



2025/04/21

## HARD TO SAY GOODBYE: EMPLOYEE DISMISSAL

So, your company is in the position where it has to let an employee go. There are instances where this will bring welcomed relief, and others that bring grief. In either case, why and how it is done must be fair to the employee and the company.

Our law does not recognise the concept of "at-will" employment. For a dismissal to be considered fair, an employer must prove both a substantive (valid, recognised reason) and procedural (course of action) ground for the termination.

The principal of fair dismissal is enshrined in our legislation:

- The Constitution of the Republic of South African 1996: Section 23(1) of the Constitution grants everyone the fundamental right to "fair labour practices".
- The Labour Relations Act No. 66 of 1995 (LRA): Sections 185 to 197 specifically governs dismissal; substantive and procedural fairness.
- Code of Good Practice: Dismissal in South Africa is General Notice 3470 of 2025, published on 4 September 2025: A consolidation of the dismissal framework. This framework recognises three primary grounds for a fair dismissal: misconduct, incapacity, and operational requirements.

### The Legal Standard: Unfair Dismissal

The LRA protects employees from being unfairly dismissed. A dismissal is unfair if the employer fails to prove it was for a fair reason (substantive fairness) AND followed a fair procedure (procedural fairness).

- **Procedural Unfairness:** The employer did not follow the correct process, such as failing to conduct a proper disciplinary hearing for misconduct or not consulting employees before retrenchment.



- **Substantive Unfairness:** There was no valid or fair reason for the dismissal, or the reason given was not the true cause of the termination.

If either substantive or procedural fairness is absent in the dismissal process, it is deemed an unfair dismissal.

A particular category is "automatically unfair dismissals" under section 187 of the LRA. These occur when an employee is dismissed for exercising their fundamental legal rights, such as:

- Participating in or supporting a protected strike.
- Belonging to a trade union or taking part in its lawful activities.
- Termination by an employer for/after the sale and transfer of the business.
- Being discriminated against based on race, gender, pregnancy, or other grounds.
- Retaliation for exercising a right under the LRA, e.g. filing a grievance with the CCMA or whistleblowing.

### Mechanisms and Processes for Fair Dismissals

Since September 2025, the consolidated Code of Good Practice: Dismissal has provided a single point of reference, replacing older, separate codes. The table below outlines essential processes for each ground of dismissal.

| Ground for Dismissal            | Definition   | Procedural Requirements  |
|---------------------------------|--|--|
| <b>Misconduct</b>               | Employee's behavior breaches a workplace rule or standard.                                       | Conduct an investigation; hold a disciplinary hearing where employee can state case and be represented; apply consistent, progressive discipline (dismissal only for serious/gross misconduct or repeat offenses). |
| <b>Incapacity</b>               | Employee unable to perform role due to poor performance, ill health, injury, or incompatibility. | Performance: provide reasonable evaluation and opportunity to improve (counseling/training) before dismissal. Ill health/incompatibility: assess extent and consider reasonable accommodation/alternatives.        |
| <b>Operational Requirements</b> | Dismissal based on business' economic, technological, or structural needs (retrenchment).        | Issue written notice inviting consultation; engage in meaningful, consensus-seeking consultation on reasons, alternatives, and selection criteria; use fair/objective criteria (e.g. LIFO); severance pay.         |

### Special Considerations

- **Probation:** The new Code clarifies that probation now also assesses "suitability", including cultural fit. The requirements for a fair dismissal are less compelling during probation, but the employer must still provide feedback and a fair opportunity for the employee to improve and respond before a decision is made.
- **Incapacity - Incompatibility:** The Code formally recognises an employee's inability to work in harmony with colleagues or the business culture as a form of incapacity. An



employer must first attempt alternatives like counseling or mediation before resorting to dismissal.

- **Small Businesses:** The Code acknowledges that smaller employers may follow less formal, simpler procedures, provided the core principles of fairness (informing the employee of the issue and allowing a response - *audi alteram partem*) are still met.

By consistently applying the principles of procedural and substantive fairness, your company can navigate employee dismissals effectively, minimise legal exposure, and build a more resilient and respected organisation.

## Actionable Steps

### Area of Focus

### Actionable Steps

#### Policy & Documentation

Establish clear, written, and accessible policies (e.g. disciplinary code, probation policy) aligned with the LRA and the new Code of Good Practice.

#### Management Training

Train managers to distinguish between misconduct (intentional rule-breaking) and incapacity (inability to perform), understand procedural vs. substantive fairness, and conduct proper investigations.

#### Consistent Application

Apply rules and sanctions consistently across all employees in similar circumstances.

#### Proactive Probation Management

Use probation to assess both performance and suitability (including cultural fit). Provide reasonable guidance, regular feedback, and a chance to respond before any decision on dismissal or extension. Commend improvements.

#### Incapacity Management (Incl. Incompatibility)

For poor performance: provide evaluation, instruction, and a reasonable opportunity to improve before considering dismissal. For ill health/injury: investigate the extent and explore reasonable accommodation.

#### Robust Retrenchment Procedure

Initiate with a written notice in the prescribed format (Annexure A of the Code). Engage in meaningful, consensus-seeking consultation on reasons, alternatives, and selection criteria.

## If Things Go Wrong

When a dismissal is found to be unfair by the CCMA or the Labour Court, the company's focus should shift immediately from defending the decision to managing the legal and reputational consequences. The goal is to demonstrate good corporate governance and move forward with minimal disruption.

Specific sanctions for an unfair dismissal:



- Reinstatement: This is the primary remedy and legally requires the employer to place the employee back in their job, often with full backpay from the date of dismissal. Failure to allow the employee to resume their duties can lead to contempt of court proceedings.
- Compensation: If reinstatement is not appropriate (e.g. the working relationship has broken down), the commissioner or court may award compensation up to 12 months' remuneration for a standard unfair dismissal, or up to 24 months for an automatically unfair dismissal.

### What to do

The best approach is one that is swift, compliant, and respectful of the legal findings. You should:

- Accept the outcome and act with integrity: Publicly fighting a binding award usually causes more reputational harm. Focus on executing the order professionally. Whether it's processing a compensation payment promptly or facilitating a smooth return to work, compliance demonstrates that the company respects the rule of law and its employees.
- Explore settlement as an alternative to reinstatement: If an award of reinstatement threatens significant operational disruption or the trust relationship has been severely damaged, approach the employee to negotiate a mutual separation agreement. This is a legally binding contract where the employee agrees to part ways in exchange for an agreed financial package, often waiving their right to further legal action. This option can allow both parties to achieve a clean break.
- Defend against reinstatement if legally justified: Reinstatement is not automatic. There are exceptions. Your company can lead evidence during the proceedings to argue against reinstatement. This is possible if a continued employment relationship would be intolerable (e.g. breakdown of trust), if reinstatement is not reasonably practicable (e.g. the position no longer exists), or if the dismissal was deemed unfair only for a procedural error.

If you objectively believe a CCMA or Labour Court decision was grossly unreasonable or legally flawed, you have the option to take the award on review to the Labour Court and finally the Labour Appeals Court. This is not the simplest route; the costs and benefits should be weighed carefully:

- E.g. you must provide security for a reinstatement award.
- Review and appeal applications can take 2 to 4 years to conclude, increasing legal costs, prolonging uncertainty and potentially damaging workplace morale.

### Non-litigious solutions



Nothing precludes your company from adopting alternative methods where a dismissal decision is being considered or has been rejected by the employee.

The precondition with these alternatives is ensuring the agreement is voluntary and without coercion to ensure it remains binding and final.

Establish formal policies and procedures such as:

- Private Arbitration: By agreeing upfront to private arbitration, a company can ensure that any future dismissal dispute is handled confidentially and efficiently by an expert, avoiding the public nature and potential backlog of the CCMA. However, ensure the process does not deprive the employee of statutory rights, e.g. legal representation and cost concerns.
- Pre-Dismissal Arbitration/Inquiry (Section 188A): This is a powerful tool for senior or sensitive dismissals. Where there is a high risk of an internal process being challenged for bias, an independent arbitrator can be brought in to conduct the hearing itself. If the employee is dismissed following such a process, the decision is final and binding, with very limited scope for further review.
- Mutual Termination/Settlement Agreements: This is often the most effective way to "save face" and manage risk. By negotiating a clean break, the company avoids the internal disruption of a disciplinary hearing and the external exposure of a CCMA/Labour Court case.

By strategically selecting the appropriate process, your company can navigate the complexities of dismissal with greater control, reduced legal exposure, while preserving operational stability. Regularly review, evaluate and update your disciplinary and termination policies and procedures.



Partner with Cyclopedic Consulting for a clear, risk-based strategy and optimised process, tailored to your size and sector.

2025/04/21



By [Adv. Sannah Poee](#) 2026/04/21