

Inconsistent dismissals make tightrope hazardous



The Code of Good Practice: Dismissal (the Code) in Schedule 8 of the Labour Relations Act (LRA) has been, in effect, provided for in section 188 (2) in Chapter 8 of the LRA. This chapter provides for this Code as part of its purpose of ensuring that employers accede to the rights of employees not to be unfairly dismissed as required by section 185(a) of the LRA.

Item 3.(1) of the Code requires all employers to adopt disciplinary rules that “create certainty and consistency in the application of discipline.” This means that the employer’s rules should apply equally to all employees unless deviation from such consistency can be fully justified objectively due to genuine operational or other existing circumstances. Thus, for example, the rule that only managers will be entitled to use the employer’s vehicles for private purposes could be a fair one if it is based on the objective fact that such perks for managers are necessary to attract and retain employees at this key organizational level. However, disciplining junior employees for damaging the employer’s vehicles while letting off Scott-free managers who cause similar damage would not be likely to be accepted by the CCMA.

Item 3.(6) of the Code states that “The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.” However, the Code also provides, via item 3.(5) that, “When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee’s

circumstances..., the nature of the job and the circumstances of the infringement itself." Read together, items 3.(5) and 3.(6) of the Code require the employer to apply disciplinary measures (especially the measure of dismissal) consistently where the circumstances prevailing are similar and not simply where the charges against employees are similar.

The importance for consistency of the similarity of circumstances is well illustrated in the case of Sibanye Gold Ltd vs AMCU (Lex Info 5 December 2024, Labour Court case number JR 2643/21). Here, 8 AMCU members, who were on strike, were dismissed for possession of dangerous weapons and breaching picketing rules. The CCMA found these dismissals substantively unfair. On review the Labour Court found that the employer had not dismissed NUM members for similar infractions. This constituted inconsistency and thus, in the circumstances of this case, the dismissals had been substantively unfair. All 8 AMCU members were reinstated with 25 months' backpay each.

This outcome highlights the need for employers to understand the law of consistency in particular and of substantive fairness in general.