

DISMISSAL FOR THE WRONG REASONS

In terms of legislation, an employer has the right to dismiss an employee, provided that the dismissal is effected for a fair reason(s) and in accordance with a fair procedure. The reasons for dismissal are limited to reasons on the grounds of the employee's conduct and capacity and the employer's operational requirements (dismissal). Employers are generally familiar with disciplinary procedures and find it easier to terminate services based on misconduct. As far as poor performance or ill health (i.e. incapacity) is concerned, however, many employers, large and small, do not know how to manage the problem. Various mistaken impressions developed about dismissal for a reason related to incapacity, such as that service cannot be terminated due to ill health, that it is almost impossible to dismiss someone on the grounds of poor performance, or that it is extremely time-consuming to do so. Consequently, the employer often attempts to evade the counselling process required by dismissal on the grounds of incapacity, by disguising the reason for dismissal as being related to operational requirements.

The following is a typical scenario: The employer realises that a need exists for restructuring the whole or a part of his business. The opportunity then arises to get rid of some of the underperformers. If the employees concerned have the shortest length of service or the least skills of the staff in question, this may work. But what does the employer do if the employees are not eligible for termination of service for these reasons? In such instances, poor management of underperformance is exposed.

The basic point of departure is that the employer may not use poor performance as the only or main criterion for dismissal, as this would be regarded as abusing the process of termination of service. This may also result in the dismissal being regarded as substantially unfair and could result in re-appointment.

Poor performance may however be used as an *additional, but secondary* criterion for selecting employees for dismissal. It forms part and parcel of a "basket" of objective criteria, including length of service, skills or compliance with an employment equity plan. In such cases, the employer needs to show evidence of the employee's underperformance and he or she should already have started a counselling process to rectify the underperformance. In addition, the employer must have applied performance standards consistently.

Another risky strategy often used is requiring employees to apply for "new" positions and rejecting the applications of those who are regarded as underperformers. Various superficial reasons are often advanced for this, e.g. that the employee is not giving his or her best, or that he or she does not fit into the corporate milieu. In terms of legislation, an employee cannot be expected to apply for a position that is materially the same as his or her current position. Under our common law, this constitutes a repudiation of the contract of employment and could result in a constructive dismissal situation if the employee refuses to re-apply and then resigns.

Whether the position is materially similar is always a factual question. (It is a good idea to come to an agreement with the employees or their trade union about a criterion, e.g. that a position would be regarded as new if more than for example 30% of the content differs.) If the new position differs materially from the old, the employer is free in principle to invite new applications and select new incumbents. Performance in the past may also be used in conjunction with other objective criteria, such as skills or proven potential, but in such cases, the employer must provide proof of the underperformance, there must be a record of the counselling and a consistent application of performance standards.

In such cases, once again, proof of underperformance, a record of counselling and the consistent application of performance criteria must be shown. Failing this, employers should avoid using underperformance as criterion for dismissal. If the new position does not differ materially from the current position, the employer would either have to close an agreement with the employee concerned to terminate the contract (at a price of course), or appoint him or her and properly manage his or her underperformance.

The lesson to be learnt is simply that employers need to manage employees who are underperforming from the moment that underperformance is observed. A hearing (on the grounds of incapacity) may be held to terminate the services of those who do not satisfactorily respond to counselling. It need not involve a prolonged process, provided that the employees know what is expected from them, that they receive the necessary training (if they do not yet have it), and provided that their supervisors provide them with speedy and continuous counselling if they fail to perform according to expectation. Counselling must be a problem-solving process and entail an action plan, as well as clear warnings that dismissal would follow if performance is not satisfactory. Of course, it is essential to record everything.

Provided that the above points are applied consistently, employers need not devise all kinds of plans to get rid of underperformers.