

SOUTH AFRICA

Items	Regulations in force on 1 January 2012
<p>1: Notification procedures in the case of individual dismissal of a worker with a regular contract</p>	<p>Poor work performance: After giving appropriate warning to the employee, notice must be given in writing, except when it is given to an illiterate employee.</p> <p>Operational reasons: The employer must issue a written notice inviting relevant parties to engage in consultation. Consulting parties are the workplace forum and/or trade union if applicable, or any other parties mentioned in a collective agreement. If there is no workplace forum or trade union, the employer must consult with the employee/s likely to be affected or their nominated representative. After consultation, the employer must select the employees to be dismissed according to selection criteria agreed between the consulting parties. If no criteria have been agreed, the criteria must be fair and objective. Notice of dismissal must then be given in writing, except when it is given to an illiterate employee.</p> <p>Calculation (for EPL indicators): average of poor work performance (written statement) and operational reasons (third party must be notified)</p>
<p>2: Delay involved before notice can start</p>	<p>Poor work performance: After the end of the probationary period, an employee should not be dismissed for unsatisfactory performance unless the employer has (i) given the employee appropriate evaluation, instruction, training, guidance or counselling; and (ii) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily. The procedure leading to the dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter. In the process, the employee should have the right to be heard and to be assisted by a trade union representative or fellow employee. Notice is then given in writing.</p> <p>Operational reasons: The employer must issue a written notice inviting relevant parties to engage in consultation. Consulting parties are the workplace forum and/or trade union if applicable, or any other parties mentioned in a collective agreement. If there is no workplace forum or trade union, the employer must consult with the employee/s likely to be affected or their nominated representative. During consultation period (typically between one week and one month duration), the employer and consulting party should try to reach consensus on appropriate measures to avoid/minimise dismissals, change the timing of dismissals or mitigate their adverse affects, the method for selecting employees to be dismissed and severance pay for dismissed employees. The employer must consider and respond to the representations made by other consulting parties and, if the employer does not agree with them, the employer must state the reasons for disagreeing. The employer must select the employees to be dismissed according to selection criteria agreed between the consulting parties. If no criteria have been agreed, the criteria must be fair and objective. Notice of dismissal must then be given in writing, except when it is given to an illiterate employee.</p> <p>Calculation (for EPL indicators): poor work performance: 6 days for prior warning procedure + 1 day for notice in writing; operational reasons: 1 day for notice of consultation + average of 17 days for consultation period + 1 day for notice in writing. Total: $(7+19)/2 = 13$ days</p>
<p>3: Length of notice period at different tenure durations (a)</p>	<p>Notice must be not less than: (i) one week if the employee has been employed for four weeks or less; (ii) two weeks if the employee has been employed for more than four weeks but not more than one year; (iii) four weeks if the employee has been employed for a year or more or is a farm or domestic worker who has been employed for more than four weeks.</p>
<p>4: Severance pay at different tenure durations (a)</p>	<p>An employer must pay an employee who is dismissed for reasons based on the employer's operation requirements severance pay equal to at least one week's remuneration for each completed year of continuous service.</p> <p>The employer does not have to pay severance if it is able to offer the employee reasonable alternative employment with it or another employer (BCEA art 41, LRA art. 196)</p>

<p>5: Definition of unfair dismissal (b)</p>	<p>Fair: Dismissals related to the employee's conduct or capacity or the employer's operational requirements and effected in accordance with a fair procedure.</p> <p>Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable (Schedule 8 LRA, Code of Good Practice, §4).</p> <p>Unfair: dismissals for discriminatory reasons, based on participation in lawful industrial action are automatically unfair. Also unfair if the employer cannot prove that the dismissal was fair.</p> <p>In cases of permanent incapacity due to ill health or injury, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability (Schedule 8 LRA, Code of Good Practice, §10). Any person determining whether a dismissal arising from ill health or injury is unfair should consider (a) whether or not the employee is capable of performing the work; and (b) if the employee is not capable (i) the extent to which the employee is able to perform the work; (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and (iii) the availability of any suitable alternative work (Schedule 8 LRA, Code of Good Practice, §11). Therefore, in the case of ill health or injury, transfer must be attempted before dismissal.</p>
<p>6: Length of trial period (c)</p>	<p>No limit set in law. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.</p> <p>Six months as a rule of thumb is generally regarded as reasonable in case law.</p>
<p>7: Compensation following unfair dismissal (d)</p>	<p>Compensation for unfair dismissal limited to 12 months' salary, except in the case of automatically unfair dismissal (e.g. dismissal on discriminatory grounds), where compensation is limited to 24 months. Additional compensation may be awarded based on provisions in an employment contract or collective agreement.</p>
<p>8: Reinstatement option for the employee following unfair dismissal (b)</p>	<p>Reinstatement is the primary remedy if the dismissal is found to be substantively, as opposed to procedurally, unfair. It is usually granted if the worker seeks it and the court does not consider it impracticable. In the case of procedurally unfair dismissals reinstatement without any other compensation can be made if the employer makes a good faith offer to do it. If the employee refuses the offer in bad faith, he is not entitled to any compensation for unfair dismissal.</p>
<p>9: Maximum time period after dismissal up to which an unfair dismissal claim can be made (e)</p>	<p>Within 30 days from the date of dismissal.</p>
<p>10: Valid cases for use of standard fixed term contracts</p>	<p>Fixed-term contracts are widely used and possible for all types of employment. No objective reason is required.</p>
<p>11: Maximum number of successive standard FTCs (initial contract plus renewals and/or prolongations)</p>	<p>No limitation, but if renewed 3-4 times and the employee had a reasonable expectation that the contract would be renewed again and it is not renewed, then this may constitute dismissal. The onus is on the employee to show that he or she had a reasonable expectation of the contract being renewed.</p>
<p>12: Maximum cumulated duration of successive standard FTCs</p>	<p>No limit</p>
<p>13: Types of work for which temporary work agency (TWA) employment is legal</p>	<p>All work</p>
<p>14: Are there restrictions on the number of renewals and/or prolongations of TWA assignments? (f)</p>	<p>No for both contracts and assignments</p>
<p>15: Maximum cumulated duration of TWA assignments (f)</p>	<p>No limit for both contracts and assignments</p>
<p>16: Does the set-up of a TWA require authorisation or reporting obligations?</p>	<p>A temporary employment service is required to register with the Department of Labour.</p>
<p>17: Do regulations ensure equal treatment of regular workers and agency workers at the user firm?</p>	<p>TWA workers are the employees of the agency and are bound by any collective agreement, sectoral determination or legislation that binds the agency.</p>

18: Definition of collective dismissal (b)	Special provisions apply to collective dismissals for operational requirements by employers employing more than 50 employees who consider dismissing: 10 employees if the employer employs up to 200; 20 employees if the employer employs between 200 and 300; 30 employees if the employer employs between 300 and 400; 40 employees if the employer employs between 400 and 500; and 50 employees if the employer employs over 500.
19: Additional notification requirements in cases of collective dismissal (g)	None.
20: Additional delays involved in cases of collective dismissal (h)	If requested by the employer or employee representatives, the Commission for Conciliation, Mediation and Arbitration must appoint a facilitator within 15 days of the retrenchment notice. Employee representatives can ask a facilitator even without the agreement of the employer. If a facilitator has been appointed, the employer may give notice of termination after 60 days of the appointment of the facilitator. If a facilitator has not been appointed, the employer may give notice of termination after 48 hours. Calculation (for EPL indicators): With facilitator: 15 days to appoint facilitator + 60 days facilitation. Without facilitator: 15 days + 2 days. Overall average delays equal to $(75+46)/2 = 60.5$ days: average of i) with facilitator asked by the employer (75 days) and ii) without facilitator asked by the employer (Average: $(75+17)/2 = 46$ days in this case). Then delays in Item 2 must be subtracted (13 days), which yields to 47.5 days
21: Other special costs to employers in case of collective dismissals (i)	None, although the negotiation of social plans is common in the public service or state enterprises.

Legend: d: days; w: weeks; m: months; y: years. For example "1m < 3y" means "1 month of notice (or severance) pay is required when length of service is below 3 years".

Notes:

- a) Three tenure durations (9 months, 4 years, 20 years). Case of a regular employee with tenure beyond any trial period, dismissed on personal grounds or economic redundancy, but without fault (where relevant, calculations of scores to compute OECD EPL indicators assume that the worker was 35 years old at the start of employment). Averages are taken where different situations apply – e.g. blue collar and white collar; dismissals for personal reasons and for redundancy.
- b) Based also on case law, if court practice tends to be more (or less) restrictive than what specified in legislation.
- c) Initial period within which regular contracts are not fully covered by employment protection provisions and unfair dismissal claims cannot usually be made.
- d) Typical compensation at 20 years of tenure, including back pay and other compensation (e.g. for future lost earnings in lieu of reinstatement or psychological injury), but excluding ordinary severance pay and pay in lieu of notice. Where relevant, calculations of scores to compute OECD EPL indicators assume that the worker was 35 years old at the start of employment and that a court case takes 6 months on average. Description based also on case law.
- e) Maximum time period after dismissal up to which an unfair dismissal claim can be made.
- f) Description based on both regulations on number and duration of the contract(s) between the temporary work agency and the employee and regulations on the number and duration of the assignment(s) with the same user firm.
- g) Notification requirements to works councils (or employee representatives), and to government authorities such as public employment offices. Only requirements on top of those requirements applying to individual redundancy dismissal count for the OECD EPL indicators (cf. Item 1).
- h) Additional delays and notice periods in the case of collective dismissal (only delays on top of those required for individual dismissals – as reported in Items 2 and 3 – count for the OECD EPL indicators).
- i) This refers to whether there are additional severance pay requirements and whether social compensation plans (detailing measures of reemployment, retraining, outplacement, etc.) are obligatory or common practice.