



# Best Practice Model: Disciplinary Policy and Procedure

## Introduction

This booklet discusses disciplinary policy and procedure under the following headings:

- *Sources of Discipline and Dismissal Law* – what references do we use for these procedures?
- *Purpose of Disciplinary Policy and Procedure* – why are they necessary?
- *Underlying Principles of Disciplinary Policy and Procedure* – what is the basis for the policies and procedures?
- *Disciplinary Policy* – what is a disciplinary policy and how does it work?
- *Disciplinary Procedure* – what is a disciplinary procedure and how do we go about it?
- *Appeal Procedure* – what appeals can be made against disciplinary outcomes?

## Sources of Discipline and Dismissal Law

Certain statutes in South Africa are our primary references to disciplinary and dismissal procedures. They include the Constitution and our labour laws.

### **Constitution of the Republic of South Africa, Act 108 of 1996**

The Constitution is the basis for all laws in the country.

*Everyone has the right to fair labour practices: Section 23(1).*

### **The Labour Relations Act, No 66 of 1995**

This law describes what is legal and illegal in relationships between employers and employees.

**A statute is a law made by a law-making body. Laws can be scrapped or changed, or new laws can be made.**

**The Constitution is the basis for all laws in the country.**

SECTION OF THE ACT	WHAT THE SECTION SAYS
<p><b>Section 185</b> <b>The right not to be unfairly dismissed or subjected to unfair labour practice.</b></p> <p>This section stresses the importance of fairness when an employee is being dismissed, and that employees have a right to be treated fairly at work.</p>	<p><i>Every employee has the right not to be:</i></p> <p><i>(a) unfairly dismissed; and</i></p> <p><i>(b) subjected to unfair labour practice.</i></p>
<p><b>Section 186(2)</b> <b>Unfair labour practice</b></p> <p>This section deals with unfair actions but does not include the dismissal of an employee. An employer is not allowed to put an employee off work or discipline him/her in any way that is not allowed by the law.</p>	<p><i>Unfair labour practice includes:</i></p> <p><i>b. The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.</i></p>



SECTION OF THE ACT	WHAT THE SECTION SAYS
<p><b>Section 188</b> <b>Other unfair dismissals</b></p> <p>Some dismissals are by their nature seen as unfair. But for other dismissals to be fair there should be a good reason, such as that the employee has behaved badly, can't do the work, or that the type of work at the workplace has changed. In any case, the employer must follow the right procedure for fair dismissal as set out by the labour law.</p>	<p>(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove</p> <p>a. that the reason for the dismissal is a fair reason –</p> <ol style="list-style-type: none"> <li>related to the employee's conduct or capacity; or</li> <li>based on the employer's operating requirements; and</li> </ol> <p>b. that the dismissal was effected in accordance with a fair procedure.</p> <p>(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.</p>
<p><b>Schedule 8</b> <b>Code of Good Practice: Dismissal</b></p> <p>This section shows what can be seen as fair dismissals and how they should be done. <i>(Schedule 8 Code of Good Practice Dismissal, Item 1)</i></p>	<ul style="list-style-type: none"> <li>It deals with the most important issues relating to employees' behaviour and their ability to do the work.</li> <li>It says that employers have a right to expect proper behaviour and work standards from employees. But at the same time the law protects employees against an employer's whims.</li> <li>This code emphasises that disciplinary codes and procedures in the workplace should be agreed by both employees and employers.</li> </ul>

## Purpose of the Disciplinary Policy and Procedure

The Disciplinary Policy and Procedure provides employers and employees with a guideline for being fair about discipline in the workplace through:

- making sure that disciplining is done legally and not done in an unfair way; and
- encouraging employees to respect and follow suitable rules for behaviour and perform according to set standards.

### Rights and Duties of Employers and Employees

There are different types of laws that describe how employers and employees should relate to each other.

## THE DIFFERENCE BETWEEN DISCIPLINARY AND INCAPACITY PROCEDURES

It is important to understand the difference between Disciplinary and Incapacity procedures.

**Disciplinary procedures apply to conduct** where employees are responsible for their behaviour – they **carry blame** for their behaviour.

In **incapacity hearings** on the other hand, the employee **carries no blame** for his/her performance. Issues of health and an inability or lack of capacity to perform a job are **not disciplinary issues**. For example, if an employee can no longer drive a tractor because his/her eyesight is failing, the matter must be dealt with in an incapacity hearing. *Incapacity Hearings are discussed on Page 28 of this booklet.*

**Common law** is based on how things have been done for many years, and the history of court judgements.

**Statutes** are laws made for specific purposes by law-making bodies such as government.

But **collective agreements** and **individual employment contracts** also play a role in deciding what rights and duties employees and employers have.

### Discipline in the Workplace

Both the Labour Relations Act and the Code of Good Practice Dismissal recognise that an employer has the right to discipline employees.

On the other hand, the Constitution, the Labour Relations Act and the Code of Good Practice Dismissal recognise an employee's right to fair treatment.

## Implementation of the Disciplinary Procedure

### Employers/Managers

Employers have the power to set standards and rules for the workplace, and they can take steps against employees who break them.

- Employers must set clear rules and standards of behaviour for the workplace.
- Employers should make sure that all employees know what the rules are, and what standards are expected of them.
- Employers should apply the rules and standards fairly and in the same way for all employees.

The Code says the purpose of disciplinary action is to help employees correct their behaviour rather than to punish them. Employees who break the rules all the time, or behave extremely badly can be dismissed.

The principles written down in the Code intend to make sure that employers set rules that are clear, reasonable and legal.

The Code also says that employees should know the rules and that employers must apply them in the same way for all employees.

The Code has also allowed for the form and content of the rules to vary according to the type and size of business (*Schedule 8 Code of Good Practice: Dismissal, Item (3)(1) & (2)*).

### Employees

If the employer believes an employee has broken the workplace rules or not met the standards:

- There should be a formal hearing for serious misconduct (bad behaviour), or a less formal meeting for less serious misconduct.
- The employee should be told within a reasonable time of the accusation against them.
- The employee may be represented by another employee or a shop steward where there is a recognised trade union in the workplace.
- There should be written reasons for any decision taken.
- The employee has the right to appeal.

## COMMON LAW

The common law says that **employers** must:

- provide work for their employees;
- pay their employees all the money due to them; and
- provide a healthy and safe working environment.

The common law also says that **employees** must:

- come to work regularly and on time;
- work efficiently and well (follow all reasonable instructions that are within the law); and
- help to benefit their employer's business.



## Disciplinary Policy

Discipline must be **substantively** and **procedurally** fair.

- Discipline should help employees to correct bad behaviour rather than punish them.
- Discipline must be applied:
  - fairly
  - consistently (the same procedure for everyone, and the same for everything)
  - promptly, and
  - progressively (starting from less strict to getting more strict for the same disciplining).
- If employees are thought to have broken workplace rules or standards, they should be:
  - given a formal hearing in the case of serious misconduct, or have a less formal meeting for less serious misconduct;
  - told of the allegations against them within a reasonable time;
  - given written reasons for a decision taken;
  - given the right to appeal;
  - given the opportunity to be represented by another employee or a shop steward where there is a recognised trade union.

### Substantive Fairness

*Substantive* means that the offence should be something solid and be able to be proven.

*Substantive fairness* relates to why someone was dismissed. To decide if a dismissal is *substantively* fair, two issues are looked at:

- Firstly, is the employee actually guilty of the offence with which they have been charged? and
- Secondly, *if it has been proven that the employee is guilty*, is the offence so serious that dismissal is seen as the correct action?

*The Code of Good Practice: Dismissal* describes what measures to use to test if a dismissal for bad behaviour is fair on substantive grounds. They are:

- (a) did the employee actually break a rule or a standard of behaviour for the workplace? and
- (b) if the rule or standard was indeed broken:
  - (i) was the rule or standard reasonable?
  - (ii) did the employee know about the rule or standard? or should he/she reasonably have known about the rule or standard?
  - (iii) has the employer applied the rule or standard in the same way for all employees?
  - (iv) was dismissal the correct action for breaking the rule or standard?

*Schedule 8, Code of Good Practice: Dismissal, Item 7*

### Procedural Fairness

*Procedural fairness* is about how something is done and that it should be fair.

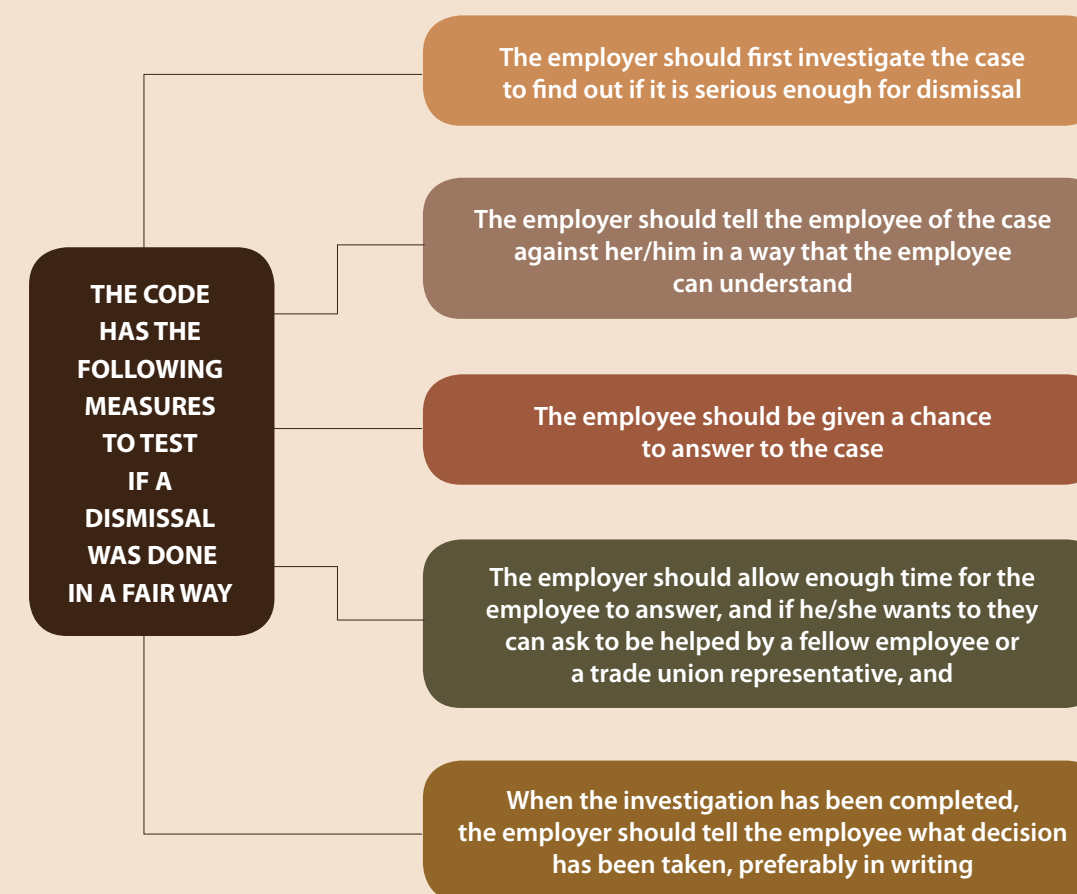
The labour law says that a dismissal for bad behaviour should be done in a way that is fair. *Labour Relations Act 66 of 1995, section 188(1)(b)]*

Even though the law does not say exactly what a *fair procedure* is, the Code gives us guidelines. *Schedule 8 Code of Good Practice Dismissal, Item 4*

If employers have their own disciplinary procedures that follow the *Code of Good Conduct: Dismissal*, they must follow them.

The Code does not replace disciplinary procedures written in collective agreements between employers and trade unions.

The reason why we need *procedural fairness* is to make sure that employers cannot just act on a whim against employees who are supposed to have committed some misconduct (bad behaviour).



*Schedule 8, Code of Good Practice: Dismissal, Item 4 (1)*

## Disciplinary Procedure

The Disciplinary Procedure is used when an employee breaks the workplace disciplinary code and the employee is held responsible for her/his behaviour. Examples include theft or being drunk at work. The severity of the disciplinary action will depend on what the employee has done.

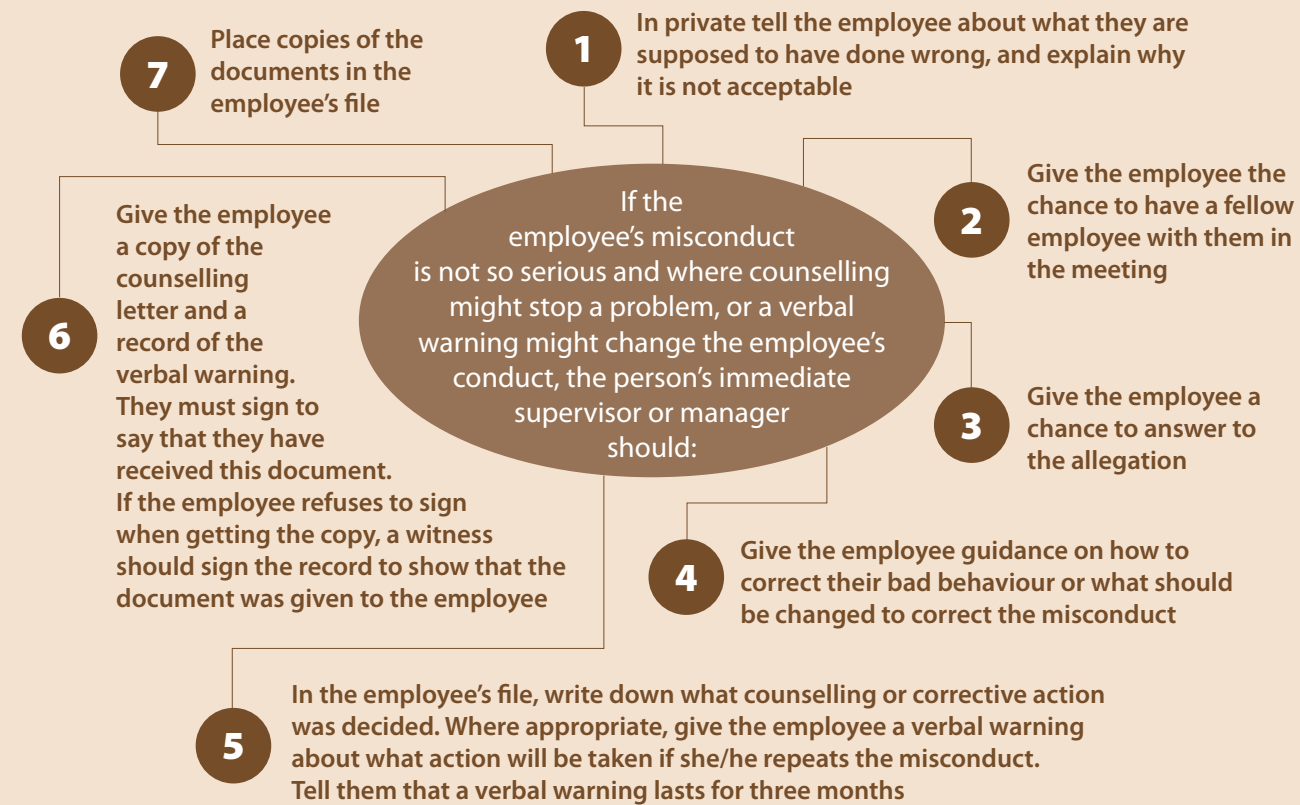
There are two types of procedures mentioned in the Disciplinary Procedure. One is an **informal procedure** for behaviour that is not so serious, and the other is a **formal procedure** for serious misconduct.



## Less Serious Misconduct: Steps to be followed

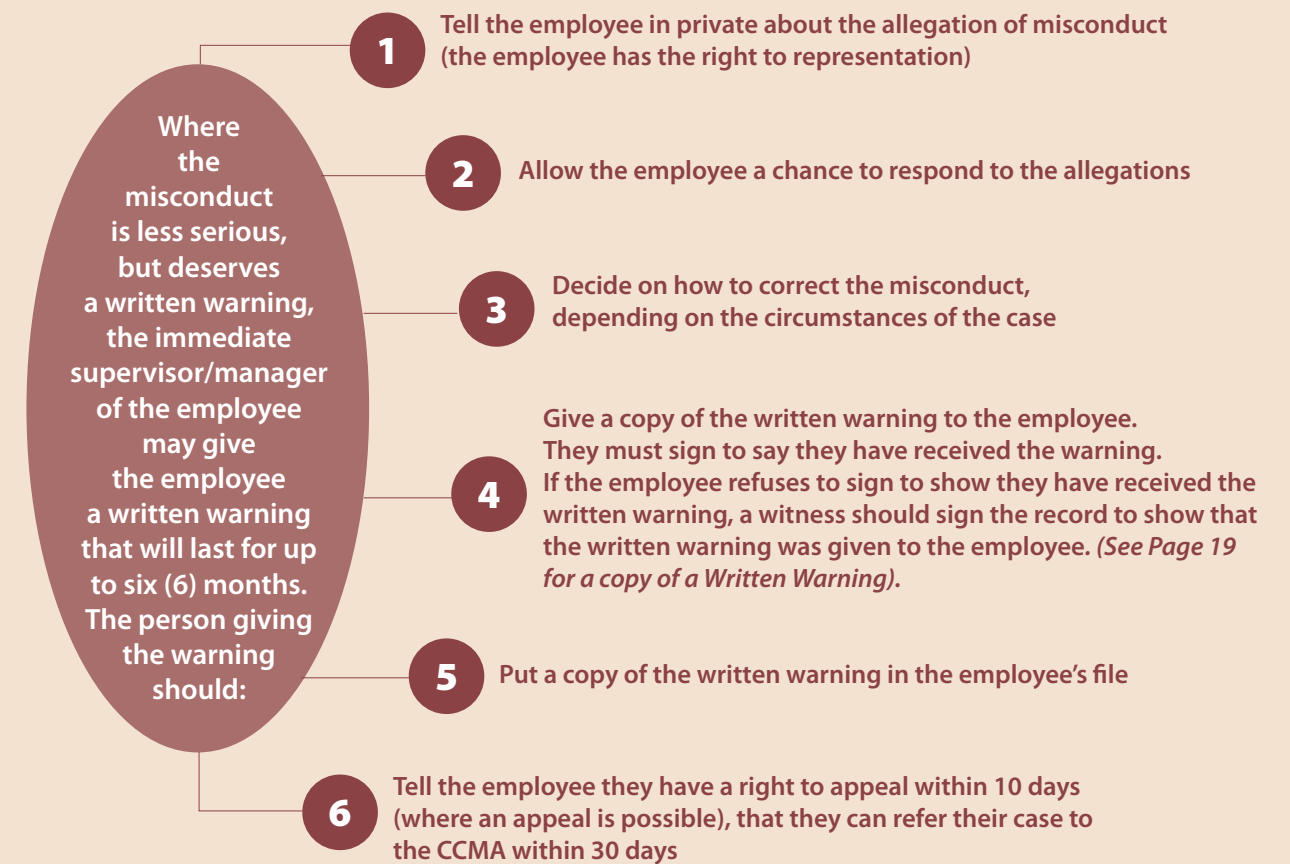
### Counselling and Verbal Warnings for Correcting Conduct

Counselling and a verbal warning are aimed at helping employees to change the behaviour that got them into trouble. It hopes to rehabilitate the employee rather than punish them. But if the employee doesn't adapt his/her behaviour, then they should know that a formal written disciplinary procedure will take place.

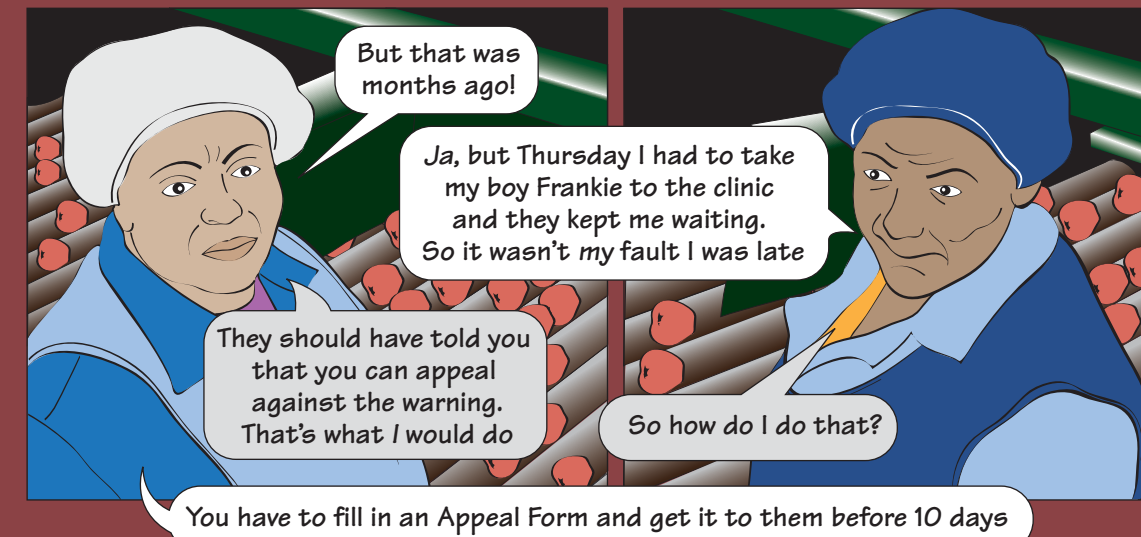


### Written Warnings

If the employee doesn't adapt his/her behaviour, then a formal written disciplinary procedure should take place.



EXAMPLE: Less Serious Misconduct



Example continued on next page





### Serious Misconduct: Steps to be followed

Where the alleged misconduct is of a more serious nature and it warrants more serious disciplinary action, the employer should hold a formal disciplinary hearing.

#### The Formal Disciplinary Hearing

A formal disciplinary hearing is made up of the following:

1. When an employer gets to know that an employee has committed a serious misconduct offence, she/he should investigate the allegation.
2. A disciplinary hearing should as far as practically possible take place within 30 days of the employer hearing about the offence, or from the end of the investigation. If the hearing doesn't take place within 30 days, the employer must tell the employee or his/her representative why there is a delay, and give the employee or his/her representative a possible time when the case will be heard.
3. The employer should make sure that a suitable venue is used for the hearing.
4. The employer must give written notice to the employee who is accused at least 4 days before the hearing so that he/she can prepare for it. (The employee can ask for this period to be longer, and the employer cannot unreasonably refuse the request). The employer should use the **Notice to Attend a Disciplinary Hearing** form (see Pages 14/15).

#### Role of the Hearing Chairperson

1. Chair the disciplinary hearing fairly by giving the employee a chance to hear the allegation against him/her, and allowing the employee to respond to the allegation and give his/her own story of what happened.
2. Make sure that the employee is aware of his/her rights and that the employee understands the allegations against him/her. Ensure that the employee received a Notice to Attend the Disciplinary Hearing with all the relevant details.
3. Hear the evidence from both sides, and allow cross-examination (questions for clarity). Then decide whether the employee is guilty or not based on the evidence and arguments presented in the case.
4. Give the employee a chance to argue why the sanction should be lessened.
5. Decide on a suitable course of action.
6. Tell the employee that they have a right to appeal within 10 days (if an appeal is allowable) or of their right to take the case to the CCMA within 30 days.
7. Complete the necessary record. (A brief description of the hearing proceedings, and the warning form or dismissal letter (depending on whether the person was found guilty or not).

(See Pages 19/20 Written Warning, Pages 21/22 Final Written Warning and Pages 23/24 Dismissal Letter.)





## Rights of the employer

The employer has the right to:

1. Hold a disciplinary hearing to consider allegations of serious misconduct.
2. Tell their side of the story, and get evidence by calling witnesses and presenting any other evidence related to the case, as well as cross-examine the employee's witness(es).
3. Submit evidence to show that the misconduct was extremely bad.

## Rights of the employee

The employee has the right to:

1. Tell his/her side of the story to defend himself/herself.
2. Be represented by a fellow employee or shop steward (of a trade union recognised by the employer). If the employer has an allegation of misconduct against a shop steward, it is a separate matter between the employer and the union to sort out.
3. Call witnesses, and cross-examine the employer and the employer's witnesses. He/she may provide any other evidence for the case, including mitigating evidence.

If the employee is found guilty of misconduct and given a sanction, the employee should be told that they have a right to appeal (where allowable) or that they can refer their case to the CCMA within 30 days. Where the employee wants to appeal the outcome of the disciplinary hearing the employee should use the **Appeal Form** (see Page 25).

## Sanctions

If an employee is found guilty of serious misconduct at a disciplinary hearing, the employer may issue any of the sanctions listed below. These will depend on whether the circumstances made the misconduct worse or whether they softened it.

1. A **Final Written Warning** is valid for 12 months (see Pages 21/22).
2. **Instead of being dismissed**, the employee may get a Final Written Warning valid for 12 months (see Pages 21/22), together with suspension without pay for 14 days. **For this sanction to be valid, the employee must of his/her own free will agree to this sanction in writing.**
3. **Instead of being dismissed**, the employee may get a Final Written Warning valid for 12 months (see Pages 21/22), together with a reduction in grade and salary for a period of between 3 and 6 months. When the time mentioned by the employer is over, the employee won't automatically be given their previous position and salary, but they can apply for promotion in the normal way for any suitable vacancies. **For this sanction to be valid, the employee must of his/her own free will agree to this sanction in writing.**
4. Dismissal (see Pages 23/24).

If the employer has an *allegation of misconduct against a shop steward*, the union should be notified and consulted by the employer. The shop steward should be given the opportunity to be represented by a trade union official (as long as the trade union is recognised by the employer).

**Sanctions are penalties or punishments given as part of a legal procedure.**

In all cases where an employee has been disciplined or dismissed, they should be told that they have a right to appeal against the disciplining or dismissal within 10 days (where an appeal is allowable). They should also be told they have a right to refer their case to the CCMA within 30 days.

EXAMPLE: Disciplinary Hearing





## Appeal Procedure

Appeals can be lodged for reasons including that:

- the hearing didn't follow the right procedure (procedural unfairness);
- the finding was unfair (procedural and/or substantive unfairness);
- the sanction was too extreme (substantive unfairness);
- the chairperson was biased or one-sided (procedural unfairness); or
- new evidence has come to light which is relevant to the disciplinary hearing.

All appeals must be submitted to the chairperson of the disciplinary hearing within 10 working days since the employee was informed of the disciplinary action or dismissal.

1

An employee may appeal against a disciplinary action or a dismissal if he/she feels that he/she was unfairly disciplined or dismissed. Employees should use the **Appeal Form** provided (see Page 25).

2

Appeals should be heard by another person of more senior job grade or status to the chairperson of the disciplinary hearing where the disciplinary sanction was imposed.

3

If there is no such person available for an appeal hearing, the employee should be told that they have a right to refer the case as a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA).

4

Unless new evidence is produced by either the employee or the employer to be considered in the appeal, the chairperson of the appeal hearing should decide the appeal by using the record of the disciplinary hearing.

5

The chairperson of the appeal hearing may agree with, change or reject the decision of the chairperson of the disciplinary hearing.

6

If the appeal is based on procedural unfairness during the disciplinary hearing, the chairperson of the appeal hearing may either:

- (a) have a complete re-hearing of all the evidence led at the disciplinary hearing; or
- (b) have only a re-hearing of those parts of the disciplinary hearing which are said to have been procedurally unfair.

## Disputes Which May Be Referred to the CCMA

The following disputes may be referred to the CCMA:

- Unfair dismissal disputes (*Section 186 (1) of the Labour Relations Act*)
- Unfair labour practice disputes (*Section 186 (2) of the Labour Relations Act*)

Unfair labour practice disputes involve:

- (a) When an employer acts unfairly in relation to promotion, demotion or probation of an employee. (This excludes disputes about dismissals for reasons relating to probation). Disputes could also be about training or benefits provided to an employee.
- (b) When an employer unfairly suspends an employee or takes any other unfair disciplinary action against him/her, except dismissal.
- (c) When an employer doesn't reinstate or refuses to reinstate or re-employ a former employee in terms of any agreement.
- (d) When an employer suffers occupational damage because an employee made a protected disclosure which is prohibited by the law. This does not apply in cases of dismissal (*Protected Disclosures Act, No. 26 of 2000*).

## How to refer disputes to the CCMA

Disputes about unfair dismissals and unfair labour practices (including penalties in disciplinary hearings) are referred to the CCMA by completing an **LRA Form 7.11**.

The **LRA Form 7.11** is available from the CCMA, the Department of Labour, Advice Offices and various libraries and other organisations. The **LRA Form 7.11** can also be downloaded from the CCMA website: [www.ccma.org.za](http://www.ccma.org.za)

The CCMA's contact details are:

CCMA House, 78 Darling Street, Cape Town, 8000.

Tel: 021 469 0111; fax: 021 465 7193/7; email: [CTN@ccma.org.za](mailto:CTN@ccma.org.za)



### NOTICE TO ATTEND A DISCIPLINARY HEARING (PAGE 1)

Name: .....

You are hereby notified that a disciplinary hearing will be held on:

Date: .....

Time: .....

Place: .....

The purpose of the hearing is to consider the following allegations of misconduct committed by you. (Details of misconduct, including date, time and place. Add extra pages if necessary).

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### NOTICE TO ATTEND A DISCIPLINARY HEARING (PAGE 2)

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1. You have the right to be represented at the disciplinary hearing by a fellow employee, a shop steward or a trade union official of a recognised trade union of which you are a member.
2. You have the right to call witnesses and to cross-examine witnesses called by the employer. You must arrange for your witnesses to attend the hearing. Tell your immediate supervisor who they are before the hearing, so that they can be released from duty.
3. If you need an interpreter, please let the person who signed this notice know well before the time of the hearing so that they can arrange one for you.
4. At the disciplinary hearing you will be given a chance to tell your side of the story, and defend yourself against the allegations of misconduct as well as in deciding which sanction to impose.

**Note to employee: By signing this form, you are merely admitting that you have received the notice of the disciplinary hearing and your signature is in no way an admission of guilt.**

Name & signature of person issuing this form ..... Date .....

Employee's signature ..... Date .....

Witness's name & signature ..... Date .....



## LETTER OF SUSPENSION

Dear ..... (name of employee)

This letter refers to our discussions about the allegations of misconduct against you and your response to the decision to suspend you.

Given the seriousness of the allegations it has been decided that you should be suspended from duty starting immediately, without loss of pay or benefits, and depending on the results of the investigation into the allegations against you.

You are being suspended because we believe that if you stay in the workplace:

*[please delete whichever not applicable]*

- it could prejudice the investigation into your alleged misconduct; and/or
- it could endanger the well-being or safety of other employees; and/or
- it could endanger the property of the employer.

During the period of your suspension, you may not enter the employer's premises without prior permission. You will be notified of the outcome of the investigation when it is finalised. If there is sufficient evidence to proceed with a disciplinary hearing, the employer will notify you of the relevant allegations and any other relevant details in writing as soon as reasonably possible.

Your suspension does not in any way constitute a judgement or any guilt in the matter.

Yours sincerely

Manager's signature ..... Date .....

Employee's signature ..... Date .....

*Should the employee refuse to sign the Letter of Suspension, a witness should sign the letter to confirm that the employee has been told about the suspension.*

Witness's name & signature ..... Date .....

## VERBAL WARNING FORM (PAGE 1)

Name of Employee .....

Date of Meeting .....

Nature of misconduct (including date, time and place) .....

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Employee's response to allegation/s (summary) .....

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Decision taken regarding employee's guilt/non-guilt .....

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### VERBAL WARNING FORM (PAGE 2)

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Sanction decided upon .....

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*If it has been decided to give the employee a verbal warning, tell the employee that a verbal warning (valid for 3 months) is the sanction imposed for their misconduct. Give the employee a copy of the verbal warning and inform him/her that it will be put in his/her personnel file.*

*Inform the employee that he/she may appeal the verbal warning within 10 days if he/she believes that the discipline was unfair (where an appeal is allowable), or that he/she has the right to refer the case to the CCMA within 30 days.*

*If the employee refuses to sign the verbal warning, make sure that a witness signs the verbal warning to record that the employee knows about the verbal warning.*

**To be signed at the end of the session only**

Signature of manager/supervisor .....

Signature of employee .....

*The employee may elect to be represented or not to be represented at the meeting*

Name and signature of representative (if represented) .....

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*If employee refuses to sign:*  
Name and signature of witness .....

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### WRITTEN WARNING FORM (PAGE 1)

Name of Employee .....

Date of Meeting .....

Nature of misconduct (including date, time and place) .....

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Employee's response to allegation/s (summary) .....

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Decision taken regarding employee's guilt/non-guilt .....

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### WRITTEN WARNING FORM (PAGE 2)

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Sanction decided upon .....

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*If it has been decided to give the employee a written warning, tell the employee that a written warning (valid for up to 6 months) is the sanction imposed for their misconduct. Give the employee a copy of the written warning and inform him/her that the written warning will be placed on his/her personnel file.*

*Tell the employee that she/he may appeal the written warning within 10 days if she/he believes that the discipline was unfair (where an appeal is applicable) or that she/he has the right to refer the case to the CCMA within 30 days.*

*If the employee refuses to sign the written warning, make sure that a witness signs the warning to record that the employee knows of the written warning.*

**To be signed at the end of the session only**

Signature of manager/supervisor .....

Signature of employee .....

*The employee may elect to be represented or not to be represented at the meeting*

Name and signature of representative (if represented) .....

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*If employee refuses to sign:*  
Name and signature of witness .....

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### FINAL WRITTEN WARNING FORM (PAGE 1)

Name of Employee .....

Date of Meeting .....

Nature of misconduct (including date, time and place) .....

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Employee's response to allegation/s (summary) .....

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Decision taken regarding employee's guilt/non-guilt .....

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### FINAL WRITTEN WARNING FORM (PAGE 2)

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Sanction decided upon .....

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*If the employee has been given a final written warning, tell the employee that a final written warning (valid for 12 months) is the sanction imposed for their misconduct. Give the employee a copy of the final written warning and tell him/her that the final written warning will be placed on his/her personnel file.*

*Tell the employee that he/she may appeal the final written warning within 10 days if he/she believes that the discipline was unfair (where an appeal is allowable) or that he/she has the right to refer the case to the CCMA within 30 days.*

*If the employee refuses to sign the final written warning, make sure that a witness signs the final written warning to record that the employee knows of the final written warning.*

**To be signed at the end of the session only**

Signature of manager/supervisor .....

Signature of employee .....

*The employee may elect to be represented or not to be represented at the meeting*

Name and signature of representative (if represented) .....

.....

*If employee refuses to sign:*  
Name and signature of witness .....

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### DISMISSAL LETTER (PAGE 1)

Name of Employee .....

Date of Meeting .....

Nature of misconduct (including date, time and place) .....

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Employee's response to allegation/s (summary) .....

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Decision taken regarding employee's guilt/non-guilt .....

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### DISMISSAL LETTER (PAGE 2)

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Sanction decided upon .....

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*If it has been decided to dismiss the employee, give the employee a copy of the letter.  
Tell the employee that she/he may appeal the dismissal within 10 days if she/he believes that the dismissal was unfair (where an appeal is allowable) or that she/he has the right to refer the dismissal to the CCMA within 30 days.*

Signature of manager/supervisor .....

Signature of employee .....

*The employee may elect to be represented  
or not to be represented at the meeting*

Name and signature of representative (if represented) .....

*If employee refuses to sign:*

Name and signature of witness .....

.....

### APPEAL FORM

Name of Employee .....

Appeal submitted on ..... (Date)

I hereby appeal against the disciplinary sanction/dismissal imposed on me on ..... (date on which employee was informed of disciplinary action/dismissal).

The reason/s for my appeal is/are as follows (please attach additional pages, if necessary):

.....

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The appeal chairperson's decision regarding the outcome of the appeal (please attach additional pages, if necessary):

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Employee's signature .....

Date .....

Employee representative's signature .....

Date .....

Manager/supervisor's signature .....

Date .....



## Best Practice Model: Incapacity Procedure

### Purpose of the Incapacity Procedure

The purpose of the Incapacity Procedure is to take corrective action where the performance or the ability of an employee is measured as being below standard. There is a difference between employees who can be expected to improve their performance, and those who can't because of ill health or injury. This is regarded as the employee not having the capacity to perform the task, and therefore not being at fault.

- The Incapacity Procedure makes sure that employees are protected from arbitrary actions and are treated fairly and consistently.
- The Incapacity Procedure also ensures that work performance meets the standards of work required by the workplace.

### What is incapacity?

When an employee cannot carry out or perform his/her contract at the levels required because of a lack of ability, it is called 'incapacity'.

1. An incapacity allegation is different from misconduct or disciplinary issues. It arises from circumstances beyond the employee's control and is seen as a 'no-fault' procedure. Therefore, if someone is subject to an incapacity procedure or hearing, the employee carries no blame for not doing a job properly. But this does not mean they will stay in the job.
2. Incapacity may be due to:
  - an employee not having the necessary skills, knowledge or ability to perform their job to the required standards;
  - ill health or injury which affects their performance;
  - an employee not being able to come to work regularly;
  - an employee not being available.

### Underlying Principles of Incapacity Procedures

There are certain conditions which must help employees to do their jobs properly.

1. Each employee should be given the opportunity and right equipment to do her/his job properly.
2. The Incapacity Procedure aims to help employees to perform their jobs as well as possible, and to sort out problems which might be affecting the employee's performance.
3. Counselling and consultation with the employee is an essential part of this procedure.
4. Incapacity procedures should be substantively and procedurally fair. Management who are in a position to take appropriate corrective action must deal with it lawfully and fairly.
5. This policy applies to all employees.

## Incapacity Procedures

### Informal procedure

An informal procedure consists of counselling and assistance.

### Investigation into Incapacity due to ill health or injury

There is no laid down format for an investigation into an employee's poor performance due to ill health or injury. However, there should be a thorough discussion about the circumstances of the employee's situation, and the requirements of the workplace. The employer should try to help the employee to keep working if at all possible. The following factors should be considered before thinking of dismissal:

- What is the nature of the job? Is it specialised or can someone else do the job?
- How long will the employee be incapacitated? Can the work be postponed?
- How serious is the incapacity? Can the employee perform some tasks but not others?
- Can someone replace the employee for the time being?

(See Page 31, Incapacity due to Poor Work Performance.)

### Counselling for Incapacity due to poor performance

- 1 The manager will counsel an employee if they fail in their job, or if they are falling short of meeting the required standards. This lack of capacity might be due to ill health or an injury which affects the employee's ability to work normally.
- 2 If a manager wants to counsel an employee, the manager must allow them to ask a representative of their own choice to help them.
- 3 The manager will tell the employee why their performance is below standard, and what the expected standards of performance are.
- 4 The employee will have the chance to explain why they are performing poorly, and help management find practical ways to improve their performance. If it is appropriate, management might refer the employee to a doctor or social worker for help.
- 5 The manager will take into account the issues raised by the employee or his/her representative, and draw up an action plan. This will say what standard the employee must follow in the job for a specified time during the next period of employment.
- 6 This action plan must be summarised in writing and a copy given to the employee. This letter and action plan will apply over a reasonable period of time.
- 7 The employee must sign the document to acknowledge that she/he received the letter and that they understand the action plan and that his/her performance will be evaluated and reviewed on a certain date.
- 8 There is no requirement for how many counselling sessions should be held before the next stage in an incapacity procedure is used, in other words, before an incapacity hearing.
- 9 If an employee is still on probation, and their capacity to do the job does not meet the required standards, the probationary employee will be counselled and given a reasonable time to improve their performance. But if the employee on probation does not improve their performance, then she/he may be dismissed after an incapacity hearing has been held.

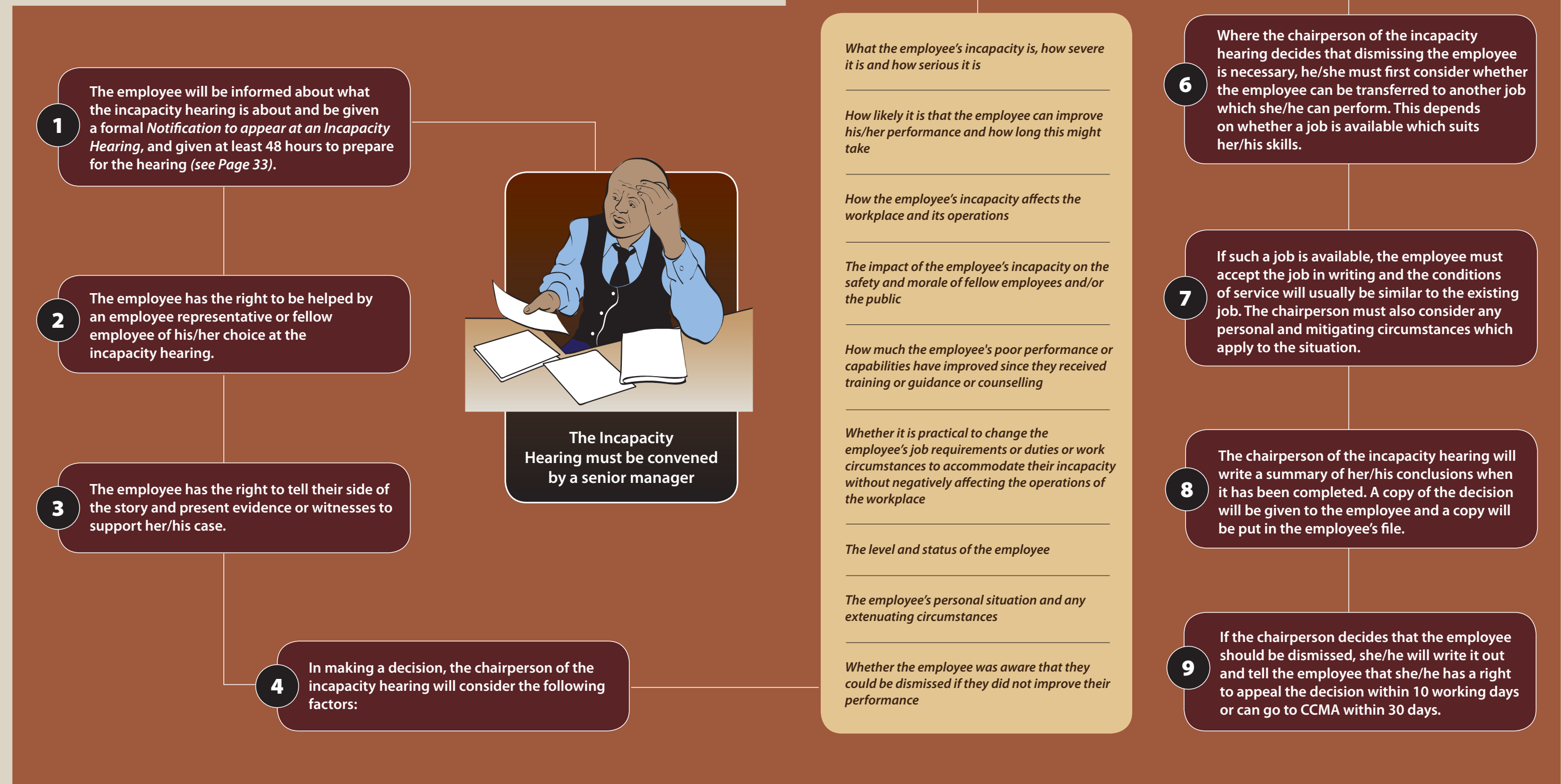
**!** Incapacity procedures can range from informal counselling to dismissal, depending on whether or not an employee will be able to bring her/his performance up to standard or not



## Conducting an Incapacity Hearing

An incapacity hearing will be convened either when:

- an employee has been counselled and his/her performance still fails to meet the prescribed standards; or
- the employee's incapacity or incapability is so bad that further counselling is not appropriate and/or practical. The manager will counsel an employee if they fail in their job, or if they are falling short of meeting the required standards. This lack of capacity might be due to ill health or an injury which affects the employee's ability to work normally.





## Appeal Review Procedure

### When an Appeal may be convened

An Appeal can only be convened if the employee claims that one or more of the following happened:

- The incapacity procedure was not properly followed.
- New evidence which was not previously submitted about the employee's performance or condition has become available. Both the employer and the employee may present such new evidence.
- The employee feels that the decision was too harsh.
- The employee can provide evidence to show that the chairperson was biased.
- The chairperson did not properly consider all the relevant factors.
- There were strong mitigating factors which were not considered before by the chairperson.

If the employee is dissatisfied with the outcome of the incapacity hearing, she/he may within ten working days of the finding write to the employer about his/her wish to appeal the decision. She/he must fill in the Review Application Form and give a reason for asking for an appeal (see above). (See Page 35, Review Application Form: Incapacity due to Poor Work Performance and Page 36, Review Application Form: Incapacity due to Ill Health.)

Unless there is another agreement, the appeal review should take place within ten working days of the appeal being lodged. It may be done purely with the written submissions from the employee, her/his representative and the manager.

The employee together with a co-worker of the employee's choice will have the right to submit a written representation to the appeal review giving the reason for the appeal and explaining any information that needs to be considered in the review.

The appeal will be held on the basis of this written submission as well as any minutes and written documents about the original incapacity hearing. The person who conducts the appeal review may choose to hold a full appeal re-hearing if they think it is appropriate.

If a full re-hearing is seen as appropriate, the hearing must be held according to the procedures for an incapacity hearing.

The chairperson conducting the appeal review will put her/his decision in writing in a Review Decision Form and explain fully how the decision was made (see Page 37, Review Decision).

Once there has been an appeal review, there are no more options available in the incapacity procedure.

If the employee is unhappy with the outcome of the appeal review, he/she may refer the matter to the CCMA within thirty calendar days.

(See Page 35, Review Application Form: Incapacity due to Poor Work Performance; Page 36, Review Application Form: Incapacity due to Ill Health and Page 37, Review Decision.)

## INCAPACITY Counselling For Poor Work Performance (Page 1)

Name of Employee .....

Workplace name .....

Representative name .....

Date of hearing .....

What is the area of poor performance or incapacity raised with the employee?

.....

.....

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.....

.....

What performance standards and capacity are expected of the employee?

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## INCAPACITY

### Counselling For Poor Work Performance (Page 2)

What standards of performance has the employee provided recently relative to expectation?

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.....

.....

Reasons given by employee for failing to attain levels of work performance and solutions proposed with a view to improving performance to levels required.

.....

.....

.....

AGREED ACTION TO BE TAKEN (GUIDANCE, INSTRUCTION, TRAINING, COUNSELLING)	BY WHOM	BY WHEN (COMMENT)

Follow-up date of review meeting .....

I acknowledge that I have received this counselling brief.

Employee's signature .....

Manager/supervisor's signature .....

Employee representative's signature .....

**A copy of this form should be given to the employee. The form will be placed in the employee's personnel file.**

## NOTIFICATION TO APPEAR AT AN INCAPACITY HEARING (PAGE 1)

Date .....

Name of Employee .....

Designation .....

Employee No .....

Department .....

*This is a notification telling you that you must attend an incapacity hearing on the date shown below. You will be asked to answer to the following allegations relating to your incapacity.*

Incapacity arising out of:

.....

.....

.....

Details of incapacity hearing:

Date .....

Time .....

Place .....



## NOTIFICATION TO APPEAR AT AN INCAPACITY HEARING (PAGE 2)

### Delivery of notification:

By hand / fax / email / post / telegram

The hearing will be chaired by: .....

If you have any concerns with the chairperson nominated to hear your case, you must inform the manager in writing at least twelve hours before the scheduled hearing about the reasons for your concerns.

At the hearing you have the following rights:

1. A representative of your workplace or a shop steward of your union may represent you at the hearing. It is your responsibility to make sure that the representative attends the hearing.
2. You have the right to be present at the hearing and to present your case in full, as well as present evidence to support your case. If you fail to attend the hearing without any good reason, the hearing will be held in your absence without any further notice to you.
3. You may call witnesses if you like. You must tell management 12 hours before the hearing so that she/he can make the necessary arrangements.
4. You have the right to question and cross-examine any of management's witnesses at the incapacity hearing.
5. You are entitled to an interpreter. If you need one, you have to tell management at least 12 hours before the hearing so the necessary arrangements can be made.
6. If you are found to be incapacitated, you have the right to present evidence in mitigation before the final outcome is decided.
7. If you are dissatisfied with the incapacity hearing decision, you have the right to an appeal review (within three days) against the decision. You must motivate fully why you want to appeal, and lodge this appeal review with the Human Resources department.

Manager .....

Date .....

I, .....

confirm that I have received the above notification to attend the incapacity hearing. I also acknowledge that the contents have been read and explained to me and that I understand my rights to a fair hearing.

Employee representative's signature .....

Date .....

## REVIEW APPLICATION FORM *Incapacity Due to Poor Work Performance*

Surname ..... Initials .....

Employee No ..... Department .....

The reason for the Appeal Review is that:

- the Incapacity Procedure was not properly adhered to;
- new evidence, not previously submitted, has come about;
- the employee feels that the disciplinary action taken was too harsh;
- the chairperson was biased;
- all the evidence which was presented was not given proper consideration;
- strong mitigating factors are present and these were not previously considered.

Signature ..... Date .....

Name ..... Title .....

Manager/HR Signature ..... Date .....

Name ..... Title .....

**Hand in this form within ten working days from the outcome of the hearing to the Human Resources department. Within five days you must submit a written motivation for your appeal.**



## REVIEW APPLICATION FORM *Incapacity Due to Ill Health*

Surname ..... Initials .....

Employee No ..... Department .....

The reason for the Appeal Review is that:

- the Incapacity Procedure was not properly adhered to;
- new evidence, not previously submitted, has come about;
- the employee feels that the disciplinary action taken was too harsh;
- the chairperson was biased;
- proper consideration was not given to all the evidence presented;
- strong mitigating factors are present and these were not previously considered.

Signature ..... Date .....

Name ..... Title .....

Manager/HR Signature ..... Date .....

Name ..... Title .....

**Hand in this form within ten working days from the outcome of the hearing to the Human Resources department. Within five days you must submit a full written motivation for your appeal.**

## REVIEW DECISION

Surname ..... Initials .....

Employee No ..... Department .....

### **TO BE COMPLETED BY PERSON DOING THE REVIEW**

Briefly summarise the main reason/s put forward by the employee for the review:

.....

.....

.....

Decision:.....

.....

.....

### **PERSON DOING THE REVIEW**

Signature ..... Date .....

Name ..... Title .....

### **EMPLOYEE**

Signature ..... Date .....

Name ..... Title .....

**NOTE: Give the employee this notice and keep a copy for the employee's personnel file.**