

Appendix. Detailed descriptions of indicators found in the second categorization

1. Accountability. The principle of accountability is found in arguments that discuss whether the employee can be held accountable for or is guilty of an incident that happened in the workplace. The category includes arguments about others being the actual culprits or having joint responsibility for what happened and arguments about the employee not being able to influence the course of events. Both of these types of arguments lower the level of accountability of the employee. Reasoning about **high integrity standards** or a special duty of care reflects accountability as well, but these arguments are in their own distinct category (see item #11). Accountability is closely related to **responsibility**. When it is argued that the employee can be held responsible for an incident of misconduct or that the employee must bear the risk of certain circumstances, responsibility is often presented as a direct cause of accountability. I distinguish between *being held* responsible for what happened and arguments about *acting* in an (ir)responsible manner. I classified the former in the accountability category and the latter in the responsibility category. Arguments about causing one's own inability to honor one's professional responsibilities do not directly address accountability and are treated as arguments about irresponsible behavior. Arguments about acting knowingly and willingly fall into the accountability category as well, as do arguments about knowing the consequences beforehand, acting against better judgment and consciously ignoring an explicit prohibition or instruction. While these arguments imply an **awareness** (item #2), it is the notion of decisiveness that they share that puts them in the accountability category. Understanding an action to be wrong or causing risk, but proceeding anyway, implies a conscious decision that makes one accountable for it.

2. Awareness. As a general principle, terminating the employment for misconduct requires that the employee knew beforehand that the alleged behavior was unacceptable. This principle, which is also referred to as the awareness principle, is also found in an objective form, when stating that the employee could or should have known their behavior to be unacceptable. Arguments about the employee knowing what was expected of them are about awareness too. This principle is also found in negated form, arguing that the employee was unaware of doing something wrong, or that company regulations are unclear or have not been handed out. While this can also be seen as arguments for **justification**, I have classified these arguments as manifestations of the awareness principle, because they specifically deal with knowledge of wrongdoing. As explained under #1, arguments about acting knowingly and willingly are classified under **accountability**.

3. Justification. This principle groups various types of arguments about justification. It includes arguing that the employee acted out of an honorable motive, such as the employer's best interests or wishes, that the employee did not act out of an unacceptable motive or that the misconduct incident was meant as a prank. It also includes arguments about the employee having a reasonable explanation for their behavior, or handled out of a reasonable interpretation, assessment or expectation, that the employee was put under pressure or provoked and arguments about the behavior being acceptable to the company's culture and victim blaming. The line between **justification** and **mitigating circumstances** (item #4) and the **employer being at fault as well** (#9) can be blurry, especially when difficult circumstances are

considered as a reason for understanding and sympathy for the employee and the court does not clearly indicate either one of these principles. Arguing that underlying circumstances make the employee's behavior acceptable or understandable is justification. Take, for example, difficult workplace circumstances, such as having a high workload. General circumstances, like having many years of employment and having a good record, on the other hand, are classified as mitigating circumstances, as are general arguments about personal circumstances and acting out of fear and stress. Statements about the employer *ordering, tolerating, or causing* the alleged behavior, *actively contributing* to circumstances causing it, for it (active involvement) are in the justification category as well, as are arguments about insufficient employer supervision or control, insufficient employee training and support and arguments about a lack of clear instructions, policy or regulations. By contrast, arguments about the employer *responding* in a wrong manner to misconduct or ongoing conflict, *ignoring* it, or *not taking appropriate or timely action* when aware of it (passive involvement) are classified under the principle specific to the employer being at fault (see item # 9).

4. Mitigating circumstances. These are circumstances that are not directly related to the incident, but to the employment in general or to the employee's personal life and that justify lessening the severity of the employer's response to the employee's misconduct. The most common example is the employee having a long employment term without prior incidents. See under item #3 for the boundary between mitigating circumstances and **justification**. This category includes arguments about acting out of fear or stress, problems in the employee's private life, other personal circumstances, the employee's mental or medical state or limited intellectual capacity. While directly related to the incident, they address a psychological state more than an understandable reason for a misconduct incident.

5. Ne bis in idem. This principle is commonly found in criminal law, meaning a defendant cannot be prosecuted for the same crime twice. An example in Dutch labor law is the argument that the incident has been previously dealt with by issuing a formal warning. This group also includes arguing that the incident happened a long time ago and that, although the employer was aware at the time, did not find it necessary to penalize the employee in any way and arguments about the employer's initial response being mild and understanding.

6. Proportionality. Arguments on whether the employee's behavior justifies terminating the employment are grouped in the principle of proportionality. I distinguish it from the principle of **seriousness** in its direct connection to and justification of the penalty of losing one's employment, whereas arguments about the employee's actions being objectionable or reprehensible in which such a direct connection is absent are put in the category for seriousness. Proportionality is the second requirement of the misconduct rule. Other examples are arguments about the employer exaggerating the situation or reacting more severely than company policy prescribes, a less severe penalty being more appropriate, the employer having a compelling interest in an expedited termination, giving the employee the benefit of the doubt or a single mistake being sufficient for termination and that for the misconduct involved no prior warning or rule of conduct is required.

7. Reasonableness. This category holds arguments about reasonableness of the employer's regulations, instructions, acts, responses, and opinions.

8. Relevance. Incidents of misconduct that are not relevant to the employment in any way, cannot provide reasonable grounds for termination. This principle is mostly about misconduct in the employee's private life, at home outside working hours, for example. This category also includes arguments aimed to demonstrate that the alleged misconduct did not constitute a breach of any standard or regulation, that the employee was entitled to act the way they did, that an instruction was given without authorization, that a regulation is unreasonable or unnecessary, that the employee's privacy is harmed without cause, or that the employer is unable to explain why the alleged behavior is reproachable.

9. Employer being at fault as well. This category groups arguments about the employer not responding correctly to unwanted behavior. These arguments can involve not handling things the right way during or in responding to the employee's misconduct or ongoing conflict. Examples are allowing misconduct to go on for some time without acting against it, violating the principle of equal treatment, insufficient monitoring of safety regulation compliance, not taking action to solve problems or conflict, causing conflict, worsening things, not providing opportunities to better bad behavior or performance, having a pre-determined plan to fire the employee (looking for a reason). Included are issues with formalities, such as improper methods of enquiry, deviating from internal penalty policies and basing the case on the wrong legal ground. This principle extends to agents acting on behalf of the employer, e.g. the company physician in cases that deal with employee illness and re-integration. Arguments about the employer having caused, ordered, allowed or tolerated the alleged misconduct are in the category for **justification**, see item #3.

10. Employee not having good work ethics. This category comprises arguments about loyalty, discretion, insubordination, rebellious behavior, attitude problems, problems accepting authority, refusing to solve conflict, keeping agreements, collegiality and not acting professionally. It includes arguments about making errors, acting in a careful manner, reporting problems in time, unwanted behavior and failure to comply with regulations about illness and re-integration, behavior unworthy of one's profession or position, slacking, sloppiness, carelessness, taking advantage of circumstances, being headstrong and unwilling to adapt, lack of organization sensitivity, troublemaking, undermining the working atmosphere, acting without proper authorization, violating company policy or Code of Conduct. It also contains arguments about a lack of tact, improper communication manners, e.g. arrogance, insult, disrespect and being hurtful. By contrast, arguments about (not) honoring the duty of good employee-ship are categorized under **seriousness** (item #15).

11. Higher ethical standards being applicable. Arguments about the employee, due to their position or profession, having to live up to higher-than-normal ethical standards are found in many cases. Common causes are being a public civil servant, being in a position of power or authority or having a special duty of care or an exemplary role.

12. Morality. The principle of morality is found in arguments disapproving of aggression, violence, making threats, blurring or ignorance of moral standards, breaking the law, intimidation or manipulation. It also includes arguments related to having committed a punishable offence and having engaged in undesirable private contact and not maintaining sufficient professional distance, sexually transgressive behavior and discrimination. Fraudulent behavior is often motivated by a desire for self-enrichment. While fraud is immoral, arguments about self-enrichment and financially damaging one's employer are categorized under **causing harm, damage or danger**.

13. Causing harm, damage or danger. This category contains arguments about causing material and non-material damage, causing injury, causing safety risks, reckless behavior and taking unnecessary risks. Also included are acting out of self-interest, self-enrichment, other ways of causing financial harm to the employer, conflict of interest, and not protecting the employer's interests. Lastly, this category includes arguments about safety regulations compliance and responsibilities for workplace safety. This category does not include arguments about violence, making threats and aggression. Those are in the category for **immorality** (item #12).

14. Being responsible. This group includes arguments about the employee acting in a responsible manner, or not, and the employee having a lack of self-insight, downplaying, or denying their bad behavior. It addresses, for example, making efforts to solve conflict or other problems, reporting problems in the workplace or a need for training or help, causing one's own inability to honor one's professional responsibilities and not taking opportunities to improve behavior or performance. See item #1 for the boundary with **accountability**.

15. Seriousness. Arguments about the employee's behavior being seriously wrong and arguments decreasing seriousness are in this group, as are arguments that explicate disapproval of or understanding for the employee's conduct. Common themes are behavior occurring within a closed group (having no impact on others, aimed to decrease seriousness), behavior being explicitly deemed annoying, objectionable, reprehensible or highly objectionable by the court, objectionable group behavior, prior incidents and systematic behavior, and seriousness of the incident. On the other hand, this category includes arguments about the employee's behavior being understandable as well. The category also includes arguments about aggravating circumstances. While such circumstances are more about facts than principles, they are relevant to the research. Typically, this type of argument is considered as additional justification for finding certain behavior to be reproachable. Therefore, it has argumentative value and enriches the categorization. Examples are collective wrongdoing (in cooperation or agreement with others), substance abuse that makes the misconduct more serious and wrongdoing towards a vulnerable or powerless individual. Lastly, arguments about (not) honoring the duty of good employee-ship are in this category. Because this duty is open-textured in itself, it is oftentimes based on other principles. For example, in case ECLI:NL:GHAMS:2019:406, the court considers that by harming the employer's reputation, the employee failed to honor his duty of good employee-ship. This entails violating a rule of law, which is an indicator for seriousness. Obviously, the case is coded for causing harm, damage or danger (item #13) as well.

Seriousness is also relevant in arguments about the appropriateness of the penalty of terminating the employment. In that context, the notion of seriousness can be seen as a part of the proportionality principle, when the court decides whether the incident is serious enough to warrant the penalty. While acknowledging that both principles overlap, I classify arguments about the appropriateness of the penalty as arguments for proportionality.

16. Sincerity. This principle groups arguments about sincerity, honesty, integrity, transparency, openness and disclosure, trustworthiness and reliability. Includes arguments about going against the employer's core values, acting secretly, concealing, lying and making one-self vulnerable to blackmail.