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What is gross misconduct, and could it cost you your job?

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1. INTRODUCTION

There are varying degrees of issues you may face in the workplace that could lead to a difficult work environment, from incapacity to negligence and misconduct.

This article will help you understand the differences between these infringements and how to approach disciplinary matters.

2. WHAT IS INCAPACITY?

Incapacity is the inherent inability of an employee to perform his/her work to the employer's established standards of quality and quantity due to ill health or injury, which can be temporary or permanent.

It is important to note that your employer can under no circumstances dismiss you whilst dealing with incapacity without following the correct procedure. Dismissal must be both substantively and procedurally fair.

3. STEPS THAT SHOULD BE FOLLOWED

Notify: Your employer should issue you with a written notice to attend a consultation to discuss your unsatisfactory work performance. You should be given at least 48 hours' notice, excluding weekends and public holidays, to prepare for the consultation.

Consultation: During the consultation, you must be afforded an opportunity to explain why you are not meeting the required standards set out in your employment contract.

During all consultations on incapacity, you have the right to be assisted by a trade union representative or a fellow employee.

4. WHAT IS NEGLIGENCE/GROSS NEGLIGENCE

A person's conduct is negligent if:

- The reasonable person would have foreseen the possibility that the particular circumstance might exist or that his conduct might bring about the particular result.
- The reasonable person would have taken steps to guard against such a possibility, and
- The conduct of the accused differed from the conduct expected of the reasonable person.

It is obvious from the above that there is sometimes an overlap between poor work performance and negligence. Negligence can be treated either as incapacity or as misconduct, depending on the circumstances.

Types of misconduct

Misconduct may differ from company to company and there is no complete list of the types of misconduct an employee can commit. Specific forms of misconduct would thus be dependent on the type of industry your company is operating in, the culture and specific workplace rules and regulations.

Typical examples of misconduct are theft, fraud, assault, wilful damage to company property, intimidation, insubordination, unauthorised absenteeism, consumption of alcoholic beverages on company premises, arriving at work under the influence of alcohol or a narcotic substance, arriving at work with the smell of alcohol on the breath, wilful poor work performance and sexual or racial harassment, to name but a few.

Dishonesty in the workplace can take many different forms, including:

- Stealing employer's money out of the till, petty cash box or safe
- Taking of business merchandise
- Unauthorised and undisclosed use of employer's equipment
- False claims of illness as reason for absence from work
- Punching an absent employee's clock card
- Getting another employee to punch one's clock card in one's absence
- Falsifying of cheques, invoices, quotations or business documents
- Embezzlement of the employer's funds
- Misrepresentation or falsification of employment qualifications or other credentials
- Fraud – for example, selling employer's merchandise or services and charging the client privately for own gain
- Telling lies to cover up work errors or for other reasons
- Secretly competing with the employer by engaging in own business in the same field

Reporting late for duty

Consistently arriving late for work could be seen as gross misconduct by your employer and lead to a dismissal.

Avoiding such circumstances can be made easier with professional help and guidance.

See what steps you can take to maintain a healthy relationship with your employer and take the correct approach to ensure your employment contract is not breached.

5. THE OUTCOME OF A DISCIPLINARY HEARING / APPEAL PROCEDURE

Disciplinary processes

Both the principles of sound management and the Labour Relations Act 66 of 1995 require that employers use firm, swift, fair and graduated disciplinary measures to deal with late-coming and other employee misconduct before dismissing the offenders.

In other words, every employer faced with late-coming should start giving warnings as soon as the problem arises and give a series of more and more serious warnings where the late-coming is repeated.

After the employee has received a series of warnings followed by a final warning and the employee comes late again, the employer should convene a formal disciplinary hearing.

Within a reasonable period after the disciplinary hearing, you should be furnished with a Notice of Outcome setting out the finding on each charge and the sanction.

A Notice of Outcome is a written notification issued to a complainant and a respondent following the conclusion of a proceeding under this Code. Such notice should also advise the right to appeal the outcome.

To initiate an appeal, you should file a Request for an Appeal.

Appeal hearings

After receiving a Request for Appeal, your employer will convene an appeal hearing, which will be conducted by a new presiding officer.

All evidence and legal argument submitted at the disciplinary hearing will need to be submitted once again. Based on the appeal hearing, the presiding officer will decide the matter.

Should you not be satisfied with the outcome of the disciplinary hearing, you will need to submit this matter to the CCMA or appropriate Bargaining Council.

You should contact a labour expert or the CCMA immediately as there are time frames that need to be adhered to.

Disciplinary Code provides framework

Where there is misconduct, a rule, norm, policy or practice needs to be in place, which an employee can break either by way of omission or commission. A Code would provide a framework, setting out how employees are to conduct themselves and behave at work.

6. MAY AN EMPLOYER MONITOR EMAILS?

It would be best to have an email monitoring policy regarding employees' private and business use of emails contained in employment contracts.

However, how extensive, and intrusive should the policy be?

Our Constitution respects a person's right to privacy. The Protection of Personal Information Act, 2013 ("POPIA") further entrenches personal data protection rights.

An employer is entitled to expect that employees will not use their emails to violate company policies, use inappropriate language, break confidentiality, or run their own business on company time.

Employment contracts usually contain clauses dealing with the monitoring and interception of emails.

These clauses typically provide that employees should not expect privacy when sending, receiving, downloading, uploading, printing or otherwise transmitting emails. And that employees must use emails for bona fide business purposes only.

In terms of POPIA, an employer who processes a employees' personal information must:

- Do so reasonably and without negatively impacting their rights as data subjects.
- Do so with the data subject's informed, express, and voluntary consent.
- Explain the purpose of such monitoring interception, to enable the employees to perform their duties and assist the employer in meeting its legal, business, administrative and management obligations.

Ask your lawyer to help you formulate a formal workplace policy governing employees' use of their computers and other devices or carefully review and update any policy that is already in place.

7. HAS POPIA FINALLY BEEN GIVEN A SET OF TEETH?

Many critics have noticed a trend in court decisions not to invoke POPIA, the Protection of Personal Information Act 4 of 2013, as amended, in its reasoning toward judgments.

For example, even the recent order to publish Matric results in the media lacked judgment and could have been an opportunity to apply POPIA. Instead, the courts have relied on the constitutional right to privacy, weighing it against other rights as the context requires.

What does this mean for us?

Individuals and companies, as either data subjects or responsible parties, have yet to see how the Act will be interpreted in South Africa.

It appears that judgments making use of POPIA are likely to follow from complaints brought to the Information Regulator using the Act's own complaints procedure.

In October 2021 the Information Regulator published a set of rules that a complainant ought to follow, making it possible to lodge a complaint with the official data protection government body. This year we will likely see a POPIA driven judgment.

The law

Section 74 of POPIA under Chapter 10 Enforcement, allows for two circumstances under which a complaint may be brought:

1. Any party may allege interference with the protection of a data subject's personal information, or
2. Either a data subject or responsible party may report their grievance with an adjudicator's decision.

Whilst the Act seems to invite all complaints, the Information Regulator's rules detail who may complain, how they should do so, and where to submit their complaint.

8. CONCLUSION

If you or someone you care about has had their personal information dealt with carelessly, you may have grounds to lodge a complaint with the Information Regulator.

Similarly, if you are a data subject or a responsible party processing personal information and you disagree with the decision made by an adjudicator, you have the right to contact the Information Regulator.