively** fair in terms of the Labour Relations Act.

- The employer bears the onus to prove that dismissal or other disciplinary action was fair.
- The employer must discharge this onus and prove the guilt of the employee on a balance of probabilities.



1. Procedural fairness

There are no statutory prescribed *procedures* to follow when investigating misconduct and/or disciplining an employee – only fairness *principles* to be complied with.

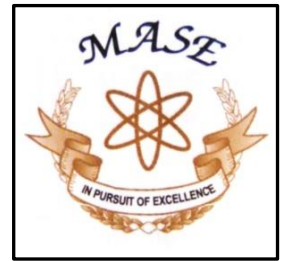
The “rules of natural justice” together with some procedural principles found in Schedule 8 of the LRA, should guide the employer towards achieving procedural fairness.

- 1.1. The employee must understand the charges / allegations against him/her, including -
 - Sufficient information regarding the allegations must be given to the employee in order for him/her to prepare a response;
 - The terminology and language used should must be understandable to the recipient;
 - It must be explained in a language that he/she understands.
- 1.2. The employee must be given a fair opportunity to present a case in response to the allegations, including -
 - Reasonable time to prepare;
 - Representation / assistance by a co-worker (There is no automatic right to external representation – an employee must formally apply to the chairperson, who has a discretion in this regard);
- 1.3. The person taking the decision must be neutral / objective / unbiased.



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These principles should be applied whether a formal or informal disciplinary procedure is followed. An informal procedure could be a disciplinary interview prior to a warning being issued; whereas a formal procedure usually refers to a disciplinary hearing/enquiry. (Please note that the terms 'hearing' and 'enquiry' are interchangeable and the reference to either has no legal effect.)

2. Substantive fairness

This requires a fair evaluation of the evidence to determine whether the employee is indeed guilty of the offence, and if so, deciding on an appropriate penalty.

Schedule 8 of the Labour Relations Act stipulates a number of aspects that must be proved to the satisfaction of the commissioner (or chairperson) to determine the guilt of the employee:

- 2.1. Existence of the rule / standard that has allegedly been breached.
 - The rule / standard must be valid, lawful and reasonable;
 - It should generally be justifiable with reference to the operational requirements of the employer.
- 2.2. The employee was aware, or could reasonably be expected to have been aware, of the rule or standard.
- 2.3. The rule must be consistently applied by the employer in the workplace.
 - Rules should be enforced against all employees consistently;
 - Consistency should be determined contemporaneously as well as historically.
- 2.4. The employee's involvement in, and the breach of, the rule / standard must be proved.

Answer questions such as

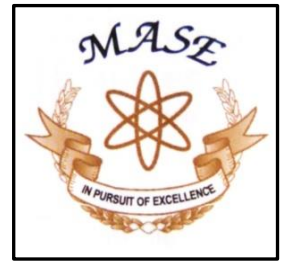
- when
 - where
 - what
 - how
 - by whom
 - why
 - who was involved
- 2.5. Fault / blame on the part of the employee in breaching the rule / standard (common law requirement). This is the state of mind of the employee at the time of the breach and usually something that can be inferred from the proven facts during the disciplinary investigation or hearing. Sometimes it is however necessary to present evidence – for example to prove pre-meditation; or to prove that the employee possessed specific knowledge or skills which would point to negligence when breaching the rule.

Misconduct can be committed intentionally or negligently:



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- Intention – Deliberate or “don’t care” approach to breaching the rule and possible harmful consequences;
- Negligence - The test for negligence is if a reasonable person in the position of the employee (comparable skills, knowledge, position, etc.) would have foreseen possible harm being caused by his/her actions or omissions and would have taken steps to prevent such harm; but the accused employee failed to do so.

- 2.6. If the employee has been found guilty, the last element of substantive fairness is to determine an appropriate and fitting disciplinary sanction. If the initiator believes that the trust relationship has broken down and that dismissal would be appropriate, there must be evidence led by the line manager of the employee to demonstrate why and how the trust relationship has perished and that continued employment is no longer possible. Mere arguments or a statement in this regard will not be sufficient for the CCMA to determine that dismissal was the appropriate sanction.

It is not an absolute requirement in cases where it is obvious that the trust relationship has broken down – such as dishonesty. However, there have been case law indicating for example that there are ‘degrees of dishonesty’, so it is advisable to rather not assume but present clear evidence in this regard.

BREACH OF PERFORMANCE STANDARDS

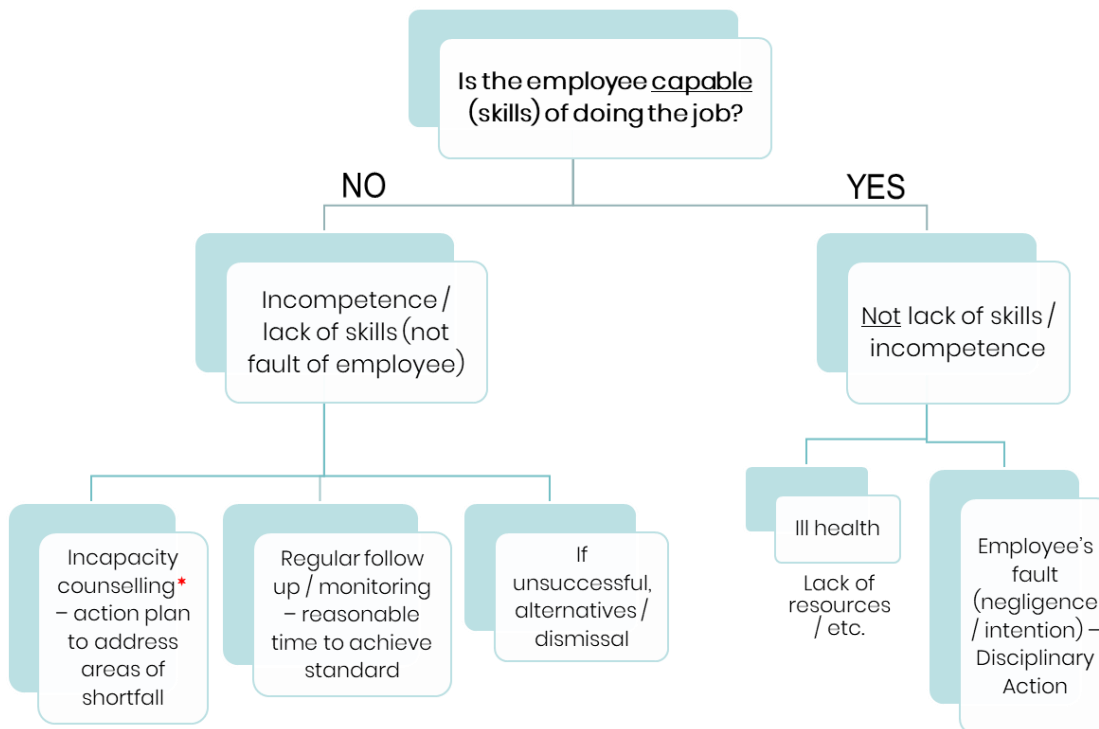
Distinguishing misconduct from incapacity in the case of poor performance

- In order to embark on a disciplinary process for a poor performing employee, the employee must firstly **be able / capable** of meeting the performance standards (competent), whereafter the other elements in terms of substantive fairness above must then be determined on a factual basis, to decide if the employee can be disciplined for the non-performance.
- If the reason for an employee’s lack of performance is the inability to perform due to incompetence / other incapacity on his/her part, an incapacity counselling procedure should be followed. *There are no disciplinary warnings applicable during an incapacity process.*
- This distinction is important in order to determine which procedure should be followed in the given situation in terms of the Labour Relations Act, i.e. *Discipline* (misconduct) or *Counselling* (incapacity).
- If the correct procedure to suit the circumstances is not followed, it does not matter that the employee has had a valid reason to dismiss the employee, it could still be a *procedurally unfair* dismissal.

Misconduct	Incapacity
Rule / Standard exists	Standard exists
Valid / reasonable	Valid / reasonable
Knowledge of standard	Knowledge of standard
Breach of standard	Breach of standard
Fault – intention or negligence	NO fault (inability to perform)
Process - Discipline	Process – Counselling (no warnings)

Determining whether a poor performing employee should be disciplined

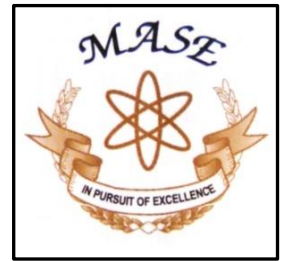
The flow diagram below can be followed to determine whether the School should follow a disciplinary process or an incapacity counselling process when an employee is under-performing.





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- If a capable employee has failed to perform as required, the existence of **fault / blameworthiness** on the part of the employee is also necessary for disciplining the employee in the case of breach of performance standards. This is usually when the lack of performance is conduct-related. A capable employee could therefore be subjected to a disciplinary investigation for performance-related complaints (such as 'negligence'), but still not be guilty of misconduct if there is a valid explanation or justification for the non-performance. If he/she is however at fault, disciplinary action can follow.

PRECAUTIONARY SUSPENSION

The decision to suspend an employee pending the outcome of a disciplinary investigation is not simply the employer's prerogative or to be done 'at will'. There are particular substantive considerations to be met.

- Precautionary suspension should not be implemented lightly and only done if there are valid concerns relating to a pending investigation.
- Suspension pending a disciplinary investigation / outcome is always on full pay.
- Decisions to suspend can be challenged at the CCMA as an unfair labour practice.

1. Substantive fairness

- Precautionary suspension should only be in cases of alleged serious misconduct and with the aim to preserve the integrity of the investigation.
- The employer must be able to show that it has reasonable and *prima facie* grounds to believe that the employee's continued presence at the workplace may -
 - jeopardise investigations;
 - interfere with evidence;
 - interfere with potential witnesses;
 - interfere with assets/property;
 - endanger the well-being of any person.
- The Court may also consider aspects such as financial or psychological prejudice, the social and personal standing of the employee and the integrity and dignity of the employee.

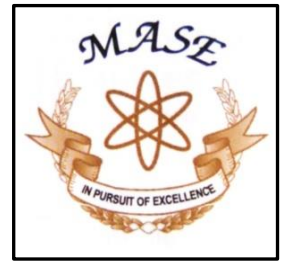
2. Procedural fairness

These requirements were clarified by the Constitutional Court during 2018. Where case law has previously indicated that an employer is required to have a 'pre-suspension discussion' with the employee or to give him/her the opportunity to make representations in respect of the employer's intended decision on precautionary suspension, this is no longer required in terms of the Court's interpretation of the applicable law.



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However, it should still be a reasonable and justifiable decision by the employer – otherwise it can be challenged as an unfair labour practice. If called upon, the employer must be able to show that (1) there were valid substantive reasons for removing the employee from the workplace; (2) that it was linked to a pending investigation; and (3) that it was not unduly long. If these principles are met and the employee is fully paid during the suspension, no further procedural steps are required in terms of the law.

However – schools who have implemented policies and procedures in terms of pre-suspension discussions, and who have not subsequently changed this, will still be bound to this in terms of their internal procedures. Some employers have elected to keep such a process in place simply as good practice.

The employee should be given written confirmation of his/her suspension, with the terms and conditions applicable during the suspension period stipulated.

- Usually the employee will not be permitted to enter the premises (or parts of the premises) or to make contact with colleagues, parents, learners, etc. – unless prior permission from the school's management had first been obtained.

The employee should however be reminded that, should he/she need to contact a co-worker or other person for the purpose of preparing for the disciplinary enquiry (to represent or be a witness), the employee should obtain permission to do so timeously in advance – and not arrive at the disciplinary enquiry unprepared and without witnesses based on the contents of the suspension letter.

- During precautionary suspension, the employee remains employed on full pay, even though not present at the workplace, and accordingly must remain contactable and available to the employer at all times during the suspension period, unless an alternative arrangement has been agreed to.

End of Information: Misconduct

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