



Misconduct outside working hours

An employer has the right to discipline or even dismiss its employees for work-related misconduct. A dismissal for misconduct is based on the employee's intentional or negligent non-compliance with company rules or standards.

In respect of misconduct, the employer bears the onus of proof in dismissal disputes. The employer must prove that the employee contravened a rule, was aware of or could reasonably have been aware of the rule, that the rule was valid, there was consistency in the application of the rule and that dismissal was the appropriate sanction (substantive fairness).

An employer cannot dictate an employee's conduct outside working hours, as employees' personal lives do not fall within the ambit of the working relationship. However, the distinction between an employee's private life and working life cannot always be separated, as the employer could have an interest when the employee's behaviour affects the employee's ability to do his/her work, the good name and reputation of the employer or its business dealings with others, or interpersonal relations in the workplace. In such cases, the employer may be entitled to take appropriate action against the employee.

Should the employer wish to discipline the employee for conduct outside working hours, the employer bears the onus of proving that it has a sufficient and legitimate interest in the employee's conduct which justifies action being taken. Therefore, it is important for the employer to show that despite the conduct not being directly related to the employee's employment, it does impact on the employment relationship in one way or another, in that, e.g.:

1. although not directly related to the employees work, the conduct happened in a place over which the employer has jurisdiction (e.g. the company pub or hostel);
2. the conduct happened during an off-site event organized by the employer (e.g. team building weekend or end of year party)
3. the employer's reputation and/ or good name was adversely affected by the employee's conduct;
4. the employee's conduct affected relationships at work; or
5. The status and/or seniority of the employee is such that his/her conduct outside working hours necessarily impacts on the employer.

Therefore, in addition to proving that the behaviour constitutes misconduct, the employer must also show a link between the employee's misconduct and his/her employment.

The test is therefore whether the conduct was work-related or affected the employment relationship.

Example 1

An employee, his colleagues and his direct line manager belong to a running club. The employer has no association with the running club except that some of its employees belong to this club. One evening after a club meeting an employee assaults his direct line manager in front of some of his colleagues. The employer makes a decision to take disciplinary action against the employee for assaulting his direct line manager, and subsequently dismisses the employee for conduct that occurred outside working hours. The employer would be required to prove that the assault affected the employment relationship.

Answer

In this matter, the employer will be in a position to do so for the following reasons:

- The work relationship between the line manager and the employee was most likely affected;
- The assault took place in front of the line manager's subordinates, which impacts on the manager's authority.

Example 2

An employee in the farming sector is provided with accommodation as part of the employee's contract of employment. The housing rules are not contained in the contract of employment. The employee continuously breaches the housing rules. After numerous discussions and warnings, the employer dismisses the employee for continuously breaching the housing rules.

Answer

The employer would be able to take disciplinary action for the following reasons:

- the employee was provided with accommodation as a direct result of his employment with the farmer;
- Accommodation and employment are connected - the employee's breach of the housing rules has sufficient impact on the employment relationship.

In conclusion, an employer can only discipline an employee for misconduct outside working hours if it can show a link between the employee's misconduct and an adverse impact on the employer or the employment relationship, meaning that the employer has a legitimate interest in the employee's conduct.

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