



AEQUITATE
MEDIATION & DISPUTE RESOLUTION SPECIALISTS

The Code of Good Practice: Dismissal

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INTRODUCTION

The **Code of Good Practice: Dismissal** is the foundational framework under the **Labour Relations Act (LRA), 1995**, guiding fair procedures and reasons for dismissals

It provides the standards employers, employees, and tribunals must follow to ensure that dismissals are both **substantively and procedurally fair**

Introduction

The **new 2025 Code**, which came into effect on **4 September 2025**, repeals:

Schedule 8 of the LRA (the previous Code of Good Practice: Dismissal), and

The **1999 Code of Good Practice: Dismissal Based on Operational Requirements**.

Introduction



The 2025 Code aims to refine clarity, promote fairness, and modernize dismissal practices to reflect evolving workplace realities



It represents a consolidation of fair dismissal requirements for all recognised forms of dismissals

Misconduct

Incapacity (poor performance, ill health, incompatibility, imprisonment)

Operational requirements (retrenchment)



The new Code is a breath of fresh air and provides much needed relief to small and medium enterprises particularly related to compliance with the burdensome procedural requirements which plagued the former Code

Definition of small business



No definition in
Code, LRA or BCEA

EEA < 50 employees
exempt from
reporting & planning

Purpose and Core Principles of the Code

Promotes **employment justice and efficiency** in the workplace

Balances the **rights of employees to fair treatment** with the **employer's right to discipline and performance**

Provides **guidance on the interpretation of the LRA** regarding dismissals

Foundational Principles

Substantive fairness: a valid and justifiable reason for dismissal

Procedural fairness: a fair process must be followed



Foundational Principles

- **Flexibility**

small businesses may deviate from the Code's procedures if justified by context

- **Progressive discipline**

dismissal is the last resort, except for serious misconduct

- **Consistency**

similar cases should result in similar sanctions unless distinguishable circumstances exist

Fair Reasons for Dismissal


Consistent with the LRA, the Code recognises **three legitimate grounds** for dismissal under section 188 of the LRA:

A dismissal will be **automatically unfair** if it violates fundamental employee rights under section 187 of the LRA — e.g., for pregnancy, union activity, or discrimination

Ground	Description	Example
Conduct	Employee behaviour breaches workplace standards or rules.	Theft, dishonesty, assault, insubordination.
Capacity	Employee lacks ability or health to perform work.	Poor performance or illness injury
Operational Requirements	Dismissal due to economic, structural or technological needs	Retrenchment



Foundational Principles procedure

- Purpose to ensure genuine opportunity for reflection
 - Dialogue means a conversation
(Item 11 of Code)
- 

Procedural Fairness: The Cornerstone

Employers must **inform the employee of allegations** in understandable language

The employee must have **adequate time to prepare** (minimum two working days)

The employee may be **assisted by a union representative or colleague**

A decision must be **communicated clearly**, preferably in writing

Informal vs Formal Procedures

Minor misconduct →
informal corrective action
(counselling, verbal
warning)

Serious or repeated
misconduct → formal
disciplinary enquiry

The Code promotes
**decriminalisation of
disciplinary hearings** —
they are **not trials**, but
opportunities for fair
dialogue



Misconduct

Progressive Discipline

The Code reaffirms **corrective discipline** over punishment:

- Minor offences → warnings or counselling
- Serious/repeated offences → final warnings or dismissal

When Dismissal Is Justified?

Dismissal may be appropriate **only when continued employment is intolerable**, considering:

- The gravity of the misconduct
- The employee's record and length of service
- The nature of the job
- Circumstances of the violation

Examples of serious misconduct:

- Gross dishonesty or theft
- Wilful damage to property
- Endangering safety of others
- Physical assault
- Gross insubordination

Consistency in Application

While consistency is important, the **2025 Code clarifies** that inconsistency does **not automatically invalidate** a dismissal

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it must be judged within context

Dismissal and Industrial Action

Participation in an **unprotected strike** constitutes misconduct, but dismissal must still be **substantively and procedurally fair**.

Employers must:



Consult the union or representatives



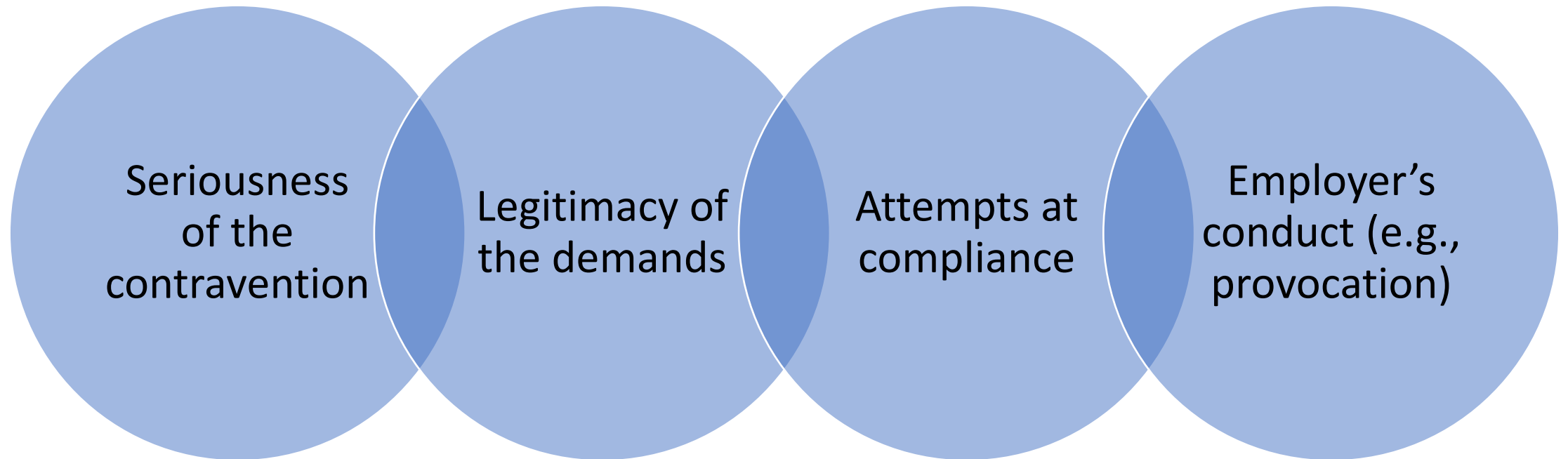
Issue a clear ultimatum outlining expected action and consequences



Allow **reasonable time** for compliance

Dismissal and Industrial Action

Factors to assess fairness





Probation

Purpose and Duration

Probation allows employers to assess:

- **Performance, suitability, and conduct** of new employees.
- Duration must be **reasonable**, depending on the role and time needed to evaluate suitability.

New Developments in 2025 Code

- **Expanded purpose:** now includes *suitability for employment* (not just performance).
- Employers can terminate during probation for **misconduct or incompatibility**, not only poor performance.
- Probation **cannot** be used to **avoid permanent employment**.
- Less stringent test for fairness — dismissals during probation may rely on “less compelling reasons” than post-probation dismissals

Incapacity | Poor work performance

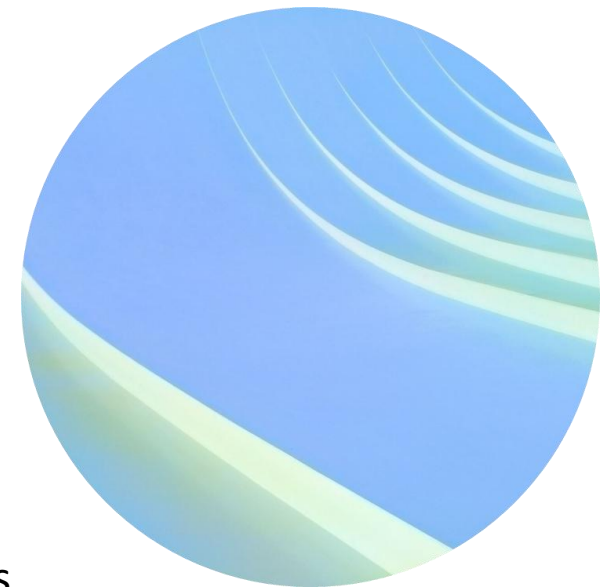
Poor Work Performance

Employers must:

- Provide **training, guidance, and counselling**
- Allow a **reasonable period** for improvement
- Investigate causes of poor performance
- Offer **alternatives to dismissal** where possible

However, **warnings are not always necessary** for:

- **Senior/managerial employees**, or
- **Highly skilled professionals** whose poor performance has serious consequences



How are incapacity and incompatibility connected?

- While incapacity and incompatibility are distinct concepts in employment law, the Code explicitly places incompatibility under the broader umbrella of incapacity. Item 21(7) of the Code recognises that an employee's inability to work harmoniously with colleagues or align with the employer's culture can now constitute a form of incapacity

Can incompatibility lead to dismissal?

In terms of the Code, incompatibility may justify dismissal if it is proven that the issue is severe enough to cause an irretrievable breakdown in the working relationship. However, this dismissal must meet the same procedural and substantive fairness requirements as other forms of incapacity-related dismissals.

Incapacity : Ill Health or Injury

Employers should investigate:

- Extent and duration of incapacity
- Alternatives (light duty, reassignment, adaptation)
- Provide opportunity for employee input
- **Higher duty of accommodation** applies if the illness/injury is work-related

Incompatibility and Other Forms of Incapacity

The 2025 Code now formally includes previously contentions reasons such as:

- **Imprisonment**
- **Incompatibility** (inability to work harmoniously or align with workplace culture) as valid grounds for dismissal under incapacity, provided due process is followed



Dismissals for Operational Requirements (Retrenchment)

Integration into the Code

For the first time, retrenchment guidelines are **merged into the Dismissal Code**, replacing the 1999 Retrenchment Code

Definition

Operational requirements refer to dismissals based on the **employer's economic, technological, or structural needs**

Key Procedural Requirements

Employers must consult employees/unions and issue a **Section 189(3) notice**, which should cover:

Information Required	Description
Reasons	Business or economic justification for retrenchment
Alternatives	What options were explored and why rejected
Selection Criteria	Objective and fair criteria used to select employees
Severance Pay	Amount proposed
Assistance	Support offered to retrenched workers
Timing	When retrenchments will occur
Re-employment	Policies regarding re-hiring affected employees

Employers with **50+ employees** must also disclose prior retrenchment statistics (section 189A procedures apply)

Application to Small Businesses

The 2025 Code explicitly recognises that **small enterprises** may lack HR departments or legal expertise.

Accordingly:

- May follow **simpler, less formal procedures**
- Fairness is assessed in light of **contextual limitations**
- Tribunals must account for **practical constraints** faced by small businesses



Record-Keeping and Accountability

Employers must retain records



The nature of transgressions



The actions taken



The reasons for those actions



Such documentation is crucial for
CCMA or Labour Court disputes



Summary of Key 2025 Updates

Area	Previous Code (Schedule 8)	2025 Code Update
Consolidation	Two separate codes (Dismissal & Retrenchment)	Single comprehensive code
Small businesses	General mention	Explicit recognition and flexibility
Probation	Limited to performance	Expanded to include suitability and misconduct
Incapacity	Ill health and poor performance	Now includes imprisonment and incompatibility
Unprotected strikes	Limited procedural guidance	Expanded steps aligned with case law
Operational requirements	Separate code (1999)	Integrated with standardised notice format
Progressive discipline	Recommended	Reaffirmed and expanded to emphasise dialogue
Fairness test	Based on Schedule 8	Now explicitly tied to case law and procedural proportionality

Conclusion

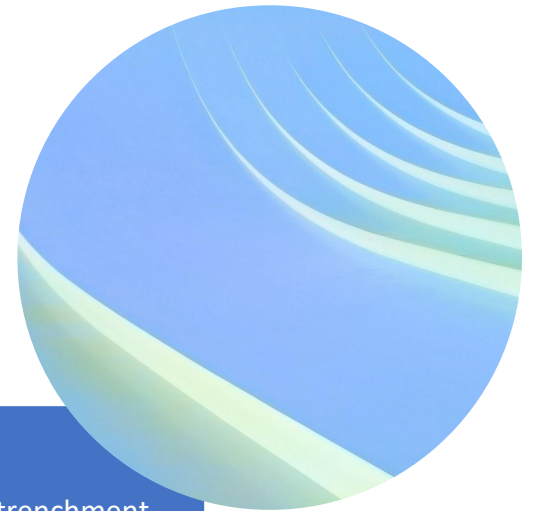
The **2025 Code of Good Practice: Dismissal** represents an evolution, not a revolution, in South African labour law.

It modernises the framework for fair dismissal by:

- Recognising workplace diversity and size differences
- Integrating all dismissal forms into one succinct Code
- Promoting flexibility, proportionality, and fairness

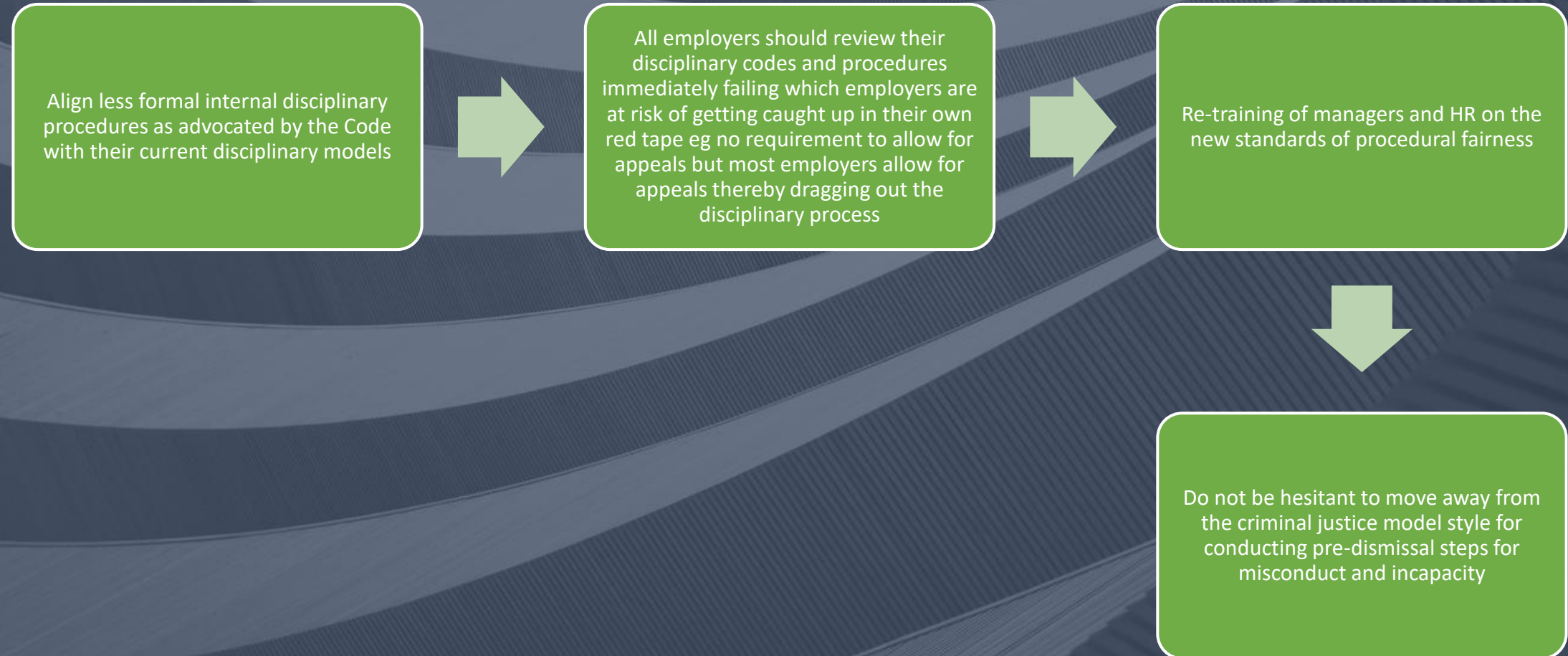
Employers must:

- Align internal disciplinary and retrenchment policies with the new Code
- Ensure documentation and consultation practices reflect procedural fairness
- Train HR and management personnel on updated requirements



Conclusion

What employers must do now?





THANK YOU

Q & A

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MOONEY FORD ATTORNEYS

