POOR PERFORMANCE

The Labour Relations Act, recognises three types of dismissal, namely:

- Misconduct
- Operational requirements (retrenchment)
- Incapacity (ill health, injury, poor performance)

Schedule 8 of the Labour Relations Act lays down the following Code of Good Practice when dealing with poor performance;-

*"**9. Guidelines in cases of dismissal for poor work performance.** – Any person determining whether a dismissal for poor work performance is unfair should consider –*

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not –

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard."

WHAT IS POOR PERFORMANCE

Poor performance does not look at the behaviour of the employee, but rather at whether the job, which the employee is being paid to do, is being done properly.

Misconduct deals with behavioural problems – performance deals with ability.

DISTINGUISH BETWEEN MISCONDUCT AND POOR PERFORMANCE

There is a fundamental duty on the part of the employee to provide competent performance.

Many employers do not know what the charge should be. The employer only knows that what is happening is unacceptable, and the employee must be dismissed as quickly as possible.

The result of this uninformed and hasty action is, the employee is charged with negligence, poor performance, incapacity, misconduct, and, as if that is not enough, the charge sheet states that the trust relationship has irretrievably broken down and the continued employment relationship has become intolerable. The final outcome is the employee is dismissed.

The employee seeks the advice of a labour lawyer or consultant, who, upon hearing the facts, gleefully burst into laughter, and sends the employer an invitation to have tea at the CCMA and to bring along his cheque book.

Grogan[1] states *"It is important to distinguish between incapacity that arises from misconduct or wilful negligence and capacity caused by circumstances beyond the employee's control. The former can be treated as a disciplinary offence. The latter requires different and more sympathetic treatment. 'No-fault' incapacity can arise from a variety of causes, including illness, technological change, and incompatibility. In all these cases, the basic principle is that employees should be timeously informed of their deficiencies, be told how to rectify them and be given a reasonable opportunity to improve before any action is taken against them".*

Thus, it is clear, there must be an investigation before any action is taken against an employee for incapacity/poor work performance. Such an investigation will be in two stages. Firstly, to determine whether the poor performance came about through misconduct on the employee's part, if so, then the employee may be disciplined for misconduct. Secondly, if the poor performance is not for reasons of misconduct, the investigation must then be geared towards determining the true reason, this may be for any one of a number reasons including inadequate training, or the employee having been promoted to a post above his level of competence.

An employer who knowingly appoints a person to a position for which he or she is unqualified or unsuited will be required to take more extensive remedial steps than would otherwise be required before dismissing the employee.[2]

RECOMMENDED PROCESS

- Standards should be linked to the job and skills profile.
- Work standards should be defined and communicated.
- Fair procedure must be followed.
- Management of poor performance should be in a progressive manner, with the aim of monitoring performance and correcting the unsatisfactory or inferior performance.
- Sufficient proof of poor performance through objective assessment of the performance in the position is necessary.
- Determine whether underlying health or injury problems exist or whether environmental issues are causing impaired performance.
- Appropriate evaluation, instruction, guidance and counselling should be given to employees, together with a reasonable period of time for improvement.
- An investigation should be undertaken to establish the reasons for the unsatisfactory performance and a counselling meeting/series of meetings held:
    - State the area(s) of inadequate performance, in relation to designated duties;
    - request a response from the employee;
    - discuss means of rectifying the performance problem;

[1] Workplace Law, fifth edition

[2] Buthelezi v Amalgamated Beverage Industries [1999] 9 BLLR 907 (LC)

  - jointly compile a plan with targets and time periods for their achievement;
  - set a date for the next meeting, incorporating a sufficient time period for improvement and other measures to be taken;
  - make the employee aware of consequences of non-improvement;
  - implement measures such as training which will assist in resolving the problem.
- Consideration should be given to alternative measures to dismissal to remedy the matter;
- In this process the employee should be given the right to be heard and to be assisted by a union representative or co-employee;
- Should poor performance persist, discipline should be implemented, culminating in a disciplinary enquiry;
- Investigate the facts;
- Suspend the employee with pay, if necessary, pending the outcome of the disciplinary enquiry;
- Establish the appropriate charge;
- Give notification of the disciplinary enquiry to the employee;
- Compile evidence (documentation etc.);
- Hold enquiry.

Comprehensive records must be kept of all meetings and discussion, as these records will be required at the CCMA. In addition records of all training given must be retained as this will assist in the employer proving the fairness, and are required for the employer's Employment Equity report.

Remember, in terms of the Labour Relations Act, all the employee has to prove is that a dismissal took place, thereafter, the onus is upon the employer to prove the dismissal was substantively fair (fair and valid reason) and procedurally fair (fair procedures were followed).