



Unfair dismissals in the workplace: The rights and obligations of employers and employees:

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The point of departure when one is considering whether a dismissal is unfair will have to be to consider what is meant by the term 'dismissal' when used in the workplace. As a rule, dismissal means the termination of employment by the employer.¹ This definition is expanded when one considers the statutory definition of dismissal in the Labour Relations Act 66 of 1995, which added instances where the employee terminates the employment contract, but where this will still be seen as a dismissal in the ordinary sense of the word.²

In the case of labour law and especially when one is dealing with dismissals in the workplace, one must rely on the statutory interventions and the relevant employment legislation and case law to determine whether a dismissal was for a fair reason and in accordance with a fair procedure or not. The most important pieces of legislation in this regard will be the Labour Relations Act 66 of 1995 ("LRA") and the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). These pieces of legislation provide for the necessary steps that must be followed when there is a dismissal of an employee in the workplace.

¹ AC Basson, MA Christianson, C Garbers, PAK le Roux & EML Strydom *The New Essential Labour Law Handbook* 6 ed (2017) 98.

² 98.

In South African law there will be three main instances where an employer can fairly dismiss an employee. This is known as the substantive reasons for the dismissal. These three instances are when there is misconduct by the employee. An example of this is when the employee breaks a rule within the workplace.³ Another form of dismissal is when the dismissal is based on the employer's operational requirements. This will be in the instances of 'retrenchment' by the employer. This is when the employee wants to work, but there is no longer work for the employee or the employer can no longer afford the services of the employee.⁴ The last reason for dismissal will be based on incapacity of the employee. This is the instances when the employee is incapable of performing his duties as per his employment contract. This means that the employee wants to work, but he is incapable of working. This can be due to medical reasons or any other reason for why he is incapable of performing to the standards expected of him from the employer.⁵

In each of these three instances or reasons for the dismissal, the employer must still follow the correct procedures, as set out in the LRA, to ensure that the dismissal and the process leading up to the dismissal is a procedurally fair one. A procedurally fair procedure will be a procedure where the employee gets a fair opportunity to state his case and also the opportunity for representation, either by a fellow employee or a trade union representative. The employee must also be given a reasonable time period in which he can prepare a response to the allegations or charges against him. Legal representation is not generally allowed during the disciplinary hearing stage of the disciplinary process.⁶

It is also important to note that the onus to prove that the dismissal was for a fair reason will always lie with the employer. The employer must thus show, in accordance with the provisions of the LRA that the dismissal was done in a substantively and procedurally fair manner.

³ 127.

⁴ 167.

⁵ 151.

⁶ 144-146.

For any further questions relating to the process of dismissals or any other legal question relating to employment contracts and labour related matters, feel free to contact Malan Lourens Viljoen Inc. who will be more than happy to offer their advice and expertise on the matter.

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