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EMPLOYERS GUIDE TO DISMISSAL OF AN EMPLOYEE IN THE WORK PLACE

Termination of employment

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INDEX

1. <u>INTRODUCTION</u>	<u>3</u>
2. <u>DISMISSALS.....</u>	<u>4</u>
A. <u>OPERATIONAL REQUIREMENTS</u>	<u>5</u>
i. <u>SMALL BUSINESSES.....</u>	<u>5-8</u>
ii. <u>LARGE BUSINSSESS (MORE THAN 50 EMPLOYEES)</u>	<u>9</u>
B. <u>MISCONDUCT</u>	<u>11-12</u>
C. <u>INCAPACITY</u>	<u>13-19</u>
3. <u>CONCLUSION.....</u>	<u>20</u>
4. <u>LEGISLATION & REFERENCES.....</u>	<u>21</u>

1. INTRODUCTION

The covid 19 pandemic requires neither introduction nor explanation into the immeasurable amount of chaos and tragedy it has caused.

We sympathize with those who have lost loved ones during this pandemic. However, there is consolation in knowing that what is meant for you, will reach you even if it's between two mountains. What isn't meant for you, won't reach you even if it's between your two lips.

In life there are no tragedies, only events. Events which make us who we are, or what we need to become

A heart felt prayer goes out to those who have lost loved ones during these trying times. In addition to the severe toll the Republic has endured in respect of mortality and morbidity, there has been a further significant strain on the socio-economic wellbeing in various sectors of the economy. The purpose of this manual, is to provide a guide to employers and businesses in dealing with matters related to the CCMA and labour court.

It is a common request from Business owners in everyday practice, to outline the basic procedure in respect of the do's and don'ts of dismissing an employee. This guide may assist an employer in keeping with the latest protocols outlined by the Basic conditions of employment act as well as the labour relations act.

It is worth noting that dismissal should never be a first port of call, and all employees should be given a fair opportunity given the circumstance. However, often there are extenuating circumstances, be it financial, disciplinary or otherwise, that may be deemed by employers as necessitating termination and the required formalities may not have been followed. This guide will assist in outlining the procedures that should be followed, when dismissing an employee

The views and opinions expressed in this guide are those of the authors and are not intended to be used verbatim. The law regarding the subjectivity surrounding labour related matters must be adhered to on a case-by-case basis in line with LRA and BCEA. In practice, there are elements that are case specific. This serves only as a reference guide into the procedures and is by no means a text on the complexities of labour law. One may still be held accountable for unfair dismissals, depending on the facts of each individual case. An employer is advised to seek the assistance of a Labour specialist or attorney when acting on any labour related issue in the work place.

2. DIMISSALS:

As a starting point, before we delve into the specific requirements in respect of particular forms of dismissal, we would like to briefly describe the basic procedure which needs to be conducted in almost all forms of dismissal:

1. STEP 1: DUTY TO INVESTIGATE ALTERNATIVES TO DISMISSAL.



2. STEP 2: CONSULT WITH EMPLOYEE TO DISCUSS POSSIBLE SOLUTIONS.



3. STEP 3: IF DISMISSAL DUE TO MISCONDUCT, ISSUE FIRST WARNING, IF IT PERSISTS CONDUCT A DISCIPLINARY HEARING.



4. STEP 4: IF NO CONSENSUS REACHED, SEND EMPLOYEE A WRITTEN NOTICE TO CONSULT (HAVE A MINUTES CONDUCTED) TO INFORM HIM OF STEPS TAKEN TO AVOID DISMISSAL, BUT HAVE FAILED AND HENCE, DISMISSAL IS TO FOLLOW.



5. STEP 5: ISSUE NOTICE OF DIMISSAL ONE MONTH BEFORE THE TERMINATION.



6. STEP 6: CALCULATE SEVERANCE PAY.



7. STEP 7: HAVE EMPLOYEE SIGN WRITTEN TERMINATION.

A. OPERATIONAL REQUIREMENTS (AKA RETRENCHMENTS)

Dismissals conducted in terms of the operational requirements of a company is regulated by sections 189 and 189A of the Labour Relations Act, which apply to companies with less than 50 and more than 50 employees, respectively.

In defining operational requirements, s213 of the act classifies the same based on the economic; technological; or structural requirements or similar needs of the company.

A common example would be the introduction of robots in a company which would result in the redundancy of employing staff, and hence, an operational requirement to dismiss them.

Pertinent to our current economic climate would be the Covid 19 virus and its devastating financial effects resulting in an economic requirement to dismiss certain persons.

i. S189 – SMALL TO MEDIUM SIZED ENTERPRISES

HOW TO DISMISS

1. SUBSTANTIVE FAIRNESS

A. THERE MUST BE INDEED AN OPERATIONAL REQUIREMENT

Whilst courts are averse to making a finding into the financial affairs of a company to ascertain whether there is indeed a need to dismiss, the court will be naïve to take it for granted that there was indeed a need to. For obvious reasons of course, as this would lead to every employer dismissing their employees under the disguise of 'operational requirements' which would in effect undermine the purpose of having an employment contract to begin with.

2. PROCEDURAL FAIRNESS

i. STEP1 - THERE MUST BE PRIOR CONSULTATION

According to s189(3), The employer must issue a written notice ONE MONTH BEFORE THE DISMISSAL, inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to-

- (a) the reasons for the proposed dismissals;

- (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;
- (d) the proposed method for selecting which employees to dismiss;
- (e) the time when, or the period during which, the dismissals are likely to take effect; the severance pay proposed;
- (f) any assistance that the employer proposes to offer to the employees likely to be dismissed;
- (g) the possibility of the future re-employment of the employees who are dismissed;
- (h) the number of employees employed by the employer; and
- (i) the number of employees that the employer has dismissed for reasons based on its operation requirements in the preceding 12 months.

The employer must consult with his employee immediately as he begins to contemplate dismissal. The courts have held that the purpose/intention must be to reach a consensus, and therefore a consultation merely to inform the employee that they are considering retrenchment and to discuss severance pay is held procedurally unfair.

NB: THERE MUST BE INDICATIONS OF A GENUINE ATTEMPT TO REACH CONSENSUS BETWEEN THE TWO PARTIES AND NOT JUST INFORMING THE EMPLOYEE OF A LOOMING DISMISSAL.

THE EMPLOYER MUST TAKE MINUTES OF THE SAID CONSULT. THE EMPLOYER CAN REQUEST PERMISSION TO RECORD THE CONSULT VIA AUDIO RECORDERS AND THEREAFTER SCRIBE IT INTO A MINUTES.

The employer must consult with:

1. Any person or group named in a collective agreement.
2. If there is no collective agreement, a workplace forum must be consulted.
3. If there is no workplace forum, the employer must consult with any registered trade union whose members are likely to be affected.
4. If there is no union, then the employees which will be likely affected must be consulted.

Purpose of consultation

Find solutions and reach an agreement to:

1. Avoid dismissals.
2. Minimize the number of dismissals.
3. Change the timing of dismissals.

4. Mitigate the adverse effects of dismissals.
5. Selection criteria
6. Severance pay.

ii. **STEP 2: EMPLOYEE MUST BE GIVEN AN OPPORTUNITY TO RESPOND**

iii. **STEP 3: EMPLOYER MUST CONSIDER THE EMPLOYEES REPRESENTATIONS AND PROVIDE FEEDBACK (REASONS WHY THEY ARE NOT ACCEPTABLE)**

iv. **STEP 4: EMPLOYERS SELECTION CRITERIA MUST BE FAIR!!!**

‘LAST IN FIRST OUT’ (LIFO) is deemed a fair selection criterion. The idea that it is the employer’s discretion on who gets dismissed is a false notion. However, employers have nevertheless been guilty at times of indirect discrimination when effecting the LIFO method.

v. **STEP 5: NOTICE OF DISMISSAL**

According to section 37 of the BCEA, (1) a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than—

(a) one week- if the employee has been employed for four weeks or less:

(b) two weeks - if the employee has been employed for more than four weeks but not more than one year:

(c) four weeks, if the employee—

(i) has been employed for one year or more: or

(ii) is a farm worker or domestic worker who has been employed for more than four weeks.

(2) A collective agreement may permit a notice period shorter than that required by subsection (1).

(3) No agreement may require or permit an employee to give a period of notice longer than that required of the employer.

(4) (a) Notice of termination of a contract of employment must be given in writing, except when it is given by an illiterate employee.

(b) If an employee who receives notice of termination is not able to understand it. The notice must be explained orally by, or on behalf of the employer to the employee in an official language the employee reasonably understands.

(5) Notice of termination of a contract of employment given by an employer must—

(a) not be given during any period of leave to which the employee is entitled in terms of Chapter Three; and

(b) not run concurrently with any period of leave to which the employee is entitled in terms of Chapter Three, except sick leave.

vi. STEP 6: SEVERANCE PAY

According to section 41 of the BCEA, an employer must pay the employee at least one week's pay for each completed year of continuous service. HOWEVER, if the employer offered an alternative role in the company to the employee which was refused, the employee is NOT entitled to severance.

According to section 38 of the BCEA, instead of giving an employee notice in terms of section 37, an employer may pay the employee the remuneration the employee would have received if the employee had worked during the notice period.

ii. LARGE SCALE DISMISSAL (S189A) – EMPLOYERS WITH MORE THAN 50 EMPLOYEES

LARGE SCALE DISMISSAL WOULD BE:

1. 10 employees, if the employer employs up to 200 employees;
2. 20 employees, if the employer employs more than 200, but not more than 300 employees;
3. 30 employees, if the employer employs more than 300, but not more THAN 400, employees.
4. 40 employees, if the employer employs more than 400, but not more than 500, employees; or
5. 50 employees if the employer employs more than 500 employees; or the number of employees that the employer contemplates dismissing, together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in (1) above.

Additional steps for LARGE ENTERPRISES

1. The parties may request the assistance of a facilitator to help out with the resolution of retrenchment issues;
2. The parties are forced to comply with the prescribed time frames (60 days moratorium) AND
3. The parties can choose to refer the matter to the Labour Court for adjudication, or to go on strike.
 - Either the employer or a representative of the majority of employees who are facing dismissal may request a facilitator, within 15 days of the employer's notice of the proposed retrenchments. If neither party requests a facilitator within the 15 days, they may still agree to request a facilitator during the consultation process.
 - The facilitator will:
 1. Chair the meeting between the parties;
 2. Decide any issues of procedure that arises in the course of meetings between the parties;
 3. Arrange any further facilitation meetings after consultation with the parties, and
 4. Direct the parties to engage in consultations without the facilitator being present.
 - The facilitator's decision is final in respect of any matter relating to the procedure for conducting the facilitation, including the date and time of

meetings. The parties may also agree that the facilitator may perform any other function.

- If a facilitator is appointed, the employer may not dismiss the employees until 60 days have lapsed from the date on which the appointment of a facilitator was requested. The employer must also still give proper notice of the retrenchments in accordance with s37(1) of the BCEA.
- If no facilitator was appointed, a minimum of 30 days must lapse before a dispute about the contemplated dismissal can be referred for conciliation to the CCMA or a bargaining council. The employer may not be dismiss employees during this period, nor may he dismiss during the conciliation period of at least 30 days. This means that the earliest that an employer would be allowed to dismiss, will be after the expiry of both the 30 day periods (after 60 days of giving notice of the contemplated large-scale dismissal). The notice must comply with s37 BCEA and s38 BCEA may also be used.

B. MISCONDUCT

One of the most exasperating aspects of Labour law, is that often employees are guilty of gross misconduct but find themselves being awarded ludicrous amounts in compensation as employers did not follow procedure.

In a fit of rage, employers irrationally dismiss such employees on the spot, only to find themselves with a costs order months later. For this reason, we urge employers to be cognizant of their actions as it may have fatal consequences.

Section 188 of the LRA regulates dismissals based on misconduct.

HOW TO DIMISS

1. SUBSTANTIVE FAIRNESS

A. Types of misconduct which would be substantively justifiable.

1. Dishonesty.
2. Alcohol and drug abuse.
3. Insubordination.
4. Absenteeism.
5. Abusive language.
6. Harassment.
7. Assault & intimidation.
8. Off-duty conduct.
9. Willful damage to property & negligence.

B. FACTORS FOR SUBSTANTIVE FAIRNESS

- Has the employee contravened a rule or standard in the workplace?
- If so, could he have been aware or reasonably aware of this rule/standard?
- Has the rule/standard been consistently applied by the employer?
- Was dismissal an appropriate sanction
- For the contravention of such rule/standard?

RULES/ STANDARDS NEED NOT BE IN WRITING. HOWEVER IT WOULD BE WISE TO HAVE A WORKPLACE POLICY.

2. PROCEDURAL FAIRNESS

- i. STEP 1: EMPLOYER MUST CONDUCT INVESTIGATION TO DETERMINE WHETHER THERE ARE GROUNDS FOR DISMISSAL (SEE SUBSTANTIVE FAIRNESS)
- ii. STEP 2: EMPLOYER MUST NOTIFY THE EMPLOYEE OF THE ALLEGATION (IN WRITING, IN FORM AND LANGUAGE UNDERSTANDABLE TO THE EMPLOYEE) (**THIS IS CONSIDERED THE FIRST WARNING**)
- iii. STEP 3: EMPLOYEE MUST BE GIVEN REASONABLE TIME TO RESPOND & THEN ALLOWED TO RESPOND.

Employee must be allowed the assistance of a trade union or co-employee.
- iv. IT IS PRUDENT TO HOST A DISCIPLINARY HEARING AND HAVING MINUTES TAKEN TO ENSURE PROCEDURAL FAIRNESS. BOTH PARTIES MUST EXPRESS THEIR VIEWS THEREIN.
- v. STEP 5: AFTER THE DISCIPLINARY HEARING IS CONCLUDED, THE EMPLOYER MUST COMMUNICATE DECISION TAKEN, AND PROVIDE THE EMPLOYEE WITH **WRITTEN NOTIFICATION** OF THE DECISION AS WELL AS THE REASONS FOR THE DECISION.
- vi. STEP 6: IF THE EMPLOYEE IS DISMISSED, THE EMPLOYER MUST REMIND HIM OF HIS RIGHTS TO REFER THE MATTER TO A BARGAINING COUNCIL OR THE CCMA.

IF THE EMPLOYEE IS PART OF A UNION, DISCIPLINE AGAINST HIM CANNOT BE INSTITUTED WITHOUT FIRST INFORMING AND CONSULTING WITH THE UNION.

C. INCAPACITY

Often referred to as the 'no-fault dismissal', incapacity is deemed as a valid ground for dismissal. It is regulated by s188 of the LRA.

TYPES OF INCAPACITY

1. POOR WORK PERFORMANCE

This is where the employee cannot do the work he is expected to because he does not comply with the required standard of performance. This where the person lacks the skills or capabilities to do the work required.

NOTE: DO NOT CONFUSE THIS WITH MISCONDUCT. MISCONDUCT IS WILLFUL!

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

1. Whether employee failed to meet a performance standard.
2. Whether employee had knowledge or could reasonably have been expected to know of the said standard.
3. Whether the employee has been given a reasonable opportunity to improve his performance and meet the requisite standard.
4. Whether dismissal is an appropriate sanction for the employee's failure to meet the standard.

EMPLOYERS ARE ENTITLED TO SET
PERFORMANCE STANDARDS –
HOWEVER, IT MUST BE VALID &
REASONABLE!

*NON ATTAINMENT OF STANDARDS
= SUBJECTIVE ENQUIRY

B. PROCEDURAL FAIRNESS

- I. STEP 1: Give employee appropriate evaluation, instruction, training, guidance, or counselling.
- II. STEP 2: Give employee a reasonable time to improve
- III. STEP 3: Investigate reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter

- IV. STEP 4: If the employee then continues to perform unsatisfactorily, he can be dismissed for poor work performance, and
- V. STEP 5: Send notice to consult to the employee.
- VI. STEP 6: Consult & allow representations from the employee.
- VII. STEP 7: During this process the employee has the right to be heard and to be assisted by a union representative or a co-employee.
- VIII. STEP 7: Send notice of dismissal at least a month before the termination date.
- IX. STEP 8: Pay lawful monies owing,

SUBSTANCE/ ALCOHOL ABUSE:

If an employee is guilty of substance/alcohol abuse = misconduct. HOWEVER, if he alleges his problem = incapacity. HENCE, he must be referred to counseling and rehabilitation rather than dismissal.

2. POOR WORK PERFORMANCE DURING PROBATION

Although the essence of probation is to determine whether the employee is capable of doing the work, he must still be treated fairly and be given a reasonable amount of time to be under probation.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

Before poor performance can be deemed poor, an employer must give the probationary employee the following assistance before a dismissal is deemed substantively fair:

- Evaluation, instruction, training, guidance or counselling to help him perform his duties.
- The employer must make it clear to the employee what the performance standard is, and where he is not meeting it.
- The employer must give the employee assistance and an opportunity to improve.
- The employer should measure the progress and give feedback.

The required assistance and the period of probation will be determined by the nature of the job.

B. PROCEDURAL FAIRNESS

- I. STEP 1: GIVE EMPLOYEE AN OPPORTUNITY TO RESPOND TO THE ALLEGATIONS
- II. STEP 2: ALLOW EMPLOYEE TO BE ASSISTED BY A UNION REPRESENTATIVE OR A CO-EMPLOYEE

3. ILL HEALTH OR INJURY

Employees must establish whether the ill-health or injury is permanent or temporary. Both physical and mental health is applicable.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

The substantive fairness rests upon the fundamental question as to whether the employee can conduct his work, and whether his job description can be adjusted to accommodate him.

B. PROCEDURAL FAIRNESS

STEP 1: DETERMINE WHETHER THE EMPLOYEE CAN CONDUCT HIS WORK

STEP 2: DETERMINE WHETHER HIS WORK CAN BE MODIFIED TO ACCOMMODATE HIS HEALTH/INJURY.

STEP 3: PROVIDE NOTICE TO CONSULT WITH EMPLOYEE

STEP 4: ALLOW EMPLOYEE TO PROVIDE RECOMMENDATIONS.

STEP 5: HAVE A MEDICAL EXPERT CONDUCT A MEDICAL REPORT ON THE EMPLOYEE

STEP 6: SHOW THAT REASONABLE STEPS WERE TAKEN TO ACCOMMODATE, AND THAT ALTERNATIVES TO DISMISSAL WAS CONSIDERED BUT PROVEN UNVIALE.

Alternatives would be for example, a reduction in the employee's salary.

STEP 7: SEND NOTICE OF DISMISSAL TO EMPLOYEE AT LEAST A MONTH BEFORE THE TERMINATION DATE.

STEP 8: PAY LAWFULLY OWING MONIES.

4. **DISABILITY**

This refers to people who have long term or recurring physical or mental impairment which substantially limits their prospects of entry into employment.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

In order to be classified as a disability it must be:

- a. Physical/ Mental
- b. Long term / recurring
- c. Substantially limit the employee's prospects.

B. PROCEDURAL FAIRNESS

I. STEP 1: PROVIDE REASONABLE ACCOMMODATION

The employer should find ways of modifying or adjusting the job of the employee to enable him to continue employment.

II. STEP 2: CONSULT WITH EMPLOYEES & TECHNICAL EXPERTS WHEN ESTABLISHING APT MEANS OF ACCOMMODATION.

- The determination of a reasonable accommodation would be influenced by the nature of the employee's impairment.
- Accommodation may be permanent or temporary.
- Will not be reasonable if prejudices the employer

III. STEP 3: IF REASONABLE ACCOMODATION CANNOT BE CONCLUDED = TERMINATION.

- Written notice must be provided to the employee detailing reasons.
- Inform the employee of disability benefits (if any)

5. **IMPOSSIBILITY OF PERFORMANCE**

This refers to a situation in which performance by either party becomes impossible. E.g. Imprisonment of the employee. However, procedure must still be followed.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

Employer must prove performance was impossible. E.g. Proof of imprisonment, or that the employee had lost their qualifications, or permit to conduct their work.

B. PROCEDURAL FAIRNESS

- 1) STEP 1: ATTEMPT TO FIND ALTERNATIVE TEMPORARY ARRANGEMENTS.
 - 2) STEP 2: NOTICE MUST BE GIVEN – EXPLAINING BOTH THE REASONS FOR IMPOSSIBILITY AS WELL AS THE REASONS WHY REASONABLE ACCOMODATION COULD NOT BE ESTABLISHED.
 - 3) STEP 3: ALLOW FOR A RESPONSE WITHIN A REASONABLE AMOUNT OF TIME.
 - 4) STEP 4: NOTICE OF DISMISSAL MUST BE GIVEN.
 - 5) STEP 5: SEVERANCE MUST BE PAID.
-

6. INCOMPATIBILITY

This is an uncommon basis for dismissal, AND IS NOT GENERALLY JUSTIFIABLE but refers to a situation where the employee doesn't 'fit in'. Either the culture of the company doesn't suit the employee or the employee's character or the company are mis-match.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

Whether the tensions and disharmony created by the employees' incompatibility could be remedied.

If NO= substantively fair to dismiss.

B. PROCEDURAL FAIRNESS

- 1) STEP 1: EMPLOYER MUST TAKE SENSIBLE, PRACTICAL AND GENIUNE STEPS TO IMPROVE THE EMPLOYEES RELATIONSHIP WITH THE WORKPLACE.

The employees should not be dismissed until their impact on the employer's enterprise had become intolerable.

- 2) STEP 2: GIVE NOTICE DETAILING REASONS FOR A PROPOSED DISMISSAL & EXPLAIN THAT STEPS WERE TAKEN TO IMPROVE BUT WERE NOT EFFECTIVE.
 - 3) STEP 3: ALLOW EMPLOYEE TO RESPOND.
 - 4) STEP 4: SEND NOTICE OF DISMISSAL.
 - 5) STEP 5: PAY ANY LAWFUL MONIES OWING.
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7. DISMISSALS AT THE BEHEST OF A 3RD PARTY

This refers to the situation where the termination of employment is at the request of a 3rd party, e.g., a client of the company.

E.g. where a client threatens to discontinue business if an employee is not dismissed as he suspects that the said employee is dishonest, fraudulent etc.

HOW TO DISMISS

A. SUBSTANTIVE FAIRNESS

1. Demand must have adequate foundation.
2. The threat of action by third party must be real and severe.
3. The employer must have no alternative but to dismiss.
4. The employer must make a reasonable attempt at dissuading the third party from acting on its threat.
5. The employer must investigate the possibility of alternatives to dismissal, in consultation with the affected employee; and
6. During the process, the employer should consider the degree of injustice that would be done to the employee if he or she was dismissed, and the blameworthiness of the employee.

B. PROCEDURAL FAIRNESS

1. STEP 1: DISUADE CLIENT FROM ACTING ON THREAT
2. STEP 2: CONSULT WITH WHITE IN REGARDS TO THE THREAT TO ASCERTAIN WHETHER THERE IS ANY TRUTH IN IT.
3. STEP 3: INVESTIGATE ALTERNATIVES TO DISMISSAL.

4. STEP 4: SHOULD THE ABOVE FAIL, SEND NOTICE OF PROPOSED DISMISSAL STATING THE ALLEGED GROUNDS.
5. STEP 5: ALLOW FOR THE EMPLOYEE TO RESPOND.
6. STEP 6: SEND NOTICE OF DISMISSAL, AT LEAST A MONTH BEFORE THE TERMINATION DATE.
7. STEP 7: PAY ANY LAWFULLY OWING MONIES.

3. CONCLUSION

Emotion can sometimes compel an employer into a hasty decision which may have costly repercussions. In moments of frustration employers tend to act in a reckless manner such as dismissing employees on the spot (summary dismissal) for poor performance or for misconduct and so forth. A further issue which aggravates the matter is that often the evidence is blaringly obvious, yet formality is still required to be followed.

For this reason, we encourage all employers against the repercussions that such conduct can lead to. Some of which include a claim for 12 months compensation payable immediately.

While following procedure may seem frustrating and lengthy. It is always wiser to, spend a little more time rather than a lot more money.

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4. LEGISLATION & REFERENCES

1. LABOUR LAW IN CONTEXT (2ND EDITION) 2017
2. LABOUR RELATIONS ACT 66 of 1995
https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf
3. BASIC CONDITIONS OF EMPLOYMENT ACT 75 of 1997
https://www.gov.za/sites/default/files/gcis_document/202002/43026rg11041gon174.pdf