

REASONS AND PROCEDURES FOR THE TERMINATION OF EMPLOYMENT DUE TO POOR PERFORMANCE



Poor work performance generally falls under incapacity as provided under Rule 15(1) of the Employment and Labour Relations, (Code of Good Practice) G.N No. 42 of 2007 which states that, an employee's incapacity may be due to ill health, injury, or poor work performance.

An employee has the responsibility to reach and maintain the employer's work performance standards, in terms of quantity and quality.

Whether stated in the employment contract, the employee undertakes to perform according to the reasonable, lawful and attainable work performance standards set by the employer. When an employee fails to meet the required performance standards, he is regarded to be incapable, and the employer has the right to dismiss the employee.

However, the employers right to dismiss an employee can only be invoked by exercising fair reason and procedures, as provided under the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007.

REASONS FOR POOR WORK PERFORMANCE UNDER THE EMPLOYMENT AND LABOUR RELATIONS (CODE OF GOOD PRACTICE) G.N. NO. 42 OF 2007

Rule 16 of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, provides that, it is important in determining the fairness of termination for poor work performance, that the performance standard is not only reasonable, but it is also known to the employees.

Rule 17 provides that, any Arbitrator or Judge who determines whether a termination for poor work performance is fair shall consider;

1. Whether or not the employee failed to meet a performance standard;
2. Whether the employee was aware or could reasonably be expected to have been aware, of the required performance standards;

3. Whether the performance standards are reasonable;
4. The reasons why the employee failed to meet the standard and;
5. Whether the employee was afforded a fair opportunity to meet the performance standard.

Having seen what the employer must determine before terminating an employee for poor work performance, we now look at each of the requirements: The 1st and 2nd points will be discussed together as they correlate. These points are whether or not the employee failed to meet a performance standard and whether the employee was aware or could reasonably be expected to have aware of the required performance standards. For an employer to terminate the employee's employment contract he/she must satisfy himself that the employee has failed to meet the performance standards set by the employer. Thus, there must be performance standards and the employee must be aware of the same.

It would be unfair to terminate an employee for failure to attain a performance standard, if the employer failed to inform the employee of the required standards. The employer has the responsibility to disclose the performance standards to the employee beforehand. However, the employee is reasonably expected to be aware of the performance standards. The employee's reasonability is tested by whether the employment contract stipulates the performance standards, or the job description or any other document and that, such documents were provided to the employee, to reasonably and prudently ensure that the employee was aware of the performance standards, that, he/she was to attain.

Reference is made from the case of Tanzania Breweries Limited vs. Leo Kobelo, High Court Labour Division, Dar es Salaam, Revision No. 211 of 2014, 29/09/15, before Her Ladyship Lilian Mashaka, J. where the Court upheld the decision of the Commission for Mediation and Arbitration (CMA) on grounds that:

- i. The Applicant (Employer) had not set performance standards clearly known to his employees;
- ii. There were procedural irregularities relating to the Applicant's failure to provide or have in place appropriate action like training to be conducted to improve performance of the Respondent;
- iii. Also, the Respondent was denied the right to be heard and represented during the meeting prior to his termination, as required under Rule 18 of GN.No.42 of 2007; and
- iv. Apart from the allegations that there was poor performance by the Respondent and would probably lead to termination, there was no evidence to prove that the procedure for termination was followed.

Thus, the Court held that, there was no valid reason for termination and that the fairness of the procedure under Rule 18 of GN. No. 42 of 2007 was not followed. Therefore, the termination was unfair, and the award of the Commission for

Mediation and Arbitration was confirmed upheld.

Whether performance standards are reasonable. When we state that the performance standards are reasonable, we mean to say that the standards are achievable. The performance standards are regarded achievable when for instance the rest of the employees have been able to attain/meet the standards without mistakes. For example, an employee who keeps on making typing errors despite having been counselled, this employee could be disciplined and possibly dismissed depending on the circumstances. When the employer fails to prove the reasonability of the performance standard, he could fail at the Commission for Mediation and Arbitration.

Reliance is made in the case of **White vs. Medpro Pharmaceutical (2000, 10 BALR 1182)** where the employee failed to meet her targets in nine out of ten months. The Commission for Conciliation, Mediation and Arbitration (CCMA), South Africa, nevertheless found her dismissal to be unfair because in the Court's view, the employer had set targets that were not achievable.

Again the 4th and 5th points of this work shall be discussed together since they also correlate. These are the reasons why the employee failed to meet the standards and whether the employee was afforded a fair opportunity to meet the performance standard.

Before terminating the employee's employment contract, the employer must be sure that he knows the reasons as to why the employee failed to meet the standards, and those reasons should not be caused by the employer in the sense that;

- the employer had failed to provide the employee with materials;
- equipment was faulty;
- required training had not been given; and
- the employer's product was not in demand or some other reason beyond the employee's control.

In this case is it important that the employer can establish the reason for the poor performance and must prove that the poor performance was the employee's fault.

PROCEDURES FOR TERMINATION FOR POOR WORK PERFORMANCE

Subject to the Provision of Rule 18 The Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, it is crystal clear that, in setting and implementing performance standards employers have to make sure that, they have afforded the employees a fair trial and the procedures have been adhered to. An employer needs to observe that they have:

1. Set targets that are proven to be reasonable;
2. Adjust targets when changed circumstances dictate this;

3. Give an employee a real chance to achieve the desired performance level; and
4. Remove all obstructions to the achievement of the standards.
5. Where the employee continues to perform unsatisfactorily, the employer shall warn the employee that employment may be terminated if there is no any improvement.
6. An opportunity to improve may be dispensed with if-
 - a. The employee is a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the standards set by the employer;
 - b. The degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify termination;
7. Prior to finalizing a decision to terminate the employment of an employee for poor work performance, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance;
8. At the meeting, the employer shall outline reasons for action to be taken and allow the employee and/or the representative to make presentations, before finalizing a decision;
9. The employer shall consider any representations made and, if these are not accepted, explain why; and
10. The outcome of the meeting shall be communicated to the employee in writing, with brief reasons.

CONCLUSION

We are of the view that, the employers should always exercise their duty by setting attainable targets and ensure that employees are made aware of the targets.

Further, employers are advised to consult Labour Law experts to ensure that the outlined legal procedures have been complied with adequately.

You can read more about us here: <https://vemmaattorneys.co.tz/reasons-and-procedures-for-the-termination-of-employment-due-to-poor-performance/>

FURTHER INFORMATION:

This article is intended to give you a general overview of the Law. If you would like further information and clarification on any issue raised in this article, please contact.

Haika-Belinda Macha
Partner
E: hb.macha@vemmaattorneys.co.tz
M: +255 688 305 999

Bernard Nkwabi
Associate
E: b.nkwabi@vemmaattorneys.co.tz
M: +255 689 016 142