



Comparing apples to oranges: consistency and workplace sanctions

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The consistency principle requires that employers impose consistent sanctions on employees who are found guilty of the same misconduct. Item 3(6) of Schedule 8 of the Code of Good Practice: Dismissal (Code) provides that:

“The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration”.

The issue of consistency was at the heart of the recent case of *Government Printing Works v Mathala N.O. and Others* (JR583/14) [2016] ZALCJHB 358 (31 August 2016). In this case, the employee, Singh, alleged that his dismissal was substantively unfair on the basis that other employees had committed the same misconduct as he had, but were not dismissed whereas he was.

Singh applied for a position with the employer which required the applicant for the position to have a Matric qualification. After conducting a verification process, the employer discovered discrepancies with the Matric certificate that Singh had submitted. In particular, the name on the certificate was different, as were the symbols he received for various subjects. When questioned, Singh claimed that his original certificate was lost whilst he was relocating, and that the certified Matric certificate in the employer's possession had subsequently been given to him by the South African Qualifications Authority. The employer did not accept this explanation, and charged Singh with ‘intentional misrepresentation’ for submitting a fraudulent Matric certificate with illegally altered passing symbols, and alternatively with ‘forgery’ for submitting a forged Matric certificate. Singh was dismissed on the first charge of “intentional misrepresentation” after a disciplinary hearing was held. He challenged the fairness of his dismissal.

At the arbitration proceedings, the commissioner was, amongst other things, required to decide on the issue of consistency. Singh alleged that he was treated inconsistently, and referred to another employee (namely a man named ‘Moeketsi’), who he alleged had committed a similar misconduct but was not dismissed. If an employee alleges inconsistency, that employee bears the onus of proving the employer's inconsistent application of rules and/or sanctions. The employer's evidence was that Moeketsi had applied for a position which required a ‘Standard 10’ qualification. Moeketsi had filled in his application by hand, and had submitted that he had failed the Standard 10 examinations in 1993, but had passed two subjects in the Senior Certificate (or Matric) examinations in 1995. Moeketsi submitted documents in support of his application. The commissioner found that Singh's dismissal was procedurally fair but substantively unfair.

The employer took the award on review to the Labour Court (Court).

The Court found that Singh's and Moeketsi's situations were different. Moeketsi had mistakenly and in good faith believed that passing the two subjects in 1995 meant that he had received his Matric qualification. When the employer was uncertain as to whether he had in fact acquired it or not, and had asked for it but not received it, the employer discussed the situation with Moeketsi and demoted him to a position that required a Standard 8 qualification only. Further, Moeketsi had not submitted fraudulent or forged documentation. In contrast, Singh knowingly and intentionally submitted fraudulent and forged documentation in support of his application, and when questioned on it presented contradictory versions regarding the authenticity of the documents.

The Court held that Singh's own witness was unable to convincingly provide instances where the employer has behaved inconsistently, and, after having alleged the inconsistency, Singh was unable to prove inconsistency. The Court referred to previous authority, including the case of *Southern Sun Hotel Interests (Pty) Ltd v CCMA & Others* [2009] 11 BLLR 1128 (LC), which stated:

“(An) inconsistency claim will fail where (the) Employer is able to differentiate between Employees who committed similar transgressions on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors”.

The Court further held that:

“Even in cases that are similar, it must be expected that there will (i) always be some inherent variances that (ii) are random, (iii) affecting different employees, and (iv) will determine different assessment and outcomes. It is certain though, that the gravity of the offence is the grandest factor causing the variances, and must always be scrutinised with greater care”.

The Court granted the review and Singh's dismissal was found to have been substantively fair in the circumstances.

The importance of this case is twofold: firstly, an employee who alleges inconsistency must lay a basis to support his allegation. He must for example provide the names of the employees as well as the circumstances of their situations. In this case Singh failed to prove inconsistency, and the Court reviewed the award. Secondly, the employee must use an adequate comparator when alleging inconsistency, which means that the situations must be the same or similar enough to warrant such comparison and that the sanction be the same.

SOURCE: <http://www.labourguide.co.za/most-recent/2378-comparing-apples-to-oranges-consistency-and-workplace-sanctions>

Probation

Probation is still alive and well – and it is legal, contrary to what some apparently believe. A probationary clause in the employment contract, and not a fixed term contract, is the appropriate way to “try out” a new employee.

A probationary employee is newly employed on a conditional employment contract – to evaluate the employee's work performance during the probationary period to ascertain if he/she is able to perform the work at the required standard, before confirming the appointment.

Probation is dealt with in terms of the Code of Good Practice – Dismissal, Schedule 8 to the Labour Relations Act.

Note:

- Probation as regulated in terms of the LRA only applies to newly hired employees – not employees who are promoted on a trial basis.
- Probation is not compulsory – the employer can decide if it is necessary when appointing an employee.
- Statutory probation and the applicable requirements, period, etc. must be agreed upon up front in the contract of employment.
- There is no prescribed probation period – the only requirement is that it must be “reasonable” and it depends on the nature of the job.
- The probationary status of an employee is only applicable to issues of work performance (competence) – it has no relevance to misconduct perpetrated by the employee during probation, nor can it be an easy way out for the employer on the basis of an arbitrary issue concerning the employee.

All issues other than work performance (competence) must be dealt with in the same way as with any permanent employee. A probationary employee is still entitled to protection by labour law.

Probation also does however also not mean that the employer can fire the probationer “at will” if it is not satisfied with his/her performance. There is a process to follow and legal requirements to be met. The dismissal must be substantively and procedurally fair.

The guidelines for dismissal for poor work performance (in general) are set out in the Code as follows:

“Any person determining whether a dismissal for poor work performance is unfair should consider-

- whether or not the employee failed to meet a performance standard; and
- if the employee did not meet a required performance standard whether or not-
 - the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - the employee was given a fair opportunity to meet the required performance standard; and
 - dismissal was an appropriate sanction for not meeting the required performance standard.”





Strategies for Managing Job Stress

While many of the methods of preventing job stress need to be developed and supported by the organization, there are things that workers can do to help you better manage job stress.

Here are 10 tips for dealing with the stress from your job:

1. Put it in perspective. Jobs are disposable. Your friends, families, and health are not. If your employer expects too much of you, and it's starting to take its toll on you, start looking for a new job/new employer.
2. Modify your job situation. If you really like your employer, but the job has become too stressful (or too boring), ask about tailoring your job to your skills. And if you got promoted into a more stressful position that you just are not able to handle, ask about a lateral transfer — or even a transfer back to your old job (if that's what you want).
3. Get time away. If you feel the stress building, take a break. Walk away from the situation, perhaps walking around the block, sitting on a park bench, taking in a little meditative time. Exercise does wonders for the psyche. But even just finding a quiet place and listening to your iPod can reduce stress.
4. Fight through the clutter. Taking the time to organization your desk or workspace can help ease the sense of losing control that comes from too much clutter. Keeping a to-do list — and then crossing things off it — also helps.
5. Talk it out. Sometimes the best stress-reducer is simply sharing your stress with someone close to you. The act of talking it out — and getting support and empathy from someone else — is often an excellent way of blowing of steam and reducing stress. Have a support system of trusted people.
6. Cultivate allies at work. Just knowing you have one or more co-workers who are willing to assist you in times of stress will reduce your stress level. Just remember to reciprocate and help them when they are in need.
7. Find humor in the situation. When you — or the people around you — start taking things too seriously, find a way to break through with laughter. Share a joke or funny story.
8. Have realistic expectations. While Americans are working longer hours, we can still only fit so much work into one day. Having unrealistic expectations for what you can accomplish sets you up for failure — and increased stress.
9. Nobody is perfect. If you are one of those types that obsess over every detail and micromanage to make sure "everything is perfect," you need to stop. Change your motto to performing your best, and leave perfection to the gods.
10. Maintain a positive attitude (and avoid those without one). Negativism sucks the energy and motivation out of any situation, so avoid it whenever possible. Instead, develop a positive attitude — and learn to reward yourself for little accomplishments (even if no one else does).

Final Thoughts on Dealing With Job Stress

Okay, so it's a cliché, but your health is everything. You need to take care of yourself, and no job, customer, or boss is worth putting yourself at risk. Find a way out through one or more of our 10 strategies. Take control of your situation — and fix it — and you will have better mental and physical health, as well as better relationships with the people around you.

SOURCE <https://www.livecareer.com/quintessential/managing-job-stress>

Probation [continued]

A probationer's performance must be monitored continuously from commencement of employment with these guidelines in mind, although reasons for dismissal related to probation may be less compelling than would be required for the poor performance (incapacity) dismissal of a permanent employee who had already completed probation or who had been working for the employer for some time.

A decision at the end of the probationary period not to appoint an employee, amounts to a dismissal. The employer must therefore be able to prove that all of the requirements in the Schedule have been met in order to succeed against a challenge of unfair dismissal relating to probation. The decision to dismiss an employee for unsuccessful probation must be supported by records so that the employer is able to justify its decision. The employer is also obliged to consider other ways, short of dismissal, to remedy the matter.

Line management must therefore actively manage the probationary period and address performance problems during probation by way of continuous evaluation, counselling, instruction, training and guidance — and pointing out to the employee in which areas he/she is not competent. The employee must also be given an opportunity to state what he/she thinks the cause of the non-performance is and how this could be addressed.

In practice, this means that the employer must ensure that line managers and supervisors are aware of these legal requirements and that they should keep detailed written records and minutes (a paper trail) of -

- meetings with the employee (where the employee may have the assistance of a co-worker), or even informal mentoring sessions or on-the-job training and coaching,
- solutions decided upon between the parties to address mistakes / performance,
- reasonable deadlines given for improvement, and
- the result of the measures taken for the employee to attain performance at the required standard.

Note that the employer should not be looking for some improvement in the employee's performance, but whether indeed the employee has been able to reach the required standard of performance during, or by the end of, the probation period.

The more senior the probationary employee is; or if it is an employee employed as a professional where certain acquired skills and competencies can be expected, the onus on the employer to provide assistance / training / etc. is less onerous.

The probationary period could be extended to further assess the employee's performance, but this should only be done in exceptional circumstances, and only for reasons relating to probation, such as where the employee has potential but the employer is not yet sure if the employee has resolved all his/her performance issues. It should not be done because the line manager has failed to properly manage the probation in the first place.

The employee must be given the opportunity to make representations, with the assistance of a co-worker / shop steward, before extending the probation period or before dismissing the employee,

The employee must also be advised of their rights to refer the matter to the CCMA / Bargaining Council.

SOURCE <http://www.labourguide.co.za/most-recent/2377-probation>

