



# Legal power and protection.

## QuickLaw answers your questions

Adoption	Maintenance
Child access	Marriages
Civil Imprisonment	Microfunding
Civil Procedure	Motor Vehicle Accidents
Consumer Protection Act	Restraining Orders
Dismissal	Strikes and Lockouts
Divorce	The Process of Civil Attachment in
Domestic Violence	Execution
Garnishee Application	Wills

Disclaimer. LegalWise has tried to include accurate and up to date information in this QuickLaw guide. However, it makes no representations and gives no warranties about the accuracy or suitability of the information contained in the QuickLaw guide. The information contained in this QuickLaw guide is not intended to be a definitive analysis of any specific legal topic nor must it be construed as legal advice. Professional legal advice should be taken from LegalWise or an attorney before any course of action is pursued. Under no circumstances whatsoever shall LegalWise be liable for any direct or consequential damages whether in contract or in delict arising out of or in connection with the use of information available from the QuickLaw guides.

Updated May 2024

## GET A LAWYER ON YOUR SIDE

[www.legalwise.co.bw](http://www.legalwise.co.bw)

Legal Expense Insurance Company (Pty) Limited t/a Leza LegalWise Botswana (UIN BW00000622146) is a registered Insurer (No. 2/9/235) (NBFIIRA)



# Dismissals

## QUICKLAW GUIDE





## Dismissals

### What is a dismissal?

- > A dismissal is when a contract of employment between an employer and employee is terminated by the employer.

### When may an employee be dismissed?

- > An employee may be dismissed if the employer has a valid and fair reason to dismiss the employee.
- > That is to say that there must be substantive and procedural fairness when dismissing an employee.
- > The employer must follow a fair procedure by affording an employee an opportunity to state his/her case before dismissing him/her.

### What is misconduct?

- > Misconduct refers to any behaviour or action by an employee that violates company policies, ethical standards, or legal regulations.
- > There must be a valid/ lawful reason for a fair dismissal in the case of misconduct, and procedural fairness must be applied where the employee is notified of the allegations against him/her, what his/her rights are and when the hearing will take place.
- > A lawful reason is not necessarily a fair reason. This means that a reason could be seen to be fair if a continued employment relationship is impossible.
- > Other alternative methods of punishment should be considered
- > Misconduct can encompass a wide range of inappropriate behaviors, including but not limited to:
  1. **Harassment:** This includes sexual harassment, bullying, discrimination, or any other form of behaviour that creates a hostile work environment for others.
  2. **Theft:** Taking company property or resources without permission, including stealing physical items, intellectual property, or data.
  3. **Fraud:** Engaging in deceptive practices for personal gain or to the detriment of the company, such as falsifying records, expense reports, or financial statements.
  4. **Substance abuse:** Being under the influence of drugs or alcohol while on the job, which can impair performance, endanger oneself for others, or violate company policies.
  5. **Violation of company policies:** Breaching rules or regulations set by the company, such as misuse of company resources, conflicts of interest, or disregarding safety protocols.
  6. **Insubordination:** Refusing to follow instructions from supervisors, failing to meet job requirements, or displaying a lack of respect or cooperation towards colleagues or management.
  7. **Engaging in behavior that undermines the reputation of the company,** such as gossiping, spreading rumors, or engaging in inappropriate social media activity related to work.

Overall, misconduct in the workplace can have serious consequences, ranging from disciplinary action such as warnings, suspension, or termination, to legal repercussions depending on the severity and nature of the misconduct. Employers typically have policies and procedures in place to address and mitigate instances of misconduct to maintain a positive and productive work environment.

### What is incapacity?

- > Incapacity refers to the situation where an employee is unable to carry out or perform to his/her contracted obligations due to the inability on the part of the employee.
- > This incapacity could be due to ill health.
- > Incapacity is different from misconduct and discipline. In the case of incapacity, the employer does not have to prove 'fault' or; blame' on the part of the employee.
- > Dismissal due to incapacity would be considered fair if the employer cannot fairly be expected to continue with the employment relationship bearing in mind the merits of the case/ circumstance of the employee's incapacity. Secondly, if the employer can ensure that he has taken reasonable steps to assist the employee in terms of affirmative action.

### When is a dismissal considered fair and what procedure is followed leading to dismissal?

- > Two requirements must be complied with to ensure that a dismissal is fair. There must be substantive fairness and procedural fairness.
- > Substantive fairness refers to a valid and fair reason for an employer to dismiss an employee. A valid reason refers to a lawful reason that justifies dismissal.
- > The reason is lawful if it is in accordance with common law, statute law, a collective agreement or the contract of employment.
- > Procedural fairness is when the employer affords the employee an opportunity to state his case and to bring mitigating circumstances to the employer's notice.
- > The procedure is as follows.
  - The employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need a formal inquiry.
  - Employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.
  - The employee should be allowed the opportunity to state a case in response to the allegations.
  - The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee.
  - The presiding official at the hearing should be unbiased and should make a fair ruling on the matter and determine an appropriate sentence.
  - The presiding official and any other members of the tribunal should not have been involved in the investigation of the matter.
  - After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

### What remedy does an employee have if s/he has been unfairly dismissed and how can s/he report the case?

- > If it is an unfair dismissal, the employer must provide remedies to the employee. There are primarily three remedies for this, reinstatement, re-employment, and compensation.
- > Any party to the dispute may refer the dispute in writing to the Labour Commissioner for mediation.
- > The person who refers the dispute must satisfy the Labour Commissioner that a copy of the notice of a dispute has been served on all other parties to the dispute.
- > Should mediation fail at the District Labour Office and application

can be for proceeding to carry on to the Industrial court for determination. Eligible parties include those aggrieved whose matters weren't resolved at mediation.

- > To initiate the process:
  1. Obtain a referral certificate from the District Labour Office.
  2. Complete a statement of case form, providing a detailed account of the dispute.
  3. Attach relevant supporting documents such as computations and letters.
  4. File and serve the application on the respondent(s).
  5. Wait for a response from the respondent(s) within the specified timeframe.
  6. If no response, the matter proceeds to default hearing; if a response is received, it must be served on the applicant.
  7. The case undergoes case management by the judge.
  8. A hearing date is set by the court.
  9. The court makes its determination based on the evidence presented.

Supporting documents required include referral certificates, referral forms, failure to reach settlement forms, referral letters, statement of case forms, computations confirmed by the District Labour Office, and any other relevant documents pertaining to the claim.

### Glossary of terms:

**"arbitration"** means arbitration proceedings conducted before an arbitration tribunal

**"employee"** means an individual, other than an independent contractor, who works for another person and who receives, or is entitled to receive, remuneration for that work; or in any manner assists in carrying on or conducting the business of an employer.

**"employer"** means any person, including the State and a user enterprise who employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or permits an individual to assist that person in any manner in carrying on or conducting that person's business.

**force majeure:** events or factors that are beyond the control of the parties to a contract and which prevents the enforceability or performance of a contract. They may include 'Acts of God' such as natural disasters, fires etc.

**nondisclosure agreements:** A non-disclosure agreement, also known as a confidentiality agreement, confidential disclosure agreement, proprietary information agreement or secrecy agreement, is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to. Examples are doctor-patient confidentiality, attorney-client privilege, bank-client, employer-employee business confidentiality etc.

**protocol:** protocol refers to a set of rules, official plan or a set of guidelines to be followed in certain situations.

**stalking:** means persistent threatening behaviour by one person against another person. This includes unwarranted following or surveillance by an individual or group toward another person against such person's wishes. Stalking is an offense.

### How can LegalWise assist you?

Should you require an explanation of your rights on this topic, please contact your nearest Branch.