



# UNFAIR DISMISSAL IN SOUTH AFRICAN LABOUR LAW

UNDERSTANDING YOUR RIGHTS  
AND OBLIGATIONS



# INTRODUCTION

South African Labour Law is deeply rooted in the constitutional right to **fair labour practices**, as enshrined in **Section 23 of the Constitution of the Republic of South Africa, 1996**. This foundational principle is given effect through the **Labour Relations Act 66 of 1995 (LRA)**, which sets out the framework for regulating employment, dismissal, and dispute resolution processes in the country.

Central to the LRA is the protection against **unfair dismissal**. This principle aims to strike a balance between the operational needs of employers and the dignity and security of employees. The **Code of Good Practice: Dismissal**, published in terms of **Schedule 8 of the LRA**, provides further practical guidance for determining the fairness of a dismissal and the procedures to be followed.

This booklet serves as a practical and legal reference for understanding what constitutes an unfair dismissal in South African law, how employers can ensure compliance with legal requirements, and what recourse is available to employees where dismissals occur outside the bounds of fairness.

# WHAT CONSTITUTES A DISMISSAL?

The LRA defines “dismissal” in **Section 186(1)**, which outlines several distinct scenarios that fall under this term. Understanding whether a dismissal has taken place is the starting point in assessing the fairness and legality thereof.

## Termination by the Employer

A straightforward termination of the employment relationship by the employer.

**Example:** An employee is handed a termination letter after being found guilty of repeated lateness.

**Legal basis:** LRA Section 186(1)(a)

## Constructive Dismissal

Occurs where an employee resigns because the employer has made continued employment intolerable.

**Example:** An employee resigns after months of harassment by a supervisor, with no recourse provided by management.

**Legal basis:** LRA Section 186(1)(e)

# WHAT CONSTITUTES A DISMISSAL?

## **Failure to Renew a Fixed-Term Contract**

Where an employee reasonably expected renewal of a contract on the same or similar terms, and the employer fails to do so.

**Example:** A school does not renew a teacher's contract despite promising continued employment for the upcoming term.

**Legal basis:** LRA Section 186(1)(b)

## **Selective Non-Re-employment**

Where an employer rehires some employees previously retrenched, but excludes others **without a fair reason.**

**Example:** After a retrenchment, only some former workers are rehired, while others with better performance records are not.

**Legal basis:** LRA Section 186(1)(d)



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# Refusal to Accept Demand

Where employment is terminated due to the employee's refusal to accept a demand in respect of a matter of mutual interest.

**Example:** An employee is dismissed after refusing to accept a new shift roster that would reduce their pay.

**Legal basis:** LRA Section 186(1)(f)



# AUTOMATICALLY UNFAIR DISMISSALS

**Automatically unfair dismissals** are those that violate fundamental rights protected under the Labour Relations Act and the Constitution. These dismissals are deemed inherently unjust, **regardless of any procedures followed**, and attract more **severe consequences** for the employer—including higher compensation or reinstatement.

The relevant provisions are contained in **Section 187(1) of the LRA.**

"The way to get started is  
to quit talking and begin  
doing."

Walt Disney



# GROUNDS FOR AUTOMATICALLY UNFAIR DISMISSALS

A dismissal is **automatically unfair** if the reason for the dismissal is:

- **Participation in protected trade union activity**

Example: An employee is dismissed for joining or participating in union-organised activities.

**Reference:** Section 187(1)(a)

- **Participation in or support of a protected strike or protest**

Example: A worker is dismissed for taking part in a protected wage-related strike.

**Reference:** Section 187(1)(b)

- **Refusal to do the work of an employee during a protected strike**

Example: An employee declines to replace a striking colleague and is dismissed as a result.

**Reference:** Section 187(1)(c)

- **Exercising rights conferred by the LRA**

Example: An employee is dismissed after lodging a grievance concerning unfair labour practices.

**Reference:** Section 187(1)(d)

# AUTOMATICALLY UNFAIR DISMISSALS

- **Discrimination based on:**

Race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or birth.

Example: An employee is dismissed shortly after revealing a pregnancy.

**Reference:** Section 187(1)(f); aligns with Section 9 of the Constitution

- **Dismissal for whistleblowing or disclosure**

Example: An employee reports unlawful conduct by the employer to an external authority and is dismissed.

**Reference:** Section 187(1)(h) and the Protected Disclosures Act

- **Dismissal due to refusal to accept a demand related to mutual interest**

Example: A worker refuses to accept unilateral changes to commission structures and is dismissed.

**Reference:** Section 187(1)(c)

# LEGAL CONSEQUENCES FOR EMPLOYERS

If a dismissal is found to be automatically unfair:

- The **CCMA** or **Labour Court** may order **reinstatement**, unless it is not reasonably practicable.
- Alternatively, compensation of up to **24 months' remuneration** may be awarded to the employee.
- The burden of proof lies with the employer to disprove the automatically unfair reason where alleged.



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# THE TWOFOLD TEST – SUBSTANTIVE AND PROCEDURAL FAIRNESS

In South African labour law, for a dismissal to be considered fair, it must comply with two critical legal requirements: **substantive fairness and procedural fairness**. This dual test is fundamental to assessing the legality of any termination and is set out in **Section 188 of the LRA**, read together with the **Code of Good Practice: Dismissal**.

Failure to meet either leg of this test will render a dismissal unfair and expose the employer to reinstatement or compensation orders.



# SUBSTANTIVE FAIRNESS

Substantive fairness concerns the **reason** for the dismissal. The employer must show that there was a valid and fair reason to terminate the employment relationship.

**Valid reasons may fall into three categories:**

- **(a) Misconduct**

- Employee has breached workplace rules or standards.
- Must be proven on a balance of probabilities.
- The rule must be valid, known, and consistently applied.

Example: An employee is dismissed for gross insubordination after repeatedly refusing to obey reasonable and lawful instructions.

- **(b) Incapacity**

- Poor performance or medical incapacity.
- Requires evidence that the employee is unable to perform the duties required by the role.

Example: An employee with a long-term illness becomes unable to fulfil essential functions despite reasonable accommodation.

- **(c) Operational Requirements (Retrenchment)**

- The dismissal is necessitated by the employer's economic, structural, or technological needs.

Example: A company retrenches staff due to the closure of a department following automation.

**Key takeaway for employers:** You must be able to demonstrate the **existence** and **fairness** of the reason. Hearsay or vague allegations will not suffice.



# PROCEDURAL FAIRNESS

Even if there is a valid reason for dismissal, the process followed must be **fair**. Procedural fairness is assessed based on the guidelines provided in the **Code of Good Practice**.

## **For misconduct cases:**

- Conduct a proper **investigation prior to the dismissal**.
- Notify the employee of the allegations in writing.
- Provide the employee with **reasonable time to prepare a response**.
- Offer the right to be heard at a **disciplinary hearing**.
- Allow representation (usually by a colleague or union representative).
- Provide written notice of the outcome and reasons for dismissal.

**Example:** If an employer summarily dismisses an employee for theft without a hearing, the dismissal will be unfair, even if theft occurred.

## **For incapacity cases:**

- Evaluate the extent of the incapacity (e.g., through medical evidence).
- Consider reasonable accommodation or alternatives to dismissal.
- Consult with the employee throughout the process.

## **For operational requirement (retrenchment) cases:**

- Engage in a meaningful **consultation process** in terms of Section 189 of the LRA.
- Discuss selection criteria, alternatives, severance pay, and support.

# EMPLOYER COMPLIANCE CHECKLIST

## For incapacity cases:

- Evaluate the extent of the incapacity (e.g., through medical evidence).
- Consider reasonable accommodation or alternatives to dismissal.
- Consult with the employee throughout the process.

## For operational requirement (retrenchment) cases:

- Engage in a meaningful consultation process in terms of Section 189 of the LRA.
- Discuss selection criteria, alternatives, severance pay, and support.

To help ensure dismissals are both substantively and procedurally fair, employers should:

- **Keep** proper records of all warnings, hearings, and consultations.
- **Apply** policies consistently across all staff.
- **Ensure** decisions are documented with reasons and evidence.
- **Avoid** acting in haste or in emotional reaction to conflict.

# CONSTRUCTIVE DISMISSAL

**Constructive dismissal** arises when an employee resigns due to intolerable working conditions that make continued employment impossible. Although the employee initiates the resignation, the law treats it as a dismissal by the employer because the resignation was not truly voluntary.

This concept is recognised in **Section 186(1)(e)** of the LRA, which defines a dismissal to include a situation where “an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

## Legal Test for Constructive Dismissal

The employee must prove the following to succeed in a constructive dismissal claim:

**1. The employment conditions were objectively intolerable**

- Mere unhappiness or dissatisfaction is not enough. There must be a breakdown in the employment relationship that a reasonable person could not be expected to endure.



# LEGAL TEST FOR CONSTRUCTIVE DISMISSAL

## 1. **The intolerability was caused by the employer's conduct**

- The employer's actions (or failure to act) must have created or sustained the intolerable situation.

## 2. **The employee had no reasonable alternative but to resign**

- Resignation must be the last resort. The employee should ideally attempt internal remedies (e.g., grievance procedures) before resigning.

## 3. **The resignation was a direct response to the intolerable conditions**

### 5.2 **Common Examples of Constructive Dismissal**

- Persistent workplace bullying or harassment, especially when reported and ignored
- Unlawful changes to terms and conditions of employment (e.g., unilateral salary reduction)
- Targeted disciplinary action without basis or consistency
- Repeated threats of dismissal or demotion
- Hostile or discriminatory work environment



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# Employer Defence Against Constructive Dismissal Claims

Employers can defend against such claims by demonstrating that:

- The workplace environment was objectively tolerable.
- The employee did not attempt to resolve the issue internally.
- The resignation was unrelated to the alleged conduct.
- Reasonable steps were taken to accommodate or support the employee.

## Consequences for Employers

If the CCMA or Labour Court finds that a constructive dismissal occurred and that it was unfair:

- The employee may be awarded **reinstatement** (if feasible), or
- **Compensation remuneration** up to **12 months'** (or 24 months if automatically unfair circumstances apply)

# DISCIPLINARY PROCESS AND THE CODE OF GOOD PRACTICE

The **Code of Good Practice: Dismissal** (Schedule 8 to the Labour Relations Act) provides clear guidance on the correct procedures that employers must follow when considering dismissal for misconduct or poor performance. The goal is to ensure that employees are treated fairly and that dismissals are used only as a last resort.

A failure to follow these procedures can render an otherwise valid dismissal procedurally unfair.

## **Purpose of Disciplinary Action**

Discipline in the workplace is not intended to be punitive. The Code encourages **corrective and progressive discipline**, meaning that:

- Employees should be informed of workplace rules and expectations
- Lesser sanctions (warnings, suspension) should be considered before dismissal, except in cases of serious misconduct

# PROCEDURAL STEPS FOR MISCONDUCT-RELATED DISMISSALS

To comply with procedural fairness, the employer should follow these steps:

## 1. Investigate the incident

- Determine whether there is a basis for the allegation. A formal investigation may not always be required, but a factual basis must exist.

## 2. Notify the employee of the charges

- Written notice must set out the allegations in understandable language, giving sufficient detail.

## 3. Provide sufficient time to prepare

- The employee must be given at least 48 hours' notice of the disciplinary hearing (longer for complex matters).

## 4. Hold a disciplinary hearing

- A fair and objective hearing must be held where the employee can:
  - State their case
  - Present evidence
  - Call witnesses
  - Be assisted by a colleague or a union representative

## 5. Decide on a sanction

- The chairperson (ideally neutral) must consider:
  - The seriousness of the offence
  - The employee's disciplinary record
  - Mitigating and aggravating factors
  - The appropriateness of the sanction (dismissal, warning, etc.)

## 6. Communicate the outcome in writing

- The decision and reasons must be communicated to the employee, including their right to appeal or refer the matter externally (e.g., to the CCMA)

# SUMMARY DISMISSAL FOR SERIOUS MISCONDUCT

**In cases of gross misconduct** (e.g., assault, fraud, theft), an employer may dismiss an employee **without notice**, provided the disciplinary process has been properly followed.

**Key point:** Even where the misconduct appears clear-cut, due process is still required. The principle of *audi alteram partem* —“hear the other side”—must always be observed.

## Record-Keeping and Consistency

**Employers should:** Keep proper records of all disciplinary steps taken

- Maintain a register of warnings issued (verbal and written)
- Apply rules consistently across the workforce to avoid discrimination or perceived unfairness



# Remedies for Unfair Dismissal

When a dismissal is found to be unfair—whether for lack of a valid reason, procedural failure, or because it falls into one of the automatically unfair categories—the employee is entitled to legal remedies.

The Labour Relations Act, particularly Section 193 and Section 194, governs the remedies available through the Commission for Conciliation, Mediation and Arbitration (CCMA), Bargaining Councils, or the Labour Court.

## Referral to the CCMA or Bargaining Council

An employee who believes they have been unfairly dismissed must refer the dispute to the CCMA (or relevant Bargaining Council) within 30 days of the date of dismissal.

If conciliation fails, the matter may proceed to arbitration (for ordinary unfair dismissals) or to the Labour Court (for automatically unfair dismissals or complex issues involving discrimination).



# AVAILABLE REMEDIES

## (a) Reinstatement

- The primary remedy in unfair dismissal cases.
- The employee is restored to their former position on the same terms and conditions.
- May be retrospective, meaning the employer may be ordered to pay back-pay from the date of dismissal.

*The employer cannot refuse reinstatement simply because the employment relationship has become strained unless it is shown that the relationship is objectively irreparable.*

## (b) Re-employment

- Similar to reinstatement, but the employee returns in a new position or under altered terms.
- Used where the original position no longer exists.

## (c) Compensation

- Awarded where reinstatement is not practical or appropriate.
- Calculated as several months' remuneration, depending on the fairness and nature of the dismissal.

### Maximum amounts:

- **Ordinary unfair dismissal:** up to **12 months' remuneration**
- **Automatically unfair dismissal:** up to **24 months' remuneration**



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# FACTORS CONSIDERED IN AWARDING REMEDIES

The CCMA or Labour Court will weigh:

- The nature of the misconduct or the reason for the dismissal
- Whether procedural fairness was followed
- Length of service
- Any prior disciplinary record
- The employee's conduct during and after the dismissal
- The impact of reinstatement on the workplace

## Legal Representation and Appeal

- Legal representation is generally **not permitted at CCMA conciliation**, but may be allowed at arbitration or the Labour Court.
- Parties unhappy with an arbitration award may apply for **review** at the Labour Court within six weeks of the award being issued, under **Section 145 of the LRA**.



# CONTACT US

If you require legal advice, assistance with a dismissal dispute, or guidance on employment law compliance, our team of labour law professionals is here to assist.

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