

CODE OF GOOD PRACTICE DISMISSAL: 2025 - A GUIDE FOR EMPLOYERS



On 4 September 2025, South Africa ushered in a new era of employment law with the commencement of the Code of Good Practice: Dismissal (“the Code”). This Code consolidates, replaces and updates the existing guidelines previously contained in Schedule 8 of the Labour Relations Act, 1995 (LRA) and the Code of Good Practice on Dismissal Based on Operational Requirements (Department of Employment and Labour, 2025).

While the essence of fairness in dismissals remains unchanged, the 2025 Code codifies key principles previously developed by courts, introduces clarifications, and recognises practical realities faced by employers.

It explicitly acknowledges the different capacities of small businesses, extends probation to include “suitability for employment,” and formally recognises incompatibility as a ground for dismissal under incapacity.

The Code is a mere guideline and does not create separate employment rights, and is subject to the substantive law and collective agreements regulating the aspects provided for in the Code.

This article examines the major changes, highlights the practical implications, and provides guidance to employers and stakeholders on the effective implementation of these provisions.

STRUCTURAL REORGANISATION AND CONSOLIDATION FOR DISMISSALS

A Unified Framework with the New Code of Good Practice

Previously, dismissal guidelines were split between two documents: Schedule 8 (general dismissal principles) and the separate retrenchment code.

The new Code brings these strands together into a single framework.

This structural change is not merely administrative; it reflects a policy preference for a coherent, accessible reference point for all stakeholders (*Department of Employment and Labour, 2025*).

Small Business Flexibility

The Code explicitly acknowledges that small enterprises cannot reasonably be expected to engage in lengthy or formal dismissal processes, given their limited human resource capacity.

Accordingly, simpler, less formal procedures may be appropriate, provided that the fundamental principles of fairness are respected.

This development provides relief to smaller employers who often face disproportionate compliance burdens, while still ensuring that employees’ rights are safeguarded.

MISCONDUCT DISMISSALS

Proportionality and Progressive Discipline

- o The Code reiterates that **dismissal for misconduct must be a last resort**. Employers are encouraged to use progressive discipline, including counselling, guidance or warnings, unless the misconduct is so serious that it renders continued employment intolerable.
- o Notably, **formal disciplinary hearings are not prescribed as mandatory**. Instead, employers are required to ensure that employees have a reasonable opportunity to respond to allegations.
- o This reflects the principle that procedural fairness need not be modelled on adversarial criminal trials, but rather on genuine dialogue.

Representation and Language

- o The Code emphasises that, where possible, employees should be permitted representation (by a trade union representative or co-employee) and that proceedings should be conducted in a language the employee understands.

Consistency and Deviations

- o Employers are reminded to apply rules consistently, but the Code acknowledges that inconsistency does not automatically render dismissal unfair where the nature of the misconduct makes continued employment intolerable.
- o Deviations from standard procedures are permitted in exceptional cases, but the employer bears the burden of justification.
- o **Implication:** Employers may adopt flexible processes, but they must document and justify any departure from the “normal” procedure to withstand scrutiny.

INCAPACITY DISMISSALS WITHIN THE CODE OF GOOD PRACTICE

Poor Work Performance

The Code confirms that employees who fall short of performance standards must be given--

- o a reasonable opportunity to improve;
- o appropriate training, guidance or counselling; and
- o an opportunity to respond to allegations before dismissal.

A significant shift is the codification of case law confirming that prior warning of dismissal is not always necessary. This applies particularly to--

- o senior managers, whose experience equips them to judge their own performance; and
- o highly specialised employees, where underperformance may have severe consequences.

This provides clarity to employers, but also increases the risk of disputes where the line between “specialised” and “ordinary” work is blurred.

Probation

- o Previously, probation was confined to assessing performance.
- o The new Code expands its purpose to include “**suitability for employment**”, explicitly covering aspects such as incompatibility and even misconduct during probation (*Department of Employment and Labour, 2025*).
- o Employers must still ensure fairness by allowing the probationer to make representations before dismissal or extension of probation.
- o However, the threshold for justification of dismissal during probation remains lower than for permanent employees.

III Health, Injury, and Other Incapacity

The Code reiterates the duty on employers to investigate incapacity caused by ill health or injury, consider alternatives, and afford employees a chance to respond.

However, it introduces two significant clarifications:

- o **Imprisonment** is expressly recognised as a valid ground of incapacity; and
- o **Incompatibility** is codified as incapacity, where an employee cannot harmonise with colleagues or the organisational culture.

This formal recognition of incompatibility provides employers with a legitimate avenue for addressing entrenched interpersonal conflicts.

However, it also creates potential risks of abuse, requiring careful documentation, attempts at mediation, and procedural fairness.

OPERATIONAL REQUIREMENTS FOR RETRENCHMENTS

Integrated Approach to Dismissals

By incorporating retrenchment into the general dismissal Code, the law now offers a unified framework.

The consultation process prescribed under *section 189 of the LRA* is reinforced by the Code, which prescribes in detail the content of retrenchment notices (*Department of Employment and Labour, 2025*).

Disclosure and Consultation

Employers are required to disclose and consult on--

- the reasons for retrenchment;
- alternatives considered;
- numbers and categories of employees affected;
- proposed selection criteria;
- severance pay;
- assistance to affected employees; and
- prospects of future re-employment.

For employers with more than 50 employees, the notice must also include the number of employees retrenched in the preceding 12 months.

Selection Criteria

Selection criteria must be fair and objective, with examples including length of service, retention of skills, and qualifications. This reflects established jurisprudence but gives clearer codified guidance.

Preference for Re-employment

- Employers are encouraged to give preference to retrenched employees when comparable positions become available in future.
- **Implication:** Employers must ensure that their retrenchment templates, policies and consultation practices align with the Code's requirements, as procedural lapses are a frequent source of litigation.

COMPARATIVE OVERVIEW

The following table outlines the primary differences between the previous regulatory framework and the 2025 Dismissal Code, highlighting how employment practices and obligations have evolved:

TOPIC	PREVIOUS POSITION	NEW CODE (2025)
Small businesses	No special recognition	Explicit flexibility for simplified procedures
Probation	Focused on performance only	Extended to suitability, incompatibility, and misconduct
Performance dismissals	Prior warning generally required	Warning not always required for senior or specialised employees
Incompatibility	Not codified	Formally recognised as incapacity
Imprisonment	Recognised only in case law	Codified as incapacity
Disciplinary procedure	Formal hearings assumed	Informal processes permitted; deviations allowed if justified
Retrenchment	Separate retrenchment code	Fully integrated into dismissal Code

Download a quick reference sheet comparing the previous framework with the *Code of Good Practice 2025 - Dismissal & Employer implications*.

WHAT ARE THE IMPLICATIONS OF THE NEW CODE OF GOOD PRACTICE FOR EMPLOYERS?

Risks

- **Inconsistency:** Flexibility may lead to unequal treatment if processes are not standardised.
- **Incompatibility dismissals:** Potential misuse as a proxy for unfair discrimination.
- **Retrenchment disputes:** More stringent disclosure requirements increase litigation risk for non-compliance.

Benefits

- **Clarity:** Codification of case law reduces uncertainty.
- **Efficiency:** Flexibility for small businesses and informal resolution of minor misconduct promotes cost-effective dispute resolution.
- **Workplace harmony:** Recognition of incompatibility provides a structured mechanism for addressing relational breakdowns.

Practical Steps

- **Audit and update policies:** Align disciplinary and retrenchment procedures with the new Code.
- **Train managers:** Ensure understanding of when informal processes are appropriate, and when warnings are unnecessary.
- **Strengthen documentation:** Keep records of investigations, consultations and reasons for deviation from formal procedures.
- **Embed employee dialogue:** Guarantee representation and language accessibility.
- **Retrenchment templates:** Incorporate prescribed notice content and objective selection criteria.
- **Mediation processes:** Develop mechanisms for addressing incompatibility fairly before resorting to dismissal.

CONCLUSION

The 2025 Code of Good Practice: Dismissal represents an evolution, not a revolution. It codifies the nuanced jurisprudence that has shaped South African labour law over three decades, while introducing pragmatic reforms that reflect the realities of modern workplaces.

For employers, the challenge lies in balancing the flexibility offered by the Code with the obligation to ensure fairness, consistency, and procedural integrity. Proper implementation will not only minimise litigation risk but also enhance trust and stability in the workplace.

*SERR Synergy assists employers and stakeholders with the required processes and procedures to **ensure compliance with labour legislation** and effectively manage employment risks, including conducting on-site disciplinary and poor work performance inquiries and dispute resolution.*

About the Author: Casper Willemse is an admitted attorney and Labour Legal Advisor at SERR Synergy, specialising in employment law and dispute resolution. Drawing on extensive litigation experience and a strong foundation in alternative dispute resolution, he provides strategic legal guidance on complex workplace and regulatory matters.

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