

DISMISSAL FOR ALLEGED MISCONDUCT

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

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: DH (Disciplinary hearing), EE (employee), ER (employer), AG (CCMA Arbitration Guidelines), Code (Code of Good Practice: Dismissal), DC (disciplinary code), Sidumo (Sidumo & An v Rustenburg Platinum Mines Ltd, CC) and Edcon (Edcon v Pillemer NO, SCA)

PROCEDURAL FAIRNESS

- 1 Was a **notice** of DH given? Was the notice in a **language** that EE can reasonably understand? AG61.1 Did it **alert** EE to charges he faced? Was the DH commenced **promptly** and without delay after the alleged misconduct? Was EE given a **reasonable time** to prepare for DH? AG61.2 Was EE allowed to be **represented** by a colleague or shop steward? AG61.3 AG71 Is EE a union official or **shop steward** and if so was his union informed of steps taken against him? Code 4(2) Was EE allowed to **listen** to evidence of ER's witnesses? Was EE allowed to **cross-examine** or challenge evidence of ER's witnesses? Was EE allowed to **give evidence** in his own defence? Was EE allowed to call **witnesses** in support of his case? AG61.4 Was EE allowed to lead evidence in **mitigation** of sanction? Was an **interpreter** provided on request? Was the chair of the DH **impartial** and unbiased? Was EE given a **letter** informing him of reason for dismissal? Code 4(3) AG61.5 Was EE informed of his right to **appeal** if any?
- 2 If procedural unfairness is alleged, what was there actual **prejudice** suffered from the alleged procedural lapses and was it **material**? AG64 AG70 Where procedure has been dispensed with, is this a **crisis zone** case where ER acted to protect lives and property? AG62-63 AG74

SUBSTANTIVE FAIRNESS

- 3 Is there a **rule/standard/procedure** in the workplace regulating the conduct? Define it. Code 7(a) AG80 Is it new or old? (Some rules or standards may be so well established and known that it is not necessary to communicate them.) What is the **importance** or **utility** (use) of the rule / standard / procedure? Was EE **inducted** on these aspects? (Sidumo) Is this rule / standard / procedure **reasonable** or generally accepted as reasonable in that specific industry? Is it **valid**? AG89-91 AG77.2.1 Code 3(1); 7(b)
- 4 Was EE **aware** or reasonably **aware** of the rule / standard / procedure? AG77.2.2 AG84 Code 7(b)(ii) Has EE applied the standard/procedure **in the past** properly or with difficulty? Did ER take steps to make EEs aware that a breach is a **dismissible** offence? Alternatively, ought EE to have been **reasonably aware** that breach would lead to dismissal? (Sidumo)
- 5 What is EE's **job title**? What are the nature and **responsibilities** of job? What are the limits of

- his **authority**? (Sidumo). Does EE work in a **team**? If so, what are the team-members' **names**, job titles, roles & responsibilities?
- 6 Was the rule / standard / procedure **breached**? Did EE **follow** the prescribed procedure? AG87 Did the EE's act / omission actually cause or risk **loss, damage, harm or prejudice** to persons or property? AG98 (Sidumo) Did ee obtain any **undue benefit**? (In case of **drunkenness**: what physical signs did EE display & was he able to perform his tasks?). What is EE's **defence**? Did EE commit the misconduct **deliberately, negligently** or in **error**? Was the conduct **lawful** ie did he act in **self-defence** or was he **provoked**? AG108. Did EE do anything or omit to do anything that has possibly been **misinterpreted** or misunderstood by ER? If so, what was that act or omission on the part of EE? AG88. Is the misconduct due to EE's mental or physical **incapacity**? If so, would an incapacity inquiry not have been appropriate?
 - 7 Is it EE's case that the charges have been **fabricated**? If so, what is, in EE's view, ER's reason for doing so? (eg ulterior motive, revenge or malice)
 - 8 Has the rule/standard/procedure been applied **consistently**? If not, what has ER done in the past? Who has been treated differently? Has ER justified difference? Should such EE have been dismissed? Has consistency resulted in the setting of a bad precedent? Has ER recently **changed its approach** to this type of misconduct? If so, were EEs **informed** of the **new approach**? Date when informed? AG77.2.3 Code 7(b)(iii) AG100-103 **Factors to determine consistency**: gravity of misconduct; EE's circumstances (including length of service, previous disciplinary record, personal circumstances); nature of the job; circumstances of the misconduct itself. Code 3(3).

NEGLIGENCE BY SKILLED EE

- 9 Is the EE **skilled** OR required to exercise high degree of care? Has he been **trained**? What would be **consequence** of lack of care? Would reasonable EE have **foreseen** that harm (or potential harm) could be caused to person/property? Would reasonable EE have taken steps to **prevent** it? **Gross negligence** is conscious, voluntary or total disregard of reasonable care with serious or disastrous consequences or the risk thereof.

SANCTION & REMEDIES

- 10 **SANCTION**: Is this considered to be **serious** misconduct? Why? AG96
- 11 Is dismissal a **fair sanction**? AG77.2.4 AG93 Code 7(b)(iv). Does the DC prescribe a procedure or sanction that is **more severe** than that generally accepted? Why? Is there room for **progressive** or corrective discipline in this case? Code3(2)&(3) (Sidumo)
- 12 What are the **aggravating** factors? AG77.2.4 AG93-99 Code 3(3)-(5) Is EE not admitting to a

blatant contravention? What are the **mitigating** factors? AG98 Did EE **plead guilty**, show **remorse**, or was **willing** to submit to a **lesser sanction**?

- 13 Is this a case of **repeat** misconduct? AG97 AG99 Code3(3)&(4) What is EE's disciplinary **record**? Code 5. What is the effect of setting a **precedent**? (Sidumo). Is the ER relying on a **final written warning** for a similar offence?
- 14 Does EE have **long service** or is about to **retire**? What is the implication of either? (Sidumo) AG106
- 15 What impact would dismissal have on EE personally and his family? AG106 & Sidumo
- 16 Did the alleged misconduct lead to a breakdown of **trust** that was serious enough to warrant dismissal? How? (Edcon) Was EE **dishonest** during the DH and the arbitration? AG114. In case of **negligence** can EE be trusted to perform properly and with the required degree of care?
- 17 **REINSTATEMENT / RE-EMPLOYMENT**: Has the ER shown that the nature of the job makes the employment relationship **intolerable**? AG107 eg dismissal for first instance of negligence by airline pilot.
- 18 AG111-129 Is reinstatement or re-employment **reasonably practicable** or feasible? Is there evidence of co-EEs or manager that there is no prospect of **good working relationship** being restored? How has EE **conducted** himself **after** the dismissal, including the **DH** or **arbitration** proceedings?
- 19 Would reinstatement cause a disproportionate level of **disruption** or **financial burden** to ER? 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**?

- 20 **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 DH; 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.