



MANAGING OR FIRING POOR PERFORMERS

Employers are, generally speaking, familiar with disciplinary procedures and find it easier to terminate services for misconduct than for incapacity. When the issue involves performance or ill health (incapacity) many employers are at a loss about how to manage the problem, writes Professor Barney Jordaan. These concerns often cause employers to try to short-circuit the counseling process required for incapacity dismissals by camouflaging the reason for dismissal as one relating to its operational requirements, he says. In a typical scenario, the employer realises there is a need to restructure his business and that this provides an opportunity to get rid of some non-achievers.

If the employees concerned have the shortest service or the least skills of all affected staff, the purpose could be achieved. However, what does the employer do if the employees do not qualify for retrenchment on these grounds? It is at such times that the results of poor management of non-achievers become glaringly obvious, writes Jordaan.

The point of departure is that an employer cannot use poor performance as the sole or even the primary criterion for retrenchment, as this will be regarded as an abuse of the retrenchment process, he advises. Performance can, however, be used as an additional but secondary criterion for selecting employees for retrenchment, as part of a "basket" of objective criteria, including length of service, skills or compliance with an employment equity plan, for example.

In such a case, however, the employer must provide proof of the employee's under-performance and should already have commenced with a counseling process to address the under-performance. The employer should also have been consistent in applying performance standards.

Equally risky is the strategy often used to ask employees to apply for "new" positions and then to turn down the applications of those perceived to be non-achievers, says Jordaan. An employee cannot lawfully be expected to re-apply for a position that is substantially the same as the position he currently occupies. Whether or not the position is substantially similar is always a factual question.

Jordaan says it is a good idea to agree on a benchmark with employees or their trade union: for example that a position will be considered to be new if more than 30 percent of its content changes. If the new position is substantially different, the employer is in principle at liberty to invite applications and to select new incumbents.

Past performance could be used together with other objective criteria such as skills or proven potential, but, again, in such instances there should be proof of under-performance, a record of counseling and consistent application of performance criteria.

If the new position is not substantially different, the employer will either have to enter into an agreement with the relevant employee to terminate the contract or will have to appoint the employee and thereafter properly manage his performance.

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