

# Dismissal for Alleged Incapacity: POOR WORK PERFORMANCE

This checklist has been prepared having regard to the CCMA Arbitration Guidelines, the Code of Good Practice: Dismissal and relevant case law

v34

**NB: The law does NOT require that each and every factor set out below apply in all cases. The law encourages the minimum of legal formality. This checklist is merely a guide and should be used with care and flexibility.**

**GLOSSARY:** IH (Incapacity hearing); EE (employee); ER (employer); AG (CCMA Arbitration Guidelines); Code (Code of Good Practice: Dismissal); PS (performance standard); APP (alleged poor performance); Sidumo (Sidumo & Ano v Rustenburg Platinum Mines Ltd (CC)); Edcon (Edcon v Pillemer NO (SCA)).

NB: This checklist does not deal with intentional or negligent under/non-performance. Consult checklist for MISCONDUCT in this regard.

## PROCEDURAL FAIRNESS

- 1 Generally speaking the same procedural issues that arise in disciplinary hearings for alleged misconduct arise in these cases. Refer to the checklist for MISCONDUCT for further information.

## ESSENTIAL INFORMATION

- 2 Is the EE allegedly not performing at required level due to alleged lack of skills, competence, knowledge or experience?
- 3 Detailed description of the essential / core functions of the EE's job. Does EE have to perform at a high level in all of these, and if not all, then which?
- 4 To whom does he report? Are there any reports?
- 5 What are the **qualifications** and **experience** required for the job and does EE have them? Was EE employed specifically for his qualifications and experience (ie headhunted)? Did EE give express/implied **warranty** on his level of **skill** and experience on CV or interview? (Is EE a **senior** or **managerial** EE? If so such EE should be able independently to assess problems & difficulties; to take steps to improve; to be able to assess whether he is performing according to PS; and accordingly not need the degree of regulation or training that **lower skilled** EEs require in order to perform their functions.)
- 6 Was EE **promoted** to this job or was he hired **externally**? If promoted, from what position was he promoted? Are there any similarities in the jobs? How did he perform in that job?
- 7 Did EE say that he could perform the job? Or did he say that he would be able to do it **provided** that he was given training, instruction & guidance?
- 8 Was EE appointed to a post for which he was **unqualified** in the knowledge that he was unqualified? Why? (If so ER may need to take more extensive remedial steps than otherwise required before dismissing)
- 9 Is EE **competent**, ie should his qualifications & experience have put him in a position to perform the relevant functions immediately or very soon after he assumed the post? (aka "Hitting the ground running.")
- 10 Does EE work in a team? If so, what are the team-members' names, job titles, roles & functions?
- 11 Is the job **complex**? What are the complexities? What is the **volume** of work? What is the **nature** and complexity of ER's **business**?
- 12 Is EE required to show any **initiative** in the performance of his job? Were there occasions when he could show it? Did he show it?

- 13 Was EE given **training** (if applicable), **instruction**, **guidance** and **feedback**? Code 8(2)(a)
- 14 What is quality or quantity (of production per hour/day) required by the **PS**? What is the quality or quantity of the work of EE?

## ASCERTAINING IF THERE WAS POOR PERFORMANCE

- 15 Are there procedures for **monitoring** and **measuring** performance? What are they?
- 16 Is EE **aware**, or could **reasonably** be expected to be aware of the PS? Code 9(b)(i). Was EE given a **fair opportunity** to meet the PS? Code 9(b)(ii)
- 17 Is EE performing to the **PS**? Was EE informed of the APP? In which areas was he failing?
- 18 Is the PS **reasonable**, realistic, fair and attainable? Has the PS always been the same, or has it been **raised**? If raised, when did that happen? Were EEs informed of the new raised standard?
- 19 Are EEs in **comparative positions** performing? Has the PS been **consistently** applied?
- 20 In the case of failure to meet **sales targets**, is this failure attributable to wilful neglect (ie misconduct) or incapacity? In other words is there a causal connection between the performance and EE's deficient output? Eg is he visiting potential clients?
- 21 In the case of failure to meet sales targets, what is the prevailing **economic climate**? What are the market or area characteristics that may impact on sales? Is there enough product? How does the product compare to competing products? Has new competition arisen recently? Are there any sales restrictions? Is EE's APP due to factors **beyond his control**? If so, what are they? Are other salespersons performing to PS?
- 22 If applicable, was EE given the necessary / relevant / technical **support** and resources / tools?
- 23 Is EE's APP based on a **single incident** or has there been a **consistent decline**? If not consistent then what are reasons for inconsistency?
- 24 Is EE's APP impacting **negatively** on the business? How? Is EE's alleged non-performance a **danger** or safety hazard to other EEs or public, or is seriously hampering production?

## COUNSELLING & AGREEMENT ON STEPS TAKEN TO IMPROVE PERFORMANCE

- 25 Was EE **counseled** on his APP? (This step may or may not apply to senior EEs) Was EE given an opportunity to make **representations** on the reasons for his APP? In other words did he state what he thinks is the cause of the non-performance, and what he thinks should be done in order to overcome the problem? Were those suggestions practical? At counseling was the **reason** for the APP identified taking into account both parties' reasons for the APP? Code 8(3)
- 26 Was it **agreed** between the parties at the counseling how EE should go about improving his performance? What was agreed? Was a **reasonable period** of time agreed to allow EE to improve? Code 8(2)(b) Did that period elapse? Did EE follow the agreed program? Was a date set for next formal counselling for review and follow-up?

## STEPS TAKEN AFTER EMPLOYEE WAS COUNSELED

- 27 Did EE's performance improve when he followed the agreed program? Was the performance monitored

and measured and if so was a record kept of that? Are there any reasons why performance has not improved? Was he given **feedback**? Can EE monitor own performance? At what intervals was feedback given? Was EE informed that his performance remains poor and that he may face dismissal?

## Dismissal at end of PROBATION

- 28 The purpose of probation is to give ER an opportunity to evaluate the EE's performance before confirming the appointment. The EE should be given reasonable evaluation, instruction, training, guidance, counselling and feedback on her performance or shortcomings. Probation can be extended reasonably. An EE may be dismissed only after he has been invited to make representations. Code 8

## SANCTION & REMEDIES

- 29 **SANCTION:** Was EE informed that he may be dismissed if goals cannot be achieved within a reasonable time?
- 30 Is there an **alternative** to dismissal? Code 9(b)(iii). Has EE been offered a post that is in keeping with his abilities even if it is a **demotion**? Could the duties be adapted? Is EE agreeable to demotion? Is his refusal to be demoted reasonable?
- 31 Does EE have **long service**? What is the implication of that? (Sidumo) What impact would dismissal have on EE? **Personal** / family circumstances? AG106 Who does he support as breadwinner? (Sidumo)
- 32 Can EE be relied upon (or trusted) to perform without being constantly supervised?
- 33 **REINSTATEMENT / RE-EMPLOYMENT:** Has the ER shown that the nature of the job makes the employment relationship **intolerable**? AG107
- 34 Is reinstatement or re-employment **reasonably practicable** or feasible? AG113 Is there evidence of co-EEs or manager that there is no prospect of **good working relationship** being restored?
- 35 Would reinstatement cause a disproportionate level of **disruption** or **financial burden** to ER? AG115. Has another EE been **appointed** in place of the applicant, even though this is not an obstacle to reinstating a deserving EE? If reinstatement is not reasonably practicable, is **re-employment** a fair outcome? Is there such post and what is the attached remuneration? Has ER shown that reinstatement or re-employment should not be from the **date of the dismissal**? AG115.
- 36 **COMPENSATION:** Factors when awarding compensation for **substantive unfairness**: EE's remuneration and benefits at the time of dismissal; time lapse since dismissal; whether EE has secured alternative employment and if so date thereof and rate of remuneration; whether EE has taken steps to mitigate his losses by finding alternative employment; financial loss suffered by EE; EE's prospects of future employment eg age, experience, education, qualifications and availability of suitable job opportunities; whether EE failed to state a case at IH; whether resolution of dispute was unreasonably delayed and if so who caused the delay; whether there was a condonation for late referral; whether dismissal was both substantively and procedurally unfair; whether EE received any payments from ER over and above that required by law, any collective agreement or contract; whether EE unreasonably refused an offer of reinstatement made in good faith; whether actions of EE led to loss or damage to ER; ER's financial position. Factors when awarding compensation for **procedural unfairness ONLY**, consider whether the lapse was minor or serious and whether it caused prejudice. AG130-136.