

## POOR PERFORMANCE VERSUS MISCONDUCT

Employers in workplaces have to deal with poor performance, and misconduct. It is therefore imperative that they clearly understand the distinction between the two issues otherwise their actions/decisions could have far reaching implications.

There is a distinction between poor work performance and misconduct and that distinction must be clearly understood by all the parties involved. Hence the approaches for dealing with these two issues are totally different from each other. According to André Classen, poor performance looks at whether the job, which the employee is being paid for, is being done properly. Misconduct occurs when a rule is broken or some other unacceptable behaviour happens (André Classen). He further regards misconduct as being all about behaviour or conduct of the employee on the job in relation to company rules, policies and procedures.

Poor performance can result from role overload or unclear objectives or unrealistic targets (Institute for Employment Studies). Poor performance must not be confused with negligence, incapacity or misconduct. There are three basic types of poor performance, according to Work Info:

- 1) Unsatisfactory work content – in terms of quality, quantity, etc.;
- 2) Breach of work practices and rules – such as breaching occupational health and safety requirements, excessive absenteeism, theft, harassment of other employees, etc.; and
- 3) Employees' personal problems.

In fact, every job has a performance standard which is laid down by the employer and that constitutes an employer's prerogative. Therefore, the employer sets performance standards and established work targets (which nowadays is done in conjunction with the employee). Employees are expected to meet the set performance standards and targets. Therefore, the employer must ensure that the employee is fully aware of the job standard; and that the employee is fully trained to do the job. It is of utmost importance therefore to note that if poor performance is detected, the employer must thoroughly investigate the incident (of poor performance); meet with the employee to discuss the issue (of poor performance), provide counselling for the employee, and give the employee reasonable period to improve his/her performance.

The employer's Employee Health and Wellness Components can provide a professional service in that regard if the poor performance relates to issues other than training and skills gaps. Such will assist the employer to establish the causes thereof (of poor performance) and thus identify appropriate interventions. Identified interventions must be intended to assist the employee to meet the required performance standard before resorting to dismissal.

There is available case law in relation to dealing with poor performance. For instance, in **Somyo v Ross Poultry Breeders (PTY) Ltd**, the Court held that 'an employer who is concerned about poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance' (also refer to **Craig v Rubtec (Pty) Ltd t/a Guys and Girls (1992) 1 LCD 29 (IC)**; **James v Waltham Holy Cross UDC [1973] IRLR 202**).

The significance of the process (of engaging with the employee) lies in the fact that the employer must identify gaps and make every effort to assist the employee in

closing those gas. However, the employee may be represented by a union representative of his/her choice in a meeting with the employer which is intended to address poor work performance. If the process does not yield positive results, the alternative is the termination of the employee's services; the employer must follow a correct and fair procedure.

Further, in **Robinson and Sun Couriers (Pty) Ltd (2003) 23 ILJ 655 (CCMA)**, Commissioner Niehouse, drew distinction between a misconduct enquiry and a poor performance enquiry. He stressed that enquiry into poor performance does not require any investigation into the issue of culpability. He went on to say that the employer has an obligation to establish the reasons for the failure to perform. He also indicated that such will help the employer to distinguish between misconduct type of failures and poor performance type of failures.

Referring to counselling sessions, Commissioner Niehouse asserted that addressing poor performance involves providing the counselling sessions during which it would be determined whether or not poor performance is due to the factors beyond the employee's control. (Refer also to **Robinson and Sun Couriers (Pty) Ltd (2003) 23 ILJ 655 (CCMA)**, **Gosstelov v Datalor Holdings (Pty) Ltd t/a Corporate Copilith (1993) 14 ILJ 171 (IC)**, **Marion Fouche in Bezuidenhout, Stanley and TR Business Systems, Burton v HWH & Associates (Pty) Ltd (unreported-NH 13/2/5299 (IC)**, and many more).

However, the approach differs when poor performance relates to a managerial employee. By virtue of his/her position, he/she (managerial employee) ought to know if he/she is not meeting the required performance standard. His/her knowledge and experience qualify him/her to judge for him/herself whether he/she is meeting the standards set by the employer. A managerial employee is like a pilot whose job demands high degree of professional skill where a small departure from the required standard could have costly/disastrous consequences (refer to **New Forest Farming CC v Cachalia & others (2003) 24 (LC)**; **Department of Home Affairs and General Public Service Sectoral Bargaining Council Z Mdladla and KR Malatji (2013) (LC)**; **Palace Engineering (Pty) Ltd and Thulani Ngcobo, Commissioner Shaan Govender N.O., and Commissioner for Conciliation Mediation and Arbitration (2014) [LAC]**; **Stevenson v Sterns Jewellers (Pty) Limited (1986) 7 ILJ 318 (IC) at 324F-G**; **Blue Circle Materials Limited v Haskins (1992) 1 ICD 6 (LAC)**). In such cases, departure from the required standard could constitute misconduct, requiring appropriate proceedings to be instituted in terms of the employer's prevailing prescripts/disciplinary code and procedure.

A common approach from relevant case law is that the employer has the obligation to inform the employee of any deficiencies in his/her performance and to assist in remedying the shortcomings. If the situation does not improve, alternatives to dismissal must be discussed with the employee and only when the employer has done all that is reasonably expected of him, that the employee can be dismissed.

In conclusion, it is of utmost importance, therefore, that managers and supervisors clearly understand the distinction between poor performance and misconduct in order to be able to deal appropriately with the problem as and when it arises (refer to **Sun Couriers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2002) 23 ILJ (LC)**).

*(An Opinion from the Labour Desk  
2<sup>nd</sup> Quarter employee relations article for 2017/18 Financial Year)*