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## OUT OF THE FIRE INTO THE FRYING PAN: DISCIPLINED, NOT DISMISSED

The workplace is a dynamic environment, with diverse individuals, all performing a strategic function in concert. Your company must expertly manage these components in order to thrive. Supervising and developing the individuals, that are the company, can be the most demanding and satisfying enterprise.

When employees fall out of sync with the company, the disciplinary process should be fundamentally corrective rather than punitive. Termination of employment, an absolute solution, is the most severe and often least desirable decision for both your company and the employee. The goal is to guide employees toward acceptable conduct and performance.

### ALTERNATIVE DISCIPLINARY PROCEDURES

#### 1. The Principle of Progressive Discipline

Progressive discipline requires an employer to apply graduated measures to correct an employee's behaviour. This typically follows a hierarchy of sanctions, from the least to most severe.

The purpose of these measures is not to punish but to:

- Remind/retrain employees of the employer's standards of conduct and performance.
- Give employees a clear opportunity to improve.

#### 2. Hierarchy of Sanctions

According to CCMA guidelines and common practice, the following non-dismissal sanctions are applied in order of increasing severity:



- a) **Counselling** An informal conversation for minor issues or where an employee is unaware of a rule. It is not a formal disciplinary action but a corrective discussion.
- b) **Verbal Warning** For minor first-time offences. A supervisor conducts an informal meeting, which is recorded for internal purposes. It serves as a formal caution.
- c) **Written Warning** Issued when a verbal warning was ineffective or for a more serious first offence. This is a formal document placed on the employee's file.
- d) **Final Written Warning** The last opportunity before dismissal. It is issued for a serious offence or a repeat of misconduct following previous warnings. It clearly states that any further breach will likely result in dismissal.

**Important:** An employer can bypass the progressive steps and issue a more severe sanction (including dismissal) for a first offence if the misconduct is serious enough, such as gross dishonesty, assault, or gross insubordination.

### 3. Other Sanctions

In some cases, an employer may consider alternative drastic sanctions:

- **Suspension:**
  - **with pay** - A precautionary measure to remove an employee from the workplace pending an investigation. The employee remains on full pay, as it is not a disciplinary sanction.
  - **without pay** - A punitive sanction imposed after a finding of misconduct. This is an alternative short of dismissal.
- **Demotion:**
  - This is another exceptional step, used only as an alternative to dismissal. It involves moving an employee to a lower position with less responsibility and remuneration. In some instances, it may be due to operational changes as an alternative to retrenchment.

#### 3.1 Suspension (With Pay): The Precautionary Measure

This is the most common form of suspension, also known as a "holding operation". It is not a punishment but a measure to protect the integrity of an investigation, safeguard persons or property, or prevent the employee from interfering with witnesses or evidence.

- **Legal Basis**
  - Section 186(2)(b) of the LRA covers both precautionary and punitive suspensions under unfair labour practices.



- **Procedure**
  - Inform the employee of the reason for the suspension.
  - Allow the employee an opportunity to make representations before the suspension is implemented. Failing to do so can render the suspension procedurally unfair.
- **Risks**
  - If a precautionary suspension is unreasonably prolonged without the advancement of a disciplinary process, the employee could claim it has become punitive and an unfair labour practice. The employer must pursue the investigation and disciplinary hearing with reasonable speed.
  - The employer also faces a financial burden for the duration, an employee is being paid for no labour in return, often with the position being temporarily duplicated by an acting employee.

#### **Example A: Tender Fraud Investigation**

The Finance Manager is alleged to have colluded with an external supplier to inflate invoices. You need time to conduct a forensic audit of his emails and shared drive. If he remains at work, he could delete evidence or coach witnesses. **Action:** Suspension with full pay pending the forensic outcome.

#### **Example B: Sexual Harassment Complaint**

A junior staff member alleges harassment by a senior Director. The Director denies it. To allow a proper investigation without the junior employee feeling intimidated or the Director influencing team statements, the Director is removed from the premises. **Action:** Suspension with full pay (this protects the complainant and the investigation, not the Director).

**Legal Justification:** The employee's presence at work poses a risk to the investigation, to other employees, or to property. It is never a punishment.

### **3.2 Suspension (Without Pay): The Punitive Sanction**

This is a serious disciplinary measure where the employee forfeits their salary for a specified period. It is a form of punishment for misconduct.

- **Types**
  - Punitive Suspension: This is the standard form, imposed as an outcome of a disciplinary hearing.
  - Precautionary Suspension Without Pay: A controversial development. In *Mark Strydom v ArcelorMittal South Africa [2023]* ZALCJHB 345, the Labour Court remarked in its judgment (*obiter*) that this could be permissible where the employee is using dilatory tactics to deliberately delay the disciplinary hearing. The court suggested it was unfair for an employer to continue paying an employee who is abusing the process to stall their own hearing.



- **Procedure**

- Conduct a Fair Hearing: The employee must be found guilty of misconduct following a procedurally fair disciplinary hearing.
- Consider Progressive Discipline: Suspension without pay is a severe penalty, usually reserved for serious misconduct or repeat offences. The employer should consider whether progressive discipline (e.g. a final written warning) is more appropriate.
- Provide Written Notification: The employee must receive a formal outcome letter detailing the reasons for the suspension, its duration, and the effective dates.
- Suspension vs. Dismissal: In some cases, it may be offered as a choice the employee can make instead of dismissal.

- **Risks**

- Unfair Labour Practice Claim: An employee can refer a dispute to the Labour Court (urgent relief), CCMA or relevant bargaining council, alleging the suspension was unfair.
- Excessive Sanction: The suspension must be proportionate to the misconduct. An excessive period could be challenged and set aside, with the employer ordered to compensate the employee for lost income.

#### Example A: Fighting Without Injury

Two employees engage in a shoving match and shouting in the warehouse. No punches landed, no injury, but a clear breach of workplace violence policy. **Mitigation:** Both are remorseful and shook hands immediately after. **Sanction:** 2 Days Suspension Without Pay (one day for each party).

#### Example B: Repeat Absenteeism

Employee has a Final Written Warning for Monday no-shows. They arrive late again with a weak excuse. **Mitigation:** Dismissal is on the table, but the chairperson notes the employee is the sole breadwinner. **Sanction:** 10 Days Suspension Without Pay **and** a Final written warning, "This is a final act of leniency. Any further misconduct of any kind in the next 12 months will result in immediate dismissal."

**Legal Justification:** The employee has been found guilty of serious misconduct at a disciplinary hearing, but dismissal is deemed too harsh due to mitigating factors. The aim is a financial penalty short of losing the job.

**Caution:** If the total period of suspension without pay is too long (e.g. 2 months), a CCMA Commissioner may view it as a "constructive dismissal" or an unfair labour practice because the employee cannot survive financially. It must be a short, sharp shock (e.g. 10 days).



### 3.3 Demotion: An Alternative to Dismissal

Demotion is a significant change to an employee's terms of employment, involving a reduction in their status, responsibilities, and often remuneration. It is a disciplinary action short of dismissal.

- **Legal Basis**
  - It is covered by Section 186(2)(a) of the LRA as an unfair labour practice.
  - Demotion is only permissible when it is offered as an alternative to a justified dismissal. Affirmed in *Arris v Afric Addressing (Pty) Ltd* [1995] 5 BLLR 525 (CCMA), the sanction of dismissal must be found to be appropriate, and the employee is then given the option to accept a lesser penalty, i.e. demotion.
- **Unilateral/Consensual Demotion**
  - Unilateral: Imposing a demotion without the employee's agreement is a breach of contract and is automatically unfair.
  - Consensual: This is the only fair way to demote an employee. It is not unilateral if the employee agrees to it.
- **Procedure**
  - Fair Disciplinary Hearing: First, conduct a disciplinary hearing to determine if dismissal is the appropriate sanction for the misconduct.
  - Offer as a Genuine Choice: Clearly present demotion as an alternative to dismissal, allowing the employee to make an informed decision.
  - Employee Consultation and Consent: The employee must consent to the demotion. The employer should consult with the employee, allowing them to make representations, and grant reasonable time to consider the offer.
  - Written Agreement: The new terms of employment, including the new position, responsibilities, and reduced salary, must be confirmed in writing and signed by both parties.
  - Consider Mitigating Factors: Demotion is most appropriate when mitigating factors (e.g. long service, a clean prior record, personal circumstances) suggest the employee could still add value in a lesser role.
- **Risks**
  - Consent is Not a Waiver: An employee who agrees to a demotion does not waive their right to later challenge its fairness at the CCMA. An employee's consent is a factor but does not automatically make the demotion fair.
  - Incapacity or Operational Requirements: Demotion can also be considered as an alternative to dismissal for poor performance (incapacity) or retrenchment (operational requirements), but the same principles of fairness, consultation, and consent apply.



**Example A:**  
**Dishonest Manager**  
**(Loss of Trust)**

A Branch Manager falsified a mileage claim for R2,500 (non-material but dishonest). Trust in the role of Manager is destroyed. **Mitigation:** He has been with the company for 20 years; he immediately paid back the money; he has a sick child, and dismissal would ruin his medical aid. **Sanction:** Demotion to Sales Representative (no management responsibilities, no company credit card or signing authority). **Consent:** He accepts demotion as the only alternative to dismissal.

**Example B:**  
**Incapacity (Poor**  
**Performance)**

A Call Centre Team Lead consistently fails to meet his own call targets because the "admin of managing the team" takes up all his time. He is not a bad employee; he is just in the wrong role. **Action:** Formal Incapacity hearing outcome. **Sanction:** Demotion to Senior Agent (higher commission potential but no team bonus). **Consent:** He signs the new contract for Senior Agent.

**Legal Justification:** The employee cannot be trusted to perform the duties of their current senior role, but they retain value in a subsidiary role. This is almost always a negotiated outcome offered, instead of a dismissal notice.

Even when dismissal is not on the table, employers must follow a fair process: inform the employee; allow them to respond; make an impartial decision and provide a written outcome with reasons and document all communications.

Consistency is crucial, disciplinary codes and sanctions must be applied consistently across the workforce. Treating similar offences differently without justification is a common basis for unfair labour practice claims.

Not every employee blunder has to end in a dismissal. Cyclopedic Consulting will guide you through the full spectrum of disciplinary sanctions, ensuring every decision is fair, corrective, and legally sound. Accountability and second chances go hand in hand.

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