



# 5 Matters an Employer Considers Prior to Terminating Employment for Commission of an Offence by an Employee Outside Work

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Section 44(4) of the Employment Act envisages two categories of offences by an employee, that amount to gross misconduct thus justifying summary dismissal of the employee. These are offences committed by the employee against the employer and offences committed by the employee against third parties outside employment. Below are matters that guide an employer in determining whether an offence committed by an employee outside his workplace interferes with the employees work and could constitute a ground for summary dismissal of the employee:

**1** An employee is under no legal obligation to disclose that they are being prosecuted for a criminal offence, unless the employee is specifically required by his contract to disclose such matters. Failure to make such disclosure is therefore not an automatic ground for summary dismissal in the absence of a contractual obligation.

**2** Being charged with a criminal offence alone is not a ground for dismissal.

**3** Consideration must be given to whether the employee is attending trial while out on bail, since gross misconduct only arises where the employee is not released within 14 days,

**4** An employer needs to allow the criminal case to be heard and determined, to find out whether the accused employee will get a custodial sentence and whether the custodial sentence will be for a period of more than 14 days.

**5** Since an offence outside employment affects third parties and not the employer a generally higher standard of proof will be placed on the employer to prove that the offence committed outside the work place interferes with the employee's performance of his duties.