

## Poor work performance (incapacity) vs. misconduct

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We are often confronted with enquiries from clients that demonstrate that many managers are still not familiar with the difference between misconduct and incapacity. The result of this is that they end up dismissing people for the wrong reasons or follow incorrect procedures prior to dismissal. The consequences of these errors can be very very expensive. In addition, applying the wrong solution to the problem means that the problem is not addressed in the most effective manner.

The LRA recognizes misconduct, incapacity and operational requirements as the three grounds justifying the dismissal of an employee. Dismissal for operational requirements and, to a lesser extent incapacity, is classified as ‘no fault’ dismissals. A dismissal for misconduct, however, is based on the employees fault i.e. intentional or negligent non-compliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness). The employer is required to give the employee an opportunity respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.



Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer’s standards. In this case the problem lies with the employee’s ‘aptitude’: although willing to do what is required, s/he is *unable* to because of some factor linked to the employee that s/he has little or no control over.

In order to fairly dismiss an employee based on poor performance, the employer is required to prove that the employee did not meet existing and known performance standards; that the under-performance is serious; and that s/he was given sufficient time, training, support, guidance or counseling to improve (substantive fairness). Proof of alleged instances of under-performance is essential (e.g. complaints from customers, sales figures, etc.). It is critically important that the employer should be able to demonstrate, if challenged at the CCMA, that the under-performance is due to the employee's inability and not some extraneous factor that cannot be laid at the employee's door and over which the employee has no control, e.g. market fluctuations. Any dismissal for poor performance must, of course, also be procedurally fair.

The following examples illustrate the application of these broad principles.

#### Example 1

A bus driver's driving license is suspended for 6 months because of his conviction for drunken driving. (The incident happened after hours while he drove his own vehicle). As a result, his public carrier permit is suspended by the local authorities. He is therefore not able to drive a bus for 6 months. Is this misconduct or incapacity?

#### Answer

The bus driver's situation would be categorized as incapacity for the following reasons:

- He is willing to work but unable to do so due to the suspension of his license and therefore temporarily lacks the inherent requirement of his job.
- He has not refused to drive the bus and therefore his action is not intentional.
- He was not convicted for drunken driving while driving the bus nor was it during office hours.
- Not having a license essentially pertains to the capacity to do the job as opposed to breaching a specific company rule.
- The employer cannot accept his tender of services because the absence of a valid license, which is an inherent job requirement.

## Example 2

Joe and Dinah had a relationship at work, which turned sour. Joe is unable to cope with the break-up and continuously sends Dinah suggestive e-mails in the hope that she would again fall for him. Dinah objects to this. Does Joe's behaviour constitute misconduct or incapacity?

### Answer

Joe's actions constitute misconduct for the following reasons:

- His actions are within his control and sent intentionally and willfully.
- Assuming that he has sent these emails from his workstation, this constitutes abuse of company equipment.
- The emails could constitute harassment and/or sexual harassment depending on its content.
- Both the above actions constitute a breach of company rules.

While the term 'disciplinary procedure' is often used by managers to refer to any action taken against an employee, whether for misconduct or incapacity, we would advise that managers should limit the use of the term 'disciplinary' to cases involving misconduct and rather to refer to 'incapacity' procedures or something similar when dealing with performance or ill health issues. Legally, while nothing turns on these terms, the different terms suggest that a different 'mindset' is needed when dealing with the various situations.

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