



Consistency in the application of discipline

Managers do not all have the same understanding of workplace rules, policies and procedures. It is for this reason that consistency in the application of discipline is required as it creates certainty and ensures that employees know and understand the implications of unacceptable conduct.

The inconsistent application of workplace rules is more common in larger organizations, especially those with workplaces spread across the country. Further, while managers must exercise flexibility when it comes to imposing disciplinary sanctions, their decisions may nevertheless be precedent setting.

The requirement of consistency is also referred to as the “parity principle”, in terms of which like cases are required to be treated alike. It may constitute unfairness to treat people who have committed similar misconduct differently where the circumstances are the same or comparable.

A distinction needs to be made between consistent application of the rule and consistency with regard to the sanction that is imposed. It is inherently unfair to institute disciplinary action against, for example, only one of two employees who are guilty of the same transgression and in respect of whom the employer has sufficient evidence against both. In this regard, justice requires that transgressors should be treated the same way. Of course, it may turn out that the evidence against the one is strong, but weak against the other, leading to one being found guilty and the other not. There is no inconsistency in that.

However, justice also demands that, when it comes to sanctions, regard must be had to the individual circumstances of each case. This is where managers need to exercise discretion based on the aggravating and mitigating circumstances of each case.

In relation to consistency when it comes to sanction, the labour courts and arbitrators have distinguished between the following two forms of consistency:

- *Historical consistency:* The employer must apply the penalty of dismissal consistently with the way in which it was applied to other employees in the past. If the employer has not applied a sanction of dismissal for the contravention of a specific rule in the past, dismissing an employee for transgressing the rule could be unfair if the employer has not given prior notice to employees that the rule and its associated sanction will in future be applied more strictly. Also, if the employer regards genuine remorse as a mitigating factor in one instance of dishonesty, for example, it should do so in other instances too.

- *Contemporaneous consistency: This requires that a penalty must be applied consistently between 2 or more employees who have committed the same offence, provided there are not exceptional mitigating circumstances present in respect of one that is absent in the case of the other.*

To overcome an inconsistency challenge, the employer must be able to show that there was a valid reason for differentiating between groups of employees guilty of the same offence. The employer must prove, for example, that the employees that have been dismissed conducted themselves more reprehensively than those who were not dismissed. The onus is on the employer to show just cause for the differential treatment of the employees within similar circumstances.

How can employers correct historical inconsistency? The labour courts have held that historical inconsistency arising from a wrong decision should not prejudice the employer indefinitely. Should the employer wish to protect itself against claims of historical inconsistency, employees should be informed that such decisions could not be expected to be adhered to in the future. Therefore, guidelines for misconduct and the required standards or norms must be clearly communicated within the organization. Issuing a warning against chairpersons who make poor disciplinary decisions, that might lead to future inconsistency, will also assist the employer's case.

The following guidelines should be considered in the implementation of sanctions:

- like cases should be treated alike;
- exercising flexibility in the application of discipline is important, but care must be taken that it could be precedent setting;
- should the employer treat like cases differently, the employer bears the onus of justifying the differential treatment;
- it is important for managers and staff to understand the underlying workplace rules and the consequences of non-adherence; and
- the employer can protect itself against historical inconsistency arising from incorrect decisions by restoring the rule and communicating it clearly.

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April 2010