SECOND EDITION

LABOUR LAW Rules!

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LABOUR LAW
Rules!

Dedicated to our students

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SECOND EDITION

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Foreword

A number of significant events happened in South Africa which impacted on labour law.

Substantial changes were proposed to reform labour laws as a result of the ever-changing labour market. Amendments were made to all main labour laws, namely the Basic Conditions of Employment Act, 1997, the Labour Relations Act, 1995, the Employment Equity Act, 1998 and also to social security laws such as the Occupational Health and Safety Act, 1993.

Some new laws, which impact on labour law, have also been enacted.

It is in the context of the above developments and debates that labour-law students and specialists are being trained.

The book successfully lays a sound basis for basic labour-law principles. Moreover, it enables students to integrate various concepts and different sources in order to develop critical analytical skills. In this way, the book empowers young and emerging scholars to assist in shaping future workplace laws. The book also may be used gainfully by IR and HR practitioners, line managers, supervisors, commissioners, arbitrators, union officials or anybody interested in getting a basic overview of the labour-law landscape.

This second edition's innovative approach again breaks new ground in the dissemination of labour law. As a teacher and practical user of labour law in my policy and professional work, I am delighted to endorse and recommend this book. I have no doubt that all readers will enjoy using it and find it practical and helpful.

Evance Kalula

Professor and Director: International Academic Programmes Office and Confucius Institute, University of Cape Town

President: International Labour and Employment Relations Association

Preface

In the past two years, since publication of the first edition of LABOUR LAW *Rules!*, significant events happened which impacted on labour law and some dramatic changes were proposed to reform labour law.

These amendments to the laws have been debated and most of them have been signed into law. Organised business called for making laws more flexible to create jobs, organised labour wanted more sustainable jobs and effective enforcement of laws. These calls have been made as a result of, *inter alia*, the fact that atypical work is increasing (the country has more workers in the informal sector generally not covered by law) than those employed in the formal sector (covered by law), the continuing high unemployment rate, persistent income inequality, continuing skills shortages, and inadequate job creation.

Amendments (already in operation) were made to all main labour laws such as the Basic Conditions of Employment Act, 1997 (BCEA), the Labour Relations Act, 1995 (LRA) (but the latter had not come into operation yet, and more amendments are in the pipeline, such as a strike ballot and checks on strikes to reduce violence), the Employment Equity Act, 1998 (EEA) and also to social security laws such as the Occupational Health and Safety Act, 1993 (OHSA) and the Unemployment Insurance Act, 2001 (UIA).

Some new laws also saw the light, for example, (i) the Employment Tax Incentive Act,[1] which provides tax incentives to encourage private sector employers to employ young people between 18 and 29 years old; (ii) the Empowerment of Women and Gender Equality Bill,[2] which focuses on equal representation of women in decision-making structures, female economic empowerment, protection, advancement and gender-mainstreaming; (iii) the Employment Services Act,[3] which provides for an employment service to provide free services to citizen-job seekers, matching them with available jobs, and associated matters. The employment of foreign nationals will be regulated in that an employer may not employ a foreign national prior to such person providing a work permit issued in terms of immigration laws.

Moreover, a National Development Plan to alleviate poverty, inequality and aims to improve health, education, growing the economy, and eradicating corruption, has seen the light.[4]

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[1] 26 of 2013. More than 130 000 young people have already been employed in terms of this Act.

[2] *GG* 35637 of 29 August 2012 GN 701 of 2012, now B50D-2013.

[3] 4 of 2014.

[4] This Plan has been drawn up after the New Growth Path (NGP) had not received a lot of support. The Plan foresees bolder policies to enhance investment and growth and, therefore, job creation and social and economic reforms.

It is in the context of the above developments and debates that we are training a new generation of labour law students and practitioners. They must be empowered to assist in shaping the future working environment and laws of the country.

The book is aimed at students who encounter labour law for the first time. It could also be used fruitfully by IR and HR practitioners, line managers, supervisors, CCMA commissioners, union officials, bargaining council or private arbitrators or anybody interested in a basic overview of the labour law landscape in the country.

The book, therefore, aims to lay a sound basis of labour law rules which will enable students to move to the next level of integrating various legal concepts and different sources in order to develop critical and analytical skills.

The text reflects materials available to us at October 2014.

Our sincere thanks go to Simon Sephton of Siber Ink and to Gawie du Toit.

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Pretoria *October 2014*

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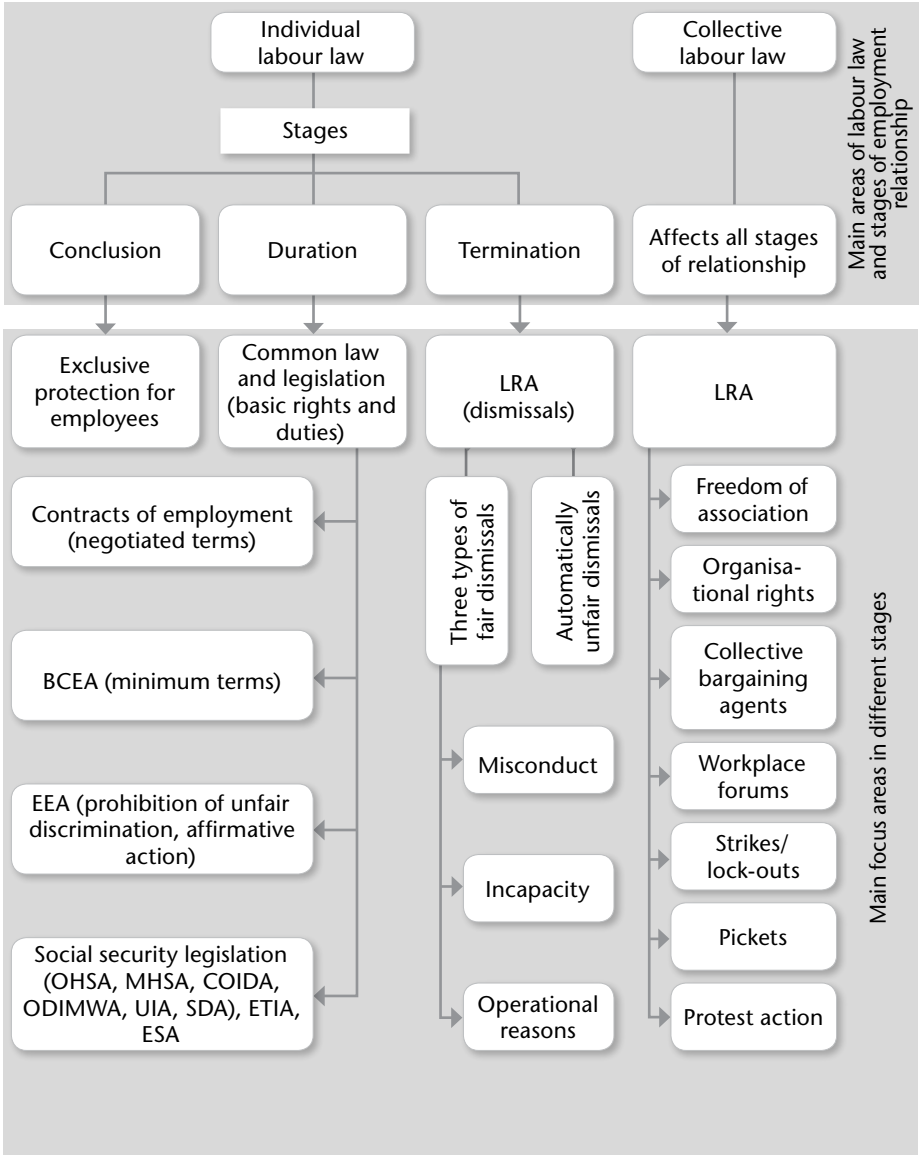
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BIRD'S-EYE VIEW: LABOUR LAW *Rules!*

The impact of labour law on the various stages of the employment relationship



Part I

Introduction to labour law

Labour law deals with the legal consequences flowing from the employment relationship. It regulates both the individual and collective employment relationship. The individual employment relationship is concluded between one employer and one employee. The collective relationship exists between one or more employers, and more than one employee. Employers may act collectively by way of employers' organisations, and employees may join trade unions, which may represent them in the collective labour arena.

The contract of employment forms the basis of the relationship between the employer and employee and, consequently, the principles of the law of contract apply to the relationship. The law of contract assumes that the parties are in an equal bargaining position. For example, if A buys B's car, they are on equal footing.

The employment contract is different because the employer is in a stronger bargaining position and can dictate the terms and conditions of the contract of employment to a large extent. The employer, ultimately, has the weapon of dismissal at its disposal. Kahn-Freund (a respected legal philosopher) said the following:[1]

> '[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power … The main object of labour law has always been, and … will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'

Hence, the principles of the law of contract had to be supplemented by labour laws designed to balance the interests of employees and employers and to ensure fairness in the employment relationship.

Part I consists of one chapter. Chapter 1 gives a brief historical background to labour law and contrasts this with modern labour law. It explains the tripartite manner of currently making such laws, and discusses the scope of labour laws.

[1] P Davies & MR Freedland *Kahn-Freund's Labour and the Law* (1983) 6.

1

General overview of labour law

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1. HISTORICAL DEVELOPMENT OF LABOUR LAW

The origin of labour law in South Africa dates back to the Gold and Diamond Rush when large groups of workers descended on the mining areas in the Witwatersrand, Kimberley and Pilgrims Rest.

Employees worked (and stayed) in poor conditions. They earned low wages and the workplace was not regulated at all. However, soon Western and European tradesmen brought with them the knowledge of protective labour legislation, trade unions, safe working conditions and basic worker protection. Importantly, they brought with them an awareness of exploitation. Local workers learned from these examples and organised to act collectively and demand better working conditions. This resulted in increasing tension between workers and employers, which culminated in large-scale, violent riots on the Witwatersrand in the early 1920s. This in turn resulted in the promulgation of the first labour law in the country, namely the Industrial Conciliation Act, 1924.[1] This Act was later replaced by, first, the Industrial Conciliation Act, 1937[2] and thereafter by the Industrial Conciliation Act, 1956.[3]

As this Act was part of legislation under the apartheid system, it provided protection for white workers only. Black workers were covered under a separate Act.[4]

In order to improve the statutory protection of workers, the Wiehahn Commission was appointed in 1977.[5] This resulted in major legislative reforms. For example, the Commission recommended that black workers should be

[1] 11 of 1924.
[2] 36 of 1937.
[3] 28 of 1956.
[4] Black Labour Relations Regulation Act 48 of 1953.
[5] The Complete Wiehahn Report Parts 1–6 and the White Paper on each Part with Notes by Professor NE Wiehahn chaired by Professor NE Wiehahn (1982).

included under the protective scope of the Industrial Conciliation Act. It further introduced the concept of an 'unfair labour practice'; it established the Industrial Court[6] (the precursor to the Labour Court); and the Act was renamed the Labour Relations Act (hereafter the '1956 LRA').[7]

The concept of unfair labour practice gained importance after 1979 with the establishment of the (then) Industrial Court, which interpreted the concept in a *broad* way to protect employees against various unfair practices by the employer during the course of employment. The definition has been changed from a non-specific and open-ended definition to a detailed one referring only to specific practices listed in the current Labour Relations Act[8] (hereafter 'LRA'). This is because the LRA codified specific examples of unfair labour practices found in earlier case law.

The principle of fairness was carried into the new democratic dispensation. It was further strengthened by the Constitution, which guarantees the right of 'everyone' to fair labour practices.[9] Moreover, the LRA[10] confirms the notion of 'unfair labour practice'. These measures ensured that this principle is firmly established in the employment relationship.

Fairness should be viewed in comparison with lawfulness. The common law and law of contract endorse lawfulness. This means that parties are within the law if they comply with the prescribed legal requirements.

> **Example:** If A concludes a contract with B to purchase a boat and they include a 'voetstoots'[11] term in the contract, they will be bound by this clause if the boat later turns out to be defective.[12]

Fairness goes further and takes all surrounding circumstances into account.

> **Example:** If C employs D and they agree in the contract that D can be dismissed if she falls pregnant, the clause will not be enforceable (despite their agreement) because it is unfair.

Fairness is required from an employer throughout the various employment stages.

---

[6] It also laid the foundation for the rules on unfair dismissal at a time when there was almost no statutory regulation on dismissal.
[7] 28 of 1956.
[8] 66 of 1995. See ch 6, para 3 below, where unfair labour practices are discussed in detail.
[9] Of 1996, s 23(1).
[10] Sections 185 and 186(2).
[11] Meaning 'without guarantees about the quality'.
[12] The Consumer Protection Act 68 of 2008 applies here.

What would fairness entail during the pre-employment stage?

During the pre-employment stage, an employer deals with a person who has not yet been employed, but is applying for employment. The law requires that an employer should be fair in its dealings with a job applicant, even though an employment relationship has not yet been formally established. The Employment Equity Act[13] (hereafter 'EEA') specifically regulates fair conduct during the pre-employment stage. It states that an employer may not unfairly discriminate against any person who applies for a job.[14]

What would fairness entail throughout the employment stage?

During the course of the employment relationship, the employer is also required to deal fairly with an employee (this constitutes the second stage of employment). For example, when the employer deals with existing employees being promoted, or when benefits are granted to them, the employer must act fairly.

What would fairness entail at the stage of termination of employment?

The third stage, during which the employer is required to act fairly, is when employment is terminated. There are various ways of terminating the employment relationship, for example, through death, resignation, insolvency, retirement or mutual agreement.[15] In all these instances an employer will have to deal fairly with an employee, but most importantly so, when an employee is dismissed. A fair dismissal requires a fair reason (substantive fairness) and a fair procedure (procedural fairness). The duty to act fairly when an employee is dismissed extends even after dismissal, for example, in cases of selective re-employment.[16]

2. LAWS IN MODERN TIME

South Africa is a member State of the International Labour Organization (hereafter 'ILO') and has ratified most of the core ILO Conventions. These conventions include the Unemployment Convention[17] (hereafter 'ILO Convention 2'), the Forced Labour Convention[18] (hereafter 'ILO Convention

[13] 55 of 1998.
[14] Section 9 of the EEA.
[15] See ch 8, para 1 below.
[16] See ch 8, para 3.4 below.
[17] 2 of 1919.
[18] 29 of 1930.

29'), the Freedom of Association and Protection of the Right to Organize Convention[19] (hereafter 'ILO Convention 87'), the Right to Organize and Collective Bargaining Convention[20] (hereafter 'ILO Convention 98'), the Equal Remuneration Convention[21] (hereafter 'ILO Convention 100'), the Discrimination (Employment and Occupation) Convention[22] (hereafter 'ILO Convention 111'), the Maternity Protection Convention[23] (hereafter 'ILO Convention 183'), the Convention on Social Security (Minimum Standards)[24] (hereafter 'ILO Convention 102') and the Benefits in the Case of Employment Injury Convention[25] (hereafter 'ILO Convention 121'). These will be discussed in this book, where compliance with ILO Conventions is reflected in South African legislation.

The main current labour laws are:

- the LRA,
- the Basic Conditions of the Employment Act[26] (hereafter 'BCEA'),
- the EEA, and
- social security laws

These were designed in line with these ILO standards and others that will be referred to in the chapters of this book.

Moreover, South Africa has endorsed the Decent Work Country Programme of the ILO.[27] This programme aims to bring positive change into workers' lives, by focusing on improvement of the following four key areas:

- job creation,
- guaranteeing rights at work,
- extending social protection, and
- promoting social dialogue.

South Africa will constantly have to ensure that existing labour practices and laws comply with the international instruments that government has endorsed and ratified.

Other Acts that impact on the employment relationship will also be referred to and discussed in the book. These are the:

- Occupational Health and Safety Act[28] (hereafter 'OHSA'),

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[19] 87 of 1948.
[20] 98 of 1949.
[21] 100 of 1951.
[22] 111 of 1958.
[23] 183 of 2000.
[24] 102 of 1952.
[25] 121 of 1964.
[26] 75 of 1997.
[27] Available at http://www.ilo.org/jobspact/resources (accessed on 11 October 2011). See also J Theron 'Decent work and the crisis of labour law in South Africa' (2014) 35 *ILJ* 1829.
[28] 85 of 1993.

- Compensation for Occupational Injuries and Diseases Act[29] (hereafter 'COIDA'),
- Mine Health and Safety Act[30] (hereafter 'MHSA'),
- Occupational Diseases in Mines and Works Act[31] (hereafter 'ODIMWA'),
- Unemployment Insurance Act[32] (hereafter 'UIA'),
- Unemployment Insurance Contribution Act[33] (hereafter 'UICA'),
- Skills Development Act[34] (hereafter 'SDA'), and
- Skills Development Levies Act[35] (hereafter 'SDLA'),
- Employment Services Act[36] (hereafter 'ESA'),
- Women Empowerment and Gender Equality Bill,[37] (hereafter 'WEGEB'), and the
- Employment Tax Incentive Act[38] (hereafter 'ETIA').

Most of the above Acts are administered by the Department of Labour (hereafter 'DoL') under the auspices of the Minister of Labour (hereafter 'MoL'). However, the SDA and the SDLA fall under the Department of Higher Education and Training, the MHSA falls under the Department of Mineral Resources; the ODIMWA resorts under the Department of Health; the WEGEB falls under the Department of Women (under the Presidency); and the EITA under the Department of Finance.

The work environment is not static and remains under scrutiny from organised labour and organised business. For example, calls from organised business requested government to make labour laws more flexible, to remove hurdles that hamper job creation and to simplify 'hiring and firing' laws. From organised labour's side, a number of calls have also been made, namely, to create more sustainable jobs to alleviate poverty, and to enforce laws more effectively. These calls were made against the background of high unemployment levels, persistent income inequality and serious skills shortages. Currently, the official unemployment rate is 25.4%.[39] The unofficial rate, however, is estimated to be much higher. It has been speculated that this rate will rise further in future given the recent strikes and above-inflation pay increases. The unemployment rate amongst the youth is especially high. Moreover, this will be worsened by the education system which is not

[29] 130 of 1993.
[30] 29 of 1996.
[31] 78 of 1973.
[32] 63 of 2001.
[33] 4 of 2002.
[34] 97 of 1998.
[35] 9 of 1999.
[36] 4 of 2014.
[37] GN 701, *GG* 35637, dated 29 August 2012, now B50D-2013.
[38] 26 of 2013. The Protection of Personal Information Act 4 of 2013 focuses on the protection of private information but will not be discussed.
[39] Statistics South Africa, Third Quarter 2014.

delivering quality education.[40] Accounting for 40% of the population, the youth have an unemployment rate of 36%, 3.4 million are not in education, employment or training, and 44% of 20 to 24 year olds do not receive any personal income. The National Development Plan (hereafter 'NDP') (discussed below) outlines an ideal where:

> 'the dependency of the unemployed on the employed will be at an optimal ratio, provided that the working-age population is absorbed into jobs'.

With the youth being a major contributor to the working-age population but largely dependent on the State and others for survival, this ideal seems 'unlikely'.[41]

The number of atypical (non-standard) workers (who are excluded from labour laws) is also on the increase. Generally, atypical work is described as different from *full-time* employment. Atypical work includes part-time work, temporary employees, casual employees and people working from home. Some of these employees are vulnerable to exploitation because they work in sectors with little or no trade union organisation or no coverage by collective bargaining. Moreover, a high proportion of them are women. They frequently have less favourable terms and conditions of employment than other employees performing the same work, as well as less security of employment. Often they do not receive social security benefits such as medical aid and pension. Such employees, therefore, depend upon statutory employment standards for basic working conditions. Some have, in theory, the protection of labour laws, but in practice the circumstances of their employment make the enforcement of their rights difficult.[42]

In response to these calls and challenges, government has announced its New Growth Path (hereafter 'NGP').[43] Due to lack of support for the NGP, this initiative has been done away with and, instead, the NDP has been adopted. This Plan wants to alleviate poverty and inequality (with the richest 20% of people in the country currently earning 70% of the national income and the poorest 20% earning 2.3% of the national income).[44] The NDP hopes to reduce unemployment to 6% by 2030.

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[40] U Joubert *Die Strandloper* (July 2014).

[41] L Moloi 'Is there a "perfect storm" on the horizon?' *Fast FACTS IRR* SARRI 1 (July 2014); K Lebone 'Youth: Young, shafted and black' *Fast FACTS IRR* SARRI 2–4 (July 2014).

[42] ES Fourie 'Non-standard workers: The South African context, International Law and regulation by the European Union' (2008) 4 *PER* 10. See also chs 2 and 3 below.

[43] Government has signed a National Skills Accord with organised business and labour and an Accord on Basic Education and Partnerships with Schools in terms of the NGP in 2011–12.

[44] The NGP has not received a lot of support, hence the introduction of the NDP which, again, is not supported by all of government. It was argued that South Africa needed a different and bolder set of policy alternatives to drive investment and growth and, therefore, job creation and social and economic reforms. Moreover, it has been argued that the solution to poverty is to allow people to earn money. Thus, barriers that stop poor people from earning money should be removed, those are, the impediments employers face in

The NDP has identified nine main challenges to address:

- a large number of South Africans do not work,
- public education needs urgent attention,
- the residues of apartheid urban planning are an obstacle to employment growth,
- public services are generally poor,
- infrastructure is poor, and crumbling,
- the public health system is dysfunctional,
- the economy is too resource-intensive,
- levels of corruption are high, and
- society remains divided.

In the State of the Nation Address of 2014, the President has stated that the social partners of the National Economic Development and Labour Council (hereafter 'NEDLAC') should be convened to start discussing these matters with a view to concluding a 'social compact' to address the above challenges.[45]

Moreover, government has proposed far-reaching amendments to the LRA, the BCEA, the EEA and the MHSA.

The Amendment Bills were, and some still are, full of controversy and have been criticised vehemently.[46] Therefore, NEDLAC has identified policy themes for discussion to assist in the polarised debate. These Bills had been signed-off by NEDLAC, often on a non-consensus basis. Some have been signed into law. Some are in operation already, such as the Employment Equity Amendment Act, while others are not in operation yet, and others are still in process. The Amendment Act on the BCEA came into operation on 1 September 2014. It has been reported widely in the media that the Labour Relations Amendment Bill will be referred back to Parliament for further amendments on labour brokers, secret ballots before strikes, making provision for interest arbitration, allowing a court to intervene in lengthy and violent strikes, and a ban on scab labour. This has not happened, and these issues were referred to NEDLAC.

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hiring labour. Another priority is to liberalise the labour market and scrap most labour laws except for basic health and safety requirements. Rather than letting the poor rely on a failing State for some alleviation of their plight, it has been argued, let them use the only asset they have, namely their labour capacity. It was mooted that denying anyone the opportunity to earn a living, is one of the worst violations of human rights. South Africa needs, as part of labour law liberalisation, a constitutional amendment protecting the right to work: free of hindrance by government, unions, employer organisations or bargaining councils (F Cronje 'Protest action in South Africa: Threat, or opportunity for reform?' *Fast Facts @Liberty The Policy Bulletin of the IRR* SARRI (1–02–2014).

[45] On NEDLAC, see para 3 below.

[46] See the Regulatory Impact Assessment of Selected Provisions of the: Labour Relations Amendment Bill, 2010; Basic Conditions of Employment Amendment Bill, 2010; Employment Equity Amendment Bill, 2010; and Employment Services Bill, 2010 prepared for the Department of Labour and the Presidency by Prof P Benjamin, Prof H Bhorat & C van der Westhuizen, dated 9 September 2010.

The Labour Relations Amendment Act[47] will come into operation on a date yet to be announced. Draft Employment Equity Regulations had been published for comment, withdrawn, and the amended Regulations were then published on 1 August 2014 (coming into effect on the same date).[48] In this book, important provisions of these Acts and Bills are discussed.

There is also currently an investigation into a national minimum wage.[49] The introduction of such a wage cannot be seen as a cure for all labour ills. It has both pros and cons and must be thoroughly investigated against the background of many complex factors such as South Africa's low economic growth rate, inequality, international underinvestment, low productivity, poverty and huge unemployment. Other concerns are the sustainability of such a wage, the volatile labour arena and the current system of concluding and extending sectoral and ministerial determinations.

It has been argued that unions and employers supporting a minimum wage, respectively, want to keep out new entrants (particularly the young and unemployed) and jobs will be lost by employers laying off staff, mechanising or closing down to cut costs.

A national minimum wage, if set, will thus have to be at a level that would allow the new entrants into the labour market at an affordable and sustainable cost, and a balance must be maintained between such a wage and job creation.

Some new laws also saw the light namely the Employment Tax Incentive Act,[50] which provides tax incentives to encourage private sector employers to employ young people from 18 to 29 years old, and the Employment Services Act,[51] which provides for setting up a free public Employment Service which would register and attempt to match work seekers with available jobs and place them.[52]

Another Bill in the pipeline is the Women Empowerment and Gender Equality Bill ('WEGEB'),[53] which focuses on equal representation of women in decision-making structures, female economic empowerment, protection, advancement and gender-mainstreaming in the private and public sectors and civil society. It also wants to fight poverty, inequality and unemployment experienced by women.

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[47] 6 of 2014 (GN 629, *GG* 37921 dated 18 August 2014).
[48] NR 595 *GG* 37873, dated 1 August 2014.
[49] State of the Nation Address, 2014.
[50] 26 of 2013. It was reported that 56 000 young people had been employed during the Act's first month of operation (*The SA Budget 2014/15*, 26–02–2014) and 133 000 up to the end of May 2014 ('The Jacob Zuma Legacy Special' *Sunday Times* (6–07–2014)).
[51] 4 of 2014.
[52] The employment of foreign nationals will be regulated in that an employer may not employ a foreign national prior to such person providing a work permit issued in terms of the Immigration Act 13 of 2002.
[53] GN 701 *GG* 35637, dated 29 August 2012, now B50D-2013.

Labour legislation is protective in nature. It is therefore important to know who qualifies as an employee and will therefore qualify for the protection offered by these laws. Independent contractors, who closely resemble employees and atypical workers, are generally excluded from the protection of labour laws. This is, in fact, one point of criticism directed at the LRA, as some commentators view the Act, which mostly protects employees in *formal* employment, as too restrictive, since the majority of workers in South Africa, a developing country, are working in the *informal* economy. This means that even though they are workers, they are not protected by labour legislation, because they are *not* formal-sector workers.

3. TRIPARTITE MAKING OF LAWS

Although labour laws deal with the employment relationship between the employer and employee, the State is also indirectly involved in this relationship. This is as a result of the protective nature of labour law. The role of the State as employer of public servants should not be confused with its role as *legislator and enforcer of rights*. Instead, the interaction between State, organised labour and organised business is crucial to ensure that all role players are involved in shaping policy matters and legislation impacting on the employment relationship.

The tripartite interaction is clearly manifested in NEDLAC. At NEDLAC, government comes together with organised business, organised labour and organised community groupings (generally) on a national level to discuss and endeavour reaching consensus on issues of social and economic policy. This tripartite interaction is to ensure that all role players are involved in shaping legislation impacting on the employment relationship. This institution is not without criticism (as discussed below).

NEDLAC's work is conducted in four chambers which discuss different aspects of social and economic policy.[54] These are the Labour Market Chamber, the Trade and Industry Chamber, the Development Chamber and the Public Finance and Monetary Policy Chamber. NEDLAC aims to:

- make economic decision making more inclusive, and
- to promote the goals of economic growth and social equity.

The Labour Market Chamber considers all new labour laws and changes to existing laws before they are submitted to Parliament.

NEDLAC has been criticised for time wasted in its deliberations, parties' inability to not reach consensus on recommendations because representatives from government and labour are not mandated (these representatives then have

[54] The chambers are required to meet at least six times in each financial year. Representation in chambers is made up of mandated representatives from organised labour, organised business and government. Sub-committees and task groups of the chambers are formed to deal with specific issues. The chambers report to a management committee, which oversees the work programme and administrative issues.

to go back to their principals and, in this way, the process becomes protracted) and not all parties are represented in the Council. Some feel it is at a 'tipping point' since it became less effective and more adversarial in recent years.[55]

4. SCOPE OF LABOUR LAWS

When studying labour law, it is important *not* to put the law into compartments. The different subject fields of law are categorised only for ease of reference. It is, however, important to realise that only a holistic view of labour laws provides the full picture of the impact of the law on the employment relationship. First of all, the various sources of law that apply to employment are important. Although labour law rules are to a large extent contained in legislation, there are other sources as well, such as:

- the Constitution,
- the common law,
- case law, and
- ILO Conventions.

Though it is impossible in this book to discuss all these various sources in detail, it is possible to give guidance on the most important aspects of labour law and empower the reader to find the answers to practical problems in the workplace. The three main labour Acts are the LRA, the BCEA and the EEA, and these are discussed in detail. These Acts are supplemented by Codes of Good Practice. The Codes do not contain binding rules, but are used widely by employers and employees as guidelines in practice. Some of the most important of these are the:

- Code of Good Practice: Dismissal[56] (hereafter 'Code: Dismissal'),
- Code of Good Practice on Dismissal Based on Operational Requirements[57] (hereafter 'Code: Dismissal Operational Requirements'),
- Code of Good Practice on Picketing[58] (hereafter 'Code: Picketing'),
- Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[59] (hereafter 'Code: Sexual Harassment'),
- Code of Good Practice: Key Aspects of HIV/AIDS and Employment[60] (hereafter 'Code: HIV/AIDS'),
- Code of Good Practice on the Employment of People with Disabilities[61] (hereafter 'Code: Disabilities'),

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[55] A Smith 'Addressing South Africa's labour market challenges—a future role for social dialogue and tripartism?' *The Dispute Resolution Digest* (2014) 81.
[56] Schedule 8 of the LRA.
[57] GN 1517, *GG* 20245, dated 16 July 1999.
[58] GN 765, *GG* 18887, dated 15 May 1998.
[59] GN 1357, *GG* 27865, dated 4 August 2005.
[60] GN R 1298, *GG* 21815, dated 1 December 2000.
[61] GN 1345, *GG* 23702, dated 19 August 2002 (as corrected by GN 1064 *GG* 23718, dated 19 August 2002).

- Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices[62] (hereafter 'Code: Integration'),
- Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child[63] (hereafter 'Code: Protection Birth'),
- Code of Good Practice on the Arrangement of Working Time[64] (hereafter 'Code: Arrangement of Working Time'),
- Code of Good Practice: Preparation, Implementation and Monitoring Employment Equity Plans[65] (hereafter 'Code: Employment Equity Plans'), and
- Code of Good Practice: Who is an Employee?[66] (hereafter 'Code: Who is an Employee?').

5. FINDING YOUR WAY THROUGH THE BOOK

The further chapters of this book will take the reader through the various stages of the employment relationship and will illustrate the legal principles applicable to each stage. See the diagram 'Bird's-eye view of LABOUR LAW *Rules!*' on page xii above. At the start of the relationship it is important to determine whether a person qualifies as an employee so as to be eligible for protection in terms of labour legislation. Such protection relates to minimum terms and conditions of employment, unfair labour practices, unfair discrimination, unfair dismissals and participation in industrial action. Once an employment contract has been finalised and an employee has commenced work, both the employee and the employer will have to act as agreed in terms of the contract of employment. But remember that the employment contract is subject to the minimum conditions of employment contained in the BCEA, and to the rights and duties under the common law.

As in any other area of life, matters may go wrong in the workplace. For example, during employment, an employee can get temporarily ill, or injured on duty, and the provisions of COIDA or the UIA may apply. An employee may have a grievance against the employer based on, for example, non-promotion or an unfair suspension, and, if not resolved, the employee will have to resort to a claim based on an unfair labour practice.[67]

With regard to dispute resolution, the LRA created the Commission for Conciliation Mediation and Arbitration (hereafter 'CCMA'), the Labour Court and the Labour Appeal Court as specialised dispute resolution institutions. The aim is to ensure accessible and fast dispute resolution. The LRA requires that most disputes must first be referred for conciliation, which can be

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[62] GN 1358 *GG* 272866, dated 4 August 2005.
[63] GNR 1441, dated 13 November 1998.
[64] GNR 1440, dated 13 November 1998.
[65] GNR 1394 *GG* 20626, dated 23 November 1999.
[66] GN 1774, *GG* 29445, dated 1 December 2006.
[67] See ch 6 below.

conducted under the auspices of the CCMA or a bargaining council or statutory council registered for a particular sector and area. If conciliation fails, the Act prescribes the dispute resolution route that should be followed. This route can take the parties either to arbitration or to adjudication. Arbitration is dealt with by either the CCMA or a bargaining or statutory council. Adjudication is dealt with by the Labour Court. After arbitration, provision is made for a review of the award. In case of adjudication, provision is made to appeal against the decision by the court *a quo*.[68]

This book therefore consists of four parts:

- Part I: Introduction to labour law
- Part II: Rules applicable during the duration of the employment relationship
- Part III: Rules applicable to the termination of the employment relationship
- Part IV: Rules applicable to collective labour law

Parts II to III of the book deal with the individual employment relationship. Part IV deals with collective labour law. Collective labour law is not discussed as a phase of employment because collective labour law influences all stages of the employment relationship. Collective labour law concerns employees acting together in trade unions and employers acting individually or as employer organisations when they bargain about matters relating to the workplace, for example wages and better working conditions.

Every Part starts with a summary and sets out the legal implications relevant to each employment phase. At the beginning of each Part the reader gets a moment to reflect on the progress through these various phases. In addition, every Part puts the reader in the picture by outlining what is to come in the next Part against the backdrop of what has been discussed previously.

Every chapter under the Parts starts with a detailed table of contents to guide the reader through that specific aspect of the employment relationship. It is recommended that the relevant sections of the Acts are also read while studying a particular chapter.

In conclusion, LABOUR LAW *Rules!* discusses labour law in context of, firstly, international labour law principles applicable to South Africa such as the ILO, its ratified Conventions and 'decent work' (as set out above), since they impact on labour laws. Secondly, labour law must be studied in the context of the Constitution, 1996. Thirdly, NEDLAC follows a particular process for making laws, although a lot of criticism has been levelled against the institution. Fourthly, South Africans find themselves in confusing political and uncertain economic circumstances. Labour law can therefore not be studied without the social, economic and political context of the country. Fifthly, the dynamics within the ranks of labour are changing. Traditional alliances are crumbling, small unions[69] have come to the fore (splitting off bigger unions)

[68] These will be discussed in more detail in ch 9 below.
[69] For example, the Association of Mineworkers and Construction Union ('AMCU').

while bigger unions' membership is declining and, currently, we have a multi-union labour landscape. Strikes are common, lengthy and plenty[70] and some unions are considering a political future.[71] Sixthly, business (as a collective) seems to be talking about mechanisation. Finally, there is increasing protest action in all communities about poor service delivery, unemployment, crime and corruption. Communities feel their interests are not represented and that the ruling party shows a lack of accountability.[72]

Enjoy the journey through the employment relationship. This journey will be easier if employees and employers alike know their labour law rules.

[70] For example, the incident at the Marikana platinum mines where people had been killed. These strikes, lasting five months, were the longest and costliest in South African history. There were also numerous other strikes in the mining, manufacturing, metal work, construction, postal and farming sectors.

[71] For example, NUMSA has threatened to break ties with COSATU (and vice versa), the ANC and the South African Communist Party and to become a political party at some stage. It basically wants to form a (political) workers' party to advance working-class problems and to challenge the ANC.

[72] J Kane-Berman 'How to fix the future' *@Liberty—The Policy Buletin of the IRR* (13 May 2014). The EFF, on the other hand, wants to form a union.

Part II

Rules applicable during the course of employment

This part of the book deals primarily with the rules that will apply during the employment relationship, but will also include the pre-employment phase, that is when a person applies for a job.

It is important that parties know what the law requires of them at these stages in terms of:

- the formalities of concluding a contract,
- the effect of certain terms in the contract of employment, for example, a restraint-of-trade clause,
- the minimum terms and conditions of employment,
- the rights and duties of employers and employees flowing from the contract,
- the consequences flowing from the *common law* and its impact on the *contractual* relationship, for example, the doctrine of vicarious liability,
- the potential and compulsory deductions that must be made from employees' salaries relating to social protection laws, for example, the UIA or for purposes of medical aid or pension funds,
- the compulsory contribution of the employer for social protection legislation, for example, the COIDA or the SDA,
- the circumstances in which the terms and conditions of employment can be changed, and
- the actions (or omissions) of the employer that will be regarded as unfair labour practices.

Part II consists of six chapters. **Chapter 2** deals with the protection provided by labour laws for employees *exclusively*. It clarifies the tests for determining the difference between an employee and an independent contractor. **Chapter 3** discusses the impact of the common law on the contractual agreement between the parties. Both these sources determine the rights and duties of employers and employees flowing from the employment relationship. **Chapter 4** looks into the BCEA which mainly regulates minimum terms and conditions of employment. **Chapter 5** focuses on the EEA, which prohibits unfair discrimination in the workplace and regulates the implementation of affirmative action measures. In **Chapter 6** the LRA is discussed, but only as far as unfair labour practices (unfair acts or omissions by an employer against an individual employee) are concerned. Unfair labour practices are discussed

separately from dismissals, because they occur during actual employment and not at termination. Finally, in **Chapter 7**, social insurance legislation is discussed. The focus in that chapter is on social insurance aspects that influence the employment relationship. The chapter discusses the three elements of social insurance legislation. These are firstly legislation aimed at prevention (in terms of the OHSA and the MHSA), legislation aimed at compensation (the COIDA, the ODIMWA, the UIA and the UICA) and reintegration (the SDA, the SDLA, the ETIA and the ESA).

2

Exclusive protection for employees in terms of legislation

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1. WHO IS AN 'EMPLOYEE'?

As previously stated, labour laws are protective by nature. To understand this you need to picture employment law as an umbrella. Only people standing under the umbrella are protected against the rain. In other words, if a person is an employee, she/he is protected by labour law. People not under the umbrella will either get wet and cold or have to find another or different umbrella to provide protection. Put differently, people not covered by labour laws will *not* be protected and will have to find other laws to protect themselves.[1]

The primary aim of the LRA is to promote sound relations between employers and employees in the workplace.[2] Workers who are not employees fall outside the scope of the LRA and are, amongst others, not entitled to protection against unfair dismissal. For this reason, it is important to be able to draw a distinction between employees and other workers who do not qualify as employees, so-called 'independent contractors'. It is sometimes difficult to distinguish between an employee and an independent contractor because they closely resemble each other.

- an independent contractor is contracted to perform a specified task or to produce a specific result,
- an employee is appointed to render personal services in terms of a job description.

The following example illustrates this close resemblance:

> **Example:** X appoints Z as a handyman to do specific tasks (for example, fixing the gutters and the roof of a house). X's gardener S is also asked to fix things around the house. Although Z and S are doing similar jobs, Z will be an independent contractor and S will be an employee.[3]

The LRA,[4] the BCEA,[5] the EEA[6] and the SDA[7] all use the same definition of 'employee'.[8] In terms of this definition, an employee is:[9]

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[1] For example, people who do not qualify as employees may still receive protection under the Constitution or the PEPUDA. See the discussion in paras 5.1 and 5.2 below.
[2] Section 1.
[3] The way to distinguish between these types of workers is explained in more detail below.
[4] Section 213.
[5] Section 1. See ch 4 below.
[6] Section 1. See ch 5 below.
[7] Section 1. See ch 7 below.
[8] However, the definitions of 'employee' contained in the UIA, the COIDA, and the OHSA differ from these. See ch 7 below.
[9] Section 213 of the LRA.

Part (*a*) of the definition	Part (*b*) of the definition
'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;' ⇩	'any other person who in any manner assists in carrying on or conducting the business of an employer …' ⇩
This part of the definition indicates the following: • it includes both employees in the private sector ('who work for another person') and in the public sector ('or for the State'). • it includes domestic and farm workers as employees.* • it incorporates the common-law contract of service (the *locatio conductio operarum* in common law) and excludes the contract of work (the *locatio conductio operis* in common law), which relates to an independent contractor.	Although, this part of the definition seems to widen the scope of part (*a*) of the definition, it should still be interpreted in the context of the tests developed by the courts to determine whether someone is an employee or not (the tests are discussed below). Independent contractors would, therefore, still be excluded from the definition of an employee.

* See the definitions of 'domestic worker' and 'farm worker' in s 1 of the BCEA.

There are certain categories of employees which can more easily be confused with independent contractors, for example, temporary employees, casual workers, contract workers, part-time employees, seasonal workers or those working from home. The difficulty of determining who qualifies as an employee and who does not, has prompted the courts to formulate various tests to distinguish between employees and independent contractors. These are listed and discussed below.

2. GUIDELINES TO DISTINGUISH BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

The courts have given guidelines to distinguish between employees and independent contractors, and developed three tests in this regard. These are:

- the control test,
- the organisation test, and
- the dominant impression test.[10]

[10] See *Smit v Workmen's Compensation Commissioner* 1979(1) SA 51 (A). In *Niselow v Liberty Life* (1996) 17 *ILJ* 673 (LAC), the court added a so-called 'economic capacity test', which holds that an employee dedicates her/his sole income-earning capacity to the employer. This test is, however, not treated as a separate (fourth) test to the tests mentioned above, as it basically forms part of the dominant impression test.

Control test	Organisation test	Dominant impression test
The test looks at the control the employer has over the work the person does, the manner in which the work must be done, and when and where the work must be done.	This test looks at whether the person is part and parcel of the business or organisation of the employer. The person's work must be integrated into the business of the employer and must not just be an accessory to the business.	This test is favoured by the courts and considers the employment relationship as a whole, rather than concentrating on only one factor (study the contents of the table below to learn more about this test).

These tests helped in distinguishing an employee from an independent contractor, but were *not* sufficiently clear to solve the problem. This meant that an employee who sought a remedy in terms of labour legislation could only access the remedy once she/he could cross the hurdle of proving an employment relationship. This burden of proof, placed on the employee, meant that access to the 'umbrella' of protection of labour law was not easy.

As a result, the LRA[11] and the BCEA[12] had been amended in 2002 to include a rebuttable presumption as to whom would be regarded as an employee. The presumption implies that, as soon as one of the factors listed in section 200A of the LRA (listed below)[13] or section 83A of the BCEA, is found to exist in the relationship between the two parties, that relationship is presumed to be an employment relationship. The other party then has the opportunity to show, on a balance of probabilities, that no employment relationship exists.[14]

Section 200A of the LRA reads as follows:

'Until the contrary is proved, for the purposes of *this* Act …, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:

(*a*) the manner in which the person works is subject to the control or direction of another person;

(*b*) the person's hours of work are subject to the control or direction of another person;

(*c*) in the case of a person who works for an organisation, the person forms part of that organisation;

[11] Section 200A.

[12] Section 83A.

[13] These two presumptions are the same and for ease of reference only the text of s 200A is provided.

[14] The presumptions, however, do not apply to people earning more than the threshold amount determined by the MoL in terms of the BCEA (s 83A(2)). See also ch 4 below. Where a work arrangement involves people who earn equally or below such amount, any party may approach the CCMA for an advisory award whether the people involved, are in fact, employees (s 83A(3)).

(*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(*e*) the person is economically dependent on the other person for whom she/he works or renders services;
(*f*) the person is provided with tools of trade or work equipment by the other person,
(*g*) the person only works for or renders services to one person.'

Sections 200A and 83A should be read in conjunction with the Code: Who is an Employee? The Code incorporates the three tests developed by the courts but it goes further and provides guidance for the possible interpretation and application of these tests in a modern context.

For example, as far as *control* is concerned, the Code determines:

- control includes the right to determine what work the employee will do, in what manner and what the employee's working hours will be, and
- control may be a term of the contract, but even where it is not specified in the contract, it does not necessarily mean that a contract of employment does not exist.

As far as the *organisation test* is concerned, the Code states, *inter alia,* that:

- the traditional workplace no longer exists and the employee does not need to work from the employer's premises to indicate that there is an employment relationship, and
- the tools of trade provided by the employer should not be interpreted narrowly and may range from a modem or cell phone package to a set of screw drivers.

As far as the *dominant impression test* is concerned, the Code confirms the importance of this test. It states that there is no single decisive factor to determine the existence or absence of an employment relationship. Therefore, all factors should be taken into account when determining the type of the relationship.[15]

The Code also contains a table (developed from case law on the subject) which compares an employee to an independent contractor and points out the difference/s between these. The following table can be used to assist in the application of the dominant impression test.[16]

[15] Code: Who is an Employee?, item 27.
[16] Code: Who is an Employee?, item 32.

Employee	Independent contractor
Object of the contract is to render personal services.	Object of the contract is to perform a specified work or produce a specified result.
Employee must perform services personally.	Independent contractor may usually perform through others.
Employer may choose when to make use of the services of the employee.	Independent contractor must perform work (or produce result) within the period fixed by the contract.
Contract terminates on death of the employee.	Contract does not necessarily terminate on death of an independent contractor.
Contract also terminates on expiry of the period of service in the contract.	Contract terminates on completion of work or production of specified result.

The following example will further illustrate the application of the various principles in practice:

Example: Richard was a street vendor who sold newspapers for a Sunday newspaper, Paper Palace. This was his only source of income since he was unemployed during the week. Paper Palace had an area manager who phoned the vendors every Friday to arrange when and where they will be picked up. The vendors are paid on commission basis. When Richard's services were terminated, he claimed unfair dismissal. The first step to get access to the 'umbrella' of labour law protection, is to show that one of the factors in the presumption had been present in the work relationship. Richard held that he was an employee because he reported to the area manager, he was supplied with the tools of the trade (posters and the newspapers to sell), and he was economically dependent on Paper Palace.

Richard was consequently assumed to be an employee. Paper Palace then had the opportunity to rebut this assumption. They had presented the following facts to the CCMA to show on a balance of probabilities that Richard was not an employee. They showed:

Richard did not form part of the organisation, the area manager was a mere contact person for practical arrangements.

The employer did not control the employee. The job necessitated that he worked on Sundays and that he must be available to sell newspapers from 05h00–15h00. If he sold no papers or chose to sit under a tree for the whole time, he would only lose commission, therefore the employer did not control what he did.

Richard was not economically dependent on Paper Palace as a result of their doing. He was allowed to work for any other employer during the week but since he was unemployed, the selling of newspapers was his only

income. However, the employer did not force him to only use his economic capacity for this purpose.

The court, therefore, held that the dominant impression test indicated that Richard was not an employee. He was not allowed to pursue his claim in terms of labour law since he was an independent contractor.

It can be safely stated that the courts are generally in favour of a purposive and expansive interpretation rather than a restrictive approach to the definition of an 'employee' in recent years. In other words, they try to extend the umbrella as far as possible.

Another important question is whether a person becomes an employee upon concluding a contract of employment with the employer *or* at the time the person commences work. This question was answered in *Wyeth SA (Pty) Ltd v Manqele*[17] where the court held that people who have signed contracts of employment, but have not yet started working, were employees for purposes of the LRA. The court, in coming to this decision, took into account the fact that section 23 of the Constitution affords 'everyone' the right to fair labour practices. When an interpretation has to be done, the definition of 'employee', the contract of employment, the Code, and the presumptions must *all* be considered together.

Various terms are used for different categories of employees which lead to further confusion. For example, terms 'temporary employee', 'casual worker', 'part-time employee' and 'contract worker' are often used interchangeably, and these categories of workers are generally known as 'temporary' or 'atypical employees'.

In the Labour Relations Amendment Act (hereafter 'Amendment Act') there is, for the first time, clarification on these concepts. The Amendment Act determines that 'non-standard forms of employment' relate to temporary employees, fixed-term employees and part-time employees. These groups of employees are discussed below.

3. NON-STANDARD EMPLOYEES

Chapter IX of the LRA regulates non-standard employment and proposed amendments to increase protection of vulnerable workers and to promote decent work. The Act attempts to clarify confusion about atypical employees as far as their definition, purpose and rights are concerned.

The Act creates three categories of non-standard employment:

- temporary employment services (hereafter 'TES') (commonly called labour brokers) and employees employed by them are temporary employees,
- fixed-term employees, and
- part-time employees.

[17] [2005] 6 BLLR 523 (LAC).

These different forms of employment will be discussed below by answering three questions, namely:

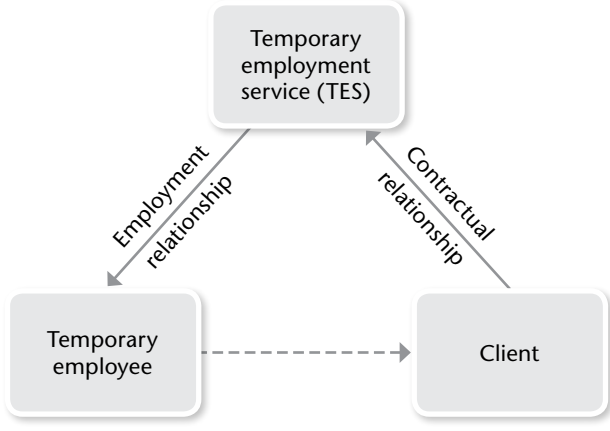
(*a*) who is a temporary employee?
(*b*) when will it be allowed?
(*c*) what will happen if there is non-compliance with the LRA?

3.1 Temporary employment services ('TES')

3.1.1 *Who is a temporary employee?*

This refers to employees supplied to a client by a TES/labour broker. Such a relationship is characterised by its triangular form. The Act defines 'temporary employment services' as:

> 'any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client; *and* who are remunerated by the temporary employment service.'



3.1.2 *When will it be allowed?*

An employer may make use of a TES/labour broker, but the Amendment Act sets restrictions as far as the duration of these services is concerned.

An employer may appoint a temporary employee for a limited or an unlimited duration, provided that it complies with the following restrictions:

Limited duration	Unlimited duration
An employee is provided for the client: • for a period of 3 months or • as a substitute for an employee of the client who is temporarily absent.	An employee is supplied for any period of time but on a temporary service basis. Exactly what temporary service is, will be determined by the relevant bargaining council/sectoral determination/MoL.

Employees who earn more than the BCEA threshold are excluded from these restrictions.

3.1.3 *What will happen if there is non-compliance with the LRA?*

As long as the parties comply with the Act and appoint temporary employees for the right reasons (for limited and unlimited periods of time), there will be no problem. In other words, as long as the employer (TES) and client comply with the LRA, the temporary employee is regarded as an employee of the TES.

If there is non-compliance, for example, where the employee is not really performing a temporary service for the client, she/he will be deemed to be the employee of the client and employed on an indefinite basis. In other words, the temporary employee will *become* a permanent employee of the client and no longer work for or be supplied by the labour broker/TES.

3.2 Fixed-term employees

3.2.1 *Who is a fixed-term employee?*

This refers to a contract of employment that terminates on/at:

- the occurrence of a specified event,
- the completion of a specified task or project, or
- a fixed date, other than an employee's normal or agreed retirement age.

The following employees are **excluded** from the restrictions with regard to fixed-term employees.:

Employees earning more than the threshold set in the BCEA, namely R205 433 per year.

- An employer that employs fewer than 10 employees, or
- an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business; or the business was formed by the division or dissolution for any reason of an existing business.

An employee employed in terms of a fixed-term contract permitted by any:
- statute,
- sectoral determination, or
- collective agreement.

There is no triangular relationship with a fixed-term contract. It is the employer and employee who conclude a contract of employment which will terminate at some set stage.

3.2.2 *When will it be allowed?*

A fixed-term contract would be allowed if the employee is appointed for a period of three months or less. An employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months *only* if:

- the nature of the work for which the employee is employed is of a limited or definite duration, or
- the employer can demonstrate any other *justifiable reason* for fixing the term of the contract

The employer who wants to offer an employee employment on a fixed-term contract or to renew or extend a fixed-term contract, will be required to do so in writing and state the reasons for it.

The Act determines that *justifiable reasons* for a fixed-term employee will be where such an employee:

- is replacing another employee who is temporarily absent from work,
- is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months,
- is a student or recent graduate who is employed for the purpose of being trained or gaining work experience,
- is employed to work exclusively on a specific project that has a limited or defined duration,
- is a non-citizen who has been granted a work permit for a period,
- is employed to perform seasonal work,
- is employed for the official public works or similar scheme,
- is employed in a position which is funded by an external source for a limited period, or
- has reached the normal or agreed retirement age applicable in the employer's business and continues to perform work for that employer.

If so required in any proceedings, the employer will have to prove that there was a justifiable reason for fixing the term of the contract and that both parties agreed about such term.

The Act also determines the following with regard to remuneration and terms and conditions of a fixed-term employee:

> 'where a fixed-term employee is appointed for longer than three months, the employer must treat such employee in the same way as a permanent employee performing the same or similar work.'

The employee may only be treated less favourably where there is a justifiable reason, for example, seniority, experience, length of service, merit, and similar criteria.

If an employee has been employed for longer than 24 months on a fixed-term contract she/he will be entitled to severance pay when the employment is terminated (except in cases where the employer arranges alternative employment for such employee). The severance pay is calculated according to the formula in the BCEA.[18]

[18] See ch 4 para 3.3.3.

Employers will also be required to give employees on fixed-term contracts equal access to opportunities to apply for available vacancies.

3.2.3 *What will happen if there is non-compliance with the LRA?*

If a fixed-term contract does not comply with the above provisions, it will be deemed to be of *indefinite or permanent* duration. In other words, the fixed-term contract worker will become a permanent employee of the employer.

3.3 Part-time employees

A part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works, and who works less hours than a comparable full-time employee.[19] This will typically be a domestic, casual or piece worker.

Since a part-time employee is a permanent employee, the Act does not extend further job security protection. It focuses more on ensuring equal treatment as far as terms and conditions of employment, remuneration, promotion and skills development are concerned.

These employees should be treated, on the whole, not less favourable than a comparable full-time employee doing the same or similar work, *unless* the employer can provide valid reasons justifying such different treatment.

These provisions, however, will not apply to:

- employers with fewer than 10 employees,
- employees earning more than R205 433 per year, and
- employees who ordinarily work fewer than 24 hours a month for a particular employer.

4. CATEGORIES OF EMPLOYEES EXCLUDED FROM THE LRA

Though the LRA applies to many employees, certain categories of employees are specifically excluded from the scope of the definition of 'employee' in the LRA. This means that even though they qualify to fall under the scope of protection of the labour law umbrella, they are specifically excluded. These categories are:[20]

- members of the National Defence Force, and
- members of the State Security Agency.[21]

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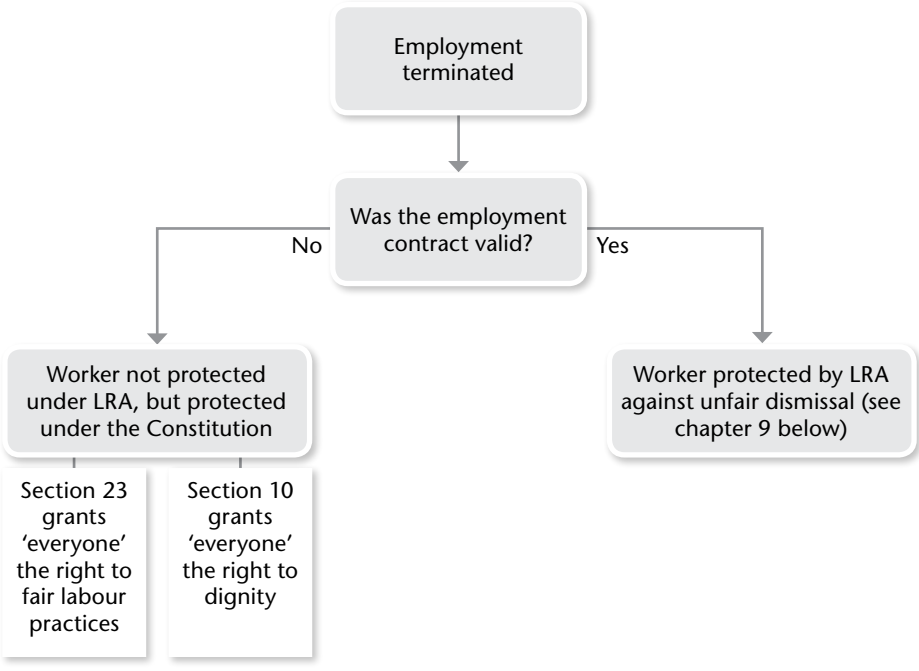
[19] The Act provides that a full-time employee is paid wholly or partly by reference to the time that she/he works and is identifiable as a full-time employee in terms of the custom/practice of the employer.

[20] Section 2.

[21] The State Security Agency consists of the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence, the National Communications Centre and Comsec (which secures communications by government). This amendment was consequential on the establishment of the State Security Agency. The same is true for the BCEA (ch 4 below), but not for the EEA (ch 5 below).

The same exclusions apply to the BCEA.[22]

The distinction has been made between protection in terms of the Constitution or in terms of the LRA for illegal workers (see the diagram below).



5. PROTECTION AND REGULATION OF ILLEGAL AND FOREIGN WORKERS

5.1 Illegal workers

> **Example:** Bessie is 'employed' by Slimy Sam to act as a drug mule. After successfully delivering the drugs, Sam refuses to pay Bessie.
>
> In terms of the common law, an unlawful contract is void (or voidable). In other words, since Bessie was 'employed' to perform an unlawful activity, she will not have protection under the labour law umbrella. Under criminal law, any unlawful conduct is punishable by a court of law, which means that Bessie can be prosecuted as well.

However, an important turning-point came with the decision of the Supreme Court of Appeal in *Kylie v CCMA*.[23] This case concerned the alleged unfair dismissal of a prostitute. The commissioner held that the CCMA did not have

[22] Section 3 of the BCEA. See also ch 4, para 2 below.
[23] 2010 4 SA 383 (LAC).

jurisdiction to hear the matter since the Commission could only deal with cases where a lawful employment contract existed between the parties.

The matter went on review to the Labour Court[24] where it upheld the common-law principle that courts should not sanction or encourage illegal activity. This principle has been enshrined in our Constitution in 'the rule of law'. It would have been contrary to this principle to find that the Labour Court had jurisdiction to decide this matter.

This decision was overruled by the Labour Appeal Court in *Kylie v CCMA & others*[25] on the basis that section 23 of the Constitution protects the dignity of 'everyone' in an employment relationship. Thus, even sex workers are entitled to the right to dignity and the right to fair labour practices.

Although the courts are bound by the common-law principles as set out by the Labour Court, these rules are not inflexible. They may be relaxed if necessitated by public policy and to prevent injustice.

The court could not find that she had been dismissed or order reinstatement as it would amount to an order to 'commit a crime'. The court awarded *Kylie* compensation, but not in terms of the principles of unfair dismissal found in the LRA but in terms of the Constitution. The reason for the order to pay compensation was to compensate her for the fact that her dignity was negatively affected because the 'employer' failed to follow a fair procedure. By framing the payment in this way, the Supreme Court of Appeal ensured that it was independent from the fact of illegal employment.

The finding of the court was interesting. Instead of focusing on the sex worker's criminal conduct, it focussed on the wrong committed against her.

Will this mean that Bessie in our example above will also have a claim in terms of section 23 of the Constitution? Not necessarily. The court specifically stated that each case had to be decided on its own merits.

5.2 Foreign workers

Similar to the *Kylie* case, the court in *Discovery Health* held that illegal foreigners will *not* receive protection under labour legislation, since they are *not* employees. However, this does not mean that there is absolutely no protection for them. These workers may still be protected by the Constitution, which, *inter alia*, guarantees everyone's right to dignity[26] and fair labour practices.[27]

In *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration & others*,[28] where the court had to decide whether an employee with a valid contract of employment, but without a valid work permit, could claim unfair dismissal. The court looked at the Immigration Act, which

[24] [2008] 9 BLLR 870 (LC).
[25] (2010) 31 *ILJ* 1600 (LAC).
[26] Section 10.
[27] Section 23(1).
[28] (2008) 29 *ILJ* 1480 (LC).

prohibits employment of an illegal foreigner (or a foreigner whose status does not authorise her/him to be employed in South Africa).[29] Any employer who knowingly employs an illegal foreigner or a foreigner in contravention of the Immigration Act, commits an offence.[30] The court found that, although the latter Act deters employers from *intentionally* hiring workers *not* authorised to work in terms of the Act, the Act cannot be used to allow an employer, through criminal conduct in employing unauthorised workers, to escape its obligations in terms of the employment contract.[31] It is important to note that the employer who employs an illegal foreigner may not refuse to pay that worker on the basis that the worker is an illegal foreigner. In other words, an illegal foreigner may still be able to enforce her/his contractual rights against the employer.[32]

The Labour Appeal Court has, therefore, accepted that, although labour rights and protection should be claimed and enforced in terms of the LRA (and other labour laws), section 23(1) of the Constitution provides *broader* protection than labour laws. If a worker is in a work relationship 'akin to an employment relationship',[33] she/he can enjoy the protection of the right to fair labour practices.

5.3 Employment Services Act[34] ('ESA') and foreign workers

5.3.1 *Purpose of the Act*

The ESA has a dual purpose, namely to:

regulate the employment of foreigners in order to ensure work opportunities and economic development of South African citizens;

and

prevent employers from mistreating foreign nationals

5.3.2 *Regulation of employment of foreigners*

The ESA defines a 'foreign national' as follows:

> 'an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act.'

---

[29] Section 38 of the Immigration Act prohibits the employment of illegal foreigners and foreigners contrary to the provisions of the Act.
[30] Section 49 of the Immigration Act.
[31] See C Bosch 'Can unauthorised workers be regarded as employees for the purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342, 1349–1350.
[32] *Dunwell Property Services CC v Sibande and others* [2012] 2 BLLR 131 (LAC).
[33] *Kylie v CCMA & others* (n 28 above).
[34] 4 of 2014.

The Act contains the following general conditions regarding the employment of foreign nationals. They may be employed but their employment must:

- comply with and give effect to the right to fair labour practices contained in section 23 of the Constitution,
- not have a negative impact on existing labour standards or the rights and expectations of South African workers, and
- must promote the training of South African citizens and permanent residents.

As far as the regulation of employment of foreigners is concerned, the ESA further determines the following:

- An employer may not employ a foreign national within the country if that person cannot produce an applicable and valid work permit, issued in terms of the Immigration Act.
- The MoL is expected to make regulations which will, amongst other things, include a duty on employers to:
  - satisfy themselves that there are no other persons in the Republic with suitable skills to fill the vacancy, before recruiting a foreign national, and
  - prepare for skills transfer planning in respect of any position in which a foreign national is employed.
- The employer may be required to first make use of the free Public Employment Service[35] (PES) (discussed below) which will keep a register of all vacant posts and job seekers. The PES will match work seekers and employers to assist employers in the recruitment of suitable employees who are South African citizens or permanent residents. Government will thus have a greater say in placing of foreign workers.

Note again that the fact that a foreign national is employed without a permit, will not stop her/him from claiming relief when dismissed.[36]

5.3.3 *Protection of foreign employees*

The ESA will further prohibit employers to permit foreign nationals to perform work for which:

- they are not authorised to perform in terms of their permits, or
- to engage in work contrary to the terms of their work permits.

The employer may also not coerce or threaten a foreign worker to do work contrary to the worker's will.

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[35] Which services include facilitating the employment of foreign nationals in a manner that is consistent with the objects of the ESA.

[36] See *Discovery Health* discussed in para 5.2 above.

6. DEFINITION OF 'EMPLOYER' (INCLUDING LABOUR BROKERS)

The identification of the employer as the other party to the employment relationship is important. South African labour legislation does not presently define an 'employer', but it can be accepted that an 'employer' will be described according to the definition of an 'employee'.

For present purposes, an 'employer' may therefore be described as:

(*a*) any person/body which employs any person in exchange for remuneration; and

(*b*) any person who permits any person to assist her/him in conducting her/his business.

Such a definition covers both the person who employs another under an employment contract (usually in *formal* employment) and the person who allows another to assist her/him in conducting her/his business. This will, for example, include labour brokers/TES.[37]

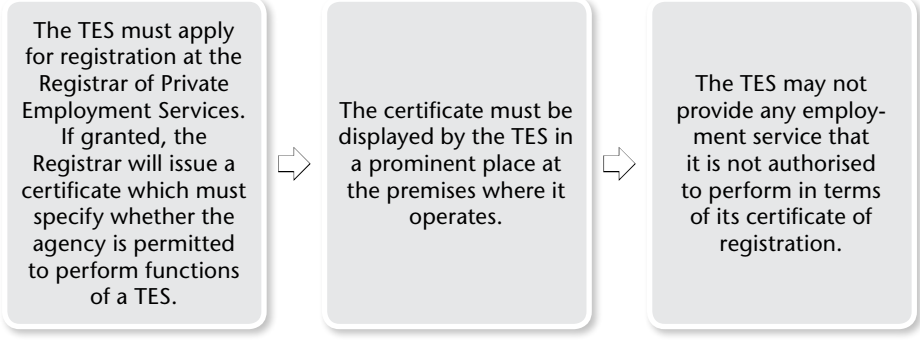
7. THE POSITION OF TEMPORARY EMPLOYMENT SERVICES ('TES')/LABOUR BROKERS

7.1 Issues regarding TES/labour brokers

Trade unions have been calling for an outright ban on labour brokers as they are of the opinion that the use of labour brokers creates difficulties in the (Labour Relations) Amendment Act and the ESA in a number of ways.

7.2 Registration of labour brokers

One of the significant proposed changes relate to registration.[38]



[37] Refer to the discussion of TES's and temporary employees in para 3.1 above.

[38] The registration of a TES may be cancelled by the Registrar if the agency fails to comply with the requirements of the ESA or any regulations in terms of the Act or any prescribed procedures.

7.3 Liability of the labour broker and client

Under the present LRA, an employee provided by a labour broker may hold the employer (in other words, the labour broker) and client jointly and severally liable if the TES contravenes:

- a collective agreement concluded in a bargaining council that regulates terms and conditions of employment,
- a binding arbitration award that regulates terms and conditions of employment,
- the BCEA, or
- a determination made in terms of the BCEA.

Joint and several liability means that the employee can satisfy her/his claim by taking action against the employer *and* the client but the employee must start with the employer. If she/he does not perform, the employee can take action against the client.

The Act simplifies the process by determining that the employee may institute proceedings against either the TES, the client or both.

7.4 Specific duties and prohibitions

Apart from the registration of a TES, as discussed above, the Act provides further protection by:

Compelling the TES to provide the temporary employee with written particulars of employment that comply with the BCEA.

Prohibiting the TES from employing any employee on terms and conditions of employment in contravention of the LRA, any employment law, sectoral determination or collective agreement concluded in the bargaining council applicable to a client to whom the employee renders services.

7.5 Private and public employment agencies

The ESA provides for private employment agencies and private agencies.[39]

A private employment agency is defined as 'any person who provides employment services for gain' and a public employment service agency is one that 'must provide … employment services free of charge to members of the public'.

[39] The purpose of the ESA includes promoting employment, improving access to the labour market for work seekers, providing opportunities for new entrants to the labour market to gain work experience, improving the employment prospects of work seekers, in particular, vulnerable work seekers, improving the employment and re-employment prospects of employees facing retrenchments, facilitating training for work seekers, in particular vulnerable work seekers, promoting employment, growth and workplace productivity, and facilitating the employment of foreign nationals in the South African economy.

Public employment services

- Will match work seekers with work opportunities, register work seekers, vacancies and other opportunities, place work seekers, exchange information among labour market participants, for example, SETAs and private employment agencies

Private employment agencies

- May not charge a job applicant a placement fee unless lawfully permitted (this is in line with the Basic Conditions of Employment Amendment Act, which also prohibits a fee in exchange for employment)
- The agreement between the TES and the client must specify the remuneration and the TES' fee
- The TES must keep a register of work seekers and the clients where they were placed
- Any provision in breach of the above will be invalid and unenforceable

The ESA also introduces the following important bodies:

- the Employment Services Board,[40]
- Productivity South Africa,[41] and
- the Protected Employment Enterprises.[42]

8. EMPLOYMENT TAX INCENTIVE ACT[43] ('ETIA')

The last piece of legislation to be considered is the ETIA. The Act provides for subsidies aimed at encouraging private sector employers to employ young people aged between the ages of 18 and 29. This legislation aims to support employment growth by focussing on labour market *activation*, especially for the youth. The ETIA proposes a definition of 'employee' as follows:

> 'a natural person who works directly for another person; and who receives or is entitled to receive remuneration from that other person but does not include an independent contractor.'

The protective reach of the umbrella referred to in paragraph 1 above, has been clarified and explained in detail now.

The focus in chapter 3 below will turn to the relationship between the people under the umbrella.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which option below will **correctly** complete the following sentence?
   It is important to distinguish between an employee and an independent contractor because ...

[40] The Board must advise the MoL on various issues regarding TES and protected work for people with disabilities.
[41] Its main function will be to promote a culture of productivity in workplaces.
[42] Its function will be to promote work and employment opportunities for people with disabilities.
[43] 26 of 2013. Also discussed in ch 7 below.

(*a*) only employees are protected by the LRA and the BCEA.
(*b*) independent contractors are protected by the LRA against unfair dismissal but they are not protected by the BCEA.
(*c*) there are certain instances where independent contractors can receive protection under the LRA.
(*d*) independent contractors are protected by the BCEA against unfair working conditions but they are not protected by the LRA.

2. Draw a clear distinction between the control test, organisation test and the dominant impression test.
3. X worked for Y as a prostitute for many years. One morning when X reports for duty, Z who is the receptionist at Y's brothel, informs X that Y has instructed her to give X a letter which informs her that her services are no longer needed as she was no longer bringing in enough money for the business. X feels that her employment has been unfairly terminated and she approaches you for advice. Do you think X will receive any form of protection in terms of the law?

✓ Feedback

1. (*a*) is correct. Only employees are protected by labour legislation.
   (*b*) is incorrect. Independent contractors are not protected by labour legislation as they are not employees.
   (*c*) is incorrect. Independent contractors are not employees and as a result they are not protected by the LRA.
   (*d*) is incorrect. Independent contractors are not protected by any labour legislation. See paragraph 2 above.
2. The *control test* considers the control the employer has over the work the person does; how the work is done and when it must be done. The *organisation test* considers whether a person is part and parcel of the employer's business or organisation. The person's work must be integrated into the employer's business and must not only be an accessory to the business of the employer. The *dominant impression test* considers the employment relationship as a whole. It does not focus on only one factor. See paragraph 2 above.
3. It was held in the *Kylie* case that even though a prostitute will not receive protection against unfair dismissal in terms of the LRA, she is, however entitled to protection under the Constitution, as the scope of the Constitution is broad and extends to everyone, including sex workers. Thus, a prostitute has a right to fair labour practices in terms of section 23 of the Constitution as a result of the employment *relationship*. This relationship exists despite the illegality of the type of work performed. See paragraph 4.1 above.

RECOMMENDED READING

1. Benjamin P 'An accident of history: who is (and who should be) an employee under South African Labour Law' (2004) 25 *ILJ* 787
3. Bosch C 'Can unauthorised workers be regarded as employees for the purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342
4. Brassey M 'The nature of employment' (1990) 11 *ILJ* 889
5. Du Toit D & Ronnie R 'Regulating the informal economy: Unpacking the oxymoron—from worker protection to worker empowerment' (2014) 35 *ILJ* 1802
6. Theron J 'Who is in and who is out: Labour law and those excluded from its protection' [2007] *LDD* 19
7. Van Eck BPS 'Temporary employment services in South Africa and Namibia' (2010) 13 *PER* 107

3

The impact of the common law on the contract of employment

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1. INTRODUCTION

The fact that parties are in an employment relationship has consequences. This is, *inter alia,* as a result of the common law, the Constitution and labour legislation which regulate such an employment relationship. This chapter focuses on the common law while the protective nature of labour legislation has already been illustrated in chapter 2 above. Note that even though the impact of the common law has been reduced as a result of labour legislation,

its relevance remains important. Common-law principles are still applicable to the modern day employment relationship, particularly where legislation is silent on a particular issue.

The impact of the common law relates to *basic* rights and duties of employees and employers. Employers and employees have certain rights and corresponding duties even if parties do not agree or specifically include them in their contracts of employment. These rights and duties are discussed in this chapter along with other important matters flowing from the common law. The effect of workplace customs, traditions and practices on the contract of employment is also discussed.

2. DUTIES OF THE EMPLOYER AND THE EMPLOYEE

The common-law duties of the employer and the employee are very broad. These duties are indirectly covered by labour legislation such as, the LRA, the BCEA and the EEA.

2.1 Duties of the employer

2.1.1 *To remunerate the employee*

The primary duty of the employer is to pay the employee, and if the employee does not work, no pay is due. This common-law duty still applies. For example, the common law does not provide for paid leave. The principle was changed by the BCEA, which provides for such paid leave in certain circumstances. If no leave in terms of the BCEA applies, the principle of 'no work, no pay' still applies, for example, during strikes.

Moreover, the common law does not prescribe what form remuneration must take. However, remuneration normally takes the form of money or payment in kind.[1] Payment in kind occurs where an employee receives something of value (a certain benefit) in the place of money

2.1.2 *To provide the employee with work*

The employer is generally not required to provide the employee with work to do except in certain special instances, such as where the employee's salary is commission-based and dependent on actual work done, or where the employee's success is dependent on the performance of certain duties on a regular basis, for example, being an actor. This also includes the employer's duty to receive the employee into service. The employer who fails to receive an employee into service is in breach of contract.

[1] The BCEA's definition of remuneration recognises payment in money, or in kind, or in both forms.

2.1.3 *To provide safe working conditions*

The employer may, depending on the nature of work or workplace, have to provide the employee with protective devices, install safety equipment and exercise proper supervision. This duty arises from both common law and legislation, such as the OHSA.

The duty to provide safe working conditions might even include the protection of an employee against any form of harassment (physical and psychological) in terms of the EEA.

Resulting from this, is the duty on the employer to contribute to, for example, the Compensation Fund created in terms of the COIDA to ensure that an employee injured on duty will be compensated. An employee who suffers an injury or damages as a result of the employer's unlawful act or omission can institute a claim against the Compensation Fund as opposed to a claim against the employer personally.

2.1.4 *To deal fairly with the employee*

This duty is captured by the constitutional right to fair labour practices.[2] The LRA protects employees against unfair treatment (unfair labour practices) during the time of employment and against unfair dismissal at the time the employment relationship is terminated. This duty is wide enough to also include the employer's common-law duties and the duty to comply with statutory obligations.

2.2 Duties of employees

2.2.1 *To render services to the employer*

The primary duty of an employee is to place her/his labour potential at the disposal of the employer. This duty includes the employee's duty to enter and remain in the employer's service. The employee who fails to enter and remain in the employer's service will not receive any remuneration from the employer. There might be exceptions, such as when an employee is on approved leave.

2.2.2 *To work competently and diligently*

When the employee enters into the employment contract with the employer, she/he guarantees that she/he is capable of doing the work competently and diligently. It is generally accepted by the courts that a contract of employment contains an implied term that the employee undertakes to perform her/his duties with reasonable competency. This is one of the reasons why the employee who lies about her/his qualifications or competencies may be found to be in breach of this duty. The employee's contract of employment may even be lawfully terminated on the ground of such misrepresentation.

[2] Section 23 of the Constitution.

2.2.3 *To obey lawful and reasonable instructions*

The employee is under the control and authority of the employer.

Non-compliance with this duty will constitute serious insubordination and breach of contract, except if the employee refuses to follow orders outside the scope of the employment contract or orders which are unlawful and unreasonable.

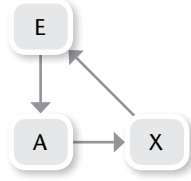
2.2.4 *To serve the employer's interests and act in good faith (also called a 'fiduciary duty')*

Each employee owes her/his employer a duty of good faith, also referred to as a 'fiduciary' duty. An employment relationship is built on trust and confidence, and this is, in fact, an implicit term of every employment contract. It includes, for example, the duty not to work against the employer's interests, not to compete with the employer, to devote hours of work to promoting the employer's business and to act honestly.

3. DOCTRINE OF VICARIOUS LIABILITY

The doctrine of vicarious liability (which is based on considerations of public policy) may also impact on the employment relationship. According to this doctrine, an employer is liable for the unlawful or delictual acts of an employee performed during the course of business. The operation of this doctrine is regulated by the common law and not by labour legislation.[3]

Example: A is employed by E to do deliveries with the company's bicycle. A bumps into X while doing a delivery. Because A committed the delict while performing his duties, X can claim damages from E.



The doctrine of vicarious liability is based on the principle that the employer (who by its profitable operations creates a risk of harm to others), has to compensate those who suffer injury as a result of the wrongful conduct of its employee/s. Vicarious liability thus protects third parties. The fact that the employer is liable to third parties for its employee's wrongful acts, however, does not mean that the employer will not have recourse against such employee. Depending on the circumstances, the employer can discipline the employee for misconduct and even claim repayment in this regard.[4]

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[3] *RH Johnson Crane Hire v Grotto Steel Construction* 1992 (3) SA 907 (C), 908F. Note that the Constitution requires the courts, when developing the common law, to promote the spirit and objects of the Bill of Rights (s 39(2)). This was in fact done with the doctrine of vicarious liability in *NK v Minister of Safety & Security* (2005) 26 *ILJ* 120 (CC).

[4] Section 34 of the BCEA regulates deductions made from an employee's salary.

In order for the employer to be held liable for the employee's wrongful conduct, the following three requirements must be met:

- there must be a contract of employment (employer/employee relationship),
- the employee must have acted in the course and scope of employment, and
- the employee must have committed a delict (that is, a negligent or intentional unlawful action or omission by an employee causing a third party to suffer damages or personal injury).

Usually, the most problematic requirement is to determine whether the employee acted in the course and scope of employment. Therefore, each case must be judged on its own merits. It might not even matter whether the employee committed the act during or after working hours, as long as the employee was acting within the scope of her/his employment. The fact that the employee's wrongful act was expressly forbidden by the employer,[5] or constituted a criminal act,[6] might also not absolve the employer from being held vicariously liable for the employee's wrongful actions.[7] It is important in this regard to determine whether at the time of the act the employee was promoting the interests of the employer or not.

Example: Employee R is a watch maker at Jewellery D. While fixing an expensive watch he switches the original with a cheap, fake watch. After the client discovered this, he claimed damages from Jewellery D. The employer will be liable for the damages of the client. The fraudulent action does not affect the fact that the employer is vicariously liable. Employee R might be disciplined by Jewellery D and may also face criminal charges.

In *Bezuidenhout NO v Eskom*,[8] the employee had been provided with a truck, marked as Eskom property, for the purpose of carrying out his duties. The employee had been expressly prohibited from giving lifts to any person without the permission of his superiors. The employee offered a lift to a hitch-hiker and along the way negligently caused an accident during which the passenger suffered severe head injuries. The Supreme Court of Appeal held that the instruction not to carry passengers placed a limitation on the scope of employment. But, the employer was not vicariously liable for the injuries sustained by the unauthorised passenger because:[9]

> 'The driver knew perfectly well that he was prohibited from giving a lift and had no intention of furthering his master's affairs by doing so, and the reality was that [the passenger's] presence added nothing to the interest of the employer in the proper administration of its service …'

[5] *Feldman (Pty) Ltd v Mall* 1945 AD 733, 756–757.
[6] *Minister of Justice v Khoza* 1966 (1) SA 410 (A); *Mhlongo v Minister of Police* 1978 (2) SA 55 (A).
[7] *Viljoen v Smith* (1997) 18 *ILJ* 61 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1997 (2) SA 591 (W).
[8] (2003) 24 *ILJ* 1084 (SCA).
[9] 1095A.

4. IMPACT OF THE CONTRACT OF EMPLOYMENT ON THE EMPLOYMENT RELATIONSHIP

4.1 Introduction

When determining the impact of the contract of employment on the employment relationship, one has to first consider the contents of the contract, as this contains the agreement between the parties. However, the terms and conditions of employment contained in the contract can be changed during the course of employment, and it is important to know when that would be legally possible. This is discussed below.

Another aspect which will also be discussed is the implications of the inclusion of a restraint-of-trade clause in a contract of employment. The enforcement and validity of such a clause remain contentious and it, therefore, warrants discussion.

Moreover, customs, traditions and practices in the workplace are briefly discussed.

4.2 General contract principles

A contract of employment must meet all the requirements that the law prescribes for the conclusion of a valid contract (not forgetting that the common law recognises freedom of contract). These requirements are:

- There must be agreement between the parties (for example, if an employer forces an employee to work, it will amount to slavery).[10] The parties further need to agree about the work the employee has to do and the remuneration she/he will receive from the employer for that work.
- The parties to the contract must have capacity to act (for example, a mentally impaired person or a person under 18 years of age will not be able to conclude a valid contract of employment).
- The agreement must be legally possible (for example, it will not be legally possible to appoint someone as an assassin for your debt collection business).
- Performance under the agreement must be physically possible (for example, if the employer appoints a personal nurse to care for her and the employer then dies, performance will no longer be physically possible).
- If any formalities are prescribed for the formation of that particular type of contract or if the parties themselves have agreed about certain formalities, then those formalities must be satisfied (for example, the employment contract of a candidate attorney must be in writing and registered with the Law Society within two months after conclusion).

As a general rule, there is no formal requirement that a contract of employment must be in writing (although it is desirable for the sake of clarity and

[10] Section 48 of the BCEA. See also ch 4, para 4.2 below.

certainty to have it in writing). A contract of employment will, therefore, be valid if concluded in writing or orally, and its terms may be either express, tacit or implied.[11] There is, however, certain information that the employer is obliged to provide to the employee in writing in terms of the BCEA.

The information which must be given to the employee in writing includes:[12]

> the full name and address of the employer; the name and occupation of the employee; the place of work; the date on which employment began; the employee's ordinary days and hours of work; the employee's wage; the rate of pay for overtime work; any other cash payments to which the employee is entitled; any payment in kind and the value thereof; the frequency of remuneration; any deductions to be made from the employee's remuneration; the leave to which the employee is entitled; the period of notice required to terminate employment; any period of employment with a previous employer that counts towards the employee's period of employment; and a list of any other documents that form part of the contract of employment

The employer must keep these written particulars for three years after the termination of the employment contract. The employer is also required to display at the workplace a statement of the employees' rights in terms of the BCEA in the official languages spoken in the workplace and in the prescribed form.[13]

The contract of employment must contain terms that are lawful in order to be valid. For example, any contract in terms of which the employee waives her/his rights to any statutory protection or a contract in terms of which the employer wants to contract out of legislative obligations will be unlawful. The terms of the contract must also be fair. Terms that are unfair will also be unreasonable.

4.3 Remedies for breach of contract

If the parties do not perform in terms of the agreement, it will constitute breach of contract in terms of common law. In the event of breach of contract, the innocent party has a choice, either to accept the breach and cancel the

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[11] *Express* terms are those which the parties to the contract incorporate into the contract by means of express declarations (in writing or orally) of intent. *Tacit* terms are those which have not been expressed in words but are based on the parties' true intention or by inference. *Implied* terms are those that are not expressed in words but are incorporated into the contract by operation of either the common law or statute, irrespective of the parties' intention.

[12] Section 29(1). These particulars are usually set out in a written contract of employment between the employer and employee.

[13] Section 30. However, this obligation does not apply to employers who employ fewer than five employees (s 28).

contract, or to compel the defaulting party to perform (called an 'order for specific performance'). In addition, the innocent party can claim damages.

> In order to provide an easier, cheaper and efficient way of resolving breach of employment contract disputes, the LRA has largely replaced the processes provided by common law.

In terms of the LRA, a breach by the employer would probably amount to an unfair labour practice, unfair discrimination or an unfair dismissal. If the employee breaches the contract, it would probably amount to misconduct.

There has been a debate over the years on whether the employee or employer could choose to pursue the dispute resolution process in such instances in terms of the common law or the LRA. In other words, should a claim be based on breach of contract or unfair dismissal?

An employee who chooses to claim common-law damages based on breach of contract will approach the High Court, and one whose claim is based on unfair dismissal will approach the CCMA. A claim based on a breach of section 23(1) of the Constitution (which guarantees 'everyone' the right to fair labour practices) will be brought before the High Court or Constitutional Court. The matter of forum shopping is discussed in more detail below.[14]

Not all common-law issues are currently regulated by employment legislation. For example, delicts and vicarious liability of employers for their employees' delictual acts, are still regulated by the common law.

4.4 Restraint of trade

> **Example:** The employee herewith agrees that, for a certain period of time (for example, three months) after termination of employment with the (employer) company, she/he will *not* accept employment with any competitor of the employer or open a business in competition with the employer within a particular distance (for example, a 20 km radius) of the premises of the employer.

A restraint-of-trade clause is normally included in employment contracts to protect the interests of the employer against unfair competition from employees after their employment has ended. The purpose of a restraint-of-trade agreement is to protect the employer's trade secrets, goodwill and business connections.[15] A restraint-of-trade clause is lawful and enforceable, unless it is unreasonable. For example, a restraint-of-trade clause that is so

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[14] Chapter 9, para 4.6. 'Forum shopping' refers to a claimant being able to choose the court (forum) in which the dispute will be heard. This can, however, lead to legal uncertainty.

[15] *Reeves & another v Marfield Insurance Brokers CC & another* 1996 (3) SA 766 (A) 772; *Walter McNaughtan (Pty) Ltd v Schwartz & others* 2004 (3) SA 381.

strict as to prevent an ex-employee from earning a living would be unenforceable. In determining whether a restraint of trade is enforceable, a court will balance the following:

The public interest, which requires parties to comply with contractual obligations even if these are unreasonable or unfair.	v	The right of all persons to be permitted as far as possible to engage in commerce or the professions of their own choice.

In *Magna Alloys & Research SA (Pty) Ltd v Ellis,*[16] the court had to balance the competing interests of the employer and employee. It held that a restraint-of-trade agreement was valid and enforceable unless it was contrary to public policy, which it would be if it is *unreasonable*. Reasonableness will be determined with reference to the interests of both the employer and the employee, public policy and surrounding circumstances. Questions that should be considered in determining reasonableness are, for example:[17]

- Is there an interest deserving of protection at the termination of the agreement?
- Is that interest being prejudiced?
- If so, how does that interest weigh up against the interests of the other party?
- Is there another facet of public policy apart from the relationship between the parties which requires that the restraint should either be enforced or disallowed?
- Is the restraint wider than necessary to protect the protectable interest?

Important factors to consider will include the area within which the restraint of trade applies, the period of the restraint and whether the employer is not merely trying to prohibit the ex-employee from using her/his skills and/or experience to earn a living.

An employer who unfairly dismisses an employee who is subjected to a restraint clause will *not* be allowed to benefit from that restraint.[18]

4.5 Changes to contractual terms and conditions of employment

The terms of the employment relationship are mainly contained in the employment contract. The employee and employer may, however, also be bound by other (relevant) statutory provisions and applicable collective agreements.

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[16] 1984 (4) SA 874 (A).

[17] *Nampesca (SA) Products (Pty) Ltd v Zaderer* (1999) 20 *ILJ* 549 (C).

[18] *Info DB Computers v Newby* 1996 *ILJ* 32 (W), 35D-F. See also, generally, C Hock 'Covenants in restraint of trade: do they survive the unlawful and unfair termination of employment by the employer?' (2003) 24 *ILJ* 1231.

An employer may not unilaterally change terms and conditions of employment as that would amount to breach of contract, that is, a repudiation of the contract. The employer who unilaterally changes terms of the contract is in actual fact terminating the original contract and introducing a new contract with new terms which were not part of the parties' agreement. A written contract of employment normally contains provisions on how parties can change terms and conditions of the contract. Where parties did not make any provision for changes, the employer who wishes to make any changes to the employee's terms and conditions of employment will (at common law) have to give the affected employee notice of termination of an existing contract and offer the employee a new contract with new terms and conditions.

Terms and conditions of the employment contract can be lawfully changed in the following ways:

- by agreement between the employer and the employee or in line with the method prescribed in the contract of employment,
- by means of a collective agreement between the employer and a trade union/s,[19]
- by operation of law, for example, the BCEA,[20] and
- through a sectoral determination issued by the MoL.[21]

The application of this is most evident when dealing with the BCEA and collective agreements, which are discussed in chapter 4 below.

It is important to know that the contract of employment provides the basis for the individual employment relationship. It is also important to know that the labour laws and the Constitution may further impact on this relationship.

In this chapter only the impact of the common law on the employment contract has been discussed. In the next chapters the impact of labour legislation is dealt with.

5. CUSTOMS, TRADITIONS AND PRACTICES IN THE WORKPLACE

In addition to the consequences that result from the common law of contract, customs, traditions and practices in the workplace also have an important impact on the employment relationship. These, may for instance, relate to a change on how a certain task is performed (as long as it does not change the terms and conditions of employment), an afternoon or morning off per month, a social visit to a historical site, a beginning-of-year or a Christmas party. The employer does not have to obtain agreement from its employees to implement or change these as long as the nature of the employee's job remains the same.

[19] See chs 4 and 11 below.

[20] This application is most evident when dealing with the BCEA and collective agreements, which are discussed in ch 4, paras 6.1–6.3 below.

[21] In terms of s 50 of the BCEA (see ch 4, para 6.3 below).

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements regarding a restraint-of-trade agreement is *correct*?
   (*a*) Restraint-of-trade agreements are generally unenforceable as they are contrary to public policy.
   (*b*) Restraint-of-trade agreements are meant to protect the skills of former employees.
   (*c*) Restraint-of-trade agreements are meant to protect the interests of the employer.
   (*d*) Restraint-of-trade agreements can be of an indefinite period.
2. What are the requirements for a valid contract of employment?
3. Greg is employed by Company ABC as a sales representative. The company has its offices in Pretoria. Greg's work involves travelling with a company car to different cities and provinces to meet potential clients. Greg had a meeting with a potential client in Rustenburg. After the meeting, which ended earlier than Greg had anticipated, instead of driving back to Pretoria, Greg decided to go and visit his friend Tom who lives in Mafikeng. When in Mafikeng, Greg meets Tom's neighbour, Barry and they start talking about business. Barry is interested in doing business with Company ABC and agrees to meet Greg the following day in Pretoria to conclude their discussion. On his way back from Mafikeng, Greg's company car gets involved in an accident with Mrs Mokone's car. Mrs Mokone's car is damaged beyond repair as a result of that accident. At the time of the accident Greg was driving at a high speed as he had another business appointment in Pretoria. Do you think Mrs Mokone will succeed if she institutes a claim against Company ABC? Substantiate your answer. Will your answer be different if Greg did not meet a potential client during his visit to Mafikeng?

✓ Feedback

1. (*a*) is incorrect. Restraint-of-trade agreements are generally enforceable unless they are unreasonable and therefore against public policy.
   (*b*) is incorrect. Restraint-of-trade agreements are not meant to protect the skills of former employees but to protect the employer's interests from employees or former employees.
   (*c*) is correct. Restraint-of-trade agreements are meant to protect the employer's interests.
   (*d*) is incorrect. Restraint-of-trade agreements are for a specified period of time. They cannot be for an indefinite period because that will be unreasonable and therefore against public policy. A restraint of trade must be reasonable and should not be used to prevent the employee from using her/his skills to earn a living. See paragraph 4.4 above.
2. (*a*) The parties to the contract must have an agreement about the work the employee is employed to do and remuneration for that work.

(*b*) The parties to the contract must have capacity to act (for example, a mentally ill person or a person under the age of majority (18 years) does not have capacity to enter into a valid contract).

(*c*) The agreement must be legally possible (parties to the contract cannot agree to do something illegal, such as agreeing to kill another person).

(*d*) Performance under the agreement must be physically possible (parties to a contract cannot agree to do something that is physically impossible, for example, where a flat that one is employed to guard, has been destroyed by fire).

(*e*) If any formalities are prescribed by the law for the formation of the contract or if the parties themselves have agreed about certain formalities, then those formalities must be satisfied (for example, if parties have agreed that the agreement must be in writing, the contract will only be valid if it is in writing). See paragraph 4.2 above.

3. Yes, Mrs Mokone will succeed with her claim against Company ABC for the damages caused to her car by Greg based on vicarious liability. You will realise that even though Greg went to Mafikeng to visit his friend Tom, the visit ended up being a business visit. Greg was able to promote the employer's business while in Mafikeng. One of the requirements for vicarious liability is that the wrongful act must have happened in the course and scope of employment. Greg has committed a delict while in the employment of Company ABC and in the course of his employment. Therefore, the company is vicariously liable to Mrs Mokone. However, the company would not have been vicariously liable if Greg's delictual (wrongful) act happened after his social visit to a friend. The fact that Greg was able to do business while in Mafikeng means that he was still within the course and scope of employment. See paragraph 3 above.

RECOMMENDED READING

1. Le Roux R 'Vicarious liability: Revisiting an old acquaintance' (2003) 24 *ILJ* 1879
2. Mischke C 'Acting in good faith: Courts focus on employee's fiduciary duty to the employer' (2004) *CLL* 14(1) 1
3. Schoombee JT 'Agreements in restraint of trade: The Appellate Division confirms new principles' (1985) 48 *THRHR* 127
4. Van der Merwe S & Van Huyssteen LF 'The force of agreements: valid, void, voidable, unenforceable' (1995) 58 *THRHR* 549

4

Basic Conditions of Employment Act (BCEA)

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1. INTRODUCTION

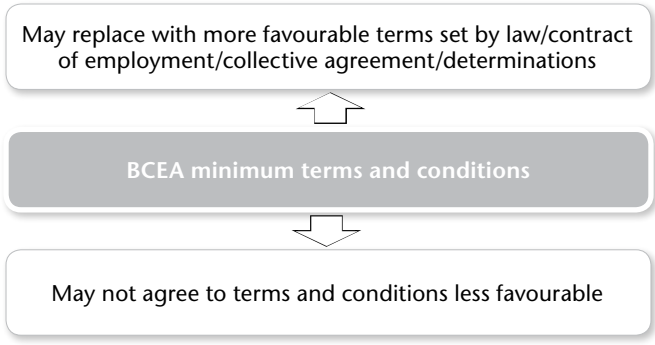
In addition to the impact of the common law, the law of contract, and work-place practices, legislation also has an important impact on the employment relationship.

Moreover, see paragraph 6 below for changing terms and conditions by way of collective agreements, and sectoral or ministerial determinations.

In this chapter the focus remains on the impact of legislation during the existence of the employment relationship (in other words, before termination).

The Act was recently amended by the Basic Conditions of Employment Amendment Act (hereafter the 'Amendment Act').[1] It has a significant impact on the contract of employment, as it establishes and enforces *minimum* terms and conditions of employment, gives effect to international standards for work by children, ensures decent work for all workers, and protects the working relationship by prohibiting exploitative practices by employers.

The Act sets the bar by prescribing minimum terms and conditions of employment. Employers may provide conditions that are better than the minimum, but not worse. This can be illustrated as follows:



2. SCOPE OF APPLICATION

In essence the BCEA gives effect to and regulates the constitutional right to fair labour practices.[2] In order to do this, the Act:

- establishes and enforces basic, minimum conditions of employment,
- regulates the variation of such conditions by way of various mechanisms, and within a framework of 'regulated flexibility',[3]
- gives effect to international standards for work by children,
- ensures decent work[4] for all workers, and
- prohibits exploitative conduct by employers towards employees.

The BCEA is applicable to almost all employees. Certain employees are, however, excluded from the Act, notably:

- members of the National Defence Force,

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[1] 20 of 2013, which came into operation on 1 September 2014.

[2] Section 23(1) of the Constitution.

[3] Within this framework, a balance can be struck between employers' interests in *flexibility* and employees' interests in *security*. See H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663, 664; A Van Niekerk (ed) *et al Law@work* (2012), 111.

[4] See J Theron 'Decent work and the crisis of labour law in South Africa' (2014) 35 *ILJ* 1829 for the problems South Africa experiences with decent work.

- members of the State Security Agency,[5]
- unpaid volunteers working for charitable organisations,
- people undergoing vocational training except to the extent that any term of their employment is regulated by the provisions of any other law,
- people employed on vessels at sea, and
- independent contractors.

In addition to these exclusions there are also *partial* exclusions: certain groups of people are excluded from certain chapters of the Act. For example, certain employees, for example, senior managerial employees and employees earning more than a certain amount, are excluded from chapter 2 of the BCEA (which regulates working time). Another example is employees who work for less than 24 hours a month who are excluded from chapter 3 of the BCEA (which regulates leave).

3. MINIMUM CONDITIONS OF EMPLOYMENT

3.1 Working time

Exclusion: Chapter 2 of the BCEA, which deals with working time, does not apply to senior managerial employees,[6] sales staff who travel to the premises of customers and who regulate their own hours of work, employees who work less than 24 hours a month for an employer, and employees who earn more than the BCEA threshold of R205 433 per year.

	Regulation	Additional comments
Maximum working hours	• Maximum of 45 hours a week. • If an employee works 5 days a week or less, she/he may not work more than 9 hours a day. • If an employee works 6 days or more a week, she/he may not work more than 8 hours a day. These hours include an hour lunch break.	Employers are required to endeavour to reduce the maximum ordinary hours to 40 hours a week and eight hours a day, through collective bargaining and sectoral determinations (section 9(3) and Schedule 1 of the BCEA).† These hours may be extended by agreement by up to 15 minutes a day, but no more than an hour per week, if employees serve members of the public (section 9(2)).
Lunch	An employee is entitled to a meal interval of at least one hour after five hours of continuous work (section 14).	The meal interval can, by agreement, be reduced to 30 minutes, or be done away with if the employee works fewer than six hours on a day.

[5] See ch 2, n 21 above.
[6] Section 6(1)(*a*).

	Regulation	Additional comments
Overtime	• Maximum of 10 hours per week. • These may be increased to a maximum of 15 hours a week by a collective agreement (section 10).	An employee may work overtime only by agreement. • An employee working overtime has to be paid one-and-a-half times normal pay or get time off. • An agreement to work overtime may not be for more than a total of 12 hours (ordinary hours plus overtime) on any particular day.
Sundays & public holidays	The employee has to be paid *double* the normal rate of pay (section 16).	The same principle and payment scale apply to work performed on a public holiday (section 18). If the employee *normally* works on Sundays, the employee has to be paid one-and-a-half times the normal rate. If an employee *normally* works on a public holiday, she/he will still be entitled to *double* pay for that day.
Night work	An employee must be given: • an allowance, or • a reduction in hours of work, and • be provided with transport between the employee's place of residence and the workplace (section 17).	• Night work is work that is performed after 18h00 and before 6h00 the next day. • It can only be worked in terms of an agreement.
Rest periods	An employee is entitled to: • a *daily* rest period of 12 hours between ending and recommencing work, and • a *weekly* rest period of at least 36 consecutive hours, which generally, has to include Sundays (section 15).	The BCEA makes provision for daily and weekly rest periods.
Compressed work week	Parties may agree that the employee will work up to 12 hours a day (including a meal interval) without receiving overtime pay, provided that: • the employee does not work more than 45 ordinary hours in any week, • more than 10 hours' overtime in any week, or • on more than five days in any week. Ordinary hours and overtime can be averaged over a period of up to four months in terms of a collective agreement (sections 11 and 12).	Averaging of working hours and overtime is allowed where hours are calculated over a period of time. This is to cater for peak periods in certain sectors, for example agriculture, where (during harvest time) employees may agree to extended hours of overtime to a maximum of 15 hours per week, but after harvesting this will no longer be necessary.

* See Code: Arrangement of Working Time which provides guidelines for arranging working time and the impact of such time on the health, safety and family responsibilities of employees (see ch 1, para 4 above).
† 'Sector' means an industry or a service (or part thereof) and in respect of a sectoral determination, that particular sector (see para 6.3 below).

3.2 Leave

Exclusion: Chapter 3 of the BCEA, which deals with leave, does *not* apply to employees who work for less than 24 hours a month for an employer (section 19). Such workers will be entitled to the leave agreed upon between the employer and employee.

	Regulation	Additional comments
Vacation leave	A minimum of 21 consecutive (calendar) days' paid vacation leave (excluding public holidays) per year for most employees. This would amount to 15 working days (section 20).	Employers and employees may agree on additional leave, either paid or unpaid.*
Maternity leave	An employee is entitled to four consecutive months' maternity leave, which may commence at: • any time from four weeks before the expected date of birth, or • on a date that a medical practitioner or midwife certifies that it is necessary either for the employee's health or her unborn child (section 25). An employee may not work for six weeks after the birth of her child. If an employee miscarries in the third trimester of her pregnancy or has a still born child, she is entitled to six weeks' leave after the miscarriage or still birth.†	The employee must notify the employer in writing of the dates of the leave she intends to take. It is *unpaid* leave but she may claim from the UIF. Remember that the BCEA sets the minimum leave, but the parties can agree to more favourable terms, for example, paid maternity leave. If an employee is not paid, she may claim from the UIF.
Family responsibility leave	An employee is entitled to three days' family responsibility leave for every 12 months worked (section 17). Family responsibility leave may be taken when an employee's: • child is born or is sick, or • in the event of the death (but *not* illness) of the employee's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.	Only for employees who have worked for longer than four months and who work at least four days a week. The interpretation is strict. For example, no provision is made for leave to be taken in the event of the death of in-laws or members of the extended family and leave relating to illness is limited to children only.

	Regulation	Additional comments
Sick leave	Six weeks' paid sick leave in every three-year cycle worked (section 22). If an employee has been absent from work for more than two consecutive days or on more than two occasions in an eight-week period, the employer may request the employee to submit a medical certificate (section 23). Such a certificate may be issued by a medical doctor or a person registered with a professional council.	A leave cycle is calculated as the number of days that an employee would normally work during a six-week cycle. If an employee works five days a week, she/he would work 30 days in six weeks and that would entitle her/him to 30 days' sick leave in three years.

* See *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2014) 35 *ILJ* 406 (SCA) where the Supreme Court of Appeal found that an employee who was absent from work for five weeks without leave was unfairly dismissed. She took leave for being trained and initiated as a sangoma (to which she has received a calling in terms of her traditional belief). She saw visions of her ancestors and sincerely believed that she was sick and her life was in danger if she did not complete the training.

† See also the Code: Protection during Pregnancy and after Birth which protects mothers-to-be and mothers against potential hazards in the work environment during pregnancy, after the birth and while breast-feeding (ch 1, para 4 above).

3.3 Other matters

3.3.1 *Wages*

Neither the BCEA nor any other law stipulates minimum wages for employees. However, an investigation for a national minimum wage is currently under way.[7] However, collective agreements concluded in bargaining councils and ministerial and sectoral determinations may establish minimum wages, and employers and employees will then be bound to contract in terms of these minimum standards, or more favourably by agreement.

Employees must be paid in South African currency daily, weekly, fortnightly or monthly, and in cash, by cheque or by direct deposit into a bank account of the employee.[8]

The employer must provide the employee with information in writing regarding the period for which the payment is made, the amount of pay, the amount and reason for any deduction that is made and the calculation of the employee's pay in general.[9]

3.3.2 *Notice periods*

A contract of employment for an indefinite period may be terminated by either the employer or the employee by giving notice of intention to terminate the contract. Notice must adhere to the notice periods required in terms of the contract of employment. However, if the contract does not make any provision for a notice period, the BCEA provides minimum notice periods,

[7] See ch 1, n 49 above
[8] Section 32.
[9] Sections 32, 33, 34, 34A and 35.

which both the employer and the employee have to comply with.[10] The BCEA provides that a contract of employment must be terminated in writing and by way of a notice period of not less than:

- one week, if the employee has been employed for six months or less,
- two weeks, if the employee has been employed for more than six months but not more than one year,
- four weeks, if the employee has been employed for one year or more, or is a farm worker or domestic worker who has been employed for more than six months.

While notice periods may generally not be shortened, the period of four weeks' notice may be reduced to two weeks by collective agreement.

In addition, the BCEA allows an employer to pay an employee an amount equivalent to the salary that the employee would have earned during the notice period, instead of requiring the employee to work such period.[11]

3.3.3 *Severance pay*

When an employee is dismissed based on the operational requirements of the employer in terms of the LRA,[12] the employer must pay the employee severance pay equal to at least one week's pay for each completed year of continuous service with that employer.[13] For example, if an employee has worked at a particular employer for six years and her/his contract is ended on the basis of operational requirements, she/he must receive six weeks' severance pay.

An employee, who unreasonably refuses to accept an offer of alternative employment with that employer or any other employer, is not entitled to severance pay.[14]

In terms of the Labour Relations Amendment Act, if an employee's fixed-term contract is justifiably extended beyond 24 months, such employee will receive a severance package of one week's salary per completed year of service.

3.3.4 *Certificate of service*

An employer is required to provide an employee with a certificate of service when employment comes to an end. Such certificate may state, amongst other things, the date of commencement of work, the job description and the remuneration at the time of termination. The reason for termination of employment may be stated only at the employee's request.

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[10] Section 37.
[11] Section 38.
[12] See ch 9, paras 4.3.3 and 4.3.4 below.
[13] Section 41.
[14] Section 41(4). Also see chapter 9 para 3.4.

3.3.5 *Payments of contributions to benefit funds*

The BCEA compels an employer who deducts a contribution from an employee for a benefit fund, for example, pension, provident, retirement or medical aid funds, to pay the amount to the fund within seven days.

4. PROHIBITION OF WORK BY CHILDREN, FORCED LABOUR AND EXPLOITATIVE PRACTICES BY EMPLOYERS

4.1 Prohibition of work by children

In terms of the Children's Act[15] a child becomes a major at the age of 18 years. The BCEA prohibits any person requiring or permitting children to work who are under the age of 15 years or the minimum school leaving age in terms of any law.[16] Moreover, it prohibits a person from requiring or permitting a child to perform work or to provide services that are:

- inappropriate for her/his age,
- place at risk the child's well-being, education, physical or mental health, or
- spiritual, moral or social development.[17]

Contravention of this section constitutes a criminal offence punishable by six years imprisonment or a fine depending on previous offences.

Children who are at least 15 years old and are no longer subject to compulsory schooling in terms of any law, are allowed to work in advertising, sporting, artistic and cultural activities, but only in terms of regulations issued by the MoL on advice of the Employment Conditions Commission (hereafter 'ECC') or a ministerial or sectoral determination.[18] Again, contravention of this section constitutes a criminal offence.

Regulations may determine conditions on work by children. For example, Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities[19] provides that a permit must be obtained from the DoL to employ children in these circumstances. Moreover:

- remuneration must be paid to the parent or guardian of the child,
- the maximum hours of work per day are four hours a day for a child aged over 10 years and three hours a day for a child younger than 10 years,

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[15] 38 of 2005.

[16] Section 43(1).

[17] Section 43(2). See s 28 of the Constitution which states that 'every' child has the right to be protected from exploitative labour practices and cannot be required or permitted to perform work that are inappropriate for the child's age or which will place at risk the child's general well-being, including her/his education, mental or physical health and social development.

[18] The regulations will also apply to children older than 15 years of age who work. See paras 6.2 and 6.3 below.

[19] GN 882, R 1202, *GG* 2942, dated 28 November 2006. See also para 6.3 below for a discussion on sectoral determinations.

- rest periods must be provided after two hours of continuous work (for children older than 10 years) or after one-and-a-half hours of continuous work (for children younger than 10 years old),
- nutritious food and drink must be provided for working children,
- safe areas must be provided for the children to rest and play, and
- safe transport must be provided between the child's home and the workplace.

The MoL may make, on advice of the ECC, regulations, to bring the Act in line with international standards relating to work by children and with regard to conducting medical examinations of children who work.

It is an offence to assist any person to require or permit a child to work in contravention of the BCEA, or to discriminate against a person who refuses to permit a child to work in contravention of the BCEA.[20]

4.2 Prohibition of forced labour

Forced labour is prohibited under the BCEA.[21] Contravention of this section constitutes a criminal offence.

4.3 Prohibition of exploitative practices by employers to secure work

Exploitative practices (ill-treating/taking advantage of employees) by employers are prohibited. For example, employers may not:

- require or accept any payment by (or on behalf of) an employee or potential employee, or
- require employees to purchase goods, services or products from the employer or from any person nominated by the employer to secure work.[22]

5. ENFORCEMENT OF THE BCEA

5.1 Courts

The Amendment Act now states that the Labour Court has *exclusive* jurisdiction in respect of *all* matters in terms of the BCEA.

However, the Labour Court further has jurisdiction to grant civil relief in some cases. This jurisdiction is not exclusive since criminal courts also have jurisdiction to deal with some of these matters. The Labour Court may, for example, grant *civil relief* (for example, an interdict) for breach of some prohibited conduct by employers such as:[23]

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[20] Section 46. The party who alleges that a person is of a certain age, has to establish that it was reasonable for that party to believe after an investigation, that the person was *not* younger than the permitted age in ss 43 and 44.

[21] Section 48. See s 13 of the Constitution which prohibits slavery or forced labour.

[22] Section 33A(1).

[23] Section 77.

- where employers require employees and prospective employees to purchase goods, services or products in return for work,
- where employers breach the conditions with regard to child labour and engage in forced labour, and
- where there are breaches of confidentiality, obstruction, undue influence, and fraud.

The Labour Court may enforce the BCEA by:[24]

- making a *compliance order* (after representations have been made) an order of court for employers which are in non-compliance,
- making orders for payment of outstanding amount/s owing to employees, and
- requiring payment of fines.

The Labour Court was set up to provide for a coherent legal framework under which all labour disputes might be speedily resolved. Thus, the amendments to the BCEA make the consolidation of various claims possible. For example, if an employee institutes proceedings for an unfair dismissal in terms of the LRA, the Labour Court or arbitrator hearing the matter, may also determine a claim for amounts owing under the BCEA, if such a claim has not prescribed.[25] Legal proceedings regarding a labour dispute may, therefore, consist of one or more matters stemming from *different* employment acts.

5.2 Inspectors

The BCEA provides for the appointment of labour inspectors who must monitor and enforce compliance with the BCEA (and other employment laws).[26] Inspectors may, amongst other things, enter workplaces, require a person to disclose relevant information, question employers and employees and inspect documents and records.

Inspectors, who have reasonable grounds to believe that employers have not complied with the Act, may secure a written undertaking from an employer who had not complied with a particular provision.[27] Failing this, the Director-General may apply to the Labour Court, for the written undertaking to be

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[24] Section 73(1) and 73(2)(*a*)–(*c*). Section 93 provides for maximum terms of imprisonment that may be imposed by a Magistrate's Court. Table 1, Sch 2 provides for maximum fines (not involving an underpayment) which may be imposed, some which had been increased by 200%.

[25] Section 74(2)(*a*).

[26] Section 63. By either meeting with the employer or serving the document on the employer.

[27] Section 68(1A). The inspector may endeavour to get agreement between the employer and the employee about the amount owed, may arrange for such payment to the employee, may receive payment at the written request of the employee (on behalf of the latter) and must then provide a receipt for the payment.

made a compliance order and to comply with such an undertaking within a specified period.[28]

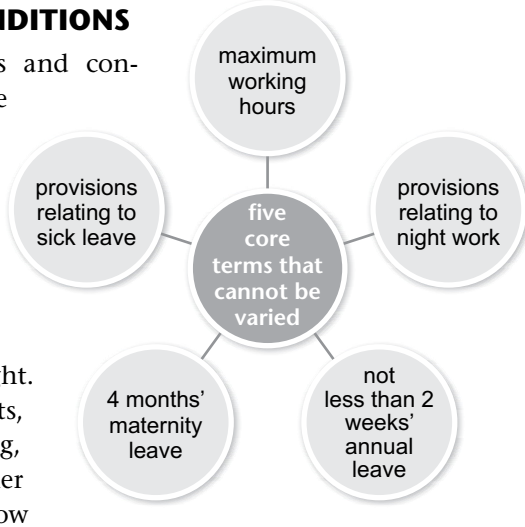
Inspectors may not issue compliance orders in the following cases:[29]

- where there is a dispute about outstanding payment which must be referred for arbitration in terms of a collective agreement,
- where the BCEA is not applicable to the employee,
- where the employee earns in excess of the BCEA threshold,
- where any proceedings have been instituted for the recovery of the amount, or
- where the amount claimed had been outstanding for longer than 12 months before a complaint was laid, a compliance order issued or a written undertaking secured.

Employers may no longer object to or appeal to the Labour Court against a compliance order issued by the Director-General because these processes were abused by employers to delay matters.[30] Through this prohibition the BCEA ensures improved enforcement of the Act.

6. VARIATION OF BASIC CONDITIONS

The BCEA allows some terms and conditions of employment to be varied to less favourable than the minimum threshold. However, *core* terms cannot be varied at all, except if it is done to be more favourable than the BCEA minimum standard. These core terms are shown in the diagram on the right.



Except for these core rights, the BCEA allows for changing, replacing or excluding other rights by way of one of the below mentioned manners.

6.1 Variation by way of a collective agreement

A collective agreement between trade unions and employers may change conditions of work, provided that such collective agreement is consistent with the

[28] Sections 68–69. A compliance order may set out dates for representations, compliance and related issues.
[29] Section 70.
[30] However, the Director-General has greater powers in this regard now.

purposes of the Act.[31] It may replace or exclude a basic condition of employment only to the extent permitted by the Act or a sectoral determination.

6.2 Variation by way of a ministerial determination

A ministerial determination[32] primarily replaces or excludes basic minimum conditions of employment in respect of any category of employees or category of employers, but generally does not set minimum wages.

A ministerial determination may relate to ordinary hours of work, overtime, meal intervals, daily and weekly rest periods, and annual leave, but must 'on the whole' be more favourable to employees than those conditions set out in the BCEA. Ministerial determinations exist for the special public works programme, small businesses and the welfare sector, which are typically non-unionised.

6.3 Variation by way of a sectoral determination

Another way of establishing/variating conditions of employment by the MoL is by way of a sectoral determination for one or more sector or area, not covered by any other collective agreement.[33]

Such a determination may be made for task-based work, piecework, homework, subcontracting and contract work. It primarily establishes remuneration and adjusts minimum rates and minimum increases, but may include other conditions of employment such as ordinary hours of work, overtime, meal intervals, daily and weekly rest periods, and annual leave, but the terms must 'on the whole' be more favourable to employees than required by the BCEA.

A sectoral determination may not reduce the protection for night work and maternity leave. It may vary ordinary hours of work only in certain circumstances:[34]

- the determination has been agreed to in a collective agreement,
- the operational requirements of the sector necessitate this, or
- the majority of employees are not members of a (registered) trade union.

Minimum wages and conditions set out in a sectoral determination will apply to the *contract of employment* between the employer and employee.

A sectoral determination may be made only after an investigation has been done (by the Director-General of the DoL) at the initiative of the MoL, as requested by an employers' or employees' organisation in a particular sector or area and after consideration of representations by the public, and preparation of a report. Moreover, the ECC has to advise the MoL on a range of

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[31] Section 49.
[32] Section 50.
[33] Sections 55(1); 55(7); 55(8).
[34] The same as for ministerial determinations (see para 6.2 above).

factors which will impact on the specific sector and area, such as the ability of employers to continue to carry on their businesses successfully, the operation of small, medium, macro and new enterprises and the cost of living.

The table below summarises what can and cannot be done by way of sectoral determination:[35]

Sectoral determinations may:
• apply to bargaining councils in respect of matters not dealt with by collective agreements concluded by a bargaining council; • prescribe minimum rates of remuneration and minimum increases, taking into account the LRA, prescribe a threshold of representativeness for a registered trade union to automatically have the organisational rights of access to the employer premises and deduction of union subscriptions in respect of workplaces covered by the sectoral determination;* and • establish the method/s for determining the conditions of service for labour tenants who have a right to occupy and use part of a farm.†

Sectoral determinations may not:
cover employees and employers:‡ • who are bound by a collective agreement concluded at a bargaining council, • who are covered by a collective agreement by way of a statutory council, and • regulating any matter already regulated by a sectoral determination for a sector and area which has been in effect for less than 12 months.

* Previously, only a bargaining council agreement could include such a provision. See ch 10 below.
† Section 55(4)*(p)*. In terms of the Land Reform (Land Tenants) Act 3 of 1966.
‡ Section 55(7).

Examples of sectoral determinations are found in farming, private security, contract cleaning, the industry of hospitality, the taxi and the domestic worker sectors (some with different minimum wages for urban and rural areas). These are all sectors that are not well organised and not able to effectively bargain collectively.

Minimum wages in these determinations are generally amended annually to keep abreast (at least) of inflation.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. State the time periods allowed in terms of the BCEA for maternity and sick leave and the cycles applicable to each of these types of leave.
2. Which *one* of the following statements is *correct*?
   (*a*) The South African law defines a child as anyone under the age of twenty-one.
   (*b*) Children under the age of fifteen may not be employed under any circumstances.
   (*c*) The Minister may issue regulations for children under the age of fifteen to work in sporting and advertising.

[35] Section 55(4).

(*d*) A child who is unlawfully employed can sue her/his employer.

3. Christina has been working for Action Ideas CC for eight months but wants to resign. Her contract of employment is silent on termination. Advise her on the requirements for termination of her contract in terms of the BCEA.

✓ Feedback

1. Maternity leave: four consecutive months with no cycle stipulated.
   Sick leave works in a three-year cycle and is calculated with reference to the number of days an employee would normally work in a six-week period.
2. (*c*) is *correct*. If the necessary regulations are issued by the Minister, children under 15 years of age may work.
   (*a*) is *incorrect*. Anyone who attains the age of 18 years, is no more a child.
   (*b*) is *incorrect*. There are circumstances under which children younger than fifteen years are allowed to work. That is in terms of regulations issued by the Minister in advertising, artistic, sporting and cultural activities.
   (*d*) is *incorrect*. In terms of the BCEA, an employer who employs a child contrary to the provisions of the Act, is guilty of a criminal offence, and will be criminally liable. That means that only the State can prosecute the employer and the child cannot take civil action by suing the employer.
3. The BCEA prescribes that a contract of employment may be terminated by one party giving notice to the other in writing. The minimum period of time for the giving of notice is stipulated by way of a notice period of not less than two weeks, if the employee has been employed for more than six months but not more than a year. An employer may give an employee her/his salary instead of notice. Since Christina's contract is silent on notice periods and she has been working for eight months, she will have to give Action Ideas CC two weeks' notice in writing of her resignation. If both parties agree, Action Ideas CC may give Christina two weeks' pay instead of her working the period.

RECOMMENDED READING

1. Benjamin P 'Enforcement and sanctions to promote compliance with South African labour legislation' (2011) 32 *ILJ* 805
2. Bosch C 'Proposed 2012 amendments relating to non-standard employment: What will the new regime be?' (2013) 34 *ILJ* 1631
3. Brassey M 'Fixing the laws that govern the labour market' (2012) 33 *ILJ* 1
4. Le Roux R 'Employment: A dodo, or simply living dangerously?' (2014) 30 *ILJ* 30
5. Theron J 'Decent work and the crisis of labour law in South Africa' (2014) 35 *ILJ* 1829.

5

Employment Equity Act (EEA)

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1. INTRODUCTION

South African society is characterised by great economic and social inequality resulting from past patriarchal and discriminatory laws, policies and practices in general, and in the workplace, in particular.

In the working environment, discrimination was implemented by laws such as the Industrial Conciliation Act,[1] which excluded black people from collective bargaining; the Mines and Works Act,[2] which provided for job reservation for whites; the Wage Act,[3] which permitted different wage determinations based on race and sex; and the Public Service Act,[4] which allowed discrimination based on sex. Little training was available to black people and women which placed them at a skills disadvantage and disabled people found it difficult to enter the workplace.

Such discrimination based on race, sex and disability has resulted in patterns of disadvantage for these groups of people.

Equality was embraced only in the 1990s under the Constitution in section 9, which stated that everyone is equal before the law and has the right to equal protection and benefit of the law. Further:

> '(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including[5] race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).'

The Constitution acknowledges South Africa's discriminatory past and holds the country's founding values to be human dignity, the achievement of

[1] 28 of 1956.
[2] 12 of 1911; later 27 of 1956.
[3] 27 of 1925; later 44 of 1937; and later 5 of 1957.
[4] 54 of 1957; later 111 of 1984.
[5] The word 'including' indicates that the specified grounds are not an exhaustive list, and that other *unspecified/unlisted* grounds exist.

equality, the advancement of human rights and freedoms, non-racism and non-sexism. The wording of the Constitution—that *equality* still has to be *achieved*—indicates that equality has been embraced as a goal, but that this was only the first step in the achievement of such a goal.

It is thus clear that section 9 provides for the prohibition of unfair discrimination on a (non-exhaustive) number of grounds, and also authorises affirmative action.

The relevant sections of the EEA gives content to the Constitution and read as follows:

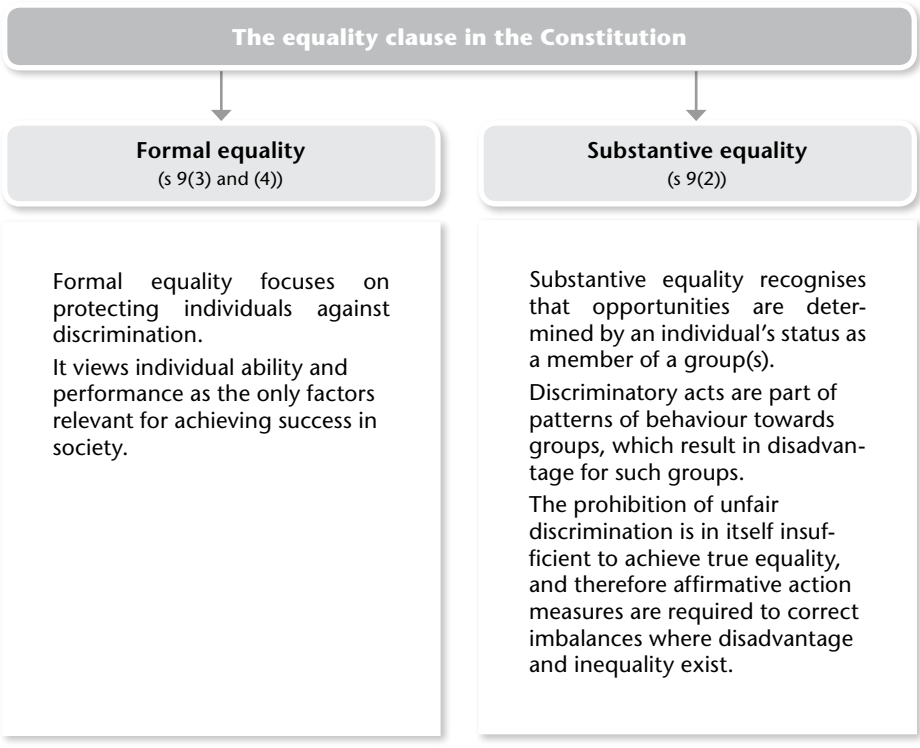
> **'5 Elimination of unfair discrimination**
> Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
>
> Prohibition of unfair discrimination
> (1) No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground;
> (2) It is not unfair discrimination to—
> (*a*) take affirmative action measures consistent with the purpose of this Act; or
> (*b*) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
> (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

Before these sections can be discussed it is important to clarify basic concepts in relation to equality. The EEA has recently been amended by the Employment Equity Amendment Act (hereafter the 'Amendment Act')[6] which came into operation on 1 August 2014. The most important amendments will be dealt with below.

[6] 47 of 2013. Moreover, Draft Employment Equity Regulations have been published for comment (GN 124 *GG* 37338, dated 28 February 2013). These had been withdrawn and a new set of Employment Equity Regulations (hereafter 'Regulations') had been published (GN 494 *GG* 37873, dated 1 August 2014). These Regulations came into operation on 1 August 2014. Criticism on the Amendment Act is that it had not added to transformation because of its emphasis on race R Mahlaka 'New Employment Equity Act lauded and slated' (available at http://www.moneyweb.co.za/mw/content/en/moneyweb-empowerment/new-employment... accessed on 6–08–2014).

2. BASIC TERMINOLOGY

2.1 Formal and substantive equality



2.2 Differentiation and discrimination

There is a significant distinction between differentiation and discrimination.

Differentiation (in the sense of treating people differently) occurs frequently in the workplace, for example when people apply for posts and when employees apply for promotion. Such differentiation is acceptable because it is based on valid grounds and serves a legitimate purpose. Similarly, differentiation in pay levels does not in itself constitute discrimination if it is based on acceptable reasons such as expertise and skills.

Discrimination, on the other hand, is a particular form of differentiation that is based on an unlawful ground, even if there is not a specific intention to discriminate. Intention is, however, relevant when the court decides on the relief to be awarded. In the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*,[7] only monthly paid employees were covered by a specific (good) pension fund. The court found the fact that only eight black

[7] (1998) 19 *ILJ* 285 (LC).

employees out of a total of 50 whom had been paid monthly, was disproportional and constituted indirect (discussed below) unfair discrimination against the black employees.

2.3 Direct and indirect discrimination

Direct discrimination is usually easy to detect and determine. It occurs if someone is clearly treated differently because of a certain characteristic, for example race or gender. An example of direct discrimination is an employee being paid less simply because she/he is disabled, of a different religion than the employer, or divorced.

Indirect discrimination is found when criteria that appear to be neutral, negatively affect a certain group disproportionately, for example, gay or Hindu people or women. Such discrimination, in contrast with direct discrimination, is often disguised and hard to detect. An example of indirect discrimination would be a requirement that candidates must have a deep bass voice. In such instance more men than women will qualify. Unless this criterion can be justified by the requirements of the job, it will amount to indirect discrimination.

2.4 Specified, unspecified/unlisted and arbitrary grounds of discrimination

The EEA prohibits unfair discrimination in any employment policy or practice on a non-exhaustive list of 19 grounds in section 6(1). This means that it is possible that other unspecified/unlisted grounds for discrimination (not contained in the list) can exist, similar to the Constitution.[8] The list of prohibited grounds in the EEA is identical to the constitutional list, but the EEA lists three additional grounds: family responsibility, HIV status and political opinion.

The Amendment Act, however, has changed section 6(1), to include 'any other arbitrary ground'. It may be argued that this was unnecessary as section 6(1) in any event makes provision for unspecified/unlisted grounds which might be arbitrary. Or, it may be asked whether an arbitrary ground is a ground totally different to the listed and unlisted grounds in that it does not refer to dignity and would not be in line with discrimination law principles laid down so far. In the past, it was cautioned that care should be taken in determining an 'arbitrary ground'. For example, it was argued that relevance to workplace needs could not be an 'arbitrary' ground as it could not affect a person's dignity (as set out in *Harksen v Lane NO*).[9]

What the listed grounds have in common is the potential to demean and belittle people. These grounds often relate to an individual's personal attributes such as biological characteristics (age, race, and sex), or their associational, intellectual, or religious beliefs.

[8] See s 9(3) of the Constitution in para 1 above.
[9] 1998 (1) SA 300 (CC).

Discrimination cases are most often based on one of the listed grounds (or a combination of grounds) such as race,[10] conscience and professional ethics,[11] sex/gender,[12] pregnancy,[13] age[14] (increasingly so as older people want to carry on working), disability,[15] belief, political or cultural affiliation,[16] birth,[17] family responsibility,[18] sexual orientation,[19] religion or cultural belief,[20] language,[21] and HIV/AIDS.[22]

An example of unfair discrimination based on religion and sex was found in the *POPCRU* case discussed below.[23] This case could also have been argued on *appearance-based* unfair discrimination,[24] a new concept which is coming to the fore.

Example: Five male prison officers were dismissed after they refused to cut their dreadlocks in accordance with the Department of Correctional Services' dress code which prohibited dreadlocks. The officers alleged that their dismissals constituted unfair discrimination based on sincerely held religious and cultural beliefs. Three officers followed the Rastafarian

[10] *Solidarity obo Barnard v SA Police Service* (2010) 31 *ILJ* 742 (LC); *SA Police Services v Solidarity obo Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (2013) 34 *ILJ* 590 (LAC); *Solidarity obo Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as Amicus Curiae)* (2014) 35 *ILJ* 416 (SCA); *SA Police Service & Solidarity obo Mrs RM Barnard & Police & Prisons Civil Rights Union as Amicus Curiae)* (not yet reported case no CCT01/2014). The *Barnard* cases will be discussed briefly in para 5.1 below.

[11] See *Naude v Member of the Executive Council, Department of Health, Mpumalanga* (2009) 30 *ILJ* 910 (LC).

[12] See *Media 24 Ltd & another v Grobler* (2005) 26 *ILJ* 1007 (SCA); *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC); *Correctional Services v Police & Prisons Civil Rights Union* (2011) 32 *ILJ* 2629 (LAC).

[13] See *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)* (2010) 31 *ILJ* 180 (LC).

[14] See *Jansen van Vuuren v SA Airways (Pty) Ltd* (2013) 34 *ILJ* 1749 (LC) which had been confirmed by the Labour Appeal Court in *South African Airways (Pty) Ltd v V and another* (CA9/13, C420/2006 [2014] ZALAC 27, 12 June 2014) but with a reduction in the amount of compensation. See also para 4.3, n 41 below.

[15] See *Singh v Minister of Justice & Constitutional Development (SA National Council for the Blind as Amicus Curiae)* (2013) 34 *ILJ* 2807 (EqC).

[16] See *Nombakuse v Department of Transport* (2013) 34 *ILJ* 671 (LC); *Jansen v Minister of Correctional Services of the Republic of South Africa* (2010) 31 *ILJ* 650 (LC).

[17] See *Mangena & others v Fila South Africa (Pty) Ltd & others* [2009] 12 BLLR 1224 (LC).

[18] See *Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA* [2007] 1 BLLR 55 (LC).

[19] See *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 *ILJ* 868 (EqC).

[20] See *SA Clothing & Textile Workers Union & others v Berg River Textiles—A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC); *Correctional Services v Police & Prisons Civil Rights Union* (n 12 above).

[21] See *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC).

[22] See *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2011) 32 *ILJ* 1637 (LC) (see a discussion of this case in ch 8, para 5.7 below).

[23] See n 12 above.

[24] Tattoos, weight, piercing, obesity, hair colour, and having a youthful/playful/beautiful/Prada look are at issue here.

religion while two others had been called by their ancestors to become traditional healers and to overcome a condition 'intwasa' suffered from since childhood. The Department, however, was not aware (neither did the officers inform them) of the fact that they were Rastafarians or that they were training to become traditional healers in terms of their Xhosa and African culture respectively. The instruction to cut the dreadlocks was found to be unjustifiable and unreasonable in the circumstances, and neither direct nor indirect discrimination based on religion or culture could be proved, as there was no causal link between the grounds and the dismissals. The employer's view that male officers who wore dreadlocks might have affected the security of prisoners by the latter grabbing them by the locks and possibly providing the latter with dagga, was unsupported by evidence. The court focused on the fact that the code did not provide for a similar requirement prohibiting dreadlocks for female officers. No evidence was provided by the employer to explain this. It found that female officers were likewise prone to the vulnerabilities set out above. On this basis, the differentiation between males and females was not justified. The court further found that the Department would not have suffered an unreasonable burden if it had exempted the employees from the code.

If an employee or applicant for employment alleges discrimination on an unlisted or arbitrary ground, the court will investigate whether the *dignity* of a person has been affected.

Fewer discrimination cases are based on unlisted grounds. Examples of unlisted grounds on which cases have been tried, include citizenship, [25] qualifications, tertiary teaching and research experience,[26] mental health/illness,[27] temporary employment status[28] and being a parent.[29]

3. PURPOSES OF THE EEA

The EEA applies to all employers as far as the prohibition of unfair discrimination is concerned, but with regards to the application of affirmative action, it applies only to designated employers. However, the EEA specifically excludes members of: [30]

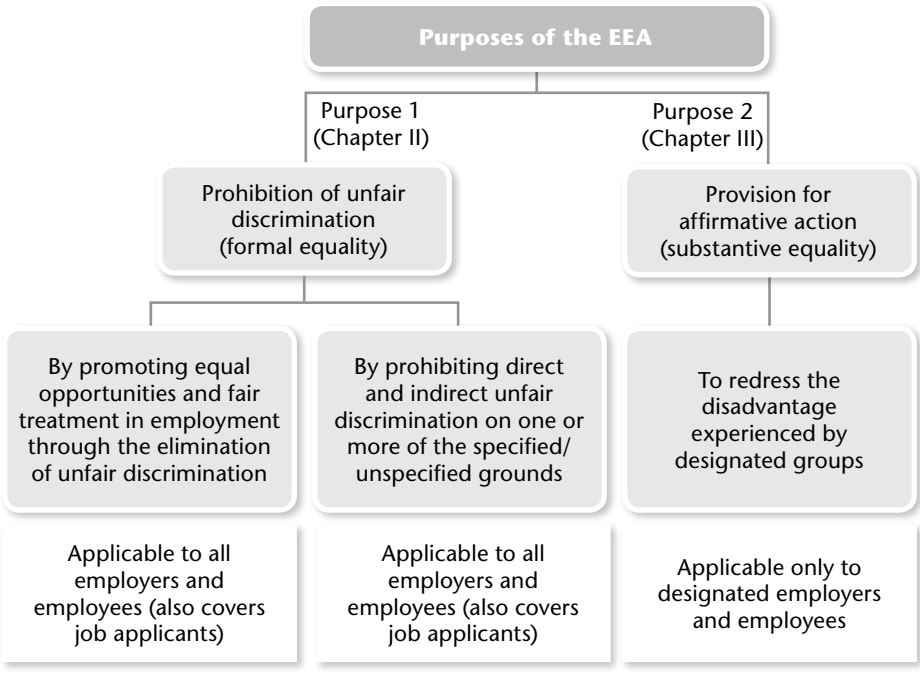
- the National Defence Force,
- the National Intelligence Agency,
- the Secret Service,

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[25] See *Larbi-Odam v Members of the Executive Committee for Education (North-West Province) & another* 1998 (1) SA 745 (CC).
[26] See *Stojce v University of KZN (Natal) & another* (n 21 above).
[27] See *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* [2009] 1 BLLR 1181 (LAC).
[28] See *McPherson v University of KwaZulu-Natal & another* (2008) 29 *ILJ* 674 (LC).
[29] See *Wallace v Du Toit* [2006] 8 BLLR 757 (LC).
[30] Section 4(3). See ch 2, n 21 above for a description of the State Security Agency.

- the National Academy of Intelligence, and
- directors and staff of Comsec.

The EEA, in giving effect to the equality provisions of the Constitution, promotes the *achievement of equality* in the workplace. It thus provides the foundation for non-discrimination and affirmative action in employment law. The Act must be interpreted in accordance with ILO Convention 111, which was ratified by South Africa.



However, the EEA is not the only equality legislation that impacts on the employment relationship. Other related legislation includes the Promotion of Equality and Prevention of Unfair Discrimination Act[31] (hereafter 'PEPUDA'), the LRA, the Broad-Based Black Economic Empowerment Act[32] (hereafter 'BBBEEA') and the Women Empowerment and Gender Equality Bill (hereafter 'WEGEB').[33] These Acts deal with equality as follows:

- The PEPUDA has as its purpose promoting equality and preventing unfair discrimination in *all* spheres of society. It does not, however, apply to persons defined as 'employees' to whom the EEA applies.[34] This does not mean that it will not apply to the workplace at all. Workers excluded from the EEA, such as independent contractors,[35] may rely on the protection of the PEPUDA.

[31] 4 of 2000.
[32] 53 of 2003.
[33] GN 701 *GG* 35637, dated 29 August 2012, now B50D-2013.
[34] Section 5(3) of the PEPUDA.
[35] See ch 2 above.

- The LRA regards a dismissal on the ground of discrimination as automatically unfair with severe penalties attached to it.[36]
- The BBBEEA intends to promote economic transformation and enable meaningful participation of 'black people' in the economy. It aims at achieving a substantial change in the racial composition of ownership and management structures in skilled occupations of existing and new enterprises. The Act criminalises 'fronting' or misrepresentation of BEE status. These may be penalised by fines of up to 10% of a company's annual turnover, jail sentences of up to five years for executive officers, and being barred from doing business with the State for up to 10 years.
- The WEGEB applies to all public and private bodies with 150 or more employees or annual turnovers above certain thresholds designated by the Minister of Women. It focuses on equal representation of women in decision-making structures (overriding any other law with different provisions) and the economic empowerment of women generally, and the socio-economic empowerment of women in rural areas and women with disabilities. It provides for gender-mainstreaming, fighting poverty, inequality and unemployment amongst women. Moreover, it addresses discriminatory patriarchal attitudes in the educational system. Offences are punishable by fines of up to 10% of a body's annual turnover and jail sentences of up to five years for accounting officers.

Remember that the EEA follows the Constitution in that it subscribes to *both* formal and substantive equality.[37] The EEA, thus, has a two-fold purpose, as shown in the diagram above.

4. FIRST PURPOSE OF THE EEA: THE PROHIBITION AGAINST UNFAIR DISCRIMINATION

4.1 Establishing unfair discrimination

Section 6(1) of the EEA provides that 'no person'[38] may unfairly discriminate against an employee[39] in 'any employment policy or practice'.[40] Once differentiation on a specified, unspecified/unlisted or arbitrary ground has been established and it has been shown that there is a link between such ground

[36] See s 187(1)(*f*) of the LRA. See ch 8, para 5.7 below for the provisions of the LRA relating to an automatically unfair dismissal.

[37] See para 2.1 above.

[38] This definition covers natural persons as well as juristic persons such as companies. The perpetrator of discrimination may be, eg, the employer, a co-employee or a third party who is in a position to apply an employment policy/practice, such as a pension fund or medical aid fund manager.

[39] Applicants for employment are also protected against unfair discrimination (s 9), although it will be difficult for them to prove unfair discrimination, as they do not have the necessary knowledge of, and insight into the employer's policies.

[40] Section 1. An 'employment policy or practice' is defined to include all aspects of employment, eg, recruitment procedures, advertising, selection criteria, the working environment and facilities, training and development.

and the differentiation (or the ground is the reason/cause for the differentiation), this will constitute discrimination. The question of the burden of proof as to the fairness or otherwise of the alleged discrimination now arises.

4.2 Onus

4.2.1 *Introduction*

Section 11 of the EEA previously provided that once the claimant has established a *prima facie* case of discrimination on a specified or unspecified/unlisted ground, there is a presumption of unfairness. The employer then had to justify the discrimination.

The Amendment Act, however, has amended the provisions regarding onus in order to align the burden of proof for unfair discrimination claims with the equivalent provisions of the PEPUDA. It distinguishes between unfair discrimination alleged on *listed* and *arbitrary* grounds. In the case of listed grounds, the onus is more onerous on the *employer*, and in the case of arbitrary grounds it is more onerous on the *complainant/employee*. It reads as follows:

> '11 (1) If unfair discrimination is alleged on a ground *listed* in section 6(1), the *employer against whom the allegation is made* must prove, on a *balance of probabilities* that such discrimination —
> (*a*) did not take place as alleged; or
> (*b*) is rational and not unfair, *or is otherwise justifiable*.
> (2) If unfair discrimination is alleged on an *arbitrary* ground, the *complainant must prove,* on a *balance of probabilities* that —
> (*a*) the conduct complained of is not rational;
> (*b*) the conduct complained of amounts to discrimination; and
> (*c*) the discrimination is unfair' (own emphasis).

4.2.2 *Listed grounds*

Therefore, for unfair discrimination alleged on a listed ground, the stages of a claim are as follows:

Stage 1	Stage 2
• During the first stage a *factual foundation* for the alleged differentiation and the ground/s on which the differentiation took place must be established. • The employee has to show that there was differentiation between her/him and another	The onus now shifts to the employer to show that, on a balance of probabilities, the alleged discrimination: • did not take place—it was, for example, mere differentiation as there was no link between the ground and the alleged differentiation or the ground was not the *reason* for the differentiation, or

Stage 1	Stage 2
employee on a listed ground that affects her/his dignity. • A *link* must exist between the ground and the differentiation (this entails showing that the ground is the 'reason' for the differentiation on a *prima facie* level), which will constitute discrimination. This will lay the *basis* for the claim.	• was rational (reasoned, sensible) and not unfair for another reason, or • was *otherwise* justified on any other reason which is 'rational' and 'not unfair,' or 'otherwise justifiable'. This is problematic as no guidance exists as to the circumstances under which discrimination will be permissible over and above the two justifications stated in section 6(2) discussed below.

4.2.3 *Arbitrary and unlisted grounds*

For unfair discrimination alleged on an arbitrary/unlisted ground, the stages are as follows:

Stage 1	Stage 2	Stage 3
• The complainant must establish the arbitrary/unlisted ground which should be measured against specified/listed grounds and should affect the dignity of the complainant. • Then a *link* between the ground and the differentiation has to be shown to establish a *factual foundation* for the differentiation. • This lays the basis for the claim—differentiation had now been elevated to discrimination, as previously, on a *prima facie* basis.	The *complainant* must now prove, on a *balance of probabilities*, (a more difficult onus than a *prima facie* onus) that the conduct complained of: • was not rational (that is, absurd, ridiculous or foolish), • amounted to discrimination (there is a link between the ground and the differentiation or the ground is the reason for the differentiation), and • was unfair.	The onus will then move back to the employer to show the discrimination was not unfair. This is problematic because the Act is not very clear on this.

The courts will have to interpret the onus section and clarity will emerge only over time. Until then there is uncertainty about:

- the wide scope of justification over and above the justifications mentioned in section 6(2) (inherent requirements of a job and affirmative action) of subsection 1(*b*), and
- the requirements in subsection (2)(*a*) and 2(*c*) to show on a *balance of probabilities* the irrational and unfair nature of the discrimination complained about in the case of an *unlisted/arbitrary* ground.

4.3 Justification grounds for discrimination

As mentioned above, section 6(2) provides two grounds of justification for allegedly unfair discrimination:[41]

- affirmative action and
- inherent job requirements.

4.3.1 *Affirmative action*

Affirmative action measures have to be applied by designated employers to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workplaces of those employers. See paragraph 5.4.1 below for a table with details on designated groups and employers.

If an employer uses affirmative action as a defence against a claim of unfair discrimination, such affirmative action measures must be consistent with the purposes of the EEA and not for other reasons.

4.3.2 *Inherent requirements of the job*

If the job in its essence requires a certain attribute/s it will not be unfair to exclude people without that attribute. For example, it is an inherent job requirement that a sales assistant in a lingerie shop is female. The exclusion of males for this job will therefore not amount to unfair discrimination. Although the EEA does not define 'inherent requirements of the job', the courts have interpreted this concept in a *narrow* manner in that only requirements that cannot be removed from the relevant job description (without changing the nature of the job), are regarded as inherent requirements. For example, it is not an inherent requirement that a bus driver must be male, or that a fire fighter may not be gay, or that a pilot should be younger than 60 years of age (it's rather her/his fitness to fly that is an inherent requirement of the job), or that a primary-school teacher must be young and female.

4.4 Other specific forms of discrimination prohibited

4.4.1 *Harassment as unfair discrimination*

Any type of *harassment* is regarded as unfair discrimination in the EEA,[42] but the term itself is not defined.

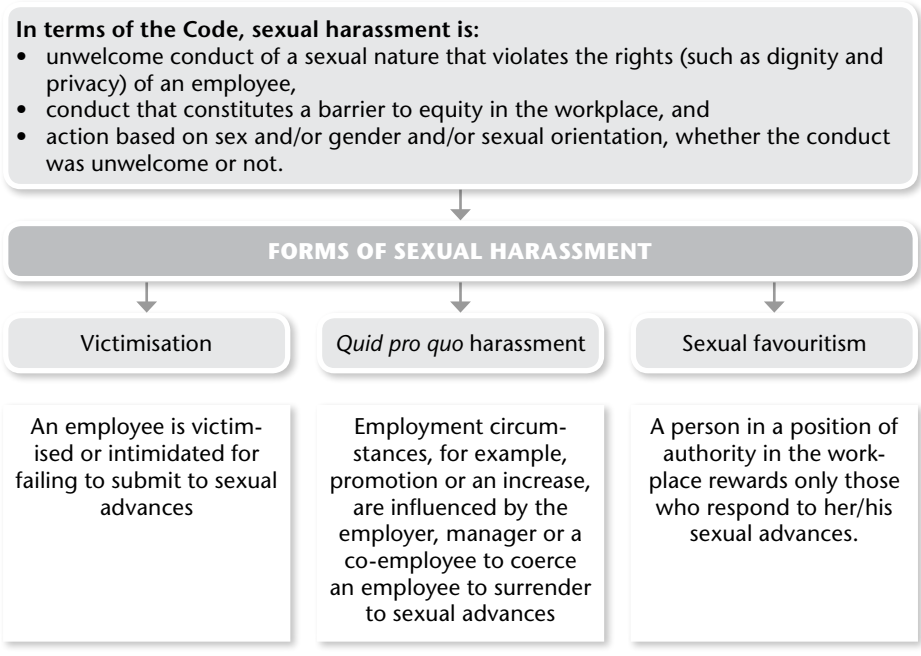
The most common form of harassment found in the workplace is sexual harassment. The Code: Sexual Harassment attempts to provide guidance to

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[41] See *South African Airways (Pty) Ltd v V & another* (n 14 above) where the judge found that the EEA may consider other defences against unfair discrimination besides the two defences listed in the Act. Only time will tell what other defences may be used.

[42] Section 6(3). The Prohibition from Harassment Act 17 of 2011 provides for protection orders against people who are harassing others. For example, tools being used to harass others (e g cell phones and laptop computers) may be attached. It is not clear to what extent this Act applies (if at all) in the workplace.

employers on how to deal with the occurrence of sexual harassment and how to curtail such conduct in the workplace. Conduct constituting sexual harassment would include *physical conduct*, *verbal conduct* and *non-verbal conduct*.



Example: In *UASA obo Zulu and Transnet Pipelines*,[43] the court strongly condemned sexual harassment as having no place in a civilised society. Here, a male employee, repeatedly sexually harassed a co-employee over a period of more than a year. He verbally abused her by calling her his wife and made repeated demands on her to have sex with him. She made it clear to him repeatedly that his conduct was unwanted and unwelcome. After an assault during which he lifted her dress and attempted to have sex with her (which was witnessed by a co-employee), the harassed employee finally reported him. After a disciplinary enquiry, the employee was dismissed. The employee did not deny the sexual harassment and showed no remorse. In fact, he maintained that such conduct was part of his culture. The arbitrator held that certain forms of misconduct were so serious that rules relating to them did not have to be spelt out to employees. In addition, the arbitrator held that it was *not* part of the Zulu culture for a man to demand sexual favours from a woman with whom he had only a working relationship. But, even if it were found to be part of that culture, the arbitrator held that such conduct had no place in a 'civilised' society. The dismissal was upheld.

[43] (2008) 29 *ILJ* 1803 (ARB). The PEPUDA and the Code: Harassment provide definitions for 'harassment'.

A claim for sexual harassment can be submitted on three possible bases as is illustrated by *Media 24 Ltd & another v Grobler*.[44] In this case Grobler was harassed by her manager and eventually she suffered from depression and other trauma. Her complaints were ignored for months and she resigned. The court found that she was automatically unfairly dismissed and able to claim on three separate causes of action, namely vicarious liability, the EEA (discrimination), and the LRA (unfair dismissal).[45]

4.4.2 *Liability of employers for employees' discriminatory conduct*

The EEA requires an employee who alleges any contravention of the Act to bring this to the attention of the employer.[46] The employer must then consult all relevant parties and take the necessary steps to eliminate such conduct. The employer will be deemed to be liable for a contravention by its employee if the employer:

- did not follow this procedure, and
- cannot prove that it did all that was reasonably practicable to ensure that an employee would not contravene the EEA.

> **Example:** In *Ntsabo v Real Security CC*[47] the employee's supervisor sexually harassed her by touching her, making unwanted sexual proposals to her and threatening her with a report about bad work performance if she did not give in to his demands. While this had been brought to the attention of her manager, the latter failed to deal with it. The employee resigned as the situation became intolerable. The Labour Court, after a finding of sexual harassment, awarded the employee compensation for an unfair dismissal in terms of the LRA and damages in terms of the EEA for future medical costs, and general damages. The award was made on the basis that the employee's supervisor had contravened the provisions of the EEA and that the failure by the employer to deal with the allegations of sexual harassment constituted unfair discrimination. The employer had failed to do all that was reasonably practicable to ensure that the supervisor would not contravene the Act, and was therefore liable.

In addition, the EEA stipulates that every employer must take steps in an attempt to eliminate unfair discrimination in any employment policy or practice. The employer, who is in the best position to know the business policies and practices, must therefore scrutinise all policies and practices *pro-actively* and do what is necessary to eliminate existing unfair discrimination in an effort to promote equal opportunity in the workplace.

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[44] See n 12 above.
[45] See chs 8 and 9 below.
[46] Section 60.
[47] [2004] 1 BLLR 58 (LC).

In order to further prevent harassment in the workplace, the Code: Sexual Harassment makes it compulsory for employers to develop sexual harassment policies which should stipulate, *inter alia*, the following:

- Sexual harassment is a form of unfair discrimination.
- Sexual harassment in the workplace will not be permitted or condoned.
- Formal and informal procedures may be used to address a complaint of sexual harassment in a sensitive, efficient and effective way.
- Confidentiality is very important in dealing with allegations of sexual harassment.
- It is a *disciplinary offence* to retaliate against an employee who, in good faith, lodges a complaint of sexual harassment.
- Disciplinary sanctions may be imposed on a perpetrator, ranging from warnings for minor instances of sexual harassment to dismissal for continued minor instances after warnings, or for serious instances of sexual harassment.

4.4.3 *Testing employees and applicants for employment*

The EEA regulates the testing of employees in the workplace.[48] Testing may be used to evaluate:

- applicants for employment to determine whether they are suitable for the job, and
- existing employees in certain circumstances.

The Act distinguishes between medical testing in general,[49] and HIV/AIDS testing specifically.[50] It also regulates psychological and other similar assessments.[51] Such testing does not in itself constitute discrimination, but the manner in which it is carried out may be discriminatory.

(*a*) Medical testing

'Medical testing' is defined broadly to include any test, question, enquiry or other means designed to establish whether an employee has any medical condition. Such testing of an employee or an applicant for employment is prohibited unless legislation permits or requires the testing, or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits, or the inherent requirements of a job.[52]

(*b*) Psychological testing

Psychological testing of an employee is prohibited unless it has been scientifically shown that the test used is valid and reliable, can be applied fairly to all

[48] Section 7.
[49] Section 1.
[50] Section 7(2).
[51] Section 8.
[52] Section 7(1).

employees, is not biased against any employee or group and has been certified by the Health Professions Council or another body authorised by law.[53]

(*c*) HIV testing

Testing to determine an employee's HIV status is prohibited unless the testing is considered to be justifiable by the Labour Court.[54]

The Act does not, however, stipulate the grounds upon which the Labour Court may authorise the testing of an employee to determine her/his HIV status. In fact, the Act prescribes only the conditions that the court can impose when it grants an order in terms of which the HIV testing of an employee is authorised.[55] However, in *Joy Mining Machinery, a Division of Harnischfeger (SA) (Pty) Ltd v NUMSA*,[56] the following factors were stipulated as circumstances under which HIV testing would be allowed:

- to prevent unfair discrimination,
- where the employer needed HIV testing to determine the extent of HIV in the workplace in order to place itself in a better position to evaluate its training and awareness programmes, and to draw up future plans based on the outcome of the tests,
- where the purpose of testing was that the employer needed to know the prevalence of HIV at its workplace in order to be pro-active in its prevention amongst employees, and to treat the symptoms and to plan for contingencies, including the fair distribution of employee benefits, medical aid and the training of replacement labour,
- where medical facts indicated the need,
- where employment conditions required testing,
- where social policy required testing,
- where the inherent requirements of the job necessitated it, or
- where particular categories of employees/jobs required such testing.

While the EEA is not clear on whether an employer needs to approach the Labour Court for authorisation to test if testing is done voluntarily and anonymously, the judge in *Irvin & Johnson Ltd v Trawler & Line Fishing Union & others*,[57] made it clear that the court's permission was not necessary in these circumstances, as there could be no unfair discrimination in such a context.

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[53] In terms of the Health Professions Act 56 of 1974.

[54] Section 7(2). The Code: HIV/AIDS elaborates on the requirements of the EEA (see ch 1, para 4 above).

[55] Section 50(4). These conditions may relate to the provision of counselling, confidentiality, the period during which the authorisation for testing applies, and the categories of jobs or employees in respect of which the authorisation for testing applies.

[56] (2002) 23 *ILJ* 391 (LC).

[57] (2003) 24 *ILJ* 771 (LC).

4.5 Equal pay for equal work or work of equal value

The EEA has not expressly regulated equal pay for equal work before the Amendment Act. However, the Labour Court has dealt with this issue in terms of the EEA by holding that pay/remuneration is an employment policy or practice, and paying one employee less than another (for a reason based on a listed/unlisted ground) for performing the same/similar work constitutes less favourable treatment. The same principle applies with regard to pay for *work of equal value*. The case in point is *Mangena v Fila South Africa (Pty) Ltd*.

Example: Shabalala (a black male) alleged that he was paid less than McMullin (a white female co-employee) for doing the same work based on race. The court took into account ILO Convention 100 as South Africa has ratified this Convention on equal pay between the sexes. The judge, moreover, extended it to include other grounds such as race. However, no factual foundation was laid in relation to the similarities of the work done by Shabalala and McMullin. In fact, Shabalala was an administrative clerk providing price stickers, an elementary mechanical job. McMullin, on the other hand, did a sale-on-consignment job involving large clients. Her job required judging and taking decisions. Shabalala's allegations were found to be speculative and he failed to establish a *prima facie* case. An attempt at an alternative claim based on work of *equal value* was held to be misplaced.

The Amendment Act, however, has amended section 6 to insert the following:

> '(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on one or more of the grounds in subsection (1), is unfair discrimination' (own emphasis).

Example: This means that all employees in all different categories (temporary, permanent, casual) at the *same* employer will enjoy equal pay as well as other terms and conditions which must be the same. Thus, the employee cannot compare her/his job with that of an employee at *another* employer but a comparison can only be done using another at the *same* employer.

The Employment Equity Regulations (hereafter 'Regulations') (drawn up with the assistance of ILO experts)[58] provide that when applying section 6(4) above, it must *first* be established:

[58] The Amendment Act makes provision for the MoL to prescribe the method and criteria for assessing work of equal value, and this has been done by way of publishing a Draft Code of Good Practice to provide practical guidance to employers and employees on how to apply the principle of equal pay for work of equal value (GN 746 in *GG* 38031, dated 29 September 2014). After comments from the public, the Code will be finalised.

- whether the work is indeed of equal value by using a certain *methodology* (Regulation 6),
- whether there is a difference in terms and conditions (including pay/remuneration), and then
- applying the onus provision (discussed above), it can be established whether the differentiation constitutes unfair discrimination or not.[59]

Moreover, the Regulations provide extensive guidelines on the meaning of the 'same work' and 'work of equal value'.

Work is the 'same' when work done:[60]

- by one employee is the *same* as the work of another employee of the same employer,
- is *identical or interchangeable*,
- is *substantially* the same as the work of another employee, or
- is sufficiently similar so that they can reasonably be considered to do the *same* job (even if the work is *not* identical or interchangeable).

Work of *equal value* is accorded the meaning set out below.

Work is of 'equal value' when:

- it is of the same value as the work of another employee of the same employer in a *different* job,
- their respective jobs are accorded the same value when objectively assessed in terms of certain criteria namely:
  - the responsibility demanded of the work, including responsibility taken for people, finances and material,
  - the skills, qualifications (including prior learning and experience) required to perform the work (formal and informal),
  - the physical, mental and emotional effort to do the work,
  - the conditions under which the work is done (including the physical environment, psychological conditions, the time of work and the area/place of the work), and
  - any other relevant factor.

Such assessment must be done free from bias and ignore race, gender, disability, or any other listed or arbitrary ground in terms of section 6(1).

[59] Regulation 3.
[60] Regulation 4.

An employer may, however, justify the value assigned to a job by referring to:

- an applicable sectoral determination by the MoL which assigned a value, and
- other factors which may *justify* different terms as *fair and rational*, which may include:[61]
  - seniority/length of service,
  - qualifications, ability, competence/potential above the minimum required for the job,
  - performance, quality or quantity of work, provided that the employees are equally subject to the employer's performance evaluation system and that the system is applied consistently,
  - if an employee is demoted due to restructuring or any other legitimate reason without a reduction in pay, and fixing the employee's salary at this level until salaries of employees in the same job category reaches this level,
  - if an employee is employed temporarily to gain experience/training and resultantly receives different pay and other terms,
  - the existence of a shortage of relevant skills or the market value of a specific job classification, and
  - any other relevant factor that is not unfairly discriminatory in terms of section 6(1).

Again, note that differentiation in pay and other terms based on one/more of the listed grounds of the EEA, will be fair and rational if it is established that the application is *not biased* against an employee/group of employees based on *race, gender, disability or any ground in section 6(1)* and has been applied in a *proportionate* manner. This must be established in accordance with the onus section of the EEA discussed in paragraph 4.2 above.

Lastly, an employer must, in order to eliminate unfair discrimination, *take steps* to eliminate differences in terms of employment (including pay) of employees who perform work of equal value, if such differences are directly/indirectly based on a listed ground. The Regulations repeat that an employer 'must ensure' no difference in pay for work of equal value based on race, gender or disability.

4.6 Resolution of unfair discrimination disputes

A dispute about unfair discrimination must be referred to the CCMA for conciliation within six months after the alleged discrimination occurred.[62] The referring party must satisfy the CCMA that a reasonable attempt was made to resolve the dispute prior to referral. Such 'reasonable attempt' may

[61] Regulation 7.
[62] See s 10(1)-(8). A bargaining council has no jurisdiction.

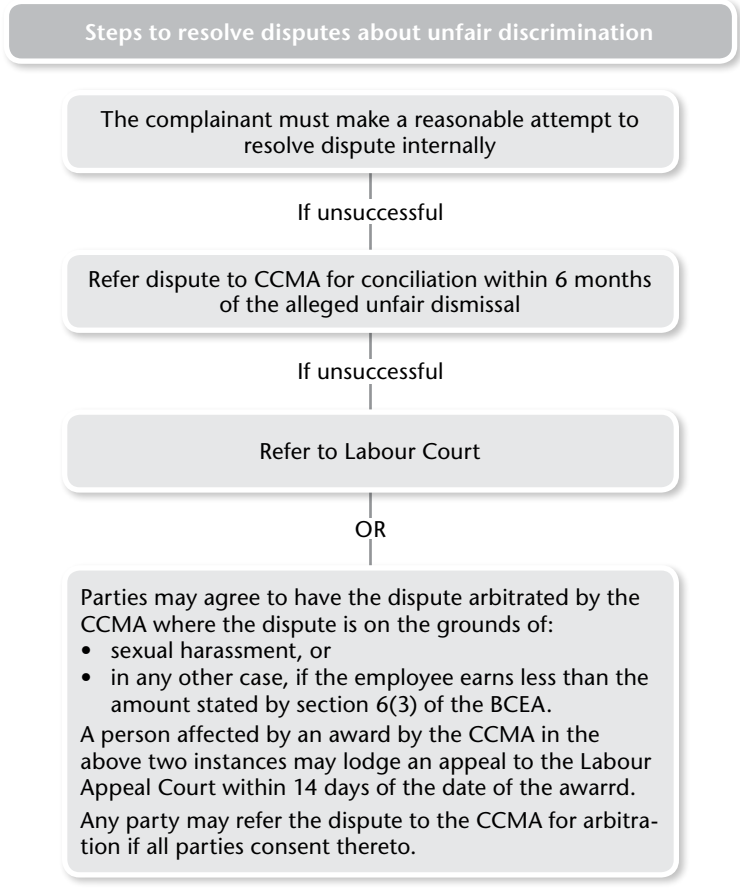
be interpreted to mean having at least exhausted the internal grievance procedures. If conciliation is unsuccessful, the dispute must then be referred to the Labour Court, unless the parties to the dispute agree to have their dispute determined by arbitration where the dispute is on the grounds of:

- sexual harassment, or
- in any other case, if the employee *earns less* than the amount stated by section 6(3) of the BCEA. This means lower-paid employees may now make use of the CCMA, a cheaper option than the Labour Court.

A person affected by an award by the CCMA may lodge an appeal to the Appeal Court within 14 days of the date of the award.

Any party may refer the dispute to the CCMA for arbitration if all parties consent thereto.[79]

The Labour Court has wide jurisdiction to determine disputes. It may, for example, grant compensation or issue an interdict to prohibit the employer from continuing with its discriminating actions.



An award made by the CCMA may include any order which the Labour Court may make (with changes as needed in the context). However, an award of damages may not exceed the amount stated in terms of section 6(3) of the BCEA.[63]

5. SECOND PURPOSE OF THE EEA: AFFIRMATIVE ACTION

5.1 Outline of affirmative action

The EEA requires (rather vaguely) that affirmative action measures must be:[64]

> '... designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.'

These measures are part of a broader strategy to promote the achievement of equality as set out in the Constitution. Such measures must include:

- identification and elimination of barriers in the workplace which adversely affect members of the designated groups,
- making reasonable accommodation for members of the designated groups,
- measures which promote diversity,
- retention, development and training of members of the designated groups, and
- preferential treatment and numerical goals to ensure equitable representation.

Affirmative action measures must be designed to attain employment equity in the workplace and must be applied fairly and rationally. This implies that when designated employers reach this goal, appointments and promotions on the basis of affirmative action will be unfairly discriminatory. Thus, for affirmative action measures to be rational it must:

- target categories of people who had been disadvantaged by unfair discrimination,
- be designed to protect or advance such people/categories of people, and
- promote the achievement of equality.

Affirmative action measures do *not* create a *right* to be appointed or promoted to a post. They can only be used only as a defence against a claim for unfair discrimination. Essentially, affirmative action is a tool to be used temporarily to achieve 'equitable representation' in the workplace.

The Constitutional Court[65] (in its first case on affirmative action) laid down a 'rationality' test for affirmative action measures to determine such measures' validity by asking three questions. Firstly, do the measures target people who had been disadvantaged by unfair discrimination; secondly, had

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[63] Section 48.
[64] Section 15(1).
[65] *Minister of Finance v Van Heerden & another* 2004 (6) SA 121 (CC), para 37.

the measures been designed to protect/advance such people; and thirdly, do the measures promote the achievement of equality?

However, the test has been criticised as it lacks the elements of fairness and proportionality.

The series of *Barnard* cases[66] illustrated both the correct and incorrect approaches to implementing affirmative action measures. Barnard (a white female), twice applied for a non-designated post of superintendent at level 9 (a level on which black females and males were under-represented and white females and males over-represented). Despite having obtained the highest score during both rounds of interviewing and being recommended by the selection panel during the second round, she was not promoted. In fact, nobody was appointed even though during the second round, two suitable black candidates were found. The National Commissioner ('NC') who had the final authority to make appointments stated cryptically that:

- the recommendation did not address representation,
- the post was not critical,
- the non-filling of the post would not affect service delivery, and
- the post had to be re-advertised in an attempt to address representation.

The Labour Court held that the rigid application of numerical goals in the SAPS's employment equity plan ('EEP') was not allowed. Instead the need for representation must be weighed up against efficiency, the individual's right to equality and a fair decision made. Where a post could not be filled by a person from a designated group because a suitable candidate could not be found, promotion to the post should not in the absence of a convincing explanation, be denied to a suitable candidate from another group. The failure to promote Barnard based on *race* was found to constitute unfair discrimination and the fact that nobody had been promoted had not mitigated or changed this finding. The SAPS was directed to promote Barnard to the post.

The SAPS successfully appealed to the Labour Appeal Court which found that:

- the NC was the only person who could determine if service delivery would be compromised, it was his prerogative and should he be incorrect, he was answerable to his accounting authority, and
- it was not for the court to dictate to the NC on the issue of service delivery and to fill a post or not.

Barnard, however, successfully appealed to the Supreme Court of Appeal. This court emphasised the specific facts of the case and made it clear that the decision should not be viewed as a formula for future affirmative action cases. It took into consideration, *inter alia,* the purpose of the EEA to achieve an egalitarian society and providing equal opportunities for all but not by numerical targets and representivity to be used as 'absolute' criteria (and turning them

[66] See n 10 above.

into quotas). Moreover, nowhere in any law for any SAPS post was the term 'critical' found, Barnard was part of the designated group of women, looking at the relevant sections of the Constitution and SAPS laws, those envisaged a professional, efficient SAPS that made *effective* use of resources and the evidence of the SAPS's only witness was so deficient that it caused the court to had no insight into the NC's reasoning. This led the court to conclude that the NC did not deal with all relevant issues and his management team's input, and in the absence of a motivation by the NC, the impression was created that the explanation for not filling the post because it was not 'critical,' was 'contrived.' Failure to appoint Barnard led to the conclusion that service delivery must have been affected, and while it was true that the NC had the power to leave the post vacant, it was not logical that where the only suitable person was from a non-designated group, that such a person should not be appointed.

The judge held that for *now*, in order to redress past imbalances by way of affirmative action, race has to be taken into account in a fair manner. It is hoped that this judgment will lead to a more nuanced application of affirmative action.

On appeal by the SAPS to the Constitutional Court it was found that the SAPS's EEP was valid and rationally implemented, and that Barnard had not been unfairly discriminated against. The Union indicated that it intended laying complaints against government at the UN and the ILO to the effect that the country's EEA is not in line with international conventions on racial discrimination.

5.2 The contents of affirmative action measures

Affirmative action measures must be designed to:[67]

- identify and eliminate employment barriers that adversely affect people from designated groups,
- further diversity in the workplace,
- reasonably accommodate (that is, to modify or adjust a job or the working environment) people from the designated groups to give them access to and advance in employment,
- ensure equitable representation of suitably qualified people from designated groups,
- retain and develop people from designated groups, and
- implement appropriate training measures, including skills development.

The measures implemented by employers may include preferential treatment (such as targeted recruitment), and numerical goals, but not quotas (which require the attainment of fixed numbers over a specified time period).

The EEA does not require designated employers to implement decisions concerning employment policies/practices that would establish absolute barriers to the prospective or continued employment/advancement of people

[67] Section 15(2).

who are *not* from the designated groups.[68] This implies some measure of protection for people who belong to non-designated groups.

5.3 Designated employers

As mentioned above, only designated employers need to apply affirmative action measures.[69] Employers who do not fall in the category 'designated employers' may, however, voluntarily comply with Chapter III of the EEA which regulates affirmative action. An employer who deliberately takes steps to avoid becoming a designated employer is guilty of an offence.

Every designated employer must implement affirmative action measures for people from designated groups to achieve *employment equity*.[70] Such employers have specific duties in designing EEPs.

Forms are provided (in the Regulations) for designated employers to use to comply with their duties relating to:

Collecting information on, and *analysing* all its policies and procedures, in order to identify employment barriers that adversely affect people from designated groups. A profile of the workforce in each occupational level must reflect the degree of under-representation. A designated employer will get information from Forms EEA1 (to be completed by all employees) in which they should indicate their gender, race, any disability (the latter is not compulsory unless it is required for the inherent requirement of jobs).

When conducting an analysis, an employer may use Form EEA8 for guidance on the national and regional economically active population ('EAP') and Form EEA9 which describes the various occupational levels at a workforce.

Statistics South Africa ('SSA') provides data on both the national and regional EAP in its Quaterly Labour Force Surveys in terms of gender and race. Employers can access these data directly from the SSA or in reviewed form from the DoL's website, www.labour.gov.za. These data may also be used when consulting, preparing and implementing an EEP (see below).

Consulting with representative trade unions and/or their employees, or representatives nominated by them. The interests of employees from across *all* occupational levels at the workplace, from *both* the designated as well as the non-designated groups, must be represented when consultation takes place.[71]

[68] Section 14(4).
[69] See the diagram on page 77 above.
[70] The Code: Employment Equity Plans provides guidelines and the Regulations provide employers with a template to draw up and implement measures.
[71] Sections 16; 17.

Disclosing of relevant information to the consulting parties to allow for effective consultation.[72]
Preparing and implementing of a detailed *EEP*[73] including, amongst others, the following: • the objectives to be achieved for each year of the plan, • numerical goals for under-represented people from designated groups at each level of the workforce, • strategies and timetables, • duration of the plan (not shorter than one year and not longer than five years), • procedures to monitor and evaluate the implementation of the plan, • internal procedures to resolve any dispute about the plan, and • people in the workforce responsible for monitoring and implementing the plan (see Form EEA13).
Reporting to the Director-General of the DoL on the progress made on an annual basis (using Forms EEA2, EEA4 and EEA10).[74] For reporting purposes, 'temporary employees' means those employed for less than three months.
Displaying a summary of the EEA in the workplace.[75]
Providing a copy of its EEP to employees.[76]
Establishing and keeping records for the workforce.[77]
Submitting a statement to the Employment Conditions Commission (hereafter 'ECC')[78] on its employees' *incomes and benefits* at each level of the workforce, with a view to reduce disproportionate income differentials.[79] Where disproportionate income levels and unfair discrimination with regards to *other* conditions had been shown, *submitting an income differential statement* on such *pay* differentiations at each level of occupation and the reasons for it.

[72] Secton 18. Section 16 of the LRA applies (see ch 9, para 3.4 below).
[73] Section 20. The Director-General may impose a fine on a designated employer if no EEP exists.
[74] Section 21. A fine may be levied if no report has been submitted, if no reasons were given as to why it was not submitted, or if the reasons are false or invalid.
[75] Section 25.
[76] *Ibid*.
[77] Section 26.
[78] See s 59 of the BCEA.
[79] Sections 27(1) and 27(2). This will enable the ECC to make recommendations on income differentials to the MoL.

Failure to comply with the duties set out above may lead to fines for employers and to state contracts being refused or cancelled.[80] Employers wanting to do business with organs of State, have to apply for certificates from the MoL confirming their compliance with chapters II and III of the EEA.

5.4 Beneficiaries of affirmative action

Designated groups	Designated employers
Black people, women, and people with disabilities* who are: • citizens of South Africa by birth or descent, or • became citizens by naturalisation before 27 April 1994 (the advent of democracy) or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies† The Amendment Act no longer defines the term 'black people' as including Africans, Coloureds and Indians. However, the Regulations still use these subgroups. Is this an oversight, or does it imply that there is no longer a ranking order for these groups? The group also includes South African citizens of Chinese descent.‡	• Larger enterprises with 50 or more employees • Employers who employ fewer than 50 employees, but have an annual turnover specified in Schedule 4 of the EEA • Municipalities • Organs of state such as the Airports Company of South Africa (ACSA), the Central Energy Fund, the Development Bank of South Africa, Eskom, the SABC, the SA Post Office Limited and Telkom SA Limited (excluding the National Defence Force, the National Intelligence Agency and the Secret Service) • Employers that are designated as such in terms of a collective agreement • The National Defence Force and the State Security Agency are explicitly *excluded* from the definition of designated employers

* See the Code: Disabilities, which sets out guidelines for equal opportunities and fair treatment of disabled people.

† People who are foreign nationals or who have become citizens after April 1994, will not count as part of employers' affirmative action targets. This is the same for the BBBEEA. Criticism on the Amendment Act is that it had not addressed real transformation because the emphasis is still very much on race (n 6 above).

‡ See *Chinese Association of South Africa & others v Minister of Labour & others* [2008] [ZAGPHC] 174, dated 18 June 2008, in which South African citizens of Chinese descent were declared to fall within the ambit of the definition of 'black people' in s 1 of the EEA (and the BBBEEA).

5.4.1 *Designated groups*

'Designated groups' include black people, women, and people with disabilities.[81] The generic term 'black people' is defined to include Africans, Coloureds and Indians. South African citizens of Chinese descent have been declared to be part of the designated group 'black people'.

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[80] Section 53(5).

[81] See para 4.3.1 above.

5.4.2 *Citizenship*

While the EEA was silent initially on whether South African citizenship is required of members of the designated groups to benefit from affirmative action, amendments to the Regulations[82] in terms of the EEA, have refined the definition of 'designated groups' to apply to South African *citizens* only.[83]

Designated groups also include (i) citizens of the Republic by birth or descent or (ii) those who became citizens by naturalisation after 26 April 1994 (and who would have been entitled to acquire citizenship by naturalisation prior to that date but who could not due to apartheid policies). These people had previously been included only by Regulation.

The serious lack of skills amongst South Africans, however, poses problems of its own to fill jobs with members of the designated groups.

5.4.3 *Is personal disadvantage required?*

The issue of whether a beneficiary of affirmative action measures must have been personally disadvantaged or whether membership of a designated group is sufficient, has been resolved in *Minister of Finance v Van Heerden & another.*[84] It was held that personal past disadvantage was not a requirement. The reason for this is that apartheid categorised people in groups, and consequences resulted from group membership, without reference to the circumstances of individuals. The system meted out disadvantages and afforded advantages according to a person's membership of a group.

5.4.4 *Degrees of disadvantage*

The notion of 'degrees' of disadvantage is not found in the EEA but comes from the courts.[85] In *Fourie v Provincial Commissioner of the SA Police Service (North West Province),*[86] for example, the Labour Court found that there were different degrees of disadvantage between black people and white women in the workplace. Here, the applicant (a highly qualified and experienced white woman) complained that she was unfairly discriminated against by being refused promotion. While the court accepted that white women had been discriminated against under apartheid, it held that the degree of discrimination was lower than that suffered by African people, who bore the brunt of apartheid. The court held that in deciding on *degrees* of disadvantage, cognisance had to be taken of:

- South African history,
- the imbalances of the past,

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[82] GN 841 *GG* 29130, dated 18 August 2006.
[83] Foreigners, consequently, could not benefit from affirmative action.
[84] 2004 (6) SA 121 (CC), para 85ff.
[85] Section 54(1)(*a*), however, provides that a code of good practice may provide guidelines for the prioritisation of designated groups. Such a code has not been published so far.
[86] (2004) 25 *ILJ* 1716 (LC).

- the fact that the apartheid system was designed to protect white people,
- the fact that particularly African employees suffered the brunt of discrimination, and
- the purposes and objectives of the EEA.

The fact that the applicant was not promoted was found to be rational and fair in the circumstances. As there were no black officers at the police station in question, and as the numbers for white women had already been exceeded, it was fair that a black person was promoted instead of the white applicant.

It is important to note that since 1999, when affirmative action was implemented, race has been favoured over gender and disability, and African over Coloured and Indian.[87] Moreover, it has been argued that the racial basis for affirmative action be re-evaluated, since South Africa has been left with a *class* structure that is largely *racially* defined. Thus, the following has been suggested as a better basis for affirmative action measures.

> '… a redress strategy with *class* objectives at its core would in substance have the effect of mediating historical racial disparities … without reinforcing racial identities and aggravating racism …' (emphasis added).

Using class or socio-economic factors may also have a strategic advantage rather than race, since there is a degree of willingness to redress inequalities on the part of white South Africans. But framing it exclusively in racial terms is not the most effective way of reaching redress. Redress is least likely to face resistance if measures to redress racial inequities can be rephrased as *anti-poverty* measures.[88]

5.4.5 *What does 'suitably qualified' mean?*

Only members of designated groups who are 'suitably qualified' can benefit from affirmative action. In effect then, the EEA rejects tokenism. Determining whether a person is 'suitably qualified', depends on her/his:[89]

- formal qualifications (such as degrees/diplomas),
- prior learning (such as diplomas not completed),
- relevant experience, or
- capacity to acquire, within a reasonable time, the ability to do the job (put differently, the potential of the person).

When determining whether a person is suitably qualified for a job, an employer must view *all* these factors. Thus, *any one* of, or *any combination* of these factors may indicate an ability to do the job.

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[87] O Dupper 'The beneficiaries of affirmative action' in O Dupper & C Garbers *Equality in the workplace: Reflections from South Africa and beyond* (2008) 301, 302–309.

[88] The most recent Annual Report of the CEE 2013–2014, 53 stated that 'we still have a long way to go' with regards to achieving equality.

[89] Section 20(3).

The employer may not unfairly discriminate against someone *solely* on the ground of that person's lack of relevant experience when determining whether a person is 'suitably qualified'. This is understandable against the background of past discriminatory laws and practices that prevented blacks/women from competing for jobs and gaining experience.

Though the definition of 'suitably qualified' appears to be broad, people *not* suitably qualified cannot be considered for affirmative action.

5.4.6 *People employed by a temporary employment service*

The Amendment Act provides for people whose services have been procured for a client by temporary employment service ('TES')/labour broker, to be deemed to be an employee of that client. Moreover, such employees who are in the employ for longer than three months, will be deemed to be employees of the client for purposes of affirmative action.[90]

5.5 Monitoring and enforcement of affirmative action

Chapter V of the EEA provides for both informal and formal ways of enforcing the affirmative action provisions of the Act. Firstly, employees and trade union representatives, for example, may bring contraventions to the attention of, amongst others, the employer, a trade union, a labour inspector, the Director-General of the DoL or the Commission for Employment Equity (hereafter 'CEE') established by the EEA. Secondly, and more formally, the Act is enforced by labour inspectors by obtaining written undertakings from employers that they will comply with the Act within a specified period and by issuing compliance orders. If an employer fails to comply with an undertaking, the Director-General may apply to the Labour Court to make such an undertaking an order of court. The same is true where an employer failed to comply with a compliance order. The Director-General may conduct a review in order to determine whether an employer is complying with the EEA and make recommendations if found to be in non-compliance, and refer cases of persistent non-compliance to the Labour Court with such recommendations to be made an order of court or to impose a fine on the employer.

The Labour Court has wide powers, which include orders requiring the employer to comply with a compliance order issued by an inspector, ordering compliance with any provision of the EEA, imposing fines for contraventions of certain provisions of the Act, and reviewing administrative actions in terms of the EEA on any ground permissable in law.[91]

The Director-General may apply to the Labour Court for an order directing an employer's compliance or imposing a fine on such employer. Maximum fines have been increased up to 200% for designated employers. These may

[90] Section 57.
[91] Section 50(1)(*h*) and 50(5) respectively. This will be done in accordance with the PAJA.

have serious financial implications for such employers and had had been criticised as disproportionate to the offence/s, as they are based on the Competition Commission's fines where there is a manipulation of industry.

Assessment of compliance with the EEA has been simplified but made tighter.[92] The criteria for compliance have been reduced and simplified to include only the extent to which suitably qualified people from the designated groups are equitably represented within each occupational level in the workforce in relation to:

- the demographic *and* regional economically active population ('EAP'),
- reasonable steps taken by a designated employer to train suitably qualified people from the designated groups,
- reasonable steps taken by a designated employer to implement its EEP,
- reasonable steps taken to implement an EEP,
- the extent to which the employer has made progress in eliminating employment barriers that adversely affect people from designated groups,
- reasonable steps taken to appoint and promote suitably qualified designated people, and
- any other prescribed factor.

Further, the MoL may, after consultation with NEDLAC, issue regulations which may specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of *either* the national EAP *or* the regional EAP. Lastly, a designated employer may raise any reasonable ground to justify its failure to comply when assessing compliance with the Act or in court proceedings.

Moreover, the contravention of:

- section 20 (preparation and implementation of EEP's)
- section 21 (preparation and submission of reports),
- section 23 (successive EEPs), and
- section 44 (refusal or failure to comply with a recommendation by the Director-General) may attract a fine linked to the employer's *annual turnover*.[93]

Straight forward maximum fines are thus done away with, showing that affirmative action measures will be more aggressively enforced.

If a designated employer does not comply with a written undertaking within the period stated, the Labour Court may make same an order of court, on application of the Director-General.[94]

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[92] Section 42.

[93] Schedule 1 of the Amendment Act deals with maximum permissible fines and Sch 4 deals with turnover thresholds applicable to designated employers in different sectors.

[94] Section 45.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements regarding discrimination is *incorrect*?
   (*a*) Discrimination may be direct or indirect.
   (*b*) Not all forms of discrimination are unfair.
   (*c*) Discrimination means treating employees differently without an acceptable reason.
   (*d*) Sexual harassment is not regarded as unfair discrimination in terms of the EEA.
2. The EEA prohibits medical testing of an employee unless, amongst other things, the testing is justifiable in the light of certain circumstances. Discuss the factors which will indicate that medical testing is indeed justifiable.
3. Write brief notes on an employer's duties not to be deemed liable for harassment by its own employees against co-employees in terms of the EEA.

✓ Feedback

1. (*d*) is *incorrect*. The EEA regards any kind of harassment as unfair discrimination.
   (*a*) is *correct*.
   (*b*) is *correct*. Mere differentiation will not be unfair.
   (*c*) is *correct*. Discrimination entails treating employees differently without acceptable reason.
2. Factors such as medical facts, employment conditions, social policy, fair distribution of employment benefits and the inherent requirements of the job will indicate that medical testing is justifiable.
3. Once an employee who alleges any contravention of the EEA (including sexual harassment) brought this to the attention of the employer, the employer must take two steps. It must first consult all relevant parties and, second, take the necessary steps to eliminate such conduct. The employer will be deemed to be liable for a contravention by its employee if it did not attend to these and cannot prove that it did all that was reasonably practicable to ensure that an employee would not contravene the EEA. An employer must thus act diligently and quickly after a report of sexual harassment.

RECOMMENDED READING

1. Cohen T 'The efficacy of international standards in countering gender inequality in the workplace' (2012) 33 *ILJ* 19
2. Dupper O & Garbers C 'Reinventing labour law: reflecting on the first 15 years of the Labour Relations Act and future challenges' *Acta Juridica* (2012) 244

3. Liebenberg S & Goldblatt B 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 335
4. McGregor M 'Affirmative action on trial—determining the legitimacy and fair application of remedial measures' *TSAR* (2013) 4 650
5. McGregor M 'Blowing the whistle: The future of affirmative action in South Africa? Parts 1 and 2' *SA Merc LJ* (2014) 26(1) 60 and *SA Merc LJ* (2014) 26(2) 282
6. Pretorius LJ 'Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) *SALJ* 3

6

Protection against unfair labour practices under the Labour Relations Act (LRA)

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1. INTRODUCTION

Keep the following important rule in mind throughout this chapter:

> An unfair labour practice can only take place while the employee is still in employment, and therefore, an unfair dismissal can never be an unfair labour practice!

Employers and employees do not always agree on the development of an employee or the best career path. In this regard, the LRA protects employees against certain unfair conduct of the employer, by classifying certain conduct of the employer as unfair labour practices. This would be, for example, where an employee is not promoted, an employee does not get the training she/he applies for or an employer discontinues a cell phone allowance of an employee. When the employee feels that she/he was treated unfairly but does not want to resign (remember the rule at the beginning of this chapter!) the possibility of an unfair labour practice should be explored.

The right not to be subjected to unfair labour practices has had a large impact on the development of labour law in South Africa.[1] It has led to changes in employer practices and policies, to ensure that managers act fairly in dealings with employees such as promotion, suspension and probation. Cheadle has argued that it is time to revisit the notion of unfair labour practices as the definition of 'unfair labour practice' only protects 'middle and senior management while the most vulnerable workers' are left without protection.[2] Surprisingly, the Labour Relations Amendment Act (hereafter 'Amendment Act') has not proposed substantive changes to unfair labour practices.

2. DEFINITION OF AN UNFAIR LABOUR PRACTICE

Section 186(2) defines an 'unfair labour practice' as follows:

> 'An "unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving—
> '(*a*) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation)

[1] The concept 'unfair labour practices' was interpreted broadly by the Industrial Court (established in 1979) to protect employees. See ch 1, para 1 above.
[2] See H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663.

or training of an employee or relating to the provision of benefits to an employee;
(*b*) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(*c*) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
(*d*) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act [26 of 2000] … on account of the employee having made a protected disclosure defined in that Act.'

3. DIFFERENCES BETWEEN CONSTITUTIONAL AND LRA PROTECTION

In the context of fair and unfair labour practices, two sections from the relevant legislation should be investigated, namely:

Section 23(1) of the Constitution	Section 185(*b*) of the LRA
'Everyone has the right to fair labour practices'	'Every employee has the right not to be … subjected to [an] unfair labour practice'

The LRA gives content to the right to fair labour practices guaranteed in section 23(1) the Constitution. Section 185(*b*) protects employees against unfair labour practices by employers. It is easy to confuse the terminology of these two sections, namely 'a right to fair labour practices' and 'an unfair labour practice'. One might want to infer that an infringement of the constitutional right to fair labour practices will amount to an 'unfair labour practice' but this is not necessarily so. The following set of facts illustrates how these concepts and its application are commonly confused.

Example: Robert is dismissed because of his stuttering. Robert feels that it is unfair to dismiss him by reason of his stuttering and it infringes his constitutional right to fair labour practices. Robert, therefore, feels that the employer committed an unfair labour practice. Robert's use of the terminology and the concepts are incorrect.

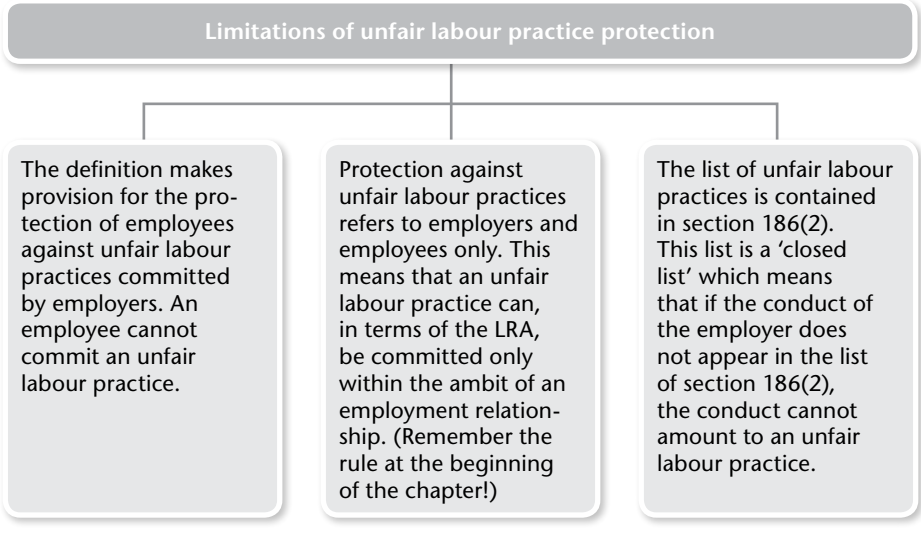
The fact that he was dismissed means that there cannot be reference to an unfair labour practice. (See the rule at the beginning of the chapter!). His dismissal might be unfair but that is dealt with in terms of the LRA's protection against unfair dismissals. An unfair dismissal infringes an employee's constitutional right to fair labour practices which protection is further refined in the LRA, which provides remedies for unfair dismissals.

The differences between these two concepts are further illustrated below:

Right to fair labour practices: Constitution	Protection against unfair labour practices: LRA
The right to fair labour practices in terms of the Constitution: • is wide • protects 'everyone', in other words, also workers who are not employees in terms of the LRA. Surrounding circumstances will be taken into account in determining whether there was an infringement of the right to fair labour practices.	The protection against unfair labour practices in terms of the LRA: • is limited to the list of actions included in the definition of an unfair labour practice • protects employees only against specific actions by employers • an employee cannot commit an unfair labour practice towards an employer; only an employer can commit an unfair labour practice towards an employee

4. EXTENT OF PROTECTION AGAINST UNFAIR LABOUR PRACTICES IN THE LRA

It is important to know the limits of the protection provided in the LRA against unfair labour practices. These are the following:



5. DETAILED DISCUSSION OF DEFINITION OF UNFAIR LABOUR PRACTICES

5.1 The unfair conduct of the employer relating to promotion

It is difficult to prove that the employer acted unfairly with regard to promotion because the employee must in effect prove an omission (a failure to act). She/he must show that they expected the employer to promote her/him and

it did not happen. Disappointment as a result of an employer's decision does not necessarily mean that the employer acted unfairly.

Promotion normally falls within the managerial prerogative. The employer will promote the most suitable candidate after a fair process has been followed. An employee does not have any legal *entitlement* to be promoted to a higher post. However, an employee may have a *reasonable expectation* of being promoted. Employers could, for example, create such an expectation through an assurance that the employee will be promoted or through past practices where people in similar conditions were promoted. This would then lead to the employee feeling that the non-promotion was unfair.

In order for a promotion to be fair, an employer must act *both* procedurally and substantively, fair. If an employer cannot justify its decision not to promote, or if the process leading to the promotion proves to be seriously flawed, the possibility that the employer committed an unfair labour practice may arise.[3]

For example, in *Gebhardt v Education Labour Relations Council & others*,[4] Gebhardt (a white female) was hearing-impaired. She applied for promotion along with a coloured female colleague. Gebhardt was recommended for promotion but the employer chose to appoint a Coloured female because she was from a designated group and the employer had to comply with its EEP. Gebhardt complained because she was also from a designated group as a disabled employee. The court found that the employer neglected to verify Gebhardt's disability in a situation where this would have played a significant role in the decision whom to promote. It was held that her non-promotion constituted an unfair labour practice and the matter was referred back to arbitration to consider whether the applicant was entitled to promotion, or whether her application for promotion should be considered afresh in light of her being part of a designated group.

It is important to note that the courts will only intervene in disputes about promotion if the employer acted in bad faith, for example where:

- the employer exercised its discretion inconsistently,
- the reasons provided cannot be substantiated,
- the decision was taken on a wrong principle, or
- the decision was taken in a biased manner.

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[3] See *Dlamini v Toyota SA Manufacturing* (2004) 25 *ILJ* 1513 (CCMA) where an employee alleged that he was subjected to an unfair labour practice since he was not promoted, while being the best candidate with the most experience. The court held that it was not a 'recruitment agency' to assist the employer in appointing the best candidate. As long as the employer did not act grossly unreasonable or in bad faith, the court will be hesitant to interfere with the discretion of the employer. See also *SA Police Union obo Buckus and SA Police Services* (2012) 33 *ILJ* 2755 (BCA) where the employer failed to comply with its selection policy and this was found to constitute an unfair labour practice.

[4] (2013) 34 *ILJ* 1183 (LC).

5.2 The unfair conduct of the employer relating to demotion

Demotion can take many forms, for example, where an employee is transferred to a lower job level or rank, receives less remuneration, loses benefits or experiences a loss in status.

For example, in *SA Police Service v Salukazana & others,*[5] the employee was the Provincial Head: Supply Chain Management in the SAPS. He was transferred to the position of Section Head: National Inspectorate. This transfer meant that where he previously reported to an area commissioner, he would report to a person of lower authority. The court held that this constituted a lowering of his status, and a 'demotion', which was an unfair labour practice.

Similarly, in *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others*,[6] the employee who was the Regional Head: Corporate Services in the Department of Correctional Services in the Western Cape was transferred to do duty at the Pollsmoor Prison after which he would be transferred to Pretoria. The employee held that it constituted a demotion because of the following reasons:

- although the employee's rank and remuneration were not going to change, his status, prestige and responsibilities would be lowered.
- the decision to transfer him was taken unilaterally and before he had a chance to state his side of the case. This was against the rules of basic fair administrative action and also against the policy of the Department.

The employer could not provide the employee with reasons why he was selected from the pool of possible suitable candidates. This was in contravention of the employer's transfer policy.

Since the employee had not consented to the demotion, it was unlawful and unfair. The so-called 'transfer' was held to be invalid and of no legal effect.

Demotion can sometimes be fair. This would, for example, be in the context of restructuring of organisations where a demotion will be done for purposes of operational reasons or as a result of incapacity. This is allowed as long as the action is taken in accordance with a fair procedure. The employer has to consider the best possible option to avoid dismissing employees; demotion can thus be an option avoiding dismissal.

Demotion could also be fair as a *disciplinary penalty*, if it is based on a valid reason (for example, as an alternative to the dismissal of an employee found guilty of misconduct), and if it is done in accordance with a fair procedure (for example, a disciplinary hearing was held).[7]

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[5] (2010) 31 *ILJ* 2465 (LC).
[6] (2008) 29 *ILJ* 2708 (LAC).
[7] See chs 8 and 9 below where fair procedures for dismissals are discussed. The same procedures would apply for demotion.

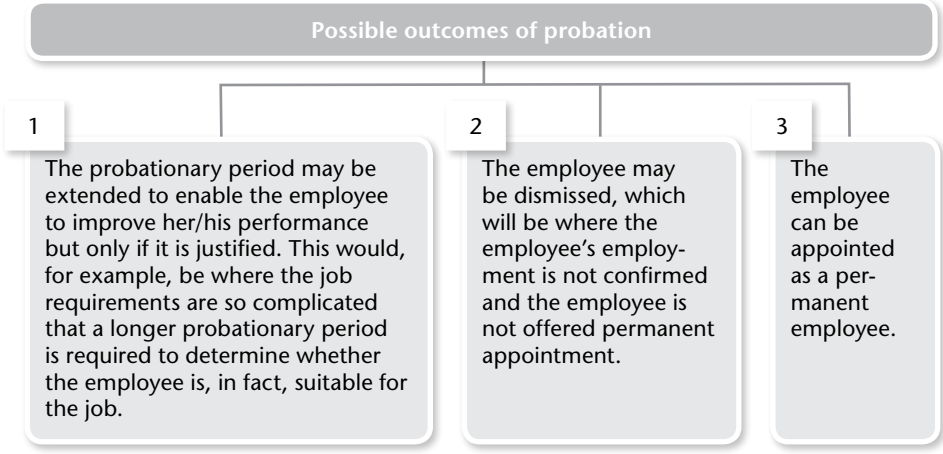
5.3 The unfair conduct of the employer relating to probation

The purpose of probation is to afford an employer the opportunity to evaluate an employee's performance before confirming the appointment. Probation should not be used for the wrong purpose, for example, to deprive employees of the status of permanent employment, or to dismiss probationers at the conclusion of the probationary period and replace them with newly hired employees.

The Code: Dismissal, dealing with probation, provides guidelines for the fair treatment of employees on probation. Non-adherence to these guidelines will amount to unfair conduct with regards to probation. The first area where unfairness with regard to probation can occur is in respect of the probation *period*. The Code sets the requirements for a fair probationary period as follows:

- the period should be determined in advance, and
- the period should be of a reasonable duration, determined with reference to:
  - the *nature* of the job (for example, a shorter probationary period would be required for a messenger/clerk, while a manager may be required to serve a longer probationary period), and
  - the *time* it would take to determine the employee's suitability for continued employment.

At the end of the probation period three outcomes are possible:



In the case of extension of the probationary period (block 1 above) or the dismissal of the employee (block 2 above), the employee must be invited to make representations, which the employer must consider. During this process the employee may be represented by a union representative or a co-employee.

In *SACTWU v Mediterranean Woollen Mills (Pty) Ltd*[8] it was held that an employer who does not want to confirm a probationary employee's appointment, must show that the procedure prior to the dismissal included:

- giving the employee an opportunity to improve,
- making the employee aware that her/his performance was unacceptable,
- counselling the employee if she/he was not able to handle the work, and
- treating the employee sympathetically and with patience.

If the employee still fails to perform satisfactorily after these requirements have been met, the contract can be terminated.

5.4 The unfair conduct of the employer relating to training

If the employer acts unfairly towards the employee as far as the provision of training is concerned, it will amount to an unfair labour practice. In order to prove that the employer acted unfairly, the employee will again have to prove that the employer failed to act when she/he expected the employer to do so with regard to training. Training is important if it is necessary for the advancement of the employee and if the employer has an established practice of training employees. In the former case, an example is found in *Mdluli & SA Police Service*.[9] The employer removed the employee (an inspector) from a training course which would have enabled him to be promoted to the rank of captain. This was done based on an allegation of misconduct relating to misuse of an official vehicle. The allegation was later withdrawn. The failure by the employer to send the employee on training constituted an unfair labour practice and the arbitrator ordered the employer to nominate the employee for the next training course.

5.5 The unfair conduct of the employer relating to provision of benefits

One of the most common unfair labour practices relates to the provision of benefits. This category of unfair labour practices is also the most difficult to apply because of the following reasons:

- the LRA does not provide a definition of 'benefits',
- the interpretation given to this term by the courts and arbitrators are quite narrow, and
- there is confusion when a dispute about a benefit will amount to a rights dispute or an interest dispute.

The last bullet point above needs further explanation. A dispute regarding an unfair labour practice must amount to a dispute of right. A benefit is seen as part of remuneration and disputes about remuneration are regarded as interest disputes, which must be resolved by way of industrial action (strikes).

[8] [1995] 3 BLLR 24 (LAC).
[9] (2003) 24 *ILJ* 1186 (BCA).

For example, in *Schoeman v Samsung Electronic SA (Pty) Ltd*,[10] the employer changed the employee's commission structure (to Schoeman's detriment) and she claimed that this was an unfair labour practice. The court held that the commission was *not* a benefit but part of remuneration. The court therefore did not have the jurisdiction to hear the matter and Schoeman had to rely on strike action to resolve her dispute. This was problematic since a single employee cannot strike, which meant that Schoeman had no remedy.

A debate has ensued about the correct interpretation of 'benefit' because benefits often form part of remuneration packages. This led to contradictory judgments, for example on whether provident funds and transport allowances are benefits or remuneration.[11]

However, in *Apollo Tyres South Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,[12] the Labour Appeal Court looked at the interpretation of a 'benefit'. In this case the employer refused to include the employee in an early retirement scheme. The commissioner and the Labour Court held that an early retirement scheme did *not* constitute a benefit. The Labour Appeal Court held that a 'benefit' in the context of an unfair labour practice should be interpreted to include *any* benefit to which the employee is entitled regardless of the fact that the benefit results from (*a*) the contract of employment, or (*b*) is judicially created, or (*c*) is granted in terms of a policy or practice subject to the employer's discretion.

This means that employees who wish to claim that the employer committed an unfair labour practice by denying them benefits, do not need to prove a right if they challenge the fairness of the employer's conduct. The employer who denies the benefit must be able to show that there was a valid reason for excluding the employee from the benefit, in this instance, the early retirement scheme. In this case the employer failed to provide a valid reason and that amounted to an unfair labour practice.

Similarly, in *United Association of South Africa obo Members/De Keur Landgoed (Edms) Bpk*,[13] the commissioner found that free transport to and from work, which the employer had provided for 15 years, constituted a benefit. Consequently, the discontinuation of such transport by the employer was an unfair labour practice. The CCMA ordered the employer to reinstate the benefit, because the promises made by the employer together with a long standing practice, made the provision of transport a contractual term.[14]

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[10] [1997] 10 BLLR 1364 (LC).

[11] See, eg, *SA Chemical Workers Union v Longmile/Unitred* (1999) 20 *ILJ* 244 (CCMA); *Van Amstel v Eskom* [2002] 9 BALR 995 (CCMA); *Kopke and Futura Footwear (Pty) Ltd* [2006] 27 *ILJ* 2476 (CCMA).

[12] [2013] 5 BLLR 434 (LAC).

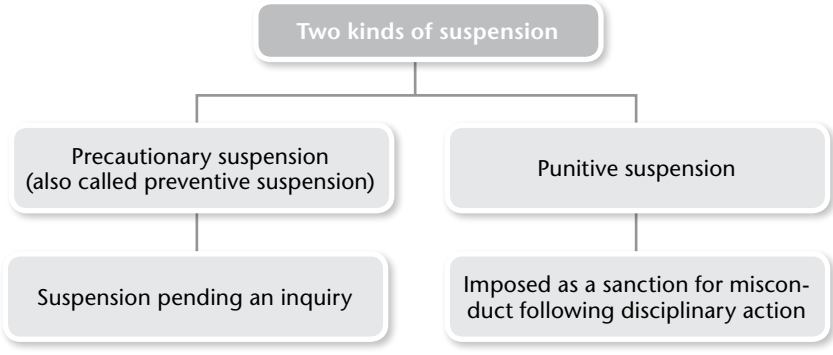
[13] Unreported (2014) 23 CCMA 6.7.3.

[14] Remember that this does not mean that once an employer grants a benefit, it can never be taken away. It can, but the employer will need to have a reason for this and she/he must consult and negotiate with the employees before it can be taken away.

Considering the nature of modern-day salary packages, it is difficult to separate benefits from remuneration, and these difficulties in defining a 'benefit' will stay until such time as the concept has been reviewed by the legislature.[15] It seems that the interpretation of a 'benefit' is much wider since the *Apollo Tyres* judgment and that any *entitlement* (even it was linked to/forms part of remuneration) which is unreasonably withheld or taken away by the employer, will amount to an unfair labour practice. As indicated by the court in *Apollo Tyres*, an entitlement can arise from the contract of employment, from promises, from workplace practices and policies, and from law.

5.6 The unfair conduct of the employer relating to suspension or any other disciplinary action short of dismissal

Two kinds of suspensions are found in practice, namely:



5.6.1 *Precautionary suspension*

(*a*) Purpose of the suspension

Precautionary suspensions could be implemented to allow an employer to investigate the alleged misconduct of an employee, and to decide whether disciplinary action should be taken against the employee.

(*b*) Payment during suspension

Suspension, as a rule, is *with* pay unless the employee agrees to suspension without pay, or a law or collective agreement authorises unpaid suspension. In *Sappi Forests (Pty) Ltd v CCMA & others*,[16] the employee was charged with misconduct for allegedly receiving payment from a contractor without the employer's knowledge. The employee also had been criminally charged. He was suspended with full pay pending the disciplinary inquiry. The employee requested a postponement of the inquiry pending the outcome of the criminal

[15] R le Roux 'The anatomy of a benefit: A labyrinthine enquiry' (2006) 27 *ILJ* 53.
[16] [2009] 3 BLLR 254 (LC).

prosecution. The employer acceded to the postponement pending the prosecution, but refused continuing the suspension of the employee on full pay. The court held that the employer agreed to the postponement of the disciplinary hearing until the criminal trial was done and, during this time, the employer had to continue to suspend the employee with pay.

(*c*) Fairness of a suspension

The decision whether or not to implement a precautionary suspension will depend largely on the circumstances of the alleged misconduct. An employee should not be suspended unless:

- there is a *prima facie reason to* believe that the employee has committed serious misconduct, and
- there is some objectively justifiable reason for excluding the employee from the workplace.

Suspension has a detrimental impact on the affected employee and may prejudice her/his reputation and job security. Suspensions must, therefore, be based on *substantively valid reasons* and *fair procedures* before they are implemented. It may be helpful making a decision on disciplinary suspensions, if employees have an opportunity to state their case before being suspended.

In *Mogothle v Premier of the North West Province & another*,[17] it was held that the suspension of an employee pending an enquiry into alleged misconduct was equivalent to an 'arrest', and should, therefore, be used *only* when there is a reasonable concern that the employee will interfere with investigations or pose some other threat. In *Tungwana/Robben Island Museum*,[18] the commissioner found that there was no *prima facie* reason for the employer to believe that the employee had committed serious misconduct. The employer, therefore, had no reason to exclude the employee from the workplace and a suspension under these circumstances amounted to an unfair labour practice. The employee was awarded six months' salary as compensation for the unfair suspension.

5.6.2 *Punitive suspension*

Fair suspension without pay could be an alternative to a sanction of dismissal in an attempt to correct the behaviour of the employee. It can be seen as a form of progressive discipline[19] where appropriate.

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[17] [2009] 4 BLLR 331 (LC).

[18] [2009] 11 BALR 1178 (CCMA). See *Legodi & others and Northern Cape Provincial Legislature* (2012) 33 *ILJ* 2213 (CCMA) where the suspensions had been found fair as the senior suspended employees held a threat to property and a risk of intimidation to junior staff. I*n Bessie and University of KwaZulu Natal* (2013) 34 *ILJ* 2130 (CCMA) an employee was suspended on full pay for more than five months pending finalisation of a disciplinary enquiry into his alleged misconduct. The suspension was held to be unfair as it was unduly long and punitive.

[19] See ch 8, para 4 below.

5.6.3 *Any other disciplinary action short of dismissal*

This protection is created to prohibit an employer from acting unfairly with regards to, for example, warnings and information on an employee's employment record.

In the matter of *Magson and Speed Weave Manufacturing (Pty) Ltd*,[20] an employer kept two warnings (which were unfairly issued) on the employee's file. The CCMA ordered the employer to remove these from the employee's record as it amounted to an unfair labour practice. In *SA Revenue Services v CCMA*[21] the employer was bound by a collective agreement, which gave the chairperson of a disciplinary enquiry the power to impose a final sanction for misconduct (as opposed to merely making a recommendation). The chairperson imposed a sanction short of dismissal, which the employer decided not to accept and dismissed the employee instead, which was held to be unfair.

5.7 The unfair conduct of the employer relating to a refusal to reinstate or re-employ an employee in terms of any agreement

Former employees are protected against refusal by the employer to reinstate or re-employ them in terms of any agreement. An example would be where the employer refuses to re-employ a retrenched (ex)-employee where a vacancy arises and, it was agreed (for example, in a collective agreement or a settlement agreement) to recall and consider the former employee, for such a position.

5.8 The unfair conduct of the employer relating to an employee suffering an occupational detriment on account of a protected disclosure ('whistle-blowing')

5.8.1 *Requirements for protection*

The Protected Disclosures Act (hereafter 'PDA') regulates the disclosure by employees of information on suspected criminal and other improper conduct by employers and co-employees, and provides remedies in this regard.[22] The purpose of this protection is to promote a culture of openness and accountability without fear of reprisal. A draft Amendment Bill[23] is currently before Parliament which aims to expand the scope of the PDA to be broader than the traditional employment relationship and to include disclosures made by independent contractors, consultants and agents.

If an employee suffers an occupational detriment because she/he made a protected disclosure in terms of PDA, it will amount to an unfair labour

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[20] (2009) 30 *ILJ* 2196 (CCMA).
[21] (2014) 35 *ILJ* 656 (LAC).
[22] These remedies are over and above the unfair labour practice remedies provided for in the LRA.
[23] Draft Protected Disclosures Amendment Bill [D2014].

practice.[24] An occupational detriment will include all unfair action short of dismissal, in other words, where the employer acts unfairly towards the employee after the protected disclosure, but she/he does not dismiss the employee.

Three requirements have to be met before an employee can claim protection in terms of these provisions:

- The employee must have made a protected disclosure.
- The employer must have taken some retaliating action against the employee which amounts to the employee suffering from an occupational detriment.
- The detriment suffered must be *on account of* (in terms of the LRA) or *partly on account of* (in terms of the PDA) the making of the protected disclosure. This implies a *causal link* between the disclosure and the retaliating action by the employer.

5.8.2 *Meaning of 'occupational detriment' and 'protected disclosure'*

It is important to understand two key concepts with regard to 'whistle-blowing' and unfair labour practices, namely:

- occupational detriment, and
- protected disclosure.

Occupational detriment

This is where an employee is subjected to any of the following as a result of 'whistle-blowing' (put differently, if the employee, after making the protected disclosure faces any of the following):

- any disciplinary action,
- dismissal, suspension, demotion, harassment or intimidation,
- being transferred against the employee's will,
- refusal of a transfer or promotion,
- subjection to a term of employment which is altered or kept altered to the employee's disadvantage,
- subjection to a term of retirement which is altered or kept altered to the employee's disadvantage,
- refusal of a reference or being provided with an adverse reference,
- denial of appointment to any position or office,
- being threatened with any of these actions, or
- being otherwise adversely affected in respect of employment, employment opportunities and work security.

[24] If an employee is dismissed because she/he has made a protected disclosure, such a dismissal will be automatically unfair in terms of s 187(1)(*h*) of the LRA. See ch 8, para 5.9 below.

Protected disclosure

Note: The PDA distinguishes between a 'protected disclosure' and a 'general protected disclosure'. The latter covers a wider range of disclosures including disclosures to the media. The general principles of these two concepts overlap to some extent, but only the former is discussed below.

A 'protected disclosure' is the disclosure of information to specific persons or bodies such as legal advisors, employers, members of Cabinet, the Public Protector or the Auditor-General. It is important that factual information must be disclosed: suspicion, rumours and personal opinion do not constitute 'factual information'.

The employee must make the disclosure:

- **in good faith** (see *Ramsammy v Wholesale Retail Sector Education & Training* (2009) 30 *ILJ* 1480 (LC)), where the court held that the fabrication of evidence by an employee implied that she/he could not have acted in good faith, and
- **reasonably believe that the information disclosed, is substantially true**.

In conclusion, the courts have generally protected whistle-blowing employees by interdicting employers from taking disciplinary action against them.

5.8.3 *Examples from case law*

The following cases are examples of protected disclosures which resulted in employees suffering an occupational detriment. In *Theron v Minister of Correctional Services & another*,[25] the disclosure about the poor health care of prisoners made by a prison doctor to the Inspecting Justice of Prisons and the relevant Parliamentary Committee, was held to be a protected disclosure. The Department of Correctional Services charged the doctor with misconduct but this was later suspended and the doctor was moved to a different medical facility. These occupational detriments as a result of the protected disclosure amounted to an unfair labour practice.

In *Engineering Council of South Africa & another v City of Tshwane Metropolitan Municipality & another*,[26] Weyers, employed by the municipality as managing engineer, informed the employer repeatedly—orally and in writing—of the danger in appointing unskilled and inexperienced people who were unable to perform the dangerous duties in the electrical control section. Weyers e-mailed the manager again and he copied the Engineering Council and the DoL. Weyers had to face a disciplinary enquiry and was found guilty of copying the e-mail without prior authorisation. The court found that copying the e-mail to the Engineering Council and the DoL constituted a protected disclosure. The municipality was interdicted from imposing any sanction on Weyers for doing so.

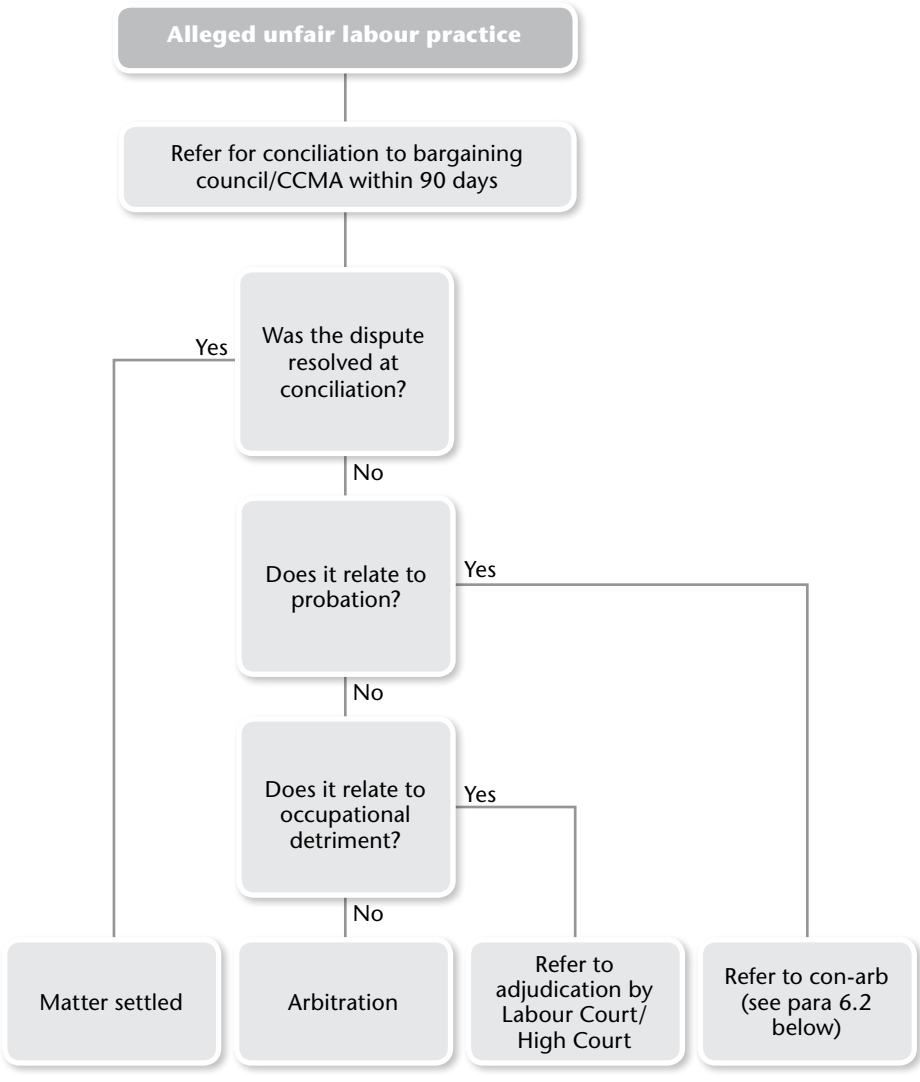
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[25] [2008] 5 BLLR 458 (LC).

[26] [2008] 6 BLLR 571 (T), confirmed on appeal in *City of Tshwane Metropolitan Municipality v Engineering Council of SA & another* (2010) 31 *ILJ* 322 (SCA).

6. RESOLUTION OF UNFAIR LABOUR PRACTICE DISPUTES

6.1 Dispute-resolution route



6.2 Time limits and institutions

Disputes about unfair labour practices must be referred in writing to a bargaining council or, if no council has jurisdiction, to the CCMA. The first step in an endeavour to resolve the matter would be conciliation.

> This referral to conciliation must be made within 90 days of the occurrence of the unfair labour practice, or within 90 days of the date when the employee became aware of it.

If conciliation has failed and the council or the CCMA has certified that the dispute remains unresolved (or if 30 days or any longer period agreed to by the parties have elapsed since the council or the CCMA has received the referral), the matter must be arbitrated by the council or the CCMA at the request of the employee.

There is one exception to the normal dispute resolution route and that is where the unfair labour practice relates to *probation*. The LRA makes provision for resolution of these disputes through a con-arb process. This means that a dispute is conciliated and if conciliation fails, the commissioner will immediately continue with arbitration.

6.3 Possible relief

Arbitrators and commissioners have wide powers to grant relief to employees. An arbitrator may determine the unfair labour practice dispute referred to her/him on terms that she/he deems reasonable. They may, for example, grant:

- declaratory orders,
- protective promotions,
- refer the matter back to the employer for reconsideration, and
- order reinstatement (in the case of demotion),
- re-employment, or
- compensation of not more than the equivalent of 12 months' remuneration.

The LRA does not expressly place the onus of proof in unfair labour practice disputes on any party. However, the employee who alleges an unfair labour practice must prove all the allegations, after which the employer will be given the opportunity to show that the conduct was not unfair.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. With regard to suspensions, which *one* of the following statements is *correct*?
   (*a*) A suspension can also qualify as disciplinary action short of dismissal.
   (*b*) Generally an employee is not obliged to remunerate an employee while she/he is on suspension.
   (*c*) One kind of suspension is found in practice, namely, preventive suspension.
   (*d*) A preventive suspension with pay does not fall within the ambit of an unfair labour practice in terms of the LRA.

2. Can an employee commit an unfair labour practice against an employer in terms of the LRA?
3. Employer Mineral Mines has, for the past two years, been paying its miners a specific amount of R300 per month as a transport allowance, but has not increased the amount since then. The union threatens to declare a dispute regarding the fact that the amount has not been increased. Will this be a dispute of right or a dispute of interest? Discuss.
4. Mr Lehabe is an assistant head of salaries at the firm Petrol Inc. He has been employed in this position for two years. When the paymaster suddenly falls ill, he is requested by management to take over the responsibilities of the paymaster until the latter returns. After three weeks, the paymaster resigns for health reasons. Mr Lehabe performs his duties diligently and on various occasions is assured by management that they are satisfied with his work performance. The position of paymaster is advertised and Mr Lehabe, confident that he is able to do the job, applies for the position. Much to his surprise he is not appointed to the position. Mr Lehabe feels that firm Petrol Inc has acted unfairly. Do you agree? Discuss.

✓ Feedback

1. Option (*a*) is *correct*. Fair suspension without pay could be an alternative to dismissal in an attempt to correct the behaviour of the employee. It can be seen as a form of progressive discipline. Option (*b*) is *incorrect*. An employee must be paid during preventive suspension. Option (*c*) is *incorrect*. Two kinds of suspension are found in practice, namely preventive and punitive suspension. Option (*d*) is *incorrect*. See paragraphs 5.6.1 and 5.6.2 above.
2. The definition of an unfair labour practice in the LRA refers only to unfair conduct by an employer towards an employee. Distinguish this position from the (wider) constitutional right to fair labour practices under which it might be possible to argue that an employee committed an unfair labour practice against a co-employee. See paragraph 3 above.
3. The matter is a dispute of interest. A dispute of interest relates to proposals for the creation of new rights, and is not merely about remuneration. Such disputes relate to the new or better terms and conditions of employment and remuneration. In the case of a dispute of right, the bargaining council or CCMA will consider whether the dispute concerns the application or interpretation of an existing right and whether the dispute is about the enforcement of a right in terms of a contract of employment, the BCEA, a collective agreement, a sectoral determination or a wage determination. See paragraph 4 above.
4. Acting in a position does not entitle an employee to be appointed to that position. However, in the case of Mr Lehabe, one could argue that the employer had created an expectation that Mr Lehabe would be permanently

appointed to the position in which he had been acting. Mr Lehabe would probably argue that, in view of the positive feedback he received from management, he was confident that he would be promoted. Although one is tempted to support Mr Lehabe, one can argue that there is at most a duty on the employer to give the employee an opportunity to be heard prior to making the final decision. See paragraph 5 above.

RECOMMENDED READING

1. Cohen T 'Employees' right to discretionary benefits' (2010) 127 (3) *SALJ* 443
2. Cohen T 'Precautionary suspensions in the public sector: *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 *ILJ* 2033 (LAC)' (2013) 34 *ILJ* 1706
3. Collier D 'Employer negligence in the promotion process: When should the arbitrator intervene?' (2011) 32 *ILJ* 2378
4. Ebrahim S 'The interpretation to be accorded to the term 'benefits' in section 186(2)(*a*) of the LRA continues: *Apollo Tyres South Africa (Pty) Limited v CCMA* (DA1/11) [2013] ZALAC 3' (2014) 17(1) *PER* 596
5. Norton D 'When is a suspension an unfair labour practice? A review of court decisions' (2013) 34 *ILJ* 1694

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1. INTRODUCTION

Social security law became more well-known in South Africa when it had been included in the Constitution.

Section 27(1)(*c*) of the Constitution grants everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Section 27(2) compels the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.

> The first question which is important to answer before this chapter is studied, is: 'What is social security?'

Social security legislation can be compared to a 'safety net' which catches people who lose their economic footing in life as a result of an unforeseen or unplanned event, such as illness or unemployment. When people cannot provide for themselves as a result of these events, the 'safety net' is there to prevent them from falling into complete destitute.

However, this social safety net is not perfect. It has some shortcomings which result in inadequate social security protection for many workers. These shortcomings are discussed in more detail in this chapter.

> The second question which must be answered in connection with this chapter, is: 'Why is social security studied as part of labour law?'

A large part of the social security protection (the social safety net) depends on the existence of an *employment relationship*. The social security entitlements which are linked to the employment relationship is called 'social insurance' and it will form the focus of the discussion in this chapter.[1]

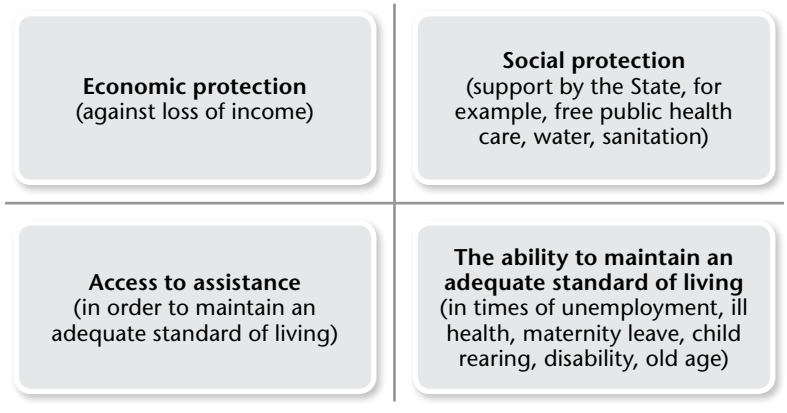
[1] Social assistance is a social security entitlement which is not linked to the existence of an employment relationship.

Social security schemes have consequences for the employment relationship. The employer should, for example, be aware of:

- the compulsory deductions to be made from the salaries of its employees,
- when, where, and to which funds these must be paid,
- what contributions the employer has to make, and
- if a social security risk should materialise, it must know the parties' rights, duties, entitlement and the process to follow.

2. DEFINITIONS

Social security is a set of laws and policies which exist to ensure that people will have:



Social security is provided through measures of social assistance and social insurance. The differences between these concepts are:

Social insurance	Social assistance
An employee contributes to an insurance fund and when a specific risk (which affects the employee's ability to earn an income, for example, unemployment) materialises, the employee may claim from that fund.	This is called a 'welfare' system which makes provision for payments by the State to the poor by way of the old-age grant, the child grant and the disability grant.
Social insurance is directly linked to the *employment relationship*. This means that a social insurance scheme requires both the employer and employees to pay monthly contributions to the fund. (People who are not employed does not have access to these funds or, if they should belong to a private fund, it is expensive because they will have to pay both the employer's and employee's contribution.)	Eligibility to these grants are *not* linked to *employment* but to *income*. The purpose of the grant is to assist the poor and indigent in society and only people who qualify in terms of a means test will qualify for a grant. The grants are financed by the State.

Social insurance	Social assistance
Example: Big Company has a pension fund to which all employees must belong. The monthly cost to belong to this fund is R1000. The employer has an agreement with the employees that Big Company will contribute R600 towards the fund and it will deduct R400 from the employee's salary and pay that over to the fund.	**Example:** Thuli, who is unemployed, looks after her two aunts, Gogo 1 and Gogo 2, who are both 68 years old. Gogo 1 worked for the SABC before retirement and earns a monthly pension of R11 000. Gogo 2 was a domestic worker and has no pension. Gogo 1 will not be eligible for the old age grant, but Gogo 2 is eligible. Thuli also looks after her brother's son, Mandla. Thuli will be eligible for a child grant for Mandla since she is his primary caregiver.

The focus of this chapter will be on social insurance since that is the part of social security linked to the employment relationship.

Social insurance can be provided by the State or through private funds. It is important to understand the difference between a public and private social insurance scheme.

Private social insurance scheme

- Administered by a private company, for example, Sanlam/Discovery.
- It is in the discretion of the employer to create such a fund for employees.
- Both employers and employees normally contribute.
- The fund has its own rules in terms of which it is governed.

State-regulated social insurance

- Administered by the State, for example, the Compensation Fund/ Unemployment Insurance Fund.
- Legislation determines whether both the employer and employees should contribute to the fund. For example, both employers and employees contribute to the unemployment insurance fund and the skills development fund but only employers contribute towards the compensation fund.
- The rules of the fund are contained in relevant legislation.

3. SHORTCOMINGS IN THE PRESENT SOCIAL SECURITY SYSTEM

The South African social security system has some shortcomings in that it cannot provide social security protection to everyone in the country. The major shortcomings are:

- social insurance schemes only protect workers in the *formal* sector of the economy and workers in the *informal* sector *cannot* join a company-subsidised pension scheme or medical aid; the latter are often also excluded from the COIDA and the UIA,
- social protection is only provided against certain risks, and

- the administration of the system is fragmented, which leads to increasing inefficiency, confusion and a lack of accountability. For example, the DoL is responsible for the OHSA, but the Department of Health (DoH) for the ODIMWA and the Department of Mineral Resources for the MHSA. Further, the Department of Higher Education and Training ('DoHET') is responsible for the skills development legislation.

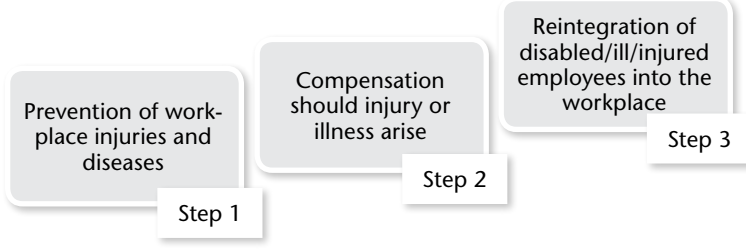
In 2002 the Committee of Inquiry into a Comprehensive Social Security System (hereafter the 'Taylor Committee') was appointed to investigate the most significant shortcomings in the social security system and to make recommendations for reform.[2] As a result of the Taylor Committee's recommendations, major reforms of the system were undertaken and draft legislation in this regard is due shortly.

The need for reform has also been stressed by the Constitutional Court in *Government of the Republic of South Africa and others v Grootboom and others*[3] and *Minister of Health and others v Treatment Action Campaign and others*.[4] The Constitutional Court held in both these cases that the State will not be able to hide behind a lack of resources to avoid the implementation of social security measures. The State must show that they have taken reasonable measures to let the right of access to social security materialise. This confirmed the enforceability of the right to social security and the duty on the State to make progress towards improved social security for all.

4. ELEMENTS OF WORKPLACE-RELATED SOCIAL SECURITY PROTECTION

> **Important:** The workplace-related social security which will be discussed in this chapter is State-regulated social insurance!

South Africa supports the ILO concept of 'decent work', as discussed in chapter 1. The notion of 'decent work' entails a three-pronged approach to workplace safety and security, as follows:

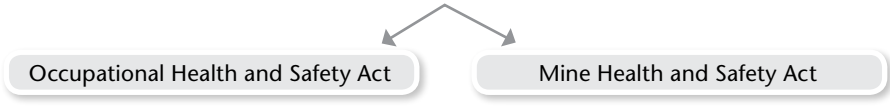


[2] The Committee chaired by Prof V Taylor submitted its report 'Transforming the Present—Protecting the Future' (Draft Consolidated Report) March 2002.
[3] [2000] 11 BCLR 1169 (CC).
[4] [2002] 10 BCLR 1033 (CC).

The legislation which were created to address these various aspects of workplace safety and security are discussed in this order below.

5. STATE-REGULATED SOCIAL INSURANCE AT STEP 1: THE PREVENTION OF WORKPLACE ACCIDENTS AND ILLNESSES

Two Acts are relevant in this regard, namely:



5.1 The Occupational Health and Safety Act ('OHSA')

The main purpose of the OHSA is to provide for the health and safety in all areas of employment activity and does not only apply to situations where an employment relationship is present. It sets a standard of care which must be complied with by employers and (to a more limited extent) by employees.

5.1.1 *Scope of application*

The OHSA applies to all employment activities and use of machinery except:

- in the mining industry, which is regulated in terms of the MHSA (discussed below),
- to people in/on any load line ship, fishing/sealing/whaling boat or any floating crane, and
- employees specifically exempted from the application of this Act.

The Act also provides for definitions of *employees* and *employers*, which is relevant to determine whether the duties imposed by the Act will apply to them. These definitions are wide, and the exclusions are more important to determine the scope of application of the Act.

	Employer	Employee
Definitions	An employer is someone: • who provides work for a person, and • remunerates her/him.	An employee is someone: • who works for an employer, and • who receives remuneration, or • who works under the supervision of an employer.
Exclusions	Labour brokers (temporary employment services / 'TES') are not employers. In other words, labour brokers/TES are not regarded as employers by the Act. The client to which the employee is sent to work is the employer because a TES employee works under the supervision of the client.	Independent contractors are excluded but the employer still owes them a general duty of safety as they are present on the premises.

(*Note:* The ambit of the OHSA is not confined to the employment relationship and, therefore, the duties imposed on employers extend beyond the safety and protection of employees.)

5.1.2 *Duties*

The OHSA places duties on employers and, to a limited extent, on employees in order to prevent workplace accidents and injuries.

These duties want to ensure that employers comply with their common-law duty to take reasonable care for the health and safety of employees.

'Reasonably practicable' steps must be taken to prevent workplace injuries and diseases. 'Reasonably practicable' means that steps are taken with regard to:

- the severity and scope of the risk,
- the knowledge reasonably available on the risk and its prevention,
- the suitable means available to remove or mitigate the risk, and
- the cost of removing or mitigating the risk.

> **Example:** Company DD Ltd employs 100 people whose work requires them to work with a computer the whole day. Company DD Ltd is concerned about the strain put on the eyes of the employees using computers all day long. In order to determine what steps would be reasonably practicable to prevent possible damage to the employees' eyesight, the employer will have to do an assessment in line with the guidelines set out above. It will, for example, consider the fact that there is no knowledge available on the risks (if any) involved with eye strain caused by computers. There are special HD screens available that can reduce eye strain but since it is still in its developing stages, its effectiveness cannot be guaranteed. There are also glasses available that can reduce the strain on eyes but again, it is very expensive. Company DD Ltd may, therefore, decide that none of these preventive measures are reasonably practicable. It may, however, be reasonably practicable to build more compulsory rest periods into the working day, for example, a 10-minute break after every two hours of work.

The Act places *general* and *specific duties* on employers which are aimed at preventing the occurrence of accidents in the workplace.

The general duty of the employer is to provide and maintain, as far as is 'reasonably practicable', a working environment that is safe and without risk to the health and safety of her/his employees.

This duty is given further content by way of more specific duties.

Specific duties of employers

- Identify the possible risks in the workplace and take precautionary measures.
- Take safety measures throughout the whole supply chain, namely, the production, processing, use, handling, storage or transport of articles/substances.
- Provide the necessary information and instructions.
- Eliminate or mitigate hazards before resorting to personal protective equipment.
- Provide and maintain systems and machinery to ensure safety for use by employees.
- Take all necessary measures to ensure compliance with the Act and enforce these.
- Prevent an employee to do any work unless the necessary precautionary safety measures have been taken.
- Ensure that work is performed and the plant/machinery is used under the general supervision of a safety manager.
- Inform employees of their and the employer's rights in terms of the Act.
- Keep accident reports.
- Report accidents to the relevant authorities.

The Act also places the following duties on the shoulders of employees:

Specific duties of employees

- Take reasonable care for her/his own health and safety as well as that of others who may be affected by their acts or omissions.
- Report any unsafe/unhealthy situation to the employer or health and safety representative, as soon as practicable.
- Report all incidents causing injury or which may affect her/his health to the employer, as soon as practicable, but not later than the end of the particular shift during which the incident occurred.
- Co-operate with the employer/other relevant person to ensure compliance with the duties imposed on them by the Act.
- Carry out any lawful order, health and safety rule and procedure in the interests of health or safety.
- With regards to criminal liability, an employee may not misuse safety equipment/act recklessly and thereby threaten the safety of any person and must co-operate with a labour inspector during an investigation.

One of the common-law duties of an employee is to follow all reasonable commands of an employer. The OHSA, however, provides protection for 'disobedient' employees under certain circumstances. It provides that an employer cannot take action against any worker who:

- gives information about their conditions at work or that the Act states they have to give,
- gives evidence in court,
- responds to any request of an inspector, or
- refuses to do anything that is against the law.

5.1.3 *Enforcement*

Compliance is monitored by health and safety representatives and health and safety committees[5] in the workplace. The Act confers certain duties on health and safety representatives, for example, to:

- review the effectiveness of health and safety measures,
- identify potential hazards at the workplace,
- examine causes of incidents in collaboration with the employer,
- investigate complaints by any employee relating to health or safety,
- make representations to the employer on general matters affecting the health or safety of the employees at the workplace,
- participate in consultations with inspectors at the workplace and accompany inspectors on inspections of the workplace, and
- attend meetings of the health and safety committee.

The OHSA falls under the administration of the DoL. Inspectors from the Department have wide powers to search workplaces, question people, ask for explanations from employers, and everything reasonably necessary to ensure compliance with and enforcement of the Act.

If an incident occurred which resulted, or could have resulted, in the injury, illness or death of a person, the DoL will *investigate* the incident and decide whether it should continue to hold a *formal inquiry*.

The latter inquiry is a formal, public proceeding (like a trial) where an inspector presides and evidence is given, witnesses testify and the proceedings are recorded. At a formal enquiry all people who have an interest in the enquiry may attend (personally or by way of a legal representative) and ask questions to witnesses.[6] When the inquiry is concluded, the presiding inspector compiles a report and submit it to the Attorney-General who will decide whether or not to proceed with criminal prosecution. An appeal against a finding or order of an inspector may be made to the Chief Inspector, and ultimately to the Labour Court.

5.2 The Mine Health and Safety Act ('MHSA')

The *main* purpose of the MHSA is to protect the health and safety of people at mines and to ensure continuous improvement in the prevention of incidents. The Act sets standards, enforcement measures and promote a co-operative approach between all role-players to meet this goal.

[5] The Act makes provision for the appointment of health and safety committees in every workplace where there are two or more safety representatives and it sets out their duties. Such committees must meet regularly to deal with all safety and health issues that affect employees.

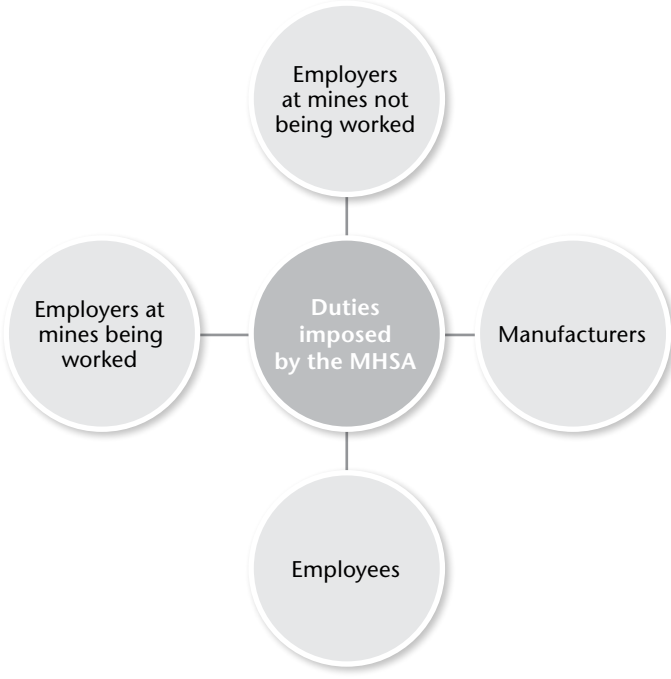
[6] The following people may have such an interest: any person who was injured/suffered damage as a result of the incident, the employer involved in the incident, any person in respect of whom, in the opinion of the inspector, it can reasonably be inferred from the evidence that she/he could be held responsible for the incident, a recognised trade union and a union of which a member is involved, any owner or occupier of the premises where the incident occurred, and any other person who can prove such interest.

5.2.1 *Scope of application*

The Act applies to all mines and it defines a 'mine' in a wide sense. It will include all premises where there is a search for, excavation of, or exploration of a mineral deposit and any process related thereto. The Department of Mineral Resources (hereafter 'DoMR') administers this Act.

5.2.2 *Duties*

The Act provides for duties for different role players at mines being worked and those not being worked as follows:



(*a*) Duties of employers at mines not being worked

The Act requires of them to continuously take reasonable steps to prevent:

- injuries,
- ill-health,
- loss of life, or
- damage of any kind.

(*b*) Duties of manufacturers and suppliers of products and services at mines

The Act compels any person who designs, manufactures, repairs, imports, erects or supplies any article for use at a mine to ensure, as far as reasonably practicable, that the article is safe for use, when used properly.

(*c*) Duties of employees

The Act places duties on employees and entitles them to certain rights. The rights and duties are summarised below:

Employees must:	Employees have the right to:
• take reasonable care to protect their own health and safety and that of other people which might be affected by their actions, • take proper care of protective clothing, and other facilities and equipment provided by the employer, • report any situation which she/he believes is a health and safety risk, • co-operate with safety officers and the employer in order to ensure compliance with the Act, and • comply with health and safety measures.	• information, • dispute their unfitness to perform work, • not pay for safety measures, • leave any working place where they can reasonably justify that it posed a serious danger to their health and safety, or when ordered to do so by the health and safety representative.

(*d*) Duties of employers at mines being worked

The Act tasks the Chief Executive Officer (hereafter the 'CEO') of the mine to take reasonable steps to ensure that the functions of the employer in terms of the Act are properly performed. The CEO may entrust this duty to another person under her/his control but that will not exempt the CEO from responsibility and she/he must still control and direct the actions of that appointed person.

> For non-employees, the employer must, as far as reasonably practicable, *identify and assess* the possible risks and hazards to they may be exposed, and ensure that people who are not employees, but who may be directly affected by the activities at the mine, are not exposed to any hazards to their health and safety.

The MHSA places a *general* duty on the employer as far as the health and safety of employees are concerned by stating that:

> '… every employer must, as far as reasonably practicable, provide and maintain a working environment that is safe and without risk to the health of employees'.

The duties of the employer as far as employees are concerned are summarised below:

Duties of employers at mines being worked are to:
• appoint a manager responsible for health and safety at the mine • maintain a healthy and safe mine environment • ensure that there is an adequate supply of health and safety equipment*

* In the Mine Health and Safety Amendment Bill 2013 [*GG* No 37027, dated 15 November 2013] (hereafter the 'Mine Health and Safety Bill') the provision of 'suitable' personal protective equipment is added. The term 'suitable' is defined in the Bill as 'appropriate in terms of size and fit; type of workplace hazards; and purpose and nature of work to be undertaken'. This requirement is to be welcomed as it accommodates the needs of women working on mines.

Duties of employers at mines being worked (*continued*)

- appoint and maintain staff at the mine with due regard to health and safety
- establish an appropriate health and safety policy
- provide health and safety training†
- assess and respond to risks
- conduct occupational hygiene measurements to measure levels of exposure to hazards at mines‡
- establish a system of medical surveillance of employees exposed to hazardous work
- keep a record of employees who perform hazardous work
- keep a record of medical surveillance
- compile annual medical reports
- provide employees with exit certificates which records her/his medical status when employment is terminated

* In the Mine Health and Safety Amendment Bill 2013 [*GG* No 37027, dated 15 November 2013] (hereafter the 'Mine Health and Safety Bill') the provision of 'suitable' personal protective equipment is added. The term 'suitable' is defined in the Bill as 'appropriate in terms of size and fit; type of workplace hazards; and purpose and nature of work to be undertaken'. This requirement is to be welcomed as it accommodates the needs of women working on mines.

† The Mine Health and Safety Bill proposes that employers must provide formal health and safety training. Formal training will require that the training is structured and assessable. Training is also made subject to being 'reasonably practicable'. This will have a significant impact on the way in which employers approach training.

‡ The Mine Health and Safety Bill requires that qualified occupational hygienists must be appointed at all mines and the employer must supply them with the means to perform their functions. This change will prevent the future use of contractors to perform these services.

(*e*) Enforcement

Just like the OHSA, the MHSA allows for health and safety representatives and committees in the workplace. In every mine with 20 or more employees, the employer must have a health and safety representative for each shift, and every mine with 100 or more employees must have one or more health and safety committees. The owner of a mine must meet with the representative trade union at the mine to enter into negotiations for the conclusion of a collective agreement concerning health and safety matters.

The DoMR administers compliance with the Act. A Mine Health and Safety Inspectorate has been established to enforce the provisions of the Act. Inspectors have certain powers when dealing with dangerous conditions in mines. For example, if an inspector has reason to believe that any practice at a mine creates a dangerous situation, she/he may give any instruction necessary to protect the health/safety of people at the mine, such as to halt all operations or to issue an order to rectify the practice.

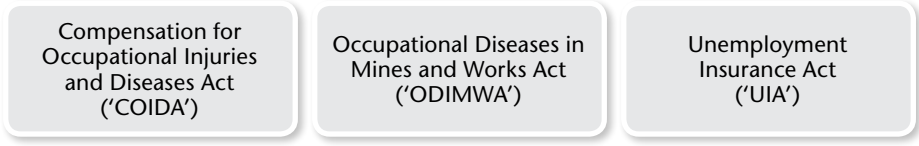
In addition, an inspector may make a recommendation in writing to the Principal Inspector of Mines that a fine be imposed on an employer who failed to comply with any provision of the MHSA.

Any person, including an employer, who contravenes, or fails to comply with, any provision of the Act, commits an offence and is liable to a fine or imprisonment. Any person adversely affected by a decision of an inspector may lodge an appeal against that decision to the Chief Inspector of Mines.[7]

[7] The Bill proposes more severe penalties for any company that is convicted of an offence

6. STATE-REGULATED SOCIAL INSURANCE AIMED AT STEP 2: THE COMPENSATION IN RESPECT OF WORKPLACE ACCIDENTS AND ILLNESSES

Three Acts are relevant in this regard, namely:



6.1 The Compensation for Occupational Injuries and Diseases Act ('COIDA')

Section 24 of the Constitution states that everyone has the right to a safe working environment that promotes personal health and well-being. To put this in perspective, employers must identify workplace hazards, assess the potential risks stemming from these hazards and take appropriate action, which includes informing employees of safety measures and risks associated with their workplace. South Africa has also ratified a number of ILO Conventions concerning employment injuries and diseases.[8] As a result of the 'decent work' agenda and in order to comply with international standards, improvement of the current system is necessary.[9]

The *main* purpose of the COIDA is to provide a system of 'no-fault' compensation for employees who sustained work-related injuries or diseases. This means that an injured employee can claim from the Compensation Fund regardless of whose fault the injury of illness was. It also means that the employer is protected against delictual action[10] by the employee.

6.1.1 *Scope of application*

The Act applies to all employers and all casual and full-time employees who become ill, or are injured, disabled or killed as a result of a workplace accident or workplace-related disease.

The Act specifically excludes the following employees from its scope of application:

- workers who are disabled for less than three days,

in terms of the MHSA. For example, fines of up to a maximum of 10% of a company's annual turnover or imprisonent of up to a maximum 10 years.

[8] These include ILO Conventions 102 and 121.

[9] Since the Taylor Committee Report (see para 3 above), attempts at reforms have commenced, many by way of improved administrative and internal procedures. Legislative reform is also underway as has been pointed out above.

[10] A delict is a wrongful act that causes damages to another person. See the discussion of vicarious liability in ch 3, para 3 above.

- domestic workers,
- individuals undergoing military training,
- members of the South African National Defence Force and the South African Police Service,
- workers guilty of wilful misconduct (unless the nature of the injury is serious or they are killed),
- anyone employed outside South Africa for 12 or more continuous months, and
- employees on temporary work assignment in South Africa.

6.1.2 *Entitlement to benefits in terms of the Act*

Entitlement to compensation in terms of the Act is linked to the fact that it is a system of no-fault compensation. This concept necessitates answers to the following questions:

(*a*) Why the need for 'no-fault' compensation?

The system of social insurance was constructed to balance the interests of employers and employees. The example below illustrates what the situation would have been like if the COIDA was *not* enacted:

> **Example:** Martha is injured at work. She wants to claim compensation from the employer for her injury. She must go to court and show that her employer acted/omitted to act and this caused her injury. She must further state that the employer's action/omission was wrongful and either intentional or negligent. Martha will also have to take into account that there might be contributory negligence on her side, which would reduce the amount of damages that she might receive.
>
> The employer may decide that the risks for injuries and diseases are too great and, in order to mitigate risk, it will rather not appoint employees in future (where possible) and will use contractors or machines to perform the work.
>
> Martha and the employer, respectively, would have had to spend a lot of money on legal costs to pursue and defend the matter.

The COIDA is, therefore, an important legal instrument because employers must, on the one hand, be protected from limitless liability while, on the other hand, employees must be protected from unsafe working conditions.

(*b*) Does fault really play no role when claiming from the Compensation Fund?

In terms of the COIDA, any compensation claim for occupational injuries or diseases that an employee might have against an employer, is replaced by the

'insurance' that the Act provides. The coverage is provided on a no-fault basis.[11] This means that an employee (or her/his dependants) will be compensated regardless of whether the employer was at fault, or whether the incident was caused by the employee's own negligence or the negligence of another person.

> **Example:** Zinzi forgot to wear her safety shoes to work. A glass bottle fell from the conveyor belt onto her foot and cuts off a toe. Zinzi had been negligent by not wearing her safety shoes but perhaps the employer was negligent too, by permitting her to work without the proper safety shoes. Since fault is not relevant for the claim, Zinzi will be able to claim on the basis that she was injured at work.

The only time when fault will be taken into account is where an employee can show that the employer's negligence caused the injury. The employee will then be entitled to increased compensation. Moreover, any employee who is under 26 years old at the time of an injury or disease, will get extra compensation.

(*c*) What about occupational diseases?

The COIDA allows for claims when an employee contracted an occupational disease. In order to make it easier to prove that the employee contracted the disease as a result of the job she/he did, the Act includes so-called 'scheduled diseases'. The Act contains working activities and lists common diseases that can be contracted as a result of performing those activities. This will enable employees to establish the link between certain jobs and common diseases resulting from such work. The schedule would, for example, look as follows:

Work performed	Common diseases that may result from this work
• Any work involving the handling of, or exposure to excessive noise, vibrating equipment.	• Hearing impairment. • Hand-arm vibration syndrome (Raynaud's phenomenon).
• Any work involving the handling of, or exposure to repetitive movements.	• Any disease due to overstraining of muscular tendonous insertions.

If an employee uses a drilling machine every day and becomes hearing impaired, it is assumed that this is the result of her/his work.

(*d*) Who contributes to the Compensation Fund?

The COIDA is a social insurance scheme and, therefore, entitlement to funds depend on contributions. The Compensation Fund is financed by annual

[11] In *Jooste v Score Supermarket Trading (Pty) Ltd* (1999) 2 BCLR 139 (CC) it was confirmed that the purpose of the COIDA is to provide social protection. An employee is compelled to claim in terms of the COIDA and as a result the employee forfeits her/his right to claim additional damages in terms of the law of delict.

contributions from employers. If an employee is then injured (or killed), or becomes ill or disabled, as a result of a workplace accident or a workplace-related disease, the employee (or her/his dependants) will be able to claim from the Fund.

The position in COIDA differs from the UIA as far as contributions are concerned. The UIA requires the employer and employee to each make a contribution to the Unemployment Insurance Fund (hereafter 'UIF'). The COIDA, however, only requires employers to make a contribution to the Compensation Fund. The employer must contribute on behalf of the employee because of the employer's common-law duty to provide safe working conditions No amount may be deducted from the employees' income for this purpose. The amount of the contribution is calculated on the basis of a formula which takes various factors into account such as the turnover of the company, the history of injuries in the workplace and the number of employees.

6.1.3 *Benefits payable*

The benefits paid in terms of the COIDA include:

- temporary disability benefits,
- permanent disability benefits,
- medical benefits, and
- benefits payable to the dependants of employees who died as a result of a work-related accident or disease.[12]

The Compensation Fund does not pay for pain and suffering, only for loss of movement or use of the body.

These benefits are calculated in terms of a formula set out in the COIDA and its Regulations. The compensation payable is worked out as a percentage of the wage the worker was earning at the time the disease or injury was diagnosed. If the worker was unemployed by the time a disease was diagnosed, the wage she/he would have been earning must be calculated.

6.1.4 *Enforcement*

The enforcement and administration of the COIDA vest in state officials in a three-tiered hierarchy, namely:

- the DoL,
- the Director-General of the DoL, and
- the Compensation Commissioner.

Failure to comply with the obligations imposed by the Act amounts to a criminal offence and, in addition, the Compensation Commissioner has the power to penalise employers who do not comply with the obligations

[12] For death benefits, the dependants would be the surviving spouse, children under the age of 18 years of age (including illegitimate, adopted and stepchildren), and if there is no spouse or children, parents and siblings will qualify.

prescribed in the Act. The Commissioner is appointed by the MoL and fulfils the majority of the duties prescribed by the Act.

6.2 The Occupational Diseases in Mines and Works Act ('ODIMWA)

> The *main* purpose of the ODIMWA is to provide for compensation if an employee at a mine contracts a respiratory disease, for example, tuberculosis, as a result of her/his work.

The ODIMWA falls under the auspices of the DoH, as opposed to the MHSA which is administered by the DoMR. This proliferation of administration, coupled with the slight overlap between the COIDA and the ODIMWA, is a shortcoming in the social security system.

An employee can only claim in terms of this Act for diseases contracted as a result of working at a mine. The Act, therefore, requires employers to conduct fitness reports and provide exit medical certificates when employees leave employment at a mine. This is done because respiratory diseases may only manifest years after exposure to a dangerous working environment. The medical certificate should then establish a link between the working conditions and the later disease.

A significant development relating to the ODIMWA was found in a judgment by the Constitutional Court in *Mankayi v AngloGold Ashanti Ltd*.[13] Here, a former underground mineworker contracted silicosis and related lung diseases. The Court held that, where the ex-employee did *not* have a claim in terms of the ODIMWA, the restriction in terms of the COIDA does not apply to him as a mineworker.

Although the ODIMWA provides some form of protection, there is room for improvement. It provides for very low levels of benefits and the application procedure, especially for dependants, is quite cumbersome. Migrant mineworkers (commonly found in the mining sector) who return to their home countries will, for example, rarely be able to claim benefits under this Act, because successful claims are reliant on medical examinations and other administrative requirements carried out in South Africa.

6.3 The Unemployment Insurance Act ('UIA')

> The *main* purpose of the Act is to provide short-term financial assistance to employees and their dependants in cases of temporary unemployment arising from unemployment, illness, maternity leave, and leave after adoption of a child. Dependants are entitled to benefits should the contributor pass away.

[13] [2011] 6 BLLR 527 (CC).

The UIA works on the principle that *both* employees and employers make monthly contributions to the UIF. This Act should be read in conjunction with the UICA, which regulates the collection of contributions by the South African Revenue Service (hereafter 'SARS') on behalf of the DoL. The primary responsibility for unemployment *policy* lies with the DoL.

The Act has a wide scope of coverage, but it is still mostly workers in the formal sector that are covered.

Since 2002, its scope of coverage had been extended to certain previously excluded groups, such as domestic and seasonal workers, as well as higher-income earners. Benefits are paid on a sliding scale. This means that lower-income contributors receive a larger percentage of benefits than higher-income contributors.

Even if someone qualifies as a contributor, she/he will not be entitled to benefits if she/he:

- received a monthly pension from the State,
- received a benefit in terms of the Compensation Fund (or similar fund established by a bargaining or statutory council under the LRA),
- failed to comply with any provision of the UIA, or any other law relating to unemployment, or
- is suspended from receiving benefits.[14]

As a result of the high levels of unemployment in the country, it is impossible to expect the UIA to make significant inroads to the alleviation of poverty. There is a need for a more holistic approach, for example, by addressing job creation policies, economic growth, improvement of education and skills development. Government has introduced a number of initiatives in this regard, for example, the National Development Plan ('NDP') which aims to eliminate poverty and reduce inequality by 2030.[15] The NDP aims to create six million jobs through the Expanded Public Works Programme over the next five years (which seems unlikely). Some provision is made for skills development, namely, the National Youth Service which trains young people to become artisans.

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[14] The Commissioner has powers to suspend a contributor or her/his dependant for a period of five years from receiving benefits if she/he submitted a false claim. The decision to suspend a contributor from receiving payments does not absolve an employer from the duty to contribute to the UIF.

[15] This was done after the National Growth Path ('NGP') did not receive enough support (see ch 1, para 2 above). Nonetheless, government has signed a National Skills Accord with organised business and labour and an Accord on Basic Education and Partnerships with Schools in terms of the NGP.

7. STATE-REGULATED SOCIAL INSURANCE AIMED AT STEP 3: REINTEGRATION OF THE INJURED EMPLOYEE INTO THE WORKPLACE

South Africa is lacking as far as the third leg of social security is concerned, that is, reintegration. Four Acts have the aim of job creation, training and more opportunities for work-seekers, namely:

Skills Development Act ('SDA')	Skills Development Levies Act ('SDLA')	Employment Tax Incentive Act ('ETIA')	Employment Services Act ('ESA')

The ability to work and to earn an income is important for a person's dignity and self-esteem. Therefore, providing only financial compensation to the unemployed is not ideal.

There is a need to improve on the reintegration of employees in the workplace after, for example, an occupational accident or injury which required an employee to leave her/his job. Moreover, government has ratified international instruments such as the United Nation Convention on the Rights of Persons with Disabilities, 2006. This Instrument compels the country to promote and realise the 'right to work'. It is aimed at the unemployed as well as employees injured or who have contracted diseases during the course of employment.

7.1 The Skills Development Act ('SDA') and the Skills Development Levies Act ('SDLA')

7.1.1 *Functioning of the Acts*

> The *main* purpose of the SDA is to create an institutional framework to develop national, sectoral, and workplace strategies to develop the skills of the workforce.[16]

South Africa suffers from a skills shortage that can be partly attributed to apartheid.[17] However, since 1994 a number of laws have been enacted to ensure that employees (generally) receive adequate skills to equip them to perform at different levels of trade and occupations.

The SDA encourages employers to provide employees with opportunities to acquire new skills. It goes wider than the *existing* employment relationship as it also provides unemployed people (especially new entrants to the labour market) the opportunity to gain work experience and employment. The SDA

[16] This Act should be read in conjunction with the SDLA, which regulates the training levies to be paid by employers to the SARS, which effectively fund skills programmes. It falls under the auspices of the Minister of Higher Education and Training.

[17] See also ch 5, para 1 above.

also provides for learnerships under which workers can gain practical work experience.

Funding for training required by the SDA is obtained from government grants and levies payable by employers in terms of the SDLA. The compulsory levy scheme fund is administered by Director-General of Higher Education and Training and the Commissioner of the SARS.

Employers must register with the Commissioner of the SARS to pay the levy (by the 7th of each month). The levy amounts to 1% of all workers' pay every month, and it may not be deducted from workers' pay.

Employers who do not pay the required levies, have to pay interest on the money they owe and may also have to pay a penalty.

The funds are distributed in the following manner:

- SETAs get 80% of the money,
- employers get some of the money back from SETAs as a refund if they train their workers, and
- the National Skills Fund gets 20% of the money, which is used for, amongst other purposes, special training.

The success of these measures relies heavily on State support and involvement, but also on support from organised labour and employers (indicating a tripartite structure created by the State).[18] The theme of tripartite structures, as found in NEDLAC, seems to be repeated in all labour and social security laws.

7.1.2 *Scope of application*

While the SDA aims to develop the skills of the South African workforce *generally*, the SDLA does not apply to employers in:

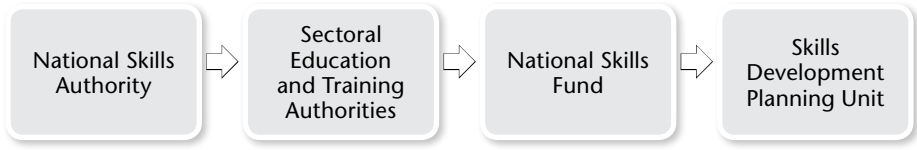
- the public service,
- religious or charity organisations,
- public entities that get more than 80% of their money from Parliament, and
- employers whose total pay to all its workers is less than R250 000 per year.

7.1.3 *Role players in the Acts*

The functioning of the Act is built around four important role players, namely:

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[18] See ch 1, para 3 above, where the tripartite composition of NEDLAC is discussed. As far as skills development is concerned, the government, organised labour and representatives of the community have shown their commitment by signing the National Skills Accord under the NGP (NGP Accord 1: National Skills Accord, Economic Development Department 2011). The purpose of this initiative was to empower citizens to mobilise the private sector, organised labour, communities and government in a partnership to expand skills in the country as a platform for creating five million new jobs by 2020. This, however, seems unlikely. See n 15 above.



National Skills Authority ('NSA')

The Minister of Higher Education and Training must appoint representatives of business, labour and the community as nominated by NEDLAC to serve on the NSA.

The NSA must advise the Minister on a national skills development policy and strategy, provide the Minister with guidelines to implement the policy, engage SETAs, and report and investigate progress made in the implementation of the objectives of the Act.

Sectoral Education and Training Authorities ('SETA')

The primary function of SETAs is to develop sector skills plans, and to implement such plans.

This can be done by establishing and promoting learnerships, registering learnerships agreements, approving workplace skills plans, collecting skills development levies in the various sectors, allocating grants, and monitoring education and training in a particular sector.

A skills programme is occupationally based, and uses accredited training providers.

Such a programme constitutes a credit towards a qualification registered in terms of the National Qualifications Framework ('NQF') as defined in the South African Qualifications Authority Act and may, on application, receive a subsidy from the relevant SETA.

National Skills Fund ('NSF')

Twenty per cent of the funds collected in terms of the SDLA has to be paid over to the NSF.

Monies can be used only for projects identified in the national skills development strategy.

Labour centres have been established to register work-seekers and employment service providers, to register vacancies and work opportunities, and to provide employment services for workers, employers, and training providers.

Skills Development Planning Unit

The Unit must research and analyse the labour market in order to determine skills development needs for South Africa as a whole, for each sector of the economy, and for organs of state.

The Unit must also assist in the formulation of the national skills development strategy, and sector skills development plans, provide information on skills to the DHET, the NSA, the SETAs, education and training providers and organs of state.

7.1.4 *Enforcement*

The Labour Court has exclusive jurisdiction in respect of all matters arising from the SDA. Note that it is an offence to obstruct or try to improperly influence an official in terms of the Act or to supply false information/documents. The offence carries criminal charges.

In contrast, a person charged with an offence under the SDLA may be tried by any court having jurisdiction within the area in which that person resides or carry on business.

7.2 Employment Tax Incentive Act[19] ('ETIA')

The purpose of the Act is to provide for a government-wage subsidy to employers who employ young and inexperienced workers (also discussed in chapter 2, paragraph 8 above).[20]

Subsidised amounts are given to private businesses for each worker they hire who is aged 18 to 29 and is earning between R2000 and R6000 per month. This applies for two years, with the amount being halved in the second year.

- For a worker earning between R2000 and R4000 per month, the amount paid by government to the business is R1000.
- For a worker earning over R4000 the amount decreases.

Businesses receive the amount as a deduction from what they pay over in income tax on behalf of their employees each month. The scheme is, therefore, administered by the SARS and businesses need to be registered with the latter to qualify.

Employers can claim the incentive when they have employees who:

- have a valid South African Identity Document,
- are 18 to 29 years old,
- are not domestic workers,
- are not related or 'connected' to the employer,
- earn at least a minimum wage in terms of wage regulating measures (if no measure exists, then the employee must earn R2 000 per month in wages),
- earn less than R6 000 per month in total remuneration (basic salary plus all other benefits), or
- were newly employed on/after 1 October 2013.

7.3 Employment Services Act[21] ('ESA')

The purposes of the ESA are to:

- promote the employment of citizens,

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[19] 26 of 2013.

[20] Up to May 2014, 133 000 young people had been employed ('The Jacob Zuma Legacy Special' *Sunday Times* (6–07–2014)).

[21] 4 of 2014. See also ch 2, para 5.3 above.

- improve access to the labour market for work seekers,
- provide opportunities for new entrants to the labour market to gain work experience,
- improve employment prospects for persons with disabilities,
- mobilise resources to create employment, promote reintegration of the retrenched, or workers who lost their employment as a result of injuries or illness, and preserve employment,
- improve employment prospects of work seekers and employees facing retrenchment,
- facilitate access by work seekers to training, and
- promote employment growth and workplace productivity.

It mainly propose to do this through the establishment of the Public Employment Services (hereafter 'PES'). Some of the most significant interventions by the PES will be:

PES services (rendered through DoL)

- Provide work to South African citizens free of charge (labour brokers which provide similar services at a cost must be licensed).
- Provide free services to citizens related to registration of job seekers, registration of placement opportunities, matching services, referrals to training and career information, and placing of work seekers with employers.
- Advise workers on access to social security benefits.
- Assist vulnerable work-seekers (the disabled, retrenched and seasonal workers, employees facing retrenchment, young people, new entrants into the labour market and members of rural communities).
- Facilitate the exchange of information among employers and work-seekers with employers having to register existing or new vacancies.
- See to career counselling and assessment of work-seekers to determine suitability.

The ESA contains specific regulations with regard to the employment of *foreign nationals*. An employer may not employ a foreign national prior to such person providing a work permit issued in terms of the Immigration Act. Procedures for employers to follow if they have to employ a foreign worker are outlined and non-compliance with the latter or abusing foreign qualifying workers are penalised. If an employee, however, works without a permit, she/he will be protected by the LRA and will be able to enforce her/his contract of employment against the employer.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Themba was employed as a cleaner at Cheeky Chicken Take-aways. While busy cleaning floors, he slipped and broke his neck. After months in hospital, he was diagnosed as permanently paralysed.
   (*a*) Can Themba lodge a claim in terms of the COIDA?

(*b*) Would Themba still have a claim if he were injured as a result of the fact that the he did not wear the required safety shoes?

(*c*) Can Themba institute action against the employer for pain and suffering on a delictual basis?

2. What are the underlying objectives of social security?
3. State whether the following statement is true or false and provide reasons for your answer: 'The Constitution of South does not protect the right to have access to social security.'

✓ Feedback

1. (*a*) Themba can claim in terms of the COIDA only if he had shown that he was an employee, injured on duty, and that he had been absent from work for more than three continuous days.

   (*b*) The COIDA provides a system of no-fault compensation for employees who are injured in accidents that arose out of and in the course of their employment or who contract occupational diseases. This means that neither the employee's nor the employer's fault will disallow the claim. The employer's fault may under certain circumstances lead to an increased claim.

   (*c*) No. In *Jooste v Score Supermarket* the court confirmed that the COIDA forms part of social protection legislation. This means that the employee gets the protection of the Compensation Fund, from where compensation can easily be claimed, and, in return, this curbs the employee's right of delictual recourse against the employer. See paragraphs 6.1.1–6.1.3 above.
2. The underlying commitment of social security is the improvement of the quality of life of people by promoting economic/material equality through the redistributive power of a democratic state. Social security takes the distribution of wealth away from the unpredictability or variations of the market to ensure that all citizens have a stake in society and that each individual has an incentive to contribute to the common wealth of society. In short, the three core tasks of social security are 'prevention', alongside 'income compensation' and 'social reintegration'.
3. False. The Constitution does protect the right to have access to social security. In section 27(1)(*c*) the Constitution grants everyone the right to have access to social security. This includes getting appropriate social assistance in circumstances where people are unable to support themselves and their dependants.

RECOMMENDED READING

1. Hilgert J 'The future of workplace health and safety as a fundamental human right' (2013) 34 *Comparative Labor Law and Policy Journal* 715

2. Le Roux W 'Powers of the Inspectorate to close a working place' (2011) 11 *The Journal of the Southern African Institute of Mining and Metallurgy* 542
3. The National Treasury 'Social security and the social wage' (available at http://www.treasury.gov.za/documents/national%20budget/2013/review/chapter%206.pdf) (date accessed 20-03-2014)
4. Tshoose CI 'Justice delayed is justice denied: Protecting ex-miners against occupational injuries and diseases: Comments on *Mankayi v AngloGold Ashanti Ltd* (2011) 32 ILJ 545 (CC)' (2011) 14(7) *PER* 233

Part III

Rules applicable to the termination of the employment relationship

At this stage of the discussion of the employment relationship it is wise to refer back to the bigger picture. The book has, so far, covered the conclusion of the contract of employment and the regulation of and remedies available to employees during the employment relationship. We are now moving to a discussion of the law at the stage when the contract of employment is terminated. This illustration captures the regulation of the employment relationship through its various stages.

All employment relationships must come to an end at some stage. Some end as planned, for example, when an employee retires, or when an employee resigns to work for another employer or starts her/his own business. Other terminations may not be planned, for example, when the employee is dismissed.

In this part of the book the various ways of terminating the contract of employment are explained. The less confrontational ways are briefly discussed. These might include, for example, resignation, retirement, death and insolvency. The main focus is, however, on the more confrontational form of termination, namely dismissal. The LRA allows dismissals for three reasons:

- misconduct,
- incapacity, and
- operational reasons.

Misconduct, or 'fault' dismissal, implies that the employee is guilty of misbehaving which causes the dismissal. Incapacity and operational reasons are termed 'no-fault' dismissals, because the employee is regarded as a victim or caught in circumstances beyond her/his control, but which nevertheless warrant dismissal. Examples are dismissal of an employee who cannot perform the required work as a result of injury, or who is retrenched because of poor economic conditions.

If a dispute about an alleged unfair dismissal arises or if an employer wants to dismiss employees, the first step will be to determine the reason for dismissal. It may only be for misconduct, incapacity or operational requirements. The specific reason will determine the process which has to be followed.

If a dismissal lacks a fair reason or procedure it will be unfair. If a dismissal is as a result of discrimination it will be *automatically* unfair.

Part III consists of two chapters. **Chapter 8** firstly discusses the foundational aspects of the law of dismissal. These include the *definition* of dismissal,

the 'no-go' area of automatically unfair dismissals (and its dispute-resolution procedures) and other ways in which the contract of employment can be terminated such as resignation or retirement by an employee.

Chapter 9 looks at the different ways in which an employee can fairly be dismissed. An employee may only be dismissed if the employer acts substantively and procedurally fair. These requirements are discussed in detail in the chapter as well as the dispute resolution procedures and routes, which should be followed in the case of an alleged unfair dismissal. Finally, the different dispute resolution institutions are explained.

8

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1. WAYS OF TERMINATING THE EMPLOYMENT CONTRACT

Termination of employment through dismissal will form the focus of this chapter. It is important to remember that the contract of employment can be terminated without constituting dismissal or unlawful termination. But before termination through dismissal is discussed in chapter 9 below, the other ways in which the contract of employment can be terminated, are discussed in this chapter.

1.1 Resignation by the employee

The BCEA recognises that employees can terminate their employment contracts by giving the required notice.[1] Resignation must be given in writing, if that is a requirement in terms of the agreement between the parties.[2]

Once the resignation is accepted by the employer, it may not be withdrawn without the employer's consent, and the employer may elect either to allow the employee work out the notice period, or to terminate the contract and pay out the employee's remuneration for the notice period.[3] However, it is not necessary for the employer to communicate its acceptance of the resignation to the employee.[4] An employee breaches the contract of employment by stopping her/his services before the end of the notice period.[5] The employment contract is terminated only at the end of the notice period and not when notice is given.[6]

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[1] See ch 4, para 3.3.2 above.

[2] See *African National Congress v Municipal Manager, George Local Municipality & others* (2010) 31 *ILJ* 69 (SCA), where the court stated that resignation must be 'unequivocally' communicated to the other party, and that the decision to resign must be conveyed to the mind of the other party to bring the cancellation into effect.

[3] *Uthingo Management (Pty) Ltd v Shear NO & others* [2009] 6 BLLR 590 (LC).

[4] See *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 *ILJ* 1477 (LC), where the court held that a resignation is a unilateral act by an employee which shows the employee's intention not to continue with the contract. The court further held that, once a notice of resignation has come to the attention of the employer, it cannot be withdrawn.

[5] *SA Music Rights Organisation Ltd v Mphatsoe* [2009] 7 BLLR 696 (LC). Here it was stated that the employer may claim damages from the employee to the equivalent of the salary the employee would have earned, had the contract run its course, but only if the employer can prove such damages.

[6] *Lottering & others v Stellenbosch Municipality* (2010) 31 *ILJ* 2923 (LC).

1.2 Termination on completion of an agreed period or task

A fixed-term employment contract will *automatically* come to an end when the period agreed upon expires, or when the task agreed upon is completed.[7]

1.3 Termination by mutual agreement

The parties to the employment contract may agree to terminate the contract. Since the parties in this instance mutually agree, the employment contract will be terminated irrespective of the length of the period originally agreed upon.

1.4 Termination on grounds of impossibility of performance

If it becomes impossible for one party to the employment contract to perform in terms of the contract, the contract comes to an end and no performance is required from either of the parties. The death of an employee during the term of the contract will also terminate the contract because of the objective impossibility of performance. However, the employer's death will not necessarily terminate the contract of employment, as the estate of the employer will still be liable to pay the employee, unless the services of the employee are of a personal nature.

1.5 Termination as a result of insolvency of the employer

The insolvency of the employer also affects the employee. A person or company can voluntarily apply for insolvency or liquidation or it can be compulsory where an application is brought by a creditor for insolvency or liquidation. The principles below relate to the effect of compulsory liquidation or sequestration on the employment contract.

Upon sequestration of the employer, the contract of employment is suspended for a period of 45 days. During this period the employee does not have to render services to the employer and the employee will not receive any payment or benefits during this period. The employee may, however, claim compensation from the Unemployment Insurance Fund.

The Insolvency Act distinguishes between a trustee and a liquidator: where an insolvent employer is an individual, a *trustee* is appointed and where the insolvent employer is a company, a *liquidator* is appointed. The trustee or liquidator takes over the affairs of the employer to finalise all matters in relation to the insolvent business.

The trustee or liquidator can decide whether the contracts of employment should continue after the 45 days. Unless there was an agreement of continued employment, all the suspended contracts will automatically terminate after the date of insolvency.

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[7] See ch 2 para 3.2 above regarding the position of fixed-term employees.

The employee is entitled to severance pay in terms of section 41 of the BCEA.[8]

1.6 Termination as a result of retirement

Parties to an employment contract are free to agree on a mandatory retirement age.[9] An agreed-to retirement age is expressly or impliedly agreed upon by the employer and employee. When an employee reaches the mandatory retirement age and does not retire, the employer may demand retirement.[10] This will not amount to discrimination based on age and is specifically excluded from the scope of an automatically unfair dismissal.[11] If there is a dispute, the onus will be on the employer to prove that the employee has indeed reached the normal or agreed-to retirement age[12] and was therefore compelled to retire.

2. TERMINATION OF THE CONTRACT OF EMPLOYMENT THROUGH DISMISSAL

An employer is allowed to dismiss an employee under certain circumstances and these circumstances and provisions are regulated by the LRA.

In terms of section 185(*a*) of the LRA every employee has the right *not* to be unfairly dismissed. An employee can only be dismissed **by the employer** (with or without notice). In terms of section 186(1) of the LRA it also includes any of the following situations where the **employer** has terminated the contract of employment (with or without notice):

- where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it,
- where an employer refused to allow an employee to resume work after she took maternity leave, and
- where an employer (who dismissed a number of employees for the same or similar reasons) has offered to re-employ one or more of them but has refused to re-employ another.

The definition of dismissal in section 186(1) also makes provision for two instances where the **employee** terminates the contract of employment (in other words, she/he resigns).

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[8] Section 38 of the Insolvency Act 24 of 1936 and s 41(2) of the BCEA. See ch 4, para 3.3.3 above.

[9] In terms of s 187(2)(*b*) of the LRA, the termination of the employment contract of the employee who has reached the normal or agreed retirement age for persons employed in that capacity, will be fair. See ch 5, para 4.2.2 above and para 5.7 below. See also *Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 *ILJ* 1333 (LC).

[10] *Thembane v Revertex Chemicals (Pty) Ltd* (1997) 18 *ILJ* 174 (LAC).

[11] *Rubenstein v Price's Daelite (Pty) Ltd* (2002) 23 *ILJ* 528 (LC).

[12] *Rockliffe v Mincom (Pty) Ltd* (2008) 29 *ILJ* 399 (LC).

This will, firstly, be where the employee resigns because the employer made continued employment intolerable for the employee. This is a so-called 'constructive' dismissal.

It will, secondly, be where an employee resigns with or without notice because as a result of or after a transfer of a business as a going concern, because the employer provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

The fact that there is a dismissal which complies with the definition in section 185(*a*) does *not* necessarily mean that the dismissal was *unfair*. The definition of dismissal is important because it indicates what actions performed by the employer (and in exceptional cases, by the employee) would bring the employment relationship to an end.

Determining the fairness of dismissal is a two-step process.

Step 1: determine whether there was a dismissal (in other words, an action that complies with those listed in section 186 set out above); and

Step 2: determine whether the dismissal was for a fair reason and whether a fair procedure was followed (because this will determine if the dismissal is fair, unfair or automatically unfair).

In Step 1 the obligation is on the employee[13] to show that she/he was dismissed. If she/he succeeds in proving that, the enquiry moves to Step 2 where the burden of proof shifts to the employer, who must show that the dismissal was not unfair. A dismissal can be fair or unfair or even automatically unfair. The only way in which the employer will be able to prove that the dismissal was not unfair will be to prove that:

- there was a fair reason for the dismissal (substantive fairness), and
- a fair procedure was followed (procedural fairness).

The interaction between Step 1 and Step 2 can be illustrated by the following dialogue, which imitates a situation at the CCMA:

Mr A:	Commissioner, I have been dismissed. I think it is unfair. I do not even know why I have been dismissed. Here is the letter stating that I have been dismissed.
Commissioner:	Mr Employer, is this the letter that you have given the employee?

[13] Only an employee will be entitled to protection from unfair dismissal. If the existence of an employment relationship is in dispute, the employee will not only have to show dismissal but also that she/he is an employee in terms of the presumption of s 200A of the LRA. See ch 2, para 2 above.

Mr Employer:	Yes, Commissioner.
Commissioner:	Mr A has therefore proved dismissal. Mr Employer, you must now show that the dismissal was not unfair.
Mr Employer:	Commissioner, the dismissal is not unfair, I had a good reason to dismiss Mr A and I followed a fair procedure.
Commissioner:	Can you prove that?
Mr Employer:	Yes, Commissioner. Here are the reports of three witnesses who saw that Mr A took money from the cash register. And here is the record of the disciplinary hearing at which Mr A was found guilty. I will call these witnesses and Mr A can cross-examine them and they will show that Mr A stole the money and that the disciplinary hearing and resultant findings were fair and correct.

The definition of a dismissal will be discussed in more detail below. It is important to know if the action or omission by the employer amounts to a dismissal before the next enquiry into the fairness or unfairness of the dismissal can be done.

3. THE DEFINITION OF 'DISMISSAL'

3.1 Termination of a contract by the employer, with or without notice

Example: M catches N red-handed as N takes R1 000 cash from the cash register. After a disciplinary hearing, N is dismissed with one month's notice, which is paid to him instead of allowing him to work on the premises for another month

This is the 'normal' and most common way to dismiss an employee. The BCEA[14] determines that an employer must give notice to an employee when terminating employment and provide minimum requirements for such periods. Whether it was fair or not to terminate employment and give notice is a separate enquiry that will be answered with reference to the requirements of substantive and procedural fairness.[15]

Although the employer must give notice when terminating employment, an exception exists in cases where the employee committed a serious breach of contract. The employer may then terminate the contract summarily, that is, immediately (without notice). Despite the fact that the employee will forfeit her/his notice when summarily dismissed, the employee must still get an opportunity to be heard in order to ensure that the employer acts procedurally fair.

[14] See ch 4, para 3.3.2 above.
[15] Section 186(1)(*a*).

In *SA Post Office Ltd v Mampeule*,[16] the employee was removed as director of the Post Office. The employer simultaneously terminated his employment because the articles of association of the Post Office stated that when a director ceased to hold office for any reason, his contract terminated automatically and simultaneously. The employee's contract of employment contained a corresponding clause to the effect that the contract would immediately and automatically terminate when he is removed as director of the Post Office. The employer therefore argued that it was not a dismissal, because the action was compelled by the articles of association and also agreed to in terms of the contract of employment. The court rejected this argument and held that it was against public policy and not possible in law. The employee had a right not to be unfairly dismissed and could not contract out of this right, and a contract cannot provide for the automatic termination of a contract of employment.

The Labour Relations Amendment Act (hereafter the Amendment Act) proposes that the definition of dismissal refers to 'termination of employment' instead of 'termination of the contract of employment'. This will provide protection against dismissal whether or not there is a formal or written contract of employment.

The Amendment Act also clarifies the date of termination. If an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, the date on which the employee is paid all outstanding salary (if the latter is an earlier date than the date of expiry of the notice period).

3.2 Refusal or failure by the employer to renew a fixed-term contract

> **Example:** R has appointed S as project manager on a one-year contract. R renewed the contract for three more consecutive years, and also gave S performance bonuses from time to time as a result of his excellent performance. When S is offered a new fixed-term contract on less favourable terms, S claims that he had been unfairly dismissed. If the employer indeed offers the employee a new contract on less favourable terms, the employee has been unfairly dismissed.[17]

If an employee reasonably expects the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offers to renew it on less favourable terms, or does not renew it at all, this will constitute a dismissal.

The main question in such a situation will revolve around whether the employer's conduct created a reasonable expectation that the fixed-term

[16] (2010) 31 *ILJ* 2051 (LAC).
[17] Section 186(1)(*b*).

contract would be renewed. Examples of conduct that would create such a reasonable expectation are previous renewals, or assurances of renewal.

In *Black v John Snow Public Health Group*,[18] the applicant claimed that the non-renewal of her fixed-term contract (which had been renewed previously) constituted an unfair dismissal. The court emphasised that, while previous renewals were relevant to determine whether there was a reasonable expectation, they were not decisive. The employee worked for a non-governmental organisation, which depended on foreign funds, and it therefore had to review its position annually in the light of the actual funding received. The employee knew that although the next year's budget made provision for her post, that was no more than a financial plan. She had a hope of renewal, but the employer never created a reasonable expectation to this effect.

The Amendment Act amends this subsection of the definition of dismissal to ensure greater protection for employees employed in terms of fixed-term contracts. Where an employee was employed in terms of a fixed-term contract of employment and reasonably expected the employer to retain the employee in employment on an indefinite basis but the employer offered to retain the employee on less favourable terms, or the employer did not offer to retain the employee, it will also amount to dismissal.

This amendment will ensure improved protection for fixed-term and temporary employees. Employees were previously only protected if they could prove that they reasonably expected the employer to renew the fixed-term contract for another fixed-term. If the employee reasonable expected to be employed full-time, it would not qualify as a dismissal. This proposed amendment would remove this uncertainty and confusion.

3.3 Refusal to allow an employee to resume work after maternity leave

> **Example:** F returns to work after four months of unpaid maternity leave. Employer G informs her that they have become used to working without her and her position no longer exists.

If an employer refuses to allow an employee to resume work after having taken maternity leave, this refusal (termination) will qualify as a dismissal.[19] In terms of the BCEA, an employee is entitled to four consecutive months' (unpaid) maternity leave.[20] This specific reference to absence during maternity in the definition of dismissal is an indication of the strong protection afforded by the LRA to female employees whose job security is jeopardised during maternity leave. This is also in line with the ILO Convention 183 on

[18] (2010) 31 *ILJ* 1152 (LC).
[19] Section 186(1)(*c*).
[20] See ch 3, para 3.2 above.

maternity protection.[21] Also remember that a dismissal relating to pregnancy will be automatically unfair.[22]

3.4 Selective re-employment

> **Example:** A, B and C worked for Chicken Mania where they packed frozen chickens. The three of them were caught stealing frozen chickens and they were subsequently dismissed. Their last working day was 31 October. On 5 November Chicken Mania asked A if he would like to come and work for them again. Although A, B and C were fairly dismissed on 31 October, the selective re-employment of A would mean that B and C may claim that they had been (unfairly) dismissed.

Where an employer dismisses a number of employees for the same or similar reasons, and subsequently offers to re-employ one or more of them, but refuses to re-employ another, this will constitute a 'dismissal'.[23] This type of dismissal will not necessarily be unfair. If an employer retrenched employees, and the financial position of the business improves, the employer may re-employ some of the employees. It will not be unfair selective re-employment as long as the employer followed a fair procedure and can justify the selection for re-employment.

3.5 Constructive dismissal

> **Example:** X works for Z as receptionist. Z has tried on a number of occasions to kiss X against her will and Z also keeps on sending pictures of himself to X via e-mail. X resigns because she feels that she can no longer work for Z under these circumstances.

Where an *employee* resigns because the employer made continued employment intolerable for the employee, it will constitute a 'dismissal', better known as a 'constructive' dismissal.[24] Although the *employee* (and *not* the *employer*) terminates the contract, it was *not* done voluntarily. The employer's conduct made it impossible for the employee to continue working for the employer.

In *Copeland and New Dawn Prophesy Business Solutions (Pty) Ltd*,[25] the court held that an employee alleging constructive dismissal had to show:

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[21] This Convention promotes the equality of all women in the workforce and the health and safety of the mother and child.
[22] See para 5.6 below.
[23] Section 186(1)(*d*).
[24] Section 186(1)(*e*).
[25] (2010) 31 *ILJ* 204 (CCMA).

> '... convincingly that his resignation ... came about as a consequence of the employer being the "villain" in the employment scenario who made the employment relationship "intolerable" to him, to such an extent that he finally in desperation, having exhausted all internal mechanisms of the employer available to him, was left with no other viable alternative but to resign'.

The court made it clear that the following three elements must be present to succeed with a claim for constructive dismissal:

- the employee must show that she/he has resigned,
- the employee must show that the reason for the resignation was that continued employment became intolerable, and
- the employee must show that it was the employer's conduct that created the intolerable circumstances.

In *Gordon and Western Cape Education Department*,[26] the employee suffered from ill-health. The employer unreasonably delayed the processing of his application for temporary incapacity leave and made unjustified deductions from his salary. The court held that the employee was constructively and unfairly dismissed.

Not all constructive dismissals are unfair. In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*,[27] an employee resigned after the employer's change to the commission structure of all employees which had led to a reduction in his income. In this case, however, the Labour Appeal Court held that even though the change in the commission structure rendered the employment intolerable and amounted to a constructive dismissal, it was not an unfair dismissal. The employer acted fairly under the circumstances where he had to apply a uniform commission structure in the workplace.

The facts of every case must be analysed in order to determine whether the conduct by the employer was mere irritation or insult, or whether it really made continued employment intolerable.

3.6 An employee being provided with less favourable terms after the transfer of a business

Example: K works for L. L sells his business to J. J changes the terms and conditions of employees so that they work six days a week, instead of (the previous) five days. Their salaries are reduced and the retirement age is also changed from 65 to 60. K finds these working conditions unbearable and resigns from J.

This is also a form of constructive dismissal. This part of the definition of dismissal should be read in conjunction with sections 197 and 197A of the LRA,

[26] (2013) 34 *ILJ* 218 (BCA)
[27] (1997) 18 *ILJ* 361 (LAC).

which were designed specifically to protect the interests of employees who are transferred between employers. If the employee resigns because conditions or circumstances at work under the new employer are *substantially* less favourable than under the previous employer, such a termination will constitute a 'dismissal'.[28]

The LRA aims to protect job security (on more or less the same terms) of an employee affected by the transfer of a business as a going concern from one employer to another, both in the ordinary course of business and in circumstances of insolvency. In both these instances a contract of employment must continue under the new employer on terms and conditions that are 'on the whole' not less favourable to the employee than those under the previous employer. Therefore, if the employee's working conditions are substantially less favourable than those provided by the previous employer, she/he can, with or without notice, terminate the contract of employment, and claim constructive dismissal.

4. FAIRNESS OF A DISMISSAL

The regulation of dismissal through legislation is important because employers must be able to run their businesses effectively and productively, with the right to 'hire and fire' particularly important in this context. The main provisions regarding dismissal are found in sections 186 and 188 the LRA, and the Code: Dismissal. They are discussed in more detail below.

The LRA does not forbid all dismissals, but only unfair dismissals. This is in line with ILO 'decent work' guidelines. This also echoes the words of Kahn-Freund (quoted in chapter 1 above) about the purpose of labour law, which is to balance the interests of employers and employees.

The LRA clearly stipulates what a fair reason and a fair corresponding process (specifically designed for every specific reason) is in order for a dismissal to be fair. The fair reason for a dismissal refers to 'substantive fairness' and the correct process refers to 'procedural fairness'.

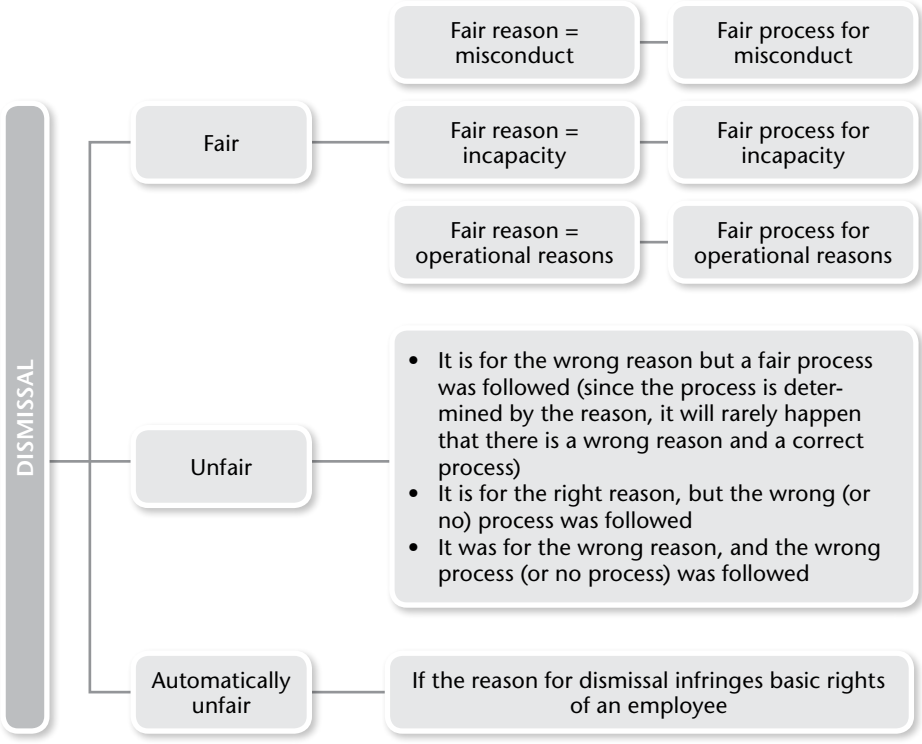
There can only be three reasons why an employee may be dismissed, and these are:

Reason 1: Misconduct of the employee.
Reason 2: Incapacity of the employee (incapacity as far as work performance is concerned or incapacity as a result of temporary or permanent illness/disability).
Reason 3: Operational reasons of the employer (these are, financial, technological, structural or similar needs).

[28] Section 186(1)(*f*).

Where the employer dismissed an employee for another reason it will be unfair. The LRA specifically prohibits dismissals where the reason for the dismissal infringes upon an employee's basic rights and these dismissals are called 'automatically unfair'. Such a dismissal is unfair simply because of the reason for the dismissal.

Before the different dismissals are discussed it is important to understand how these dismissals fit in with and relate to one another.



The following example illustrates the differences between so-called fair, unfair and automatically unfair dismissals further.

Mary went on maternity leave. Upon her return the employer informs her that she cannot resume employment. Would this be a dismissal and if so, would it be fair, unfair or automatically unfair?

STEP 1 is to determine whether there was a dismissal. The employer did not allow Mary to resume employment after maternity leave, and this conduct by the employer qualifies as a dismissal. STEP 2 is for the employer to show that the dismissal was not unfair. However, where the dismissal was because of Mary's pregnancy it will be an automatically unfair dismissal and the employer will not be able to show that the dismissal was not unfair.

The employer, however, indicates that Mary was not dismissed because of her pregnancy but because of misconduct. During her maternity leave, the employer discovered that she previously stole money. Since the reason for the dismissal is misconduct, the employer will get the opportunity to prove that the dismissal was not unfair.

Although the employer could show substantive fairness (proving theft), he did not follow the correct procedure. He did not inform Mary of the charges against her and did not hold a proper disciplinary hearing. The dismissal would therefore be unfair.

Despite making provision for a dismissal, the LRA ascribes to the principle of progressive discipline.[29] This means that disciplinary action should be used to make employees aware of the standards of conduct required of them. Dismissal should be reserved for cases of serious misconduct, repeated offences, where the trust relationship has broken down and/or as a measure of last resort. As an alternative to dismissal, the employer should consider, *inter alia*:

- counselling
- warnings, and
- informal correction.

In *Department of Labour v General Public Service Sectoral Bargaining Council & others*,[30] the employee was suspended without pay for three months for serious misconduct. By implementing progressive discipline in this instance, the employer gave the employee an opportunity to correct his behaviour. This was also the situation in *NUM & others v Martin & East (Pty) Ltd*[31] where employees who participated in an unprotected strike, had been suspended without pay instead of being dismissed. In this case the employer, however, dismissed the shop stewards for the same transgression. The court found that the dismissals of the shop stewards, while the other employees were only suspended, were automatically unfair.

In *Matsi and JP Hugo Residence CC t/a Hoffe Park Accommodation Centre*,[32] an employee who disclosed his salary to a co-employee was given a final written warning. The court found this to be an unfair labour practice since the employee merely exercised his right to freedom of speech.

If an employee is dismissed and she/he feels that it was unfair, they must make use of the relevant dispute resolution institution stipulated by the LRA. The most important role players in this regard are:

- the CCMA, accredited agencies and bargaining councils, and
- the Labour Court and Labour Appeal Court.

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[29] See the Code: Dismissal, items 3(2) and 3(3).
[30] (2010) 31 *ILJ* 1313 (LAC).
[31] (2013) 34 *ILJ* 978 (LC).
[32] (2013) 34 *ILJ* 1018 (CCMA).

As part of the discussion of automatically unfair dismissals below, the specific dispute resolution route will be discussed in paragraph 5.10 below.

5. AUTOMATICALLY UNFAIR DISMISSALS

The LRA defines 'automatically unfair dismissals' in section 187. The motivation for the creation of this specific category of dismissal is to provide a remedy to an employee when a basic right of the employee has been infringed. An automatically unfair dismissal carries a more severe maximum penalty than an ordinary unfair dismissal, namely a maximum of 24 months' salary. The only reasons that may justify the infringement of a basic right of an employee will be if:

- an inherent requirement of the job necessitates the infringement, or
- an employee was dismissed because she/he had reached the normal or agreed-to retirement age.[33]

The LRA regards nine types of dismissals as automatically unfair, discussed below. According to section 187 of the LRA:

> 'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 [section 5 confers protections relating to the right to freedom of association and on members of workplace forums] or, if the reason for the dismissal is:
> (*a*) that the employee participated in or supported, or indicated an intention to participate in or support, a [protected] strike or protest action;
> (*b*) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a [protected] strike or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
> (*c*) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
> (*d*) that the employee took action, or indicated an intention to take action against the employer by:
> (i) exercising any right conferred by this Act; or
> (ii) participating in any proceedings in terms of this Act;
> (*e*) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
> (*f*) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

[33] Under these circumstances an employee will not be able to claim that she/he was discriminated against based on his age. In *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 *ILJ* 1190 (LC) a 64-year-old employee's services were terminated. His agreed retirement age was 65 years and the court consequently found the dismissal to be automatically unfair.

(*g*) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
(*h*) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.'

5.1 The employer acts contrary to section 5 (an employee's right to freedom of association)

Freedom of association is discussed in chapter 10 and refers to an employee's right to join a trade union, belong to a trade union, and to participate in the activities of a union (including the right to strike). If an employer dismisses an employee because she/he exercises one of these rights, the dismissal will be automatically unfair. For example, if an employer dismisses a successful shop steward for no apparent reason, it will constitute an automatically unfair dismissal.[34]

An important issue in this regard concerns *senior managerial employees'* right to freedom of association. If a senior manager is also a member of a trade union, there is potential for conflict of interests, since a managerial employee may have access to information that can harm the employer if divulged to the union.

At the same time she/he cannot be dismissed when exercising the right to freedom of association. In *IMATU & others v Rustenburg Transitional Council*,[35] the court recognised the delicate nature of this dual role. Although a senior manager cannot be prevented from joining a union, she/he should act in good faith towards the employer, which, in turn, implies that the employee must be careful in balancing the interests of the union and the employer.

5.2 Participation in or supporting a protected strike or protest action

Where an employee is dismissed for participating in a protected strike or protest action, this will constitute an automatically unfair dismissal.[36] This protection extends to *protected* strikes only, as discussed in chapter 13 below. There are two exceptions to the rule. Employees may be dismissed during a protected strike in cases of:

- misconduct, and/or
- operational reasons.

[34] Section 187(1).
[35] (2000) 21 *ILJ* 377 (LC).
[36] Section 187(1)(*a*).

5.3 Refusal to do the work of employees who are on a protected strike

This is further protection against infringement of the right to freedom of association. If an employer dismisses an employee for refusing to do work which is normally done by an employee who takes part in a protected strike, it will constitute an automatically unfair dismissal.[37]

If the employee however refuses to do her/his *own* work while the other employees are on strike, it will amount to insubordination.

5.4 Compelling an employee to accept a demand made by the employer

If an employer dismisses an employee to force the employee to accept a demand in respect of any matter of mutual interest between the employer and employee, it will constitute an automatically unfair dismissal.[38] Such dismissal is regarded as automatically unfair because an employer is in effect bullying the employee by threatening her/him with dismissal if the employer's demand is not acceded to.

Importantly, this protection must be seen against the employer's right to change workplace rules and practices. Terms and conditions of employment can, however, only be changed by way of negotiation. The prohibition against this type of dismissal is there to ensure that, in this process, the employer does not exert unfair pressure by threatening employees with dismissal.

This issue was under scrutiny in *NUMSA & others v Fry's Metals (Pty) Ltd*[39] where an employer wanted to change the shift system. The union refused this change and persisted with its viewpoint despite several attempts by the employer to persuade it otherwise. In the end, the employer took the position that, if the union does not accept the shift change, it will have to dismiss the employees for operational reasons. Put differently, the employer argued that, in that particular business, it was an operational requirement that the workers must be willing to work on the new shift system. The dismissal was therefore not to force the employees to accept the new shift system, but to find (new) employees who would be willing to work in terms of the new shift system.

The court held that the employer's demand was final and not a mere threat. It constituted a fair dismissal for operational reasons.

> Assume (using the same facts as in *Fry's Metals* discussed above) that the employer completed retrenchments on 31 October and started appointing new employees willing to work the shift system on 1 November, and half of the retrenched workers then returned remorseful and willing to accept the

[37] Section 187(1)(*b*).
[38] Section 187(1)(*c*).
[39] (2001) 22 *ILJ* 701 (LC); *Fry's Metals v National Union of Metalworkers of SA & others* (2003) 42 *ILJ* 133 (LAC).

new system and were reappointed by the employer. This would signify that the employer had not really meant to retrench, but had used the threat of dismissal to force employees to change their minds, and the dismissal of all employees on 31 October would therefore be automatically unfair.

The Amendment Act classifies as automatically unfair a dismissal where the reason for the dismissal is a *refusal by employees* to accept a demand in respect of any matter of mutual interest between them and their employer. Where the employer could previously escape liability if the reason of the dismissal was *not to compel (force)* the employees to accept a demand in respect of any matter of mutual interest, it now not only looks at the intention of the employer but rather at the reaction of the employees.

5.5 Exercising rights against the employer

Where an employer dismisses an employee for exercising her/his rights granted by the LRA against the employer, this will constitute an automatically unfair dismissal.[40] This protects the sanctity of the LRA and prohibits the victimisation of employees who exercise rights in terms of the LRA.

5.6 Pregnancy, intended pregnancy or any reason related to pregnancy

If an employer dismisses an employee because of pregnancy, intended pregnancy or any reason related to pregnancy, this will constitute an automatically unfair dismissal.[41] This provision has given rise to more litigation than any other automatically unfair reason for dismissal.[42]

An example of this is found in *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)*.[43] Here, an employee was harassed and victimised because of the non-disclosure of her pregnancy during the interview for the job. Once disclosed after joining the company, she was reprimanded for poor work performance and eventually dismissed based on misconduct. The court held that the employee has shown that the non-disclosure of her pregnancy was the dominant reason for her dismissal. It was common cause that there was *no* obligation on an *employee* to disclose her pregnancy. She merely had to organise her maternity leave as required in terms of the BCEA.[44] The dismissal constituted an automatically unfair dismissal. This interpretation is correct and important, since some employers still discriminate against

[40] Section 187(1)(*d*).
[41] Section 187(1)(*e*).
[42] N Smit & M Olivier 'Discrimination based on pregnancy in employment law: The case of *Woolworths v Whitehead*' (2002) *TSAR* 783.
[43] (2010) 31 *ILJ* 180 (LC).
[44] See ch 4, para 3.2 above.

pregnant employees because of the fact that their absence affects the normal run of business, and because of the financial costs of replacing such employees.

In *Mashava v Cuzen & Woods Attorneys*,[45] a candidate attorney did not disclose her pregnancy during an interview for appointment. When she was appointed and informed the employer of her pregnancy, she was dismissed for deceiving the employer during the interview. The court held that deceit would warrant dismissal, but that failure to disclose pregnancy has not amounted to deceit.

Section 6 of the EEA prohibits discrimination against job applicants on a number of grounds including pregnancy.[46] If an employee lied about her pregnancy it will not amount to dishonesty for which she can be dismissed since she was not required to share such personal information.

5.7 Unfair discrimination

A dismissal is automatically unfair if based on unfair discrimination against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.[47] However, some measure of discretion is allowed as to the fairness of the dismissal if the reason for the discrimination is based on the inherent requirements of the particular job, or age, if the employee has reached the normal or agreed-to retirement age for persons employed in that capacity.

The case of *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*[48] provides an example of an automatically unfair dismissal based on unfair discrimination. Here, the employee, when requested by the employer to disclose personal particulars a few days after starting the job, revealed that he had a number of illnesses (including being HIV positive) and allergies (including being allergic to penicillin). The employer dismissed and removed the employee from the premises. The employer's justification for his actions was that the employee had 'misrepresented' his state of health during the interview. Two issues arose, namely, whether the employee was capable of performing his duties and, if so, whether his dismissal was based on misconduct or his HIV status.

The *employee* claimed, firstly, that he was automatically unfairly dismissed in terms of the LRA due to his HIV status. Secondly, he had a right to privacy and was, therefore, not obliged to disclose his HIV status. The employer had, thus, unfairly discriminated against him on the basis of his HIV status.

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[45] (2000) 21 *ILJ* 402 (LC).
[46] See ch 5, n 13 above.
[47] Section 187(1)(*f*). Remember that s 6 of the EEA also prohibits unfair discrimination against employees. See ch 5, para 4 above.
[48] (2011) 32 *ILJ* 1637 (LC).

Moreover, the employee argued that by removing him from the premises, his dignity was impaired (in terms of the EEA).[49]

The *employer* argued that the employee was severely ill and that he would not be able to do his work as stable-yard manager, trainer and riding instructor. The evidence showed that the employee's HIV infection was under control and that he was physically fit to do the job.

The court found that the employer's opinion that the employee was ill was based on a general stereotyping of *all* people with HIV. This affected the employee's dignity and resulted in the unfair condemnation of the employee to 'economic death'.

The *employer* further argued that the ability to inject horses with penicillin was an 'inherent requirement of the job', and that the employee was unable to do this task. The *court* held this to be a 'thin veil' to disguise the *real* reason for the dismissal, namely the employee's HIV status. It was found that the employee was automatically unfairly dismissed on this basis.[50]

In *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others*,[51] some male prison officers were dismissed for refusing to cut their dreadlocks. The Supreme Court of Appeal found that the dismissal was automatically unfair since they were discriminated against on the basis of religion (three of them being Rastafarians and two having been called to become sangomas) and gender (as females had been allowed to wear dreadlocks). The employer could not prove that an appearance with no dreadlocks was an inherent job requirement and it was not proved that it affected the officers' ability to perform their duties of jeopardising safety.

5.8 Transfer of a business

Dismissal because of a transfer of a business as a going concern will be automatically unfair.[52] The circumstances of each case will determine the period after the transfer for which this protection will last. For example, an employer who buys a business as a going concern is entitled to restructure the business.[53] But if, for example, all the transferred employees are dismissed as a result of the restructuring, that will probably be automatically unfair.

In *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd*,[54] the employee was retrenched shortly after the company he worked for, merged with another company. The employee claimed that his dismissal was automatically unfair.

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[49] See also ch 5, paras 4.2.2–4.2.3 above.

[50] However, the court lacked jurisdiction in respect of the claim for a *solatium* (an amount to comfort the employee) in terms of the EEA for having been treated in a humiliating manner which left him undignified and homeless.

[51] (2013) 34 *ILJ* 1375 (SCA).

[52] Section 187(1)(*g*).

[53] *Forecourt Express (Pty) Ltd v SATAWU* (2006) 27 *ILJ* 2537 (LAC).

[54] (2008) 29 *ILJ* 1564 (LC).

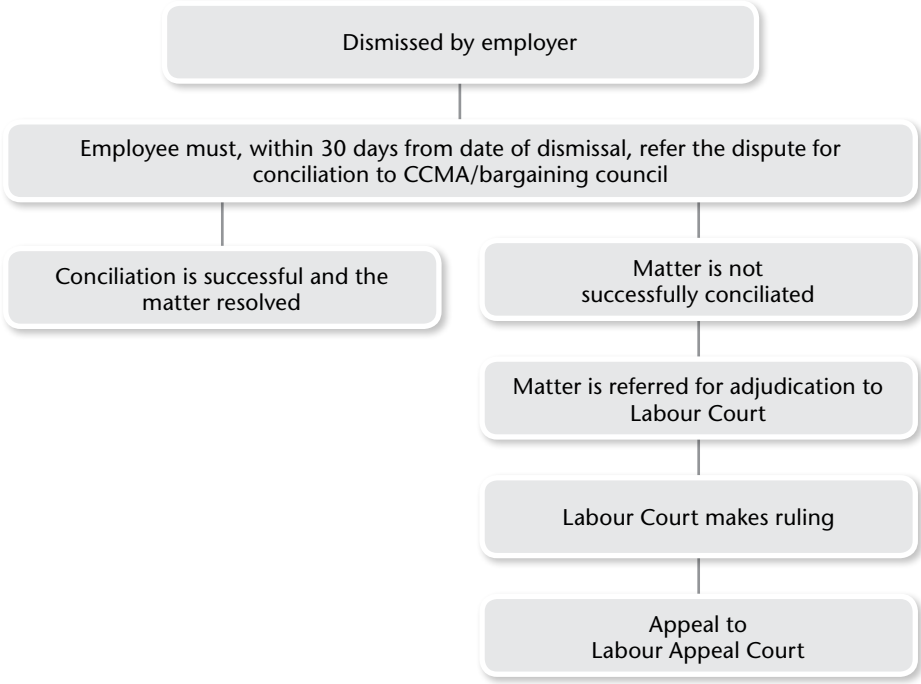
The court held that there must be a causal link between the transfer and the dismissal in order to establish such a dismissal.

5.9 Protected disclosures

Dismissal for making a protected disclosure ('blowing the whistle') in terms of the PDA will be automatically unfair.[55] The PDA defines what actions will constitute a protected disclosure.

An example of this is found in *Sekgobela v State Information Technology Agency (Pty) Ltd*.[56] Here, the court found that the main reason for the dismissal of the applicant, a manager, was that he had made a protected disclosure about the employer's failure to adhere to tender procedures (and not misconduct as the employer had alleged before the dismissal), and that such dismissal was automatically unfair. The court pointed out that the employer, being an organ of the state entrusted with public funds and trusted by the public to adhere to tender policies, exacerbated the matter.

5.10 Dispute resolution for an automatically unfair dismissal



In a dispute regarding an alleged automatically unfair dismissal, the employee must show a dismissal and the reasons for it as set out above.[57] The employer

[55] Section 187(1)(*h*). See ch 6, para 5.8 above for a discussion of further case law in this regard.
[56] (2008) 29 *ILJ* 1995 (LC).
[57] Paragraphs 5.1–5.9 above.

must then show that it was not for one of those reasons discussed above. If she/he cannot succeed in doing that, then the dismissal was automatically unfair. The only two justification grounds may be that the dismissal was justified by the inherent requirements of the particular job, or by the employee's age, if the employee had reached the normal or agreed-to retirement age for persons employed in that capacity.

The compensation awarded to an employee whose dismissal is automatically unfair must be 'just and equitable' in all the circumstances, but not more than the equivalent of 24 months' remuneration.[58]

The Employment Equity Amendment Act allows for the referral of a dispute regarding sexual harassment to the CCMA instead of the Labour Court. Any other discrimination dispute where the employee involved earns less than the BCEA threshold, the dispute may also be referred to the CCMA instead of the Labour Court. This implies that a dispute about an alleged automatically unfair dismissal based on discrimination will fall under the jurisdiction of the CCMA.

The Amendment Act also makes provision for the appointment of an arbitrator to conduct a predismissal inquiry into the conduct or capacity of an employee even in a dispute relating to a protected disclosure. If an employee is suspended pending an investigation in this regard it will not amount to an occupational detriment.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which one of the following actions will constitute a dismissal?
   (*a*) Susan's retirement age in terms of her contract is 65 but when she turns 63 she retires to spend more time with her grandchildren.
   (*b*) Betty is not happy at work and the employer tells her that it might be better to resign in the circumstances. She resigns.
   (*c*) Company ABC closes its Polokwane operations and retrenches the five employees at the branch. It undertakes to re-employ them if business picks up again, which it does 2 months' later. ABC re-employs two of the five employees.
   (*d*) Lerato is appointed to assist with the marking of the matric exam scripts. Upon completion of the marking, her employment ends.
2. Briefly discuss whether it will constitute 'progressive discipline' if an employer calls in an employee who was drunk at work, and tells him that he will not take disciplinary action against the employee if the employee undertakes to resign as a shop steward.
3. The National Employee Union ('NEU') is on strike. Duncan is not on strike but in sympathy with the other striking employees he is working slower than usual and taking longer lunch and smoke breaks. He feels that this

[58] Section 194(3).

is justified because there is more work because the other employees are striking. Duncan's supervisor reprimands him about this. Duncan continues with his own little defiance campaign and as a result he is dismissed. He alleges that it was unfair because the employer victimised him because of his support for NEU. Advise Duncan.

✓ Feedback

1. Option (*c*) is the *correct* option. The action of Company ABC amounts to selective re-employment, which is a form of dismissal. ABC dismissed all five employees for operational reasons. It decided, however, to re-employ only two of the five. Be careful that you do not confuse the two steps for determining whether there was a dismissal and if it was fair or not. The action of ABC constitutes a dismissal. Step 2 of the enquiry will be to determine whether it was fair or not. The fact that ABC selectively re-employed two employees does not necessarily mean that the dismissal was unfair. If ABC can show that, for example, only two positions opened up and that these two employees had the skills for the jobs, or the other three were not interested to apply, that will influence the fairness of the dismissal. Option (*a*) is *incorrect*. Susan's early retirement is voluntary and amounts to termination by mutual agreement. Option (*b*) is *incorrect*. Betty resigns and nothing in the facts suggests that it was a constructive dismissal in that the employer made continued employment intolerable. Remember that constructive dismissal must be a measure of last resort and any other person in the shoes of Betty must also find it intolerable. Option (*d*) is *incorrect*. Lerato was appointed on a fixed-term contract (the period of appointment was linked to the marking of the exam scripts) and when the contract terminated, the employment relationship terminated.
2. Progressive discipline is aimed at the correction of wrong behaviour and to make employees aware of the standards of conduct required of them. The action of the employer will, however, amount to black-mail as it is not aimed at correction of behaviour. If the employer dismisses the employee if he refuses to resign as shop steward, the dismissal will be an automatically unfair dismissal.
3. It will be an automatically unfair dismissal if the employer dismissed an employee for exercising her/his right to freedom of association or where an employee refused to do the work of another striking employee. In this case, however, Duncan refused to do his own work properly and his sympathy for the workers was not expressed by way of a proper secondary strike. His actions therefore amounted to misconduct, and specifically insubordination. His dismissal was probably fair, if the employer followed the correct procedure.

RECOMMENDED READING

1. Dekker AH 'Did he jump or was he pushed? Revisiting constructive dismissal' (2012) 24(3) *SA Merc LJ* 346
2. Photo MR & Mnyongani F 'When ancestors call an employee: *Kievits Kroon Country Estate (Pty) Ltd v Johanna Mmoledi and others*' (2013) 25(4) *SA Merc LJ* 589
3. Rycroft A 'The intolerable relationship' (2012) 33 *ILJ* 2271
4. Van Niekerk A 'Is the South African law of unfair dismissal unjust? A reply to Martin Brassey' (2013) 34 *ILJ* 28
5. Whitear-Nel N, Grant B & Jansen van Rensburg L 'Is an attempted retraction of a resignation consistent with a claim for constructive dismissal?' (2012) 33 *ILJ* 2309

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1. DISMISSAL FOR MISCONDUCT

1.1 Substantive fairness

The LRA states that an employee who is guilty of misconduct can be dismissed. It is important to understand what misconduct in the workplace entails. An employee will be committing misconduct if she/he breaks a workplace rule. These workplace rules can be found in the disciplinary code of a workplace and it includes workplace rules which are so well-know that the employer can reasonably expect the employee to be aware of them.

> **Example:** Employee D is employed as a mechanic by employer E, but also repairs cars for his own account after hours. This will constitute misconduct.

Other well-known rules would include a duty not to steal or not to assault a co-employee or a duty to act in the best interest of the employer. These apply implicitly and need not be included in the contract of employment. In order to ensure that rules in the workplace are clear and that there are certainty and consistency in the application of discipline, the Code: Dismissal (issued in terms of the LRA), determines that all employers should adopt disciplinary rules to ensure that employees know the required standard of conduct.

This must be communicated to them in a manner that they understand. This may vary depending on the size and nature of the workplace. For example, in a larger business there will be a more formal approach to discipline, whereas in a smaller business, the approach will be more informal.

Even though misconduct is a recognised reason for dismissal, it still needs to be substantively fair. This can be illustrated by the following of facts:

> **Example:** Employer E struck bad traffic on the way to work. When he arrived at the office he noticed employee F playing around on Facebook. He grabbed F by the collar and later handed him a notice to attend a

disciplinary meeting. Even though the employer can dictate how employees use office resources, dismissal will not necessarily be substantively fair if employees were not previously informed that they were not allowed to use Facebook. It would also be unfair if one employee were disciplined or dismissed for the transgression of using Facebook, while others did it without being punished.

The Code: Dismissal sets the following requirements for substantive fairness:[1]

- Did the employee contravene a rule or standard regulating conduct in, or of relevance to, the workplace?
- If so, was the rule valid and reasonable? This is normally determined with reference to the needs of the workplace and business.
- Was the employee aware of the rule, or could she/he reasonably be expected to have been aware of the rule? An employee can only be punished if she/he knew that the conduct was unacceptable and that a transgression of this rule could lead to dismissal.
- Did the employer consistently apply the rule? An employer cannot enforce a rule, which had been previously ignored. This is called 'historical inconsistency', because present conduct is inconsistent with past conduct. If a rule is to be enforced in the future, the employer must inform the employees beforehand. If, at a given time, an employer's treatment of several employees guilty of the same offence were inconsistent, that would be 'contemporaneous inconsistency'.
- Is dismissal an appropriate action for contravention of the rule? Dismissal should be seen as a matter of last resort.[2] Normally, dismissal will not be appropriate in the case of a first offence, unless the misconduct is serious and of such gravity that it renders the employment relationship intolerable. The appropriateness of dismissal as a penalty will depend on the employee's circumstances, including:
  - length of service,
  - previous disciplinary record,
  - personal circumstances,
  - the nature of the job, and
  - the circumstances of the infringement itself.

1.2 Substantive fairness for different types of misconduct

It is impossible to list all types of misconduct that can occur in the workplace. Employers normally provide guidelines and clarity by way of a disciplinary code and procedure but even then not all possible forms of misconduct can be listed.

[1] Items 2 and 7.
[2] See the discussion of progressive discipline in ch 8, para 4 above.

Case law provides examples of various forms of misconduct for which employees have been dismissed. The examples below follow the approach of stating the duty or principle, where after a situation is given in a less straightforward situation.

1.2.1 *Unauthorised absence from work, abscondment, desertion and time-related offences*

(*a*) Principle

The primary responsibility of an employee is to make her/his services available to the employer. If an employee fails to report for work, she/he is in breach of the employment contract. The circumstances of the employee's absence will determine whether the employee can be disciplined and ultimately dismissed. For example, an employee cannot be dismissed for one incident of late-coming, but dismissal may be appropriate for repeated incidents of late-coming.

(*b*) Application to a less straight-forward set of facts

> **Example:** S often pretends to have a migraine on a Friday and then takes sick leave. F, a colleague of S was also booked off sick but was seen shopping every day during her sick leave.
>
> Both S and F are abusing their sick leave. They may be disciplined for this because they did not report for work and did not act in the best interest of the employer.

In *AECI Explosives Ltd (Zomerveld) v Mambalu*,[3] the Labour Appeal Court confirmed that a dismissal in similar circumstances, where an employee acted unreliably before and after weekends, alleging ill-health, will be substantively fair.

The circumstances will determine if dismissal would be the appropriate penalty.

> **Example:** E works for G. After the Christmas holidays she does not return to work. G has tried to contact her without success. She shows up two weeks later and informs G that she was in jail for drunken driving and she only got out on bail then.

This would amount to abscondment or absence without leave ('AWOL'). This should be distinguished from desertion. The differences between these are illustrated below.

[3] (1995) 16 *ILJ* 1505 (LAC).

AWOL	Desertion
• If the employee does not want to terminate the employment contract, but stays away from work without leave. • Warrants dismissal if the period of absence is unreasonably long. • If the employee returns after a few days with a letter to show that she/he had a reason for the absence, for example, having been hospitalised or imprisoned, a dismissal will not be appropriate.	• If the employee, without resigning, stays away from work with the intention of terminating the contract of employment. • The employer must terminate the contract of employment by holding a disciplinary hearing in the absence of the employee. • Even if the employee returns after dismissal, the employer must give her/him an opportunity to state a case.

1.2.2 *Attitudes of hostility, abusive language, racism and insubordination*

(*a*) Principle

An employer may expect of employees to work together in a reasonable harmonious relationship.

(*b*) Application to a less straight-forward set of facts:

If an employee acts with hostility towards the employer or co-employees, she/he can be dismissed.

If an employee uses abusive language, including swear words or remarks that instigate racism,[4] religious discrimination,[5] sexism[6] or any other discriminatory action, the employee is guilty of misconduct. The abusiveness of the remarks will depend on the context of every case. For example, in *Lithotech Manufacturing Cape—A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper & Packaging Industries & others*,[7] an employee was dismissed for swearing at his superior. In this case the employees used swear words liberally on the shop floor and even the supervisor admitted to swearing from time to time.[8] The Labour Court found that dismissal was *not* appropriate. The mere fact that abusive language is used by an employee does not necessarily justify dismissal. All the circumstances must be considered.

The distribution of racial offensive e-mails or making of racial remarks in the workplace constitute misconduct and warrants dismissal. In *SA Commercial Catering & Allied Workers Union obo Sikhundla and Radisson Blu Hotel*

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[4] *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 *ILJ* 703 (LC).

[5] *Cronje v Toyota Manufacturing* (2001) 22 *ILJ* 735 (CCMA).

[6] *Rautenbach v Relyant Retail (Pty) Ltd* (2005) 8 BALR (CCMA).

[7] (2010) 31 *ILJ* 1425 (LC).

[8] The court also took into account the fact that the employee had worked for the company for almost 20 years, with a clean disciplinary record. Moreover, he was on the brink of retirement, and the employer could not prove that the trust relationship had broken down.

Waterfront,[9] an employee who had made false allegations of racism was fairly dismissed. False accusations of racial discrimination against co-employees or the employer 'must be addressed zealously if such allegations are baseless'.[10]

In *NUMSA obo Smith and Hilfort Plastics — A Division of Astrapak Manufacturing Holdings (Pty) Ltd*,[11] two employees directed racial slurs at one another. Despite the fact that the words were uttered in anger and on the spur of the moment, the dismissals was held to be unfair. The actions of the employees undermined workplace relations and constituted a serious offence.

In the matter of *Mmolawa & others and Tintinger t/a Beginnings*[12] employees who refused to carry out an instruction were asked to sign a final written warning and a new contract of employment. When they refused they were ordered to leave the employer's premises. The commissioner found that the employees were dismissed without good reason or procedure. The employer should have followed a disciplinary process for insubordination but acted unfairly by ordering them to leave the workplace.

1.2.3 *Theft (including petty theft and stock losses), team misconduct, dishonesty, and breach of the trust relationship*

(*a*) Principle

Theft by an employee causes irreparable harm to the relationship of trust and confidence between the employer and employee, and it would be fair to dismiss such a thieving employee.

(*b*) Application to a less straight-forward set of facts:

The application in circumstances where the *value* of the property stolen was minimal has been contentious.

In *Miyambo v Commission for Conciliation, Mediation & Arbitration & others*,[13] an employee who stole a piece of scrap metal was dismissed. The court held that, even though the value of the property was minimal, the act of stealing impacted on the trust relationship and had potential significant economic repercussions.

In contrast, in *SA Commercial Catering & Allied Workers Union obo Bolashe and Pinzon Traders (Pty) Ltd*,[14] an employee who was dismissed for petty theft was reinstated by the court. The employee worked at a confectionary and ate some bread returned by a customer. As workplace policy provided that perishable stuff should not be resold or given to staff, the bread would have been given to the pigs. Dismissal as a sanction was found to be too harsh in the circumstances.

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[9] (2010) 31 *ILJ* 1500 (CCMA).
[10] Paragraph 45.
[11] (2014) 34 *ILJ* 325 (BCA).
[12] (2014) 35 *ILJ* 560 (CCMA).
[13] (2010) 31 *ILJ* 2031 (LAC).
[14] (2010) 31 *ILJ* 1974 (CCMA).

In cases of petty theft the circumstances will determine whether a dismissal based on breach of trust will be fair. Thus, the court will have to balance the duty of the employee to act in good faith with the LRA's approach that employers must follow a process of progressive discipline and use dismissal as a matter of last resort.

If, in a misconduct case, the employer cannot identify the guilty party, it may resort to dismissal of a group of employees. In *Foschini Group v Maidi & others*,[15] the employer experienced a 28% loss of clothing stock at a small branch. The employees at the branch refused to attend disciplinary enquiries and were resultantly dismissed. The Labour Appeal Court found that dismissal of all the employees at the branch was fair. The court held that, if employees in a small store were unable to explain huge stock losses and unable to show that it was beyond their control, the only possible inference to be drawn, was that they were guilty. This phenomenon is also known as 'team misconduct'.[16] In *SACCAWU obo Molele & others/Mr Price*,[17] the commissioner held that team misconduct may be relied on only if the employer has proved that it had in place an effective system (such as video cameras) and processes for curbing theft to reduce losses.[18]

If there is a sufficiently close link between the misconduct of the employee and the employment relationship, the employer can discipline the employee for such misconduct:

- after hours and/or
- off the employer's premises,

provided that the link exists in the particular circumstances. This was the case in *National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd*,[19] where an employee who attacked his supervisor on the bus to work, was fairly dismissed. In *Moloto and Gazelle Plastics Management*,[20] an employee accused a co-employee of stealing his cell phone and stabbed him with a knife. This happened at a shop outside the working premises and not during working hours. The court held the dismissal to be justified because it was closely connected to the working relationship. The injured employee could not perform his normal duties as a result of his injuries and the employee charged with misconduct intimidated several witnesses prior to the disciplinary hearing.

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[15] (2010) 31 *ILJ* 1787 (LAC).
[16] Paragraph 57.
[17] [2010] 10 BALR 1105 (CCMA).
[18] 1116E-1117A. See PAK le Roux 'Mass dismissals and "team misconduct"—When the whole is greater than the sum of its parts' (2010) *CLL* 20(3) 81.
[19] (1986) 7 *ILJ* 739 (IC), 743E-F.
[20] (2013) 34 *ILJ* 2999 (BCA).

1.2.4 *Other forms of misconduct*

There are a number of other forms of misconduct that may warrant dismissal. These examples below are common forms of misconduct and are not discussed in detail:

- assault,[21]
- conflict of interest,[22]
- damage to property,[23]
- intimidation,[24]
- sexual harassment,[25] and
- alcohol and drug abuse.[26]

The approach followed thus far will apply also in determining whether the employee's conduct constitutes misconduct. The employer must then follow the rules relating to substantive and procedural fairness in terms of the LRA.

1.3 Procedural fairness

Procedural fairness is as important as substantive fairness for a dismissal based on misconduct (as, in fact, for *all* dismissals). The importance of this will be illustrated below.

> **Example:** G, an employee, assaulted her employer, H, in the workplace, in the presence of other employees. H removed G from the premises and never communicated with her again. If G challenged the fairness of her dismissal at the CCMA, the commissioner will probably find that the dismissal was substantively fair, but procedurally unfair. This would mean

[21] *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* [2008] 6 BLLR 535 (SCA).

[22] In *Devine v SA Breweries & another* (2003) 2 BALR 130, the court held that in the case of an employee who sold computers after hours, which had nothing to do with the business of the employer, there was no conflict of interest.

[23] *CEPPWAWU obo Malinga & others/Chemical Specialists Ltd* [2008] 10 BALR 907 (NBCCI). In *South African Transport & Allied Workers Union v Garvis & others* [2011] ZASCA 152, it was held that a trade union is responsible (to the employer and general public) for the unlawful violent behaviour of members during a protest. This was based on s 11(2)(*b*) of the Regulation of Gatherings Act 205 of 1993. This did not infringe upon their constitutional right to assemble and demonstrate peacefully.

[24] *NUMSA obo Buthelezi & other/Innovatible Mining Products* [2008] 10 BALR 921 (MEIBC).

[25] *Christian v Colliers Properties* [2005] 5 BLLR 479. In *Media 24 Ltd & another v Grobler* [2005] 3 ALL SA 297 (SCA), a dismissal based on sexual harassment was found to have been automatically unfair. The SCA acknowledged that the employee will also have a delictual claim against the employer based on vicarious liability. See ch 3, para 3; ch 5, para 4.4.1 above.

[26] In the case of certain kinds of incapacity, eg, alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider. In *SACCAWU obo Ntonga & another/A1 Fisheries* [1999] 8 BALR 943 (CCMA), the CCMA held that the employer does not need to show how much alcohol has been consumed, as long as it can show that alcohol had been consumed. If an employee has a dependency problem, the Code: Dismissal prescribes counselling and rehabilitation instead of dismissal based on misconduct.

that G (who was the one who had assaulted H), must be compensated by her employer. This is correct because G should have had an opportunity to defend herself.

The requirements for a procedurally fair dismissal based on misconduct are set out below in a checklist that must be followed to ensure that the process complies with the provisions of the LRA. However, in informal working environments, it will be somewhat awkward to follow this process.

The main principle is that the employer must give the employee an opportunity to be heard and to defend her-/himself against the allegations. If that happens in a more informal manner, it will also constitute a fair process.[27]

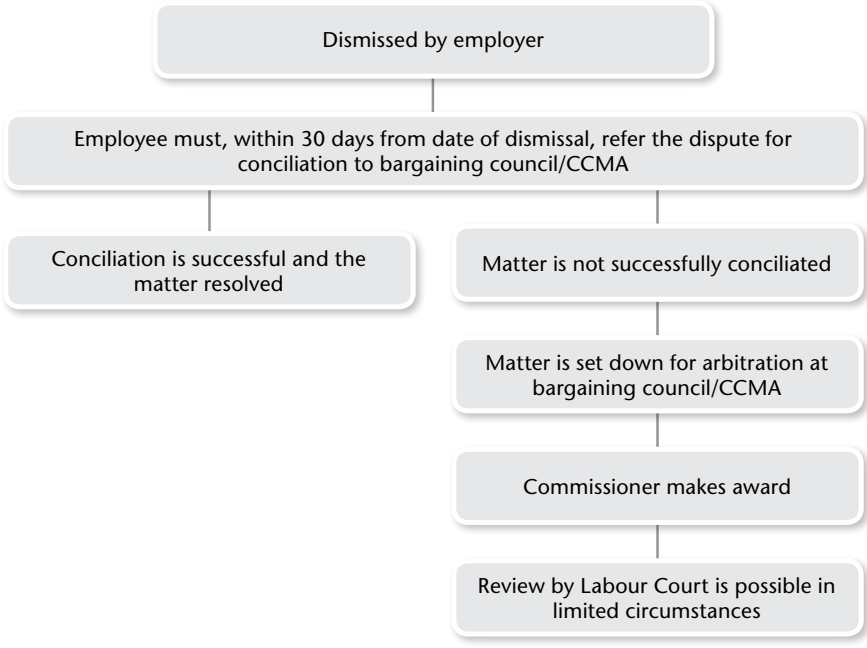
The CCMA Rules make provisions for charging a fee where an employer dismissed an employee for a fair reason but where he did not follow a fair procedure. The reason for this is to deter employers from acting unreasonably as far as this is concerned. In terms of the proposed labour law amendments this will also be possible for bargaining councils in future.

Checklist to ensure a procedurally fair dismissal

Step	Action	Yes/No
1	Did the employer conduct an investigation to determine whether there are grounds for dismissal?	Yes
2	Did the employer notify the employee of the allegations (in a form and language that the employee could reasonably understand)?	Yes
3	Did the employee get reasonable time to prepare?	Yes
4	Was the employee allowed to state a case in response to the allegations?	Yes
5	Was the employee allowed the assistance of a union representative or co-employee?	Yes
6	Did the employer, after the enquiry, communicate the decision taken, and furnish the employee with written notification of the decision as well as the reasons for the decision?	Yes
7	If the employee is dismissed, did the employer remind her/him of any rights to refer the matter to a bargaining council or the CCMA?	Yes
Special reminder 1: Discipline against a union representative or an employee who is an office bearer or official of a union, should not be instituted without first informing and consulting with the union.		
Special reminder 2: An employer can dispense with a predismissal hearing only under exceptional circumstances, namely in crisis-zone situations (where there is a danger to life or property) and if the employee waives her/his to a hearing.		

[27] The rule that an employee must get an opportunity to state a case in response to allegations, is called the *audi alteram partem* principle. See item 4 of the Code: Dismissal.

1.4 Dispute resolution for a dismissal based on misconduct



If an employee should feel that she/he was unfairly dismissed, the dispute must be referred to the CCMA or bargaining council within 30 days after the date of dismissal.

The Amendment Act clarifies the date of dismissal in cases where an employee is dismissed with notice. If an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, the date on which the employee is paid all outstanding salary (whichever is the earlier date).

The LRA caps the amount of compensation that can be awarded for an unfair dismissal. A maximum of 12 months' salary can be awarded as compensation to an employee whose dismissal is found to be substantively and/or procedurally unfair.[28]

It is calculated at the employee's rate of remuneration on the date of dismissal.

2. DISMISSAL FOR INCAPACITY

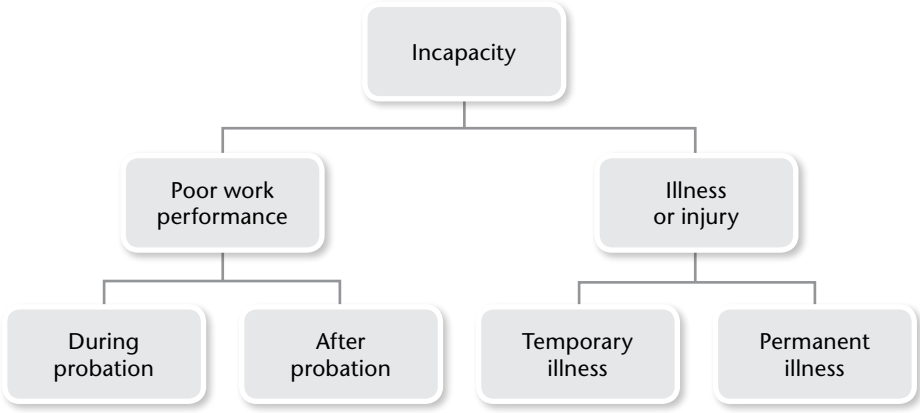
2.1 General

The second recognised reason for an employer to fairly dismiss an employee is for incapacity. Incapacity is regulated in terms of section 188 of the LRA, and

[28] Section 194(1).

it is refers to cases where poor work performance or ill health or injury renders the employee incapable to perform her/his duties.

Incapacity involves some form of behaviour, conduct or inability which is neither intentional nor negligent. A dismissal based on incapacity is, therefore, known as a 'no-fault' dismissal.



It is sometimes difficult to determine whether an employee's conduct constitutes misconduct or incapacity.

> **Example:** D works at Hairdresser B. She highlights a client's hair and it turns out purple instead of blonde. Is D guilty of misconduct or poor work performance?

Sometimes there is a very fine line between incapacity and misconduct. This was illustrated in *Boss Logistics v Phopi & others*.[29] Here, the employee pretended during the job interview to be an expert sales person, but this proved to be false later. The employer decided not to provide the employee with counselling, training or assistance, since the person's initial deception had seriously breached the trust relationship. It was found that where a senior employee misrepresented her/his experience and qualifications, there is no duty on the employer to provide such employee with counselling or training.[30]

Another area where the 'fine line' may be come across, would be in the case of substance abuse. If an employee is found to be drunk on duty, it will amount to misconduct and warrant dismissal. However, if the employee alleges that she/he is an alcoholic, the employer should rather consider incapacity (and not misconduct) as the ground for dismissal, because the Code: Dismissal[31] requires employers to regard alcoholism and drug abuse as incapacity, and

[29] (2010) 31 *ILJ* 1644 (LC).
[30] 1652H-1653B.
[31] Item 10(3).

recommends counselling and rehabilitation rather than dismissal.[32] The circumstances of the case will indicate whether it is a matter of misconduct or of incapacity based on substance abuse.[33]

Since dismissal for incapacity is regarded as a form of no-fault dismissal, the process is more accommodating and collaborative that the process for a misconduct dismissal.

2.2 Poor work performance during probation

For purposes of poor work performance, the LRA distinguishes between employees on probation and employees who have completed their probationary period.

Since one of the purposes of probation is to determine whether an employee can perform the job to which she/he has been appointed, the LRA still requires the employer to act fairly towards a probationary employee. In order to do this, The Code: Dismissal, however, compels an employer to give the employee on probation the following assistance before she/he can be dismissed for poor work performance:

- Evaluation, instruction, training, guidance or counselling needed to perform her/his duties during this period.
- The employer must make clear to the employee what the performance standard is, and where she/he falls short.
- The employer must give the employee assistance and an opportunity to improve.
- The employer should measure the progress and give feedback.
- The required assistance and the period of probation will be determined by the nature of the job.
- If an employee is dismissed during the probationary period, the employee should have an opportunity to respond to the allegations, and she/he may also be assisted by a union representative or co-employee.

Some employers believe that a probationary employee can be dismissed with 24 hours' notice and without any regard to procedure. That is a fallacy.

A probationary employee is protected against unfair dismissal and enjoys the protection of the BCEA and the LRA. This would, for example, mean that a probationary employee, before being dismissed for misconduct, is entitled to a disciplinary hearing in terms of the Code: Dismissal and the employee must be given notice as required by the BCEA.

To address poor work performance in cases of probation is problematic. The purpose of probation is to see if the employee can do the work. If the

[32] See n 26 above.
[33] Items 8 and 9.

employee cannot, the question is to what extent the employer must help the employee.

> **Example:** K is a permanent employee and L is a probationary employee. Both do the same job, and both struggle with Excel spreadsheets. Their supervisor shows them how Excel works. He provides them with further training and with a detailed manual. Assume further, that after two months both still struggle with Excel. It would be fair to not make L's appointment permanent, based on poor work performance. It might not be fair, at this stage, to dismiss K for poor work performance.

The reason for dismissing a probationary employee can be 'less compelling' than those for dismissing an employee whose appointment has been confirmed.[34]

2.3 Poor work performance after probation

After probation, once an employee has been permanently appointed, an employer should be careful when considering dismissal of the employee for poor work performance. The employer should consider other ways, short of dismissal, to remedy the matter. Before an employer can dismiss an employee on this basis, the employer should:

- investigate to determine the reasons for the unsatisfactory performance,
- give appropriate evaluation, instruction, training, guidance or counseling,
- give the employee a reasonable period of time to improve,
- if the employee then continues to perform unsatisfactorily, she/he can be dismissed for poor work performance, and
- during this process the employee has the right to be heard and to be assisted by a union representative or a co-employee.

2.4 Ill health or injury

The Code: Dismissal distinguishes between temporary or permanent illness or injury. The LRA allows for the dismissal of ill or injured employees. By way of the provisions discussed below, it aims to provide job security in that an employer is compelled to:

- consider alternatives before dismissal, and
- get input from the employee on alternatives before the employee is dismissed.

The Code: Dismissal specifically states that an employer should attempt to accommodate an employee injured on duty, in the workplace.[35] This means

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[34] Item 8(1)(*j*).

[35] Item 11. The LRA protects an employee against unfair dismissal in these circumstances, and the COIDA and UIA can provide compensation under certain conditions. This forms

that employers may adopt the most cost-effective means that are consistent with effectively removing the barrier to a person being unable to perform the job and enjoy equal access to the benefits and opportunities of employment. This would include:

- adapting existing facilities to make them accessible,
- reorganising work stations,
- securing alternative employment, and
- adapting the duties or work circumstances to accommodate the disabililty.

The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer. Unjustifiable hardship may be described as action that requires significant or considerable difficulty or expense, and would substantially harm the viability of the enterprise.

The LRA aims to prevent employers from dismissing employees because of injury or illness.[36] In cases of temporary illness, the question whether an employee can be dismissed and after what period of absence, is even more difficult. This is due to the fact that because the illness or injury is temporary, the possibility exists that the employee can return to her/his previous position.

In *Bhengu & another and Transnet Freight Rail*,[37] two employees insisted that they were too ill to work. They persisted with this while failing to provide any proof of their illness and they did not co-operate with the employer's efforts to accommodate them. They were consequently dismissed and the commissioner found their dismissals to be fair.

In *Williams and Diesel-Electric Cape (Pty) Ltd*,[38] an employee was dismissed for constantly arriving late for work. The arbitrator found the dismissal to be unfair because the employer failed to take into account that the employee suffered from a medical condition which required him to use (unreliable) public transport. Although the employer was aware of the medical condition, he failed to endeavour to accommodate the employee. The arbitrator found the dismissal unfair.

Substantive fairness in cases of dismissal for injury or illness would therefore entail the following:

- the employer must make an informed decision,
- the employer must determine whether or not the employee is capable of performing the work, and
- if the employee is not capable the employer must:

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part of the 'decent work' agenda, namely to prevent injuries but also to provide compensation if an employee is injured.

[36] This is an important aspect of 'decent work'. Employees should not depend indefinitely on grants and compensation payments, but should preferably return to work and be given the opportunity to earn a living despite their incapacity.

[37] (2013) 34 *ILJ* 2711 (BCA).

[38] (2013) 34 *ILJ* 1870 (BCA).

- determine the extent to which the employee is able to perform the work,
- 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.

Procedural fairness would entail that:

- the employee gets an opportunity to respond and make suggestions (the employee may be assisted by a co-employee or union representative),
- the employer must consult with the employee,
- the employer must consider the available medical information, and
- the employer must attempt to accommodate the employee where reasonably possible.

The following checklist can be used to ensure procedural fairness in cases of temporary as well as permanent illness or injury:

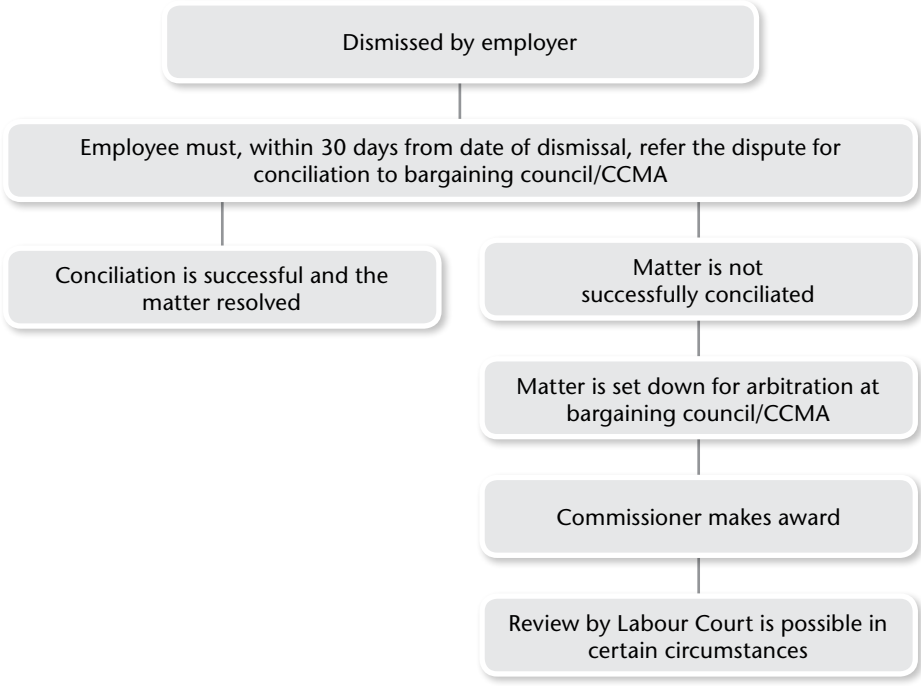
Did the employer take the following into account?	Yes/No	Finding
1. The nature of the job		Employer will have to be able to substantiate the answer, if yes, or give a reason why not, if no.
2. The period of absence		
3. The seriousness of the illness or injury		
4. The possibility of securing a temporary replacement for the ill or injured employee		
5. The degree of incapacity		
6. The cause of the incapacity: if the employee is incapacitated as a result of a work-related illness or injury, the obligation on the employer to accommodate the incapacity of the employee is more onerous		
7. The availability of any suitable alternative work or the adaptation of duties or work circumstances to accommodate the employee's disability		

Injury as a result of a workplace accident deserves additional comment. Employees who become disabled during employment should, where practicable, be reintegrated into work. If an employee is, or becomes a person with a disability, the employer should keep in touch with the employee and where practicable, encourage early return-to-work. This may require vocational rehabilitation, transitional work programmes and where appropriate, temporary or permanent flexible working time.[39] For example, in *Tshaka and Vodacom*

[39] See items 9, 10 and 11 of the Code: Disability.

(Pty) Ltd,[40] the dismissal of an employee permanently disabled through injury on duty has been found to be unfair because the employer did not consider all alternatives to retain the employee (for example, alternative positions outside the city where the employee was based). In *Rosh Pinah Zinc Corporation (Pty) Ltd v Muronga,*[41] an employee who was a loader-driver, was injured in a motor vehicle accident not related to the work, and could no longer perform his duties. The employer accommodated him in various temporary positions (waiting for a permanent position to open up). The employer ultimately offered him a permanent position but on a lower job grade. The employee refused the offer to work at a lower income and the employer dismissed him based on permanent disability. The court found the dismissal to be fair.

2.5 Dispute resolution for a dismissal based on incapacity



Integrated example: It has been said earlier that it is important not to put the law into separate compartments. In a practical situation the possible impact of the law in totality should be taken into account. This can further be illustrated by way of an example where an employee has been injured.

[40] (2005) 26 *ILJ* 568 (CCMA).
[41] (2013) 34 *ILJ* 2748 (Nm). The case was heard in the Namibian High Court and, as there was no Namibian judicial precedents, South African law had been used.

P works for L as a painter. While painting he fell off the scaffolding, broke his neck and is now paralysed. K also works as a painter for L and also fell off the scaffolding. He only broke his arm.

Depending on the circumstances, the following laws apply (remember that this is only to illustrate the interaction between the various Acts; the circumstances of the incident will obviously also influence the claims):

- LRA: This Act protects them against unfair dismissal. Neither P, who is permanently incapacitated, nor K, who is temporarily incapacitated, can be dismissed unless the employer complies with substantive and procedural fairness as discussed above.
- BCEA: This Act regulates sick leave and will determine the period of absence.[42]
- EEA: This Act deals with the prohibition of discrimination on the basis of disability and people with disabilities also qualify as designated employees. Depending on circumstances this might be relevant.[43]
- COIDA: Since both P and K were injured on duty they will probably qualify for compensation in terms of the COIDA.[44]
- If P and K do not qualify for a benefit in terms of the COIDA they may claim from the UIA.

3. DISMISSAL BASED ON OPERATIONAL REASONS

3.1 The definition of operational requirements

A dismissal based on operational reasons is regarded as a 'no-fault' dismissal, because the termination does not result from the actions or fault of the employee. The term 'operational requirements' is defined in the LRA,[45] and the definition distinguishes between four broad categories of operational requirements:

- economic needs,
- technological needs,
- structural needs, and
- similar needs.

An employer's *economic needs* and the dismissal of employees as a result of these needs relate to the financial management of the enterprise including financial

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[42] See discussion in ch 4, para 3.2 above.

[43] The term 'disability' is not defined in the LRA, but the EEA defines a person with disability as a person with a permanent or recurring illness that renders the performance of a job impossible (s 1). The EEA requires employers to make 'reasonable accommodation' for employees with disabilities (s 15(2)(*c*)). In *Wylie v Standard Executors & Trustees* (2006) 27 *ILJ* 2210 (CCMA), the CCMA held that the employer's duty to provide reasonable accommodation under the EEA is more onerous than the LRA's requirements with regard to disabled employees. Also see item 9 of the Code: Disability.

[44] See ch 7, para 6 above.

[45] Section 213.

difficulties experienced by the business as a result of changes in the market, a decrease in demand for its products, a decrease in production itself, in government subsidies or the cost implications of compliance with the BCEA.

Technological needs of an organisation refer to the introduction of new technology, for example, machinery/computers that lead to the redundancy of employees.

Structural needs relate to the redundancy of posts consequent to the restructuring of an employer's enterprise, which might be, for example, as a result of a merger.

Similar needs constitutes a broad category that has to be determined with reference to the specific circumstances of each case.

Examples of similar needs are:
- incompatibility, and
- breakdown in the trust relationship

3.2 Number of employees affected and operational reasons

The number of employees that will be dismissed, will determine the process and related fairness requirements which should be followed. The LRA makes two distinctions in this regard:

- big and small employers, and
- large- and small-scale retrenchments.

Big employer

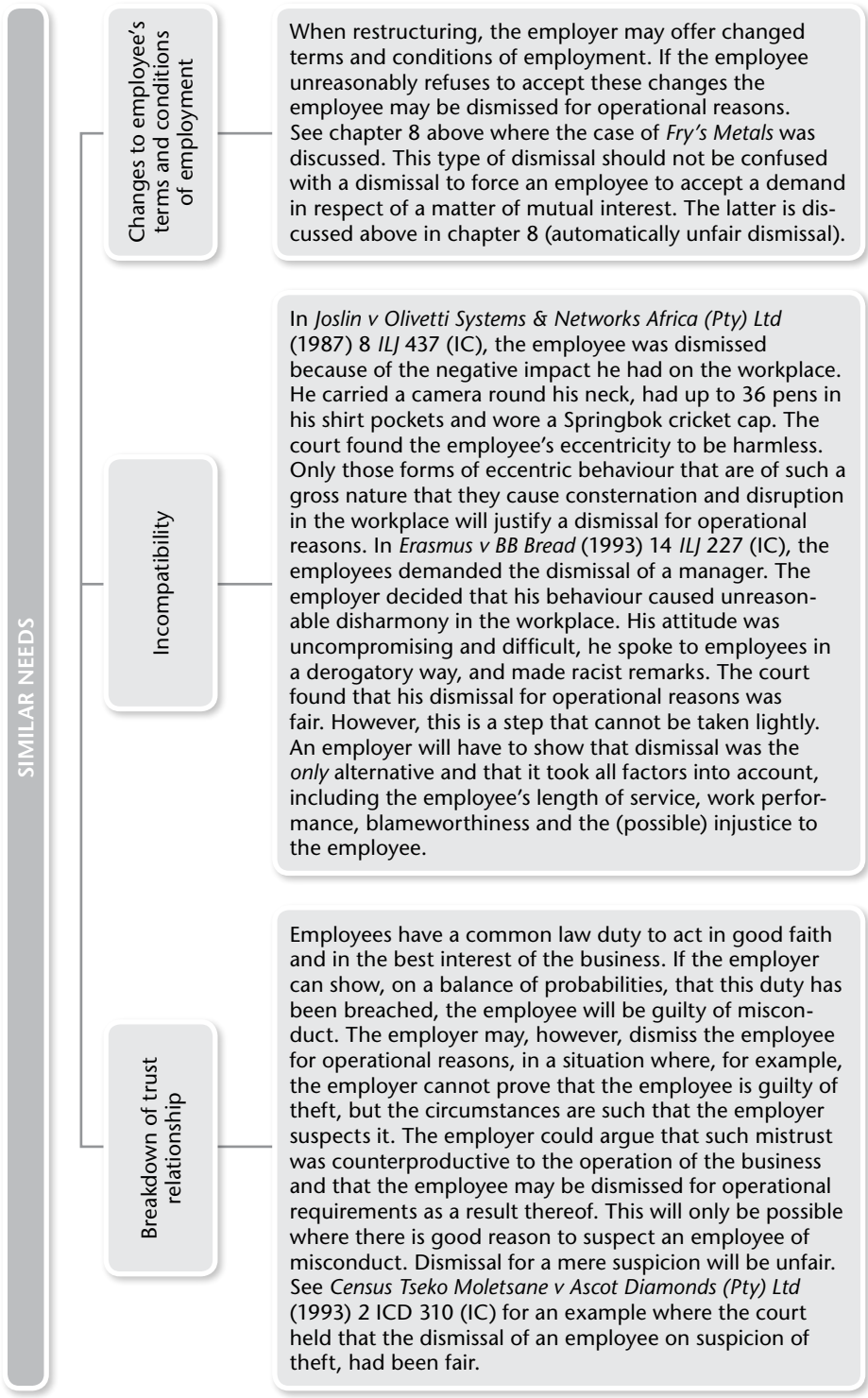
A big employer is an employer that employs more than 50 employees

Small employer

A small employer is an employer that employs fewer than 50 employees

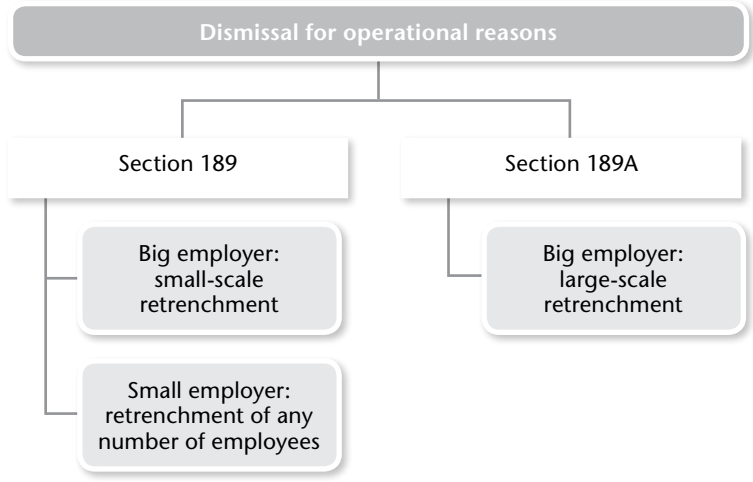
The LRA refers to a large-scale retrenchment and by implication the opposite would be regarded as a small-scale (or normal) retrenchment.

A large-scale retrenchment will be where:
- the employer employs more than 50 but not more than 200 employees, and 10 employees are dismissed, or
- the employer employs more than 200, but not more than 300 employees, and 20 employees are dismissed, or
- the employer employs more than 300, but not more than 400 employees, and 30 employees are dismissed, or


SIMILAR NEEDS
Changes to employee's terms and conditions of employment
When restructuring, the employer may offer changed terms and conditions of employment. If the employee unreasonably refuses to accept these changes the employee may be dismissed for operational reasons. See chapter 8 above where the case of *Fry's Metals* was discussed. This type of dismissal should not be confused with a dismissal to force an employee to accept a demand in respect of a matter of mutual interest. The latter is discussed above in chapter 8 (automatically unfair dismissal).
Incompatibility
In *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1987) 8 *ILJ* 437 (IC), the employee was dismissed because of the negative impact he had on the workplace. He carried a camera round his neck, had up to 36 pens in his shirt pockets and wore a Springbok cricket cap. The court found the employee's eccentricity to be harmless. Only those forms of eccentric behaviour that are of such a gross nature that they cause consternation and disruption in the workplace will justify a dismissal for operational reasons. In *Erasmus v BB Bread* (1993) 14 *ILJ* 227 (IC), the employees demanded the dismissal of a manager. The employer decided that his behaviour caused unreasonable disharmony in the workplace. His attitude was uncompromising and difficult, he spoke to employees in a derogatory way, and made racist remarks. The court found that his dismissal for operational reasons was fair. However, this is a step that cannot be taken lightly. An employer will have to show that dismissal was the *only* alternative and that it took all factors into account, including the employee's length of service, work performance, blameworthiness and the (possible) injustice to the employee.
Breakdown of trust relationship
Employees have a common law duty to act in good faith and in the best interest of the business. If the employer can show, on a balance of probabilities, that this duty has been breached, the employee will be guilty of misconduct. The employer may, however, dismiss the employee for operational reasons, in a situation where, for example, the employer cannot prove that the employee is guilty of theft, but the circumstances are such that the employer suspects it. The employer could argue that such mistrust was counterproductive to the operation of the business and that the employee may be dismissed for operational requirements as a result thereof. This will only be possible where there is good reason to suspect an employee of misconduct. Dismissal for a mere suspicion will be unfair. See *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* (1993) 2 ICD 310 (IC) for an example where the court held that the dismissal of an employee on suspicion of theft, had been fair.

- the employer employs more than 400, but not more than 500 employees, and 40 employees are dismissed, or
- the employer employs more than 500 employees, and 50 employees are dismissed.

It is clear from the definition of a large-scale retrenchment in terms of section 189A, that only a big employer will be bound by this. The diagram below illustrates the process prescribed in the LRA for each of these dismissals.



This can be further illustrated by the following set of facts:

Example: B employs 500 employees and retrenches five employees. S employs 10 employees and retrenches six employees. BB employs 250 employees and in January 2010 he retrenched five employees, in July 2010 he retrenched another 10 employees and in November 2010 he retrenched a further 10 employees.

- B is a big employer, but the retrenchment does not constitute a large-scale dismissal. The dismissal in this case would therefore have to be in accordance with section 189.
- S is a small employer. The LRA does not make provision for a large-scale dismissal by a small employer. S, as a small employer, will therefore retrench employees in accordance with section 189 in this example (and in all further retrenchments).
- BB is a big employer. The three retrenchments, if viewed separately, would all qualify as small-scale retrenchments. However, section 189A states that the number of employees retrenched in the last 12 months will be used to determine if a retrenchment constitutes a large-scale retrenchment. In this case, it will amount to a large scale retrenchment, since there were 250 employees in the workplace of whom, during the

past 12 months, 25 employees have been dismissed. BB will have to follow the procedure prescribed in section 189A.

3.3 Substantive fairness

Substantive fairness in this context will mean that the employer must truly have a economical, technological, structural or similar need to dismiss employees. This is difficult to determine because employers have the right to run their businesses in the way they see fit and profitable.

Example: If employer Q wants to buy a machine to make the business more profitable, that is Q's prerogative. If this means that five employees, V, W, X, Y and Z, will lose their jobs, the question is whether the court or the employees can prevent Q from buying the machine.

The courts are generally hesitant to interfere in the business decisions of organisations. In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[46] it was stated that the court should not 'second-guess' the employer's commercial reasons for taking a specific decision to retrench employees. In later decisions the courts adopted a stricter approach and held that the employer's version would not merely be accepted on face value.[47] Rather, the court itself should determine whether retrenchment had a reasonable basis and commercial rationale. Later, the court held that the retrenchment should remain a matter of last resort.[48]

In *Welch v Kulu Kenilworth (Pty) Ltd & others*,[49] a company which struggled financially retrenched employees in order to save the business. The court held that it would not interfere with a reasonable decision taken by the company, even if it meant closure of the business. Here, the company was trading in insolvent circumstances and the court held that it could not be required of shareholders or directors of an increasingly insolvent company to 'fritter away their own resources to keep the entity afloat'.

The substantive fairness of a dismissal based on operational requirements must be determined with reference to the facts and circumstances of every case. Section 189A includes a definition of substantive fairness which should be used to in determining whether a large-scale retrenchment by a big employer is substantively fair.[50] According to section 189A, a dismissal will be substantively fair for operational reasons if the following requirements are met:

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[46] (2000) 21 *ILJ* 129 (LAC).
[47] *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 *ILJ* 2264 (LAC).
[48] See *CWIU & others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC).
[49] (2013) 34 ILJ 1804 (LC).
[50] This definition seems to have limited managerial prerogative to some extent as far as retrenchments are concerned (*SATAWU v Old Mutual Life Assurance Company South Africa Ltd* [2005] 4 BLLR 378 (LC)).

- the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs,
- the dismissal was operationally justifiable on rational grounds,
- there was a proper consideration of alternatives, and
- selection criteria had been fair and objective.

Since the definition was only added to section 189A, there is uncertainty whether the same principles will apply to section 189 retrenchments.

The Amendment Act recommends the removal of this definition in section 189A(19) because of its uncertainty. The removal of this section will allow courts to develop case law with regard to the circumstances and facts of every case.

3.4 Procedural fairness in terms of section 189

The process for retrenchment is extensive and important to ensure fairness. In fact, it is clear from the definition that certain aspects of substantive and procedural fairness overlap. The courts are very strict when scrutinising whether the process prescribed by the LRA has been followed.

In *Maritz v Calibre Clinical Consultants (Pty) Ltd & another,*[51] the court held that employees are entitled to a 'high degree' of fairness when retrenched. In this case, the court found that retrenchment was unfair because the employer did not approach the process in a *bona fide* manner and with an open mind in respect of alternatives or measures to avoid retrenchment.[52]

The process prescribed by section 189 remains the *basic* retrenchment process, and it is compulsory for *small as well as big employers* in the process of *small-scale* retrenchments to follow this process carefully.

In terms of section 189 there are seven requirements for a dismissal by a small employer or a small-scale dismissal by a big employer. Again, procedural fairness can be ensured by ensuring compliance with the requirements below:

Requirement	✓
Was there prior consultation? Consultation must take place when the employer *contemplates* dismissal; in other words, at the stage when the employer has *not reached a final decision* to dismiss, but has merely foreseen the possibility. In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) the Labour Appeal Court interpreted this to mean 'at the earliest opportunity'.	

[51] (2010) 31 *ILJ* 1436 (LC).
[52] Paragraph 30.

Requirement	✓
Whom did the employer consult with? It is also important to know whom the employer must consult with: • First, the person or group indicated in a collective agreement must be consulted. • If there is no collective agreement, a workplace forum (if there is one) and any registered trade union whose members are likely to be affected by the dismissals, must be consulted. • If there is no workplace forum, the employer must consult with any registered trade union whose members are likely to be affected by the proposed dismissals. If there is no such union, the employer must consult the employees (or their nominated representatives) likely to be affected by the proposed dismissals.	
How did the parties consult? Consultation in terms of section 189(2) means to 'attempt to reach consensus'. A single meeting is not sufficient consultation with employees. In *Jenkin v Khumbula Media Connexion (Pty) Ltd* [2010] 12 BLLR 1295 (LAC), the court found that a single meeting during which the appellant employee was told that the respondent was considering retrenchments and a severance package, was not sufficient to constitute consultation. Such an abrupt process fell short of preretrenchment requirements as set out in the LRA, particularly if one looks at the aim of such consultation. The appellant's consequent dismissal was thus procedurally unfair. In *Association of Mineworkers & Construction Union & others v Shanduka Coal (Pty) Ltd* (2013) 34 *ILJ* 1519 (LC), the court held that a retrenchment was not unfair where consultation failed because the union was evasive and did not cooperate throughout the process.	
Did they attempt to reach consensus? There are six matters about which the parties must endeavour to reach agreement/consensus: • appropriate measures to avoid the dismissals, • appropriate measures to minimise the number of dismissals, • appropriate measures to change the timing of the dismissals, • appropriate measures to mitigate the adverse effects of the dismissals, • the selection criteria, and • severance pay. In *Super Group Supply Chain Partners v Dlamini & others* (2013) 34 *ILJ* 108 (LAC) the employer did not consult with the employees but invited them to come and speak to the employer. The court held the dismissal to be unfair.	
Did the employer disclose relevant information in writing? Sections 189(3) and 16 of the LRA, which compel an employer to disclose *relevant* information, regulate this. The other party's right to demand information is thus not unrestricted. In terms of section 16(5), four categories of information need *not* be disclosed, namely information that: • is legally privileged, • the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court, • is confidential and, if disclosed, may cause substantial harm to an employee or the employer, or • is private personal information relating to an employee (unless that employee consents to the disclosure of that information).	

Requirement	✓
The CCMA, in arbitration, may order the disclosure of two of these categories of information under certain circumstances (discussed below).	
Did the employees get a chance to respond? Should the employer not allow the union or employee representative or workplace forum or any other relevant party to make representations during consultation, the dismissal will be procedurally unfair.	
Did the employer consider all representations? The employer should consider the representations in a genuine attempt to retain as many employees as possible. The employer must respond to the representations and give reasons if and why they are not acceptable.	
Did the employer use fair and objective selection criteria? The Code: Dismissal Operational Requirements acknowledges the criterion of LIFO (last in, first out), which is widely accepted as fair and objective. It can, however, amount to indirect discrimination in some instances, for example, if only affirmative-action appointments (the last appointed employees) are affected. The criterion FIFO (first in, first out) will also amount to indirect discrimination based on age. In *Super Group Supply Chain Partners v Dlamini & others* (2013) 34 *ILJ* 108 (LAC), the company failed to use selection criteria and opted for an 'open competition' where everyone had to apply for the open positions. This was found to be unfair.	
Did the employer pay severance pay? The payment of severance pay is regulated in section 41 of the BCEA. An employer must pay the employee a minimum of one week's salary per completed year of continuous service. The employer's duty to pay severance pay is not absolute. If an employee unreasonably refuses to accept the employer's offer of alternative employment with it or any other employer, the employee will forfeit entitlement to severance pay. In *Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics v CEPPAWU* (2014) 35 ILJ 140 (LAC), retrenched employees refused the employer's offer of alternative employment on the same or increased salary. The court found that they acted unreasonably and forfeited their severance pay. Employees who were offered alternative employment but with a decrease in salary would not forfeit their severance pay if they refuse alternative employment.	

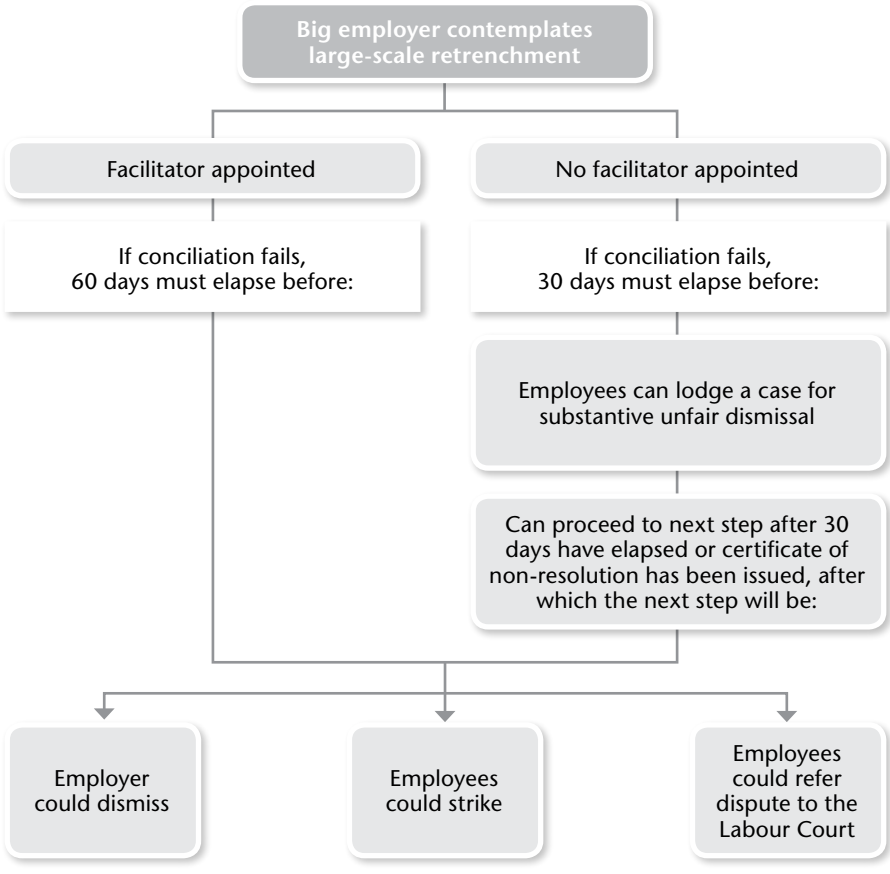
3.5 Procedural fairness and large-scale dismissals by big employers

The requirements for procedural fairness as prescribed in section 189 are also applicable to large-scale dismissals by big employers. In 2002 the LRA was amended with section 189A being added. This section introduces additional requirements for procedurally fair dismissals by big employers undertaking large-scale retrenchments.

The most significant amendment deals with the involvement of a facilitator in the process to attempt to reconcile the parties and reach agreement on important matters. The employer can request facilitation at the time that it starts with

consultation with the employee representatives. The employees' representatives can also request facilitation if they represent the majority of employees.

The facilitation must be done in line with the guidelines set by the DoL and the parties are bound by the following time limits and dispute resolution routes set in the LRA.



3.6 Dispute resolution for unfair large-scale retrenchments

If facilitation and conciliation are unsuccessful, the parties can choose to refer a dispute about the *substantive fairness* of the dismissal to the Labour Court. This is an *exception* to the normal rule that rights disputes must be referred for adjudication and may not be the reason for strike action. The LRA gives employees a choice to, in the case of a dispute about substantive fairness, either resolve the dispute by way of adjudication in the Labour Court or by way of strike action. Once they have elected their appropriate course of action they may not change it later.[53]

[53] The only other instance where the LRA allows this exception where a rights dispute may be resolved through strike action, is in the case of organisational rights.

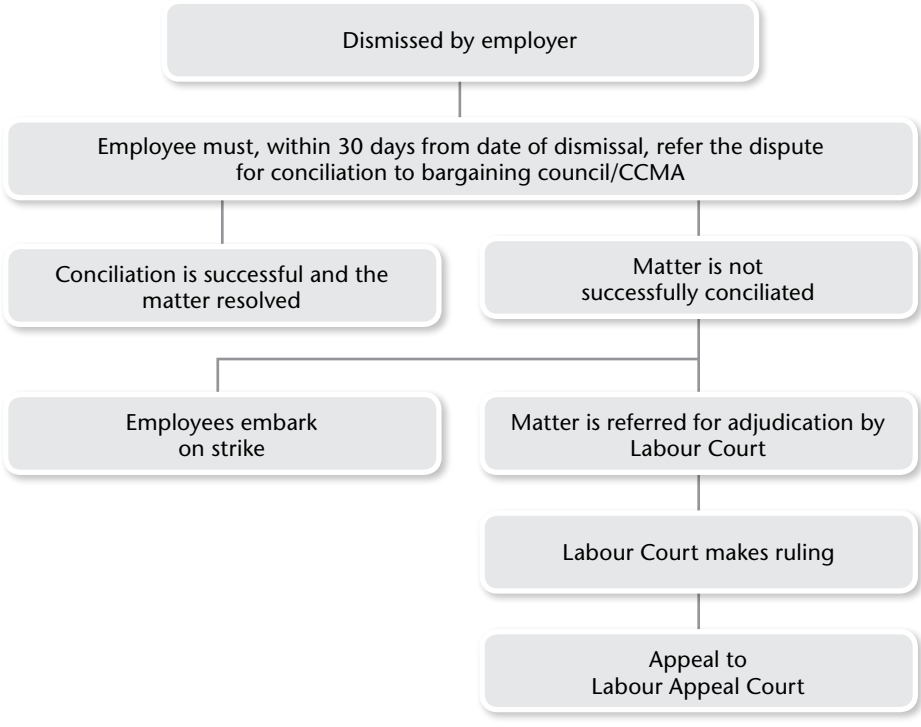
Employees may also challenge the *procedural fairness* of the dismissal. Such a claim must be brought within 30 days after the employer gave notice of its intention to terminate the employment contracts.[54] The employees may approach the Labour Court by way of application for any of the following orders:

- compelling the employer to comply with a fair procedure,
- interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure,
- directing the employer to reinstate an employee until it has complied with a fair procedure, or
- making an award of compensation.

The Act sets certain time limits for retrenchments where facilitation is allowed.

3.7 Dispute resolution for unfair small-scale retrenchments

Dispute resolution for a dismissal in terms of section 189, in other words a small-scale dismissal, is as shown in the diagram below.



In this regard there is also an exception where one employee is retrenched. Such an employee has the choice to refer the dispute either to the CCMA or to

[54] If no notice is given, the date on which the employees are dismissed. The Labour Court may, on good cause shown, condone any failure to comply with this time limit.

the Labour Court, so as not to limit a single employee, who may not be able to afford the legal costs of Labour Court litigation.

The Amendment Act proposes that the jurisdiction of the CCMA should be broadened to allow employees of an employer, which employs less than 10 employees, to refer a dispute about unfair retrenchment to the CCMA. This is irrespective of the number of employees dismissed or whether the dispute deals with substantive or procedural fairness.

4. OTHER ASPECTS OF DISPUTE RESOLUTION FOR LABOUR MATTERS

The regulation of dismissal is important because employers must be able to run their businesses effectively and productively, with the right to 'hire and fire' particularly important in this context. The LRA, therefore, allows employers to dismiss employees, provided that a fair reason and a fair procedure had been followed. This is in line with ILO 'decent work' guidelines. This also echoes the words of Kahn-Freund (quoted in chapter 1 above) about the purpose of labour law, which is to balance the interests of employers and employees.

The LRA (along with the BCEA) was designed to provide a 'one-stop shop' for all labour matters, as opposed to the more cumbersome processes under the 1956 LRA and the common law. The LRA aims to create a fast, efficient and simple dispute-resolution mechanism. Some aspects aimed at simplifying the process are:

- The prescription periods are shorter. An unfair dismissal dispute must, for example, be referred within 30 days after dismissal. In a normal civil case for an unpaid debt, for example, the prescription period is three years.
- The manner in which cases may be referred is simple. The referring party must complete a short form and must fax or post it to the other party (and retain proof that it has been sent). In a civil claim where summons is issued, it must be served on the other part by the sheriff of the court.
- The involvement of legal representatives (attorneys and advocates) in the process, especially at the CCMA, is limited.

The dispute resolution routes have already been discussed above for every type of dismissal. It is important to also highlight the following:

4.1 Conciliation

If, after the internal processes in the workplace have been followed and completed, the employee wants to challenge the fairness of a dismissal, the *reason* for the dismissal will again determine the dispute resolution route.

In almost all cases of alleged unfair dismissal, the LRA requires that the matter must first be referred for conciliation.

If conciliation is unsuccessful, a dispute about a dismissal based on misconduct or incapacity will go for arbitration, while a dispute about an automatically unfair dismissal must go for adjudication to the Labour Court. If a dismissal dispute based on operational requirements is not conciliated successfully, it may be referred to the Labour Court for adjudication. Note the exceptions in this regard for a dispute about a dismissal for operation reasons where a single employee is involved and in the case of a large-scale dismissal in terms of section 189(A).

The Act determines that a case must be conciliated within 30 days of the date of referral. Conciliation is where a third party (commissioner) assists the disputing parties to bring them to a settlement. The commissioner must determine the process to be followed and it can include mediation, fact-finding, recommendations and advisory arbitration.

If conciliation is unsuccessful, the commissioner must issue a certificate stating that the dispute was not conciliated.

4.2 Arbitration

It is important to remember that arbitration by the CCMA is not a stop-over on the way to the Labour Court. The CCMA is a separate dispute-resolution body with jurisdiction to conduct arbitration. The LRA specifically determines when a dispute must go for arbitration and when for adjudication. In the context of dismissal, the following disputes must be referred for arbitration:

- unfair dismissal of an employee for misconduct or incapacity,
- constructive dismissal as a result of a transfer of a business as a going concern, and
- where the employee does not know the reason for the dismissal.

Arbitration can take place at a bargaining council (if there is one registered for the area and sector in which the employee worked) or to the CCMA (if no council exists).

The award by the arbitrator is *final*. This means that such award can only be taken on *review*.

If a commissioner has issued a certificate stating that a dispute is unresolved, a party may within 90 days refer a dispute for arbitration.

The LRA gives wide powers to the arbitrator. The arbitrator may conduct the arbitration in a manner that she/he considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

4.3 Reviews and appeals

In terms of the common law it is not possible to take an arbitration award on appeal. It only allows for review.

The difference between appeal and review is that an appeal is a request to a higher court to change or modify a decision. A review is concerned with the correctness of the legal matters of a decision. Section 145 of the LRA regulates reviews of arbitration awards.

If a party to a dispute alleges that there was a defect in any arbitration proceedings, she/he may apply to the Labour Court for an order setting aside the arbitration award. This application must be filed within 6 weeks' from the date of receipt of the award. The Amendment Act further proposes that once a party filed for a review application she/he must apply for a court date within 6 months' of filing of the application.

A defect would be where:

- the commissioner committed misconduct, a gross irregularity or exceeded his powers or
- where an award has been improperly obtained.

Once the application for review is filed the enforcement of the award is suspended. The Amendment Act proposes that the institution of review proceedings does not suspend the operation of an arbitration award unless the applicant for review can furnish security to the satisfaction of the court.

A review in the context of the LRA has been given a wider interpretation than the common-law concept, because the LRA provides for compulsory arbitration.[55]

In the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[56] the test for review was formulated as follows:[57]

> 'Is the decision reached by the commissioner, one that a reasonable decision-maker would not reach on all the material available to him or her?'

This was confirmed in *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[58] where the Supreme Court of Appeal warned that this test does not mean that there is, since *Sidumo*, a more generous standard of review. For example, where there was a material error of fact or where there was not enough weight or relevance given to a particular fact, that will not be sufficient for a review.

Section 157 of the LRA allows for an appeal to the Labour Appeal Court against an order or ruling of the Labour Court (except on constitutional matters). A party may only appeal against an order/ruling of the Labour Court.

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[55] Section 145.
[56] [2007] 12 BLLR 1097 (CC).
[57] Paragraph 69.
[58] (2013) 34 *ILJ* 2795 (SCA).

4.4 Remedies

The primary remedy for unfair dismissal is reinstatement, which must be ordered except in the following circumstances, when compensation will rather be awarded:[59]

- the employee does not wish to be reinstated or re-employed,
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable,
- it is not reasonably practicable for the employer to reinstate or re-employ the employee, or
- the dismissal is unfair only because the employer did not follow a fair procedure.

The LRA caps the amount of compensation that can be awarded for an unfair dismissal. A maximum of 12 months' salary can be awarded as compensation to an employee whose dismissal is found to be substantively and/or procedurally unfair.[60]

It is calculated at the employee's rate of remuneration on the date of dismissal.

The compensation awarded to an employee whose dismissal is automatically unfair must be 'just and equitable' in all the circumstances, but not more than the equivalent of 24 months' remuneration.[61]

4.5 Predismissal inquiry

In some instances the employer may, with consent of the employee, apply for a predismissal inquiry (previously called 'predismissal arbitration'). The benefit of this process is that it avoids a repetition of processes, namely an internal disciplinary hearing and a possible later challenge of the dismissal dispute in arbitration. It saves time and money.

4.6 Jurisdiction of the courts in labour disputes

The LRA aimed to give exclusive jurisdiction to specialist courts, which would mean that labour claims could no longer be based on delictual or contractual grounds and therefore it could not be heard by the High Court (but see the discussion below).

The LRA envisaged three specialist labour dispute institutions to resolve matters, namely the CCMA, the Labour Court and the Labour Appeal Court. The processes at the CCMA were discussed above. The Labour Court has the same status as any division of the High Court. The Labour Court has wide powers as far as adjudication of various disputes is concerned. Review of

[59] Section 193(2).
[60] Section 194(1).
[61] Section 194(3).

arbitration awards will also go to the Labour Court. As far as dismissal is concerned, the following disputes must be referred to the Labour Court:

- automatically unfair dismissal,
- dismissal as a result of a strike or lock-out, and
- dismissal for operational reasons.

The drafters of the Act had not foreseen the conflict that would arise between the different courts as a result of the hierarchy of courts set out in the Constitution.

In terms of the Constitution, the Constitutional Court is the highest court in all constitutional matters and the Supreme Court of Appeal is the highest court of appeal in all other matters. The resultant effect was that the Labour Appeal Court was no longer the highest court of appeal in labour matters, since the Supreme Court of Appeal was actually the apex court.

This position was changed by the Constitution Seventeenth Amendment Act, 2012 (hereafter 'CSAA').[62] This Act determines that the Constitutional Court is the highest court in all matters, whether constitutional or not. The Supreme Court of Appeal is no longer the highest court in respect of labour or competition matters. This restores the apex status of the Labour Appeal Court in labour matters. The Labour Appeal Court is thus the highest court of appeal for all labour matters.[63]

Another debate which still continues relate to whether the Labour Court or High Court should have jurisdiction in labour matters. This conflict would, for example, arise in the following situation:

Example: Jacob had been dismissed by his employer because he is overweight. He may choose to pursue the case on the basis of an automatically unfair dismissal because the employer discriminated against him. A claim on this basis would be referred to the Labour Court in terms of the LRA. He may also decide to approach the High Court on the basis that the employer infringed his right to fair labour practices in terms of section 23 of the Constitution, or breached the EEA.

Where a public service employee pursues an alleged unfair dismissal under the Protection of Administrative Justice Act,[64] the possibility of forum shopping also exists.

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[62] GN 72 *GG* 36128, dated 1 February 2013.
[63] Superior Courts Act 10 of 2013. Previously, an appeal from the Labour Appeal Court was possible to the Supreme Court of Appeal.
[64] 3 of 2000.

With regard to the jurisdictional conflict between the High Court and Labour Court (as set out above), there is still no resolution. Since this conflict was not addressed in the CSAA or the Employment Equity Amendment Act, the likelihood of forum shopping remains.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which one of the following statements about the substantive fairness of dismissal is *correct*?
   (*a*) An employer with a zero-tolerance approach to alcohol abuse, catches an employee with 0,02 mg of alcohol in the bloodstream. The employer dismisses the employee.
   (*b*) An employee who has been given previous opportunities to rehabilitate from his alcohol addiction arrives drunk at work one morning and the employer dismisses him.
   (*c*) After every lunchtime, Nelson arrives back at the office slightly intoxicated. The effect is that his work after lunch is not up to standard. The employer dismisses him on the basis of poor work performance.
   (*d*) An employee refuses to undergo a breathalyser test and the employer dismisses him for insubordination.
2. Briefly discuss whether the following selection criteria applied by the employer complies with the requirements of LRA:
   'The company will reduce the personnel in its sales department and only five positions will be retained. All employees may apply for these positions and should your application not be successful you will be retrenched. Please note that all employees older than 60 years will not be considered for these positions.'
3. Discuss whether the following employees will be guilty of misconduct:
   (*a*) Company XYZ (in Pretoria) has a policy that allows employees to use cars from the company's car pool for meetings in Johannesburg. All cars must be signed out and signed back in on the same day except with special written permission from the Car Pool Manager. Employee X signs out a car on a Friday morning but does not make it back to Pretoria before closing time. He sends an sms to the Car Pool Manager to say he will return the car on Monday. Is X guilty of misconduct?
   (*b*) Zandi received a study loan from her employer. The terms of the loan stipulates that she must show proof of the expenses relating to her studies and she will be reimbursed accordingly. Zandi bought stationary at Makro for purposes of her studies and also a microwave oven. The employer accuses Zandi of dishonesty in that she used the study loan for personal expenses and dismisses her. Is Zandi guilty of misconduct?

✓ Feedback

1. Option (*b*) is the *correct* statement. An employer must assist an employee with an addiction to rehabilitate and give her/him an opportunity to improve. If the employee persists with her/his drinking habits, she/he may be dismissed. The question dealt with substantive fairness but remember that the employer will still have to hold a meeting where the employee must get an opportunity to state her/his case in order for the dismissal to be fair. Option (*a*) is *incorrect*. In the matter of *General Industries Workers Union of SA obo Thokoane and Lafarge Industries SA (Pty) Ltd* (2013) 34 *ILJ* 2732 (BCAD), it was found that intoxication is a matter of degree, and in determining whether dismissal was appropriate, it must be determined with reference to the circumstances. A blood alcohol level of 0.02 mg probably does not justify dismissal. Option (*c*) is *incorrect*. Although the employer would be able to act against Nelson, it should be on the basis of misconduct but if Nelson showed that he is in fact addicted to alcohol, the employer would have to follow a process to dismiss him based on incapacity. Option (*d*) is *incorrect*. An employee who refuses to undergo a breathalyser test will only be guilty of insubordination if the employer's disciplinary code specifically states that all employees are compelled to undergo breathalyser tests and that refusal will amount to insubordination.
2. The clause does not comply with the requirements of the LRA. An employer must endeavour to reach consensus with the employees on the selection criteria. By leaving the selection to the employees through their applications, is unfair. The employer must lead the process, disclose the selection criteria and it should be subject to scrutiny to determine if it is fair and objective. The criteria discriminate against older employees and will therefore not be fair and objective.

3 (*a*) X will be guilty of misconduct if there was a valid rule which X knew about, and despite this, he breached the rule. In this case it is unclear whether X has breached the rule and whether dismissal was appropriate. The fact that X gave notice of his late return via sms may amount to written notice. This will have to be established during a disciplinary hearing.

3 (*b*) Zandi did breach her duty to act in good faith and was dishonest. There is a breach of trust between the employer and Zandi and the value of the item about which she was dishonest is irrelevant.

RECOMMENDED READING

1. Coetzee F, Patel A & Beerman R 'Section 197 of the Labour Relations Act—Some comments on practical considerations when drafting agreements' (2013) 34 *ILJ* 1658

2. Coetzer N 'Substance over form—The importance of disciplinary charges in determining the fairness of a dismissal for misconduct' (2013) 34 *ILJ* 57
3. Lechwano A 'Incapacity through a new lens: *Samancor* and beyond' (2013) 34 *ILJ* 38
4. Manamela TE 'Failure to obey employer's lawful and reasonable instruction—Operational perspective in the case of a dismissal: *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd* (2013) 25(3) *SA Merc LJ* 418
5. McCann M, Harker-Burnhams N, Albertyn C & Bhoola U *Alcohol, drugs and employment* (2011) Juta
6. Opperman M *A practical guide to disciplinary hearings* (2011) Juta

Part IV

Rules applicable to collective labour law

The power play between employers and employees is best displayed in the engagement of employer and employees through collective labour law. The increasing labour unrest in South Africa in the mining and metal and engineering sector is a clear illustration of this. The LRA and other labour legislation lay down basic rights, duties and remedies to ensure fairness in the employment relationship. These are matters relating to rights that employees have and are called 'rights issues'.

When it comes to creating new terms and conditions of employment ('interest issues' or 'matters of mutual interest') or changing existing terms, there is no legislation specifically regulating the situation. This is because these issues can best be determined by the parties themselves. For example, a court cannot determine an annual increase for employees, or whether a crèche facility at the workplace is obligatory, or whether employees should get Friday afternoons off. It is impossible to regulate these matters of mutual interest. This is where collective bargaining comes into the picture.

The LRA recognises the importance of collective bargaining and supports the mechanism. If collective bargaining can be compared to a boxing match, the LRA can be seen as the organiser of the boxing match and the employers and trade unions are the boxers on opposite sides. The LRA provides the basic rules to protect the boxers both in and outside the boxing ring. This is done, for example, by protecting the right of employees to form and join trade unions and to participate in their activities and those of employers who can form employers' organisations. As a result of the increasing labour unrest in the country, there are calls for labour amendments to facilitate labour harmony in the collective labour law arena.

The LRA regulates the registration of trade unions and employers' organisations. It creates bargaining forums (such as bargaining councils and statutory councils); it guarantees the right to freedom of association; and it regulates organisational rights and strikes and lock-outs.

Once workers are organised in a registered trade union (and employers in an employers' organisation), the power play between workers and employers begins. Employees may endeavour forcing the employer's hand by way of *strike action*, and the employer can exert pressure on employees by way of a *lock-out*. It is accepted that strike action will result in a certain measure of economic hardship for the employer and, provided that the strike has obtained

protected status in terms of the law (in other words, the strike is *not prohibited* and the *prescribed procedures* have been followed), such economic hardship is considered to be part and parcel of the power struggle between employees and their employers. In fact, this is the whole idea! The more the employer is hurt economically, the greater the chance that the strikers' demands will be met.

It is important to know when a strike (or a lock-out) is protected or not, because that will determine the course of action and remedies for employers in the case of a strike, and for employees in the case of a lock-out.

Part IV consists of five chapters. **Chapter 10** deals with the development of trade unions, freedom of association, unions' and employers' rights, and the foundations of collective labour law. **Chapter 11** discusses collective bargaining. **Chapter 12** gives a discussion of workplace forums. The purpose of these forums is to promote employee participation in decision-making in the workplace. At present very few workplace forums have been established. The reason for this is not clear.

Chapter 13 looks into industrial action, namely, strikes and lock-outs. Industrial action (sometimes also called 'collective action') refers to employees acting together to force the hand of the employer. For purposes of industrial action, employers can act individually or collectively with other employers to lock out employees. Industrial action by employees takes the form of strike action, and by employers the form of a lock-out.

Strikes and lock-outs are a reality in the workplace and conflict in the workplace is not necessarily negative. It gives the parties an opportunity to reaffirm their different bargaining strengths and positions. Conflict becomes problematic only if matters get out of hand as a result of the power struggle. That will then undermine the purpose of the conflict.

Another problematic aspect of conflict is that once parties are in a stand-off, the matter will not be resolved without a 'loser' and a 'winner'. In the long run, this may lead to a deterioration of the relationship and it may even spark further friction about other issues.

In the workplace the law wants to ensure healthy and productive conflict that can lead to the resolution of matters of mutual interest. The LRA sets out the manner in which to do this by way of regulating industrial action.

Chapter 14 looks into pickets (in support of protected strike action) and protest action which unions may use to advance their socio-economic rights, such as better education or the e-toll system.

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1. HISTORICAL BACKGROUND TO FREEDOM OF ASSOCIATION AND TRADE UNIONISM IN SOUTH AFRICA

1.1 Colonialisation

During the colonisation of the southern tip of Africa in the 17th century, slavery was at the order of the day and no concept of trade unionism existed.

1.2 Late 1800s to early 1900s

Skilled mineworkers and artisans from overseas (mainly Britain) brought with them the concept of unionism during the latter half of the 19th century. Their unions excluded black workers, who they regarded as cheap unskilled labour that would undermine their job security.

One of the first documented trade unions in South Africa was the Carpenters and Joiners Union which represented skilled white workers recruited from mainly Australia and Europe.

In 1907, black and white miners went on strike because of mine owners attempting to reduce black workers' wages. The strike continued until early 1908 when government passed the Railway Regulations Act[1] to regulate conditions of employment in the mining sector. The provisions of this Act placed the first ban on striking.[2]

When the Union of South Africa was established in 1910, its Constitution ignored the rights of blacks and dealt mainly with conflict in white politics. The Mines and Works Act[3] excluded blacks from all skilled jobs and from certain semi-skilled jobs in the mines. Government continued to pass laws limiting the rights and freedoms of black workers.

In 1919, the Industrial and Commercial Workers' Union was established as the first black workers union.

On the international scene, the ILO was established in 1919 with South Africa being a founding member.

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[1] 13 of 1908.
[2] Other laws had been passed such as the Industrial Disputes Prevention Act 20 of 1909 but it also excluded black employees.
[3] 12 of 1911.

1.3 The 1920s

Many incidents of industrial unrest occurred as a result of attempts by employers to introduce cheap black labour during the 1920s.

Large-scale labour unrest and violent strikes took place on the Witwatersrand in 1922 with the primary causes being the competition for jobs and different remuneration between whites and blacks. This led to the Industrial Conciliation Act[4] (hereafter 'ICA') passed in 1924. The ICA gave unions statutory recognition, introduced a framework for collective bargaining and regulated strikes and lock-outs but still *excluded* black employees.

Moreover, the Wage Act[5] provided for the unilateral determination of wages and conditions of work where there was no agreement under the ICA and in industries falling outside the industrial council system. Unlike the ICA, the Wage Act applied to black workers and wage determinations had to be equal amongst all races.

The South African Trade and Labour Council was formed in 1926. It pursued a policy of open membership for all unions and promoted the establishment of parallel black unions.

The ICA of 1924 was replaced by the Consolidated Industrial Conciliation Act[6] but it did not solve the problem of the dual labour system.

1.4 The 1940s to 1960s

By 1946, union membership increased considerably as a large number of blacks lived in urban areas by then. However, a strike broke out and government responded by amending the ICA to prohibit strikes by blacks. Black trade unionism was shattered.

Under the National Party's apartheid policies from 1948 onwards, white workers continued to prosper at the exclusion of black workers.

The Botha Commission of Inquiry of 1948 investigated labour matters. The findings of the Commission triggered the passing of the Suppression of Communism Act,[7] which was intended to suppress collective organisation by blacks and to divide black trade unionism. Moreover, many black trade unions leaders were arrested and banned. The Commission, however, recommended that black unions should be able to negotiate within the ambit of the statutory system and that strikes by black workers be permissible, but only in certain circumstances. It also proposed that registered unions should be prohibited from engaging in political activities.

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[4] 11 of 1924.
[5] 27 of 1925.
[6] 36 of 1937.
[7] 44 of 1950.

In 1954, the South African Trade Union Council, which later became the Trade Union Council of South Africa (hereafter 'TUCSA'), was formed.[8] Some affiliates of TUCSA came together with members of the Council of Non-European Trade Unions in mid-1950 to form a new body, the South African Congress of Trade Unions (hereafter 'SACTU'), a federation of black unions formed on a non-racial basis. SACTU maintained a link with the political organization, the African National Congress[9] (hereafter 'ANC'), and was active in promoting a political role for unions.[10]

To give further effect to the recommendations of the Botha Commission, the ICA was repealed and a new ICA[11] was passed. The latter Act was the first statute which extensively dealt with freedom of association and trade union rights for workers. It provided that no employer could require an employee not to be, or become, a member of a union. It defined an 'employee' as:

> 'any person (other than a black) employed by or working for, any employer, and receiving or being entitled to receive, any remuneration and any other person whatsoever (other than a black) who in any manner assists in the caring on, or conducting of the business of the employer.'

The exclusion of blacks from the definition of 'employee' did not prevent them from forming and joining unregistered trade unions of their own. The Act further prohibited the registration of multi-racial unions.

When the United Nations Universal Declaration of Human Rights was adopted in 1948, South Africa continued with its policy on racial separation. The United Nations General Assembly passed a resolution condemning the country's apartheid policies and requested all UN member states to cease relations with South Africa in 1962. South Africa withdrew from the ILO in 1966.

After the Sharpeville massacre in 1960, banning orders were served on some political parties and most of SACTU's leaders were exiled.

In 1961, the Republic of South Africa was established and a new Constitution was adopted including mainly whites.[12] The black population was set on a course of separate development.[13]

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[8] Black unions were excluded from this federation but their members were encouraged to form parallel unions with which they could liaise.

[9] Founded on 1 January 1912.

[10] Due to SACTU's neglect of shop floor issues, it became weak and disintegrated under State repression in 1965.

[11] 28 of 1956.

[12] 32 of 1961.

[13] Legislation such as the Black Authorities Act 68 of 1951, the Black Labour Act 67 of 1964 and the Promotion of Black Self-Government Act 46 of 1959 played a big role in oppressing blacks.

1.5 The 1970s

Blacks started organising themselves into trade unions in the 1970s. The Bantu Labour Regulations Act[14] was passed in 1973. This Act undermined the development of black trade unionism because blacks were confined to mainly employer-initiated committees with little bargaining power. In addition, those in agriculture, gold and coal mining, and government services were excluded from the Act.

Calls from the international community for disinvestment in South Africa increased in 1976. As a result, government appointed the Wiehahn Commission of Inquiry into labour legislation in 1977.

The Commission made proposals on fundamental changes. For instance, it recommended that:

- freedom of association should be granted to all employees regardless of sex, race or creed,
- trade unions should be allowed to register irrespective of their composition in terms of colour, race or sex,[15]
- trade unions should be free to determine their own rules, and
- contracts excluding employees' right to union membership or participation in union activities by an employer, should be defined as an 'unfair labour practice'.

The Commission further called for the establishment of an Industrial Court and the abolition of job reservations.

Most of the recommendations of the Wiehahn Commission were accepted. Amendments were made to provide protection of freedom of association to all employees regardless of their origin or race. Trade unions were granted full autonomy in respect of their membership. The definition of 'employee' was changed to avoid any reference to race. Requirements and procedures for the registration of trade unions also had been revised.

During the early 1980s, outdoor trade union meetings were prohibited,[16] and if allowed, only with the permission of the Minister of Law and Order, or the magistrate having jurisdiction in that particular area.

In 1983, South Africa adopted a new Constitution.[17] Like its predecessors, it entrenched racial discrimination and classification. It excluded blacks by denying them political rights. As a result, the Congress of South African Trade Unions (hereafter 'COSATU') was formed in 1985. COSATU strongly supported the ANC which was banned at the time. It also supported the political struggle and calls for international sanctions against apartheid. New federations of workers were formed with the United Workers Union of South Africa

[14] 70 of 1973.
[15] Report of the Wiehahn Commission of Enquiry into Labour Legislation Part I RP 47/1979. See ch 1, para 1 above.
[16] In terms of the Internal Security Act 74 of 1982.
[17] 110 of 1983.

under the umbrella of the Inkatha Freedom Party and the National Council of Trade Unions in 1986.

1.6 Democracy

With the announcement of the release of Nelson Mandela and other political prisoners in 1990, government lifted the ban on political organisations. Talks took place between the State, business and labour resulting in the 'Laboria Minutes', with the Labour Relations Amendment Act[18] translating these Minutes into law.

Both the interim and final Constitutions contained labour rights.

In 1993 NEDLAC came into being. In 1994, the MoL appointed a Task Team to review labour laws. Consequently, the Labour Relations Act[19] was passed.

This Act provided a framework within which the constitutional rights could materialise to form and join trade unions and employers' organisations and to participate in their activities. It also provided for organisational rights for unions in the workplace and an entrenched right to strike. For the first time in history, all employees were brought under the ambit of one labour system.

Trade unions flourished under the democratic order. Their status and powers increased as they used their position in NEDLAC. Moreover, the alliance relationship between trade unions and political parties came to the fore.[20] More recently, unions started splitting and smaller unions were formed.

2. FREEDOM OF ASSOCIATION

Freedom of association is one of the basic principles of collective labour law as it is the foundation for collective bargaining.

> Freedom of association means that people have the right to associate with others in order to defend and protect their common interests. Workers' right to freedom of association is protected by the Constitution, the LRA and ILO Conventions.

In the workplace, freedom of association entails the right of workers to:

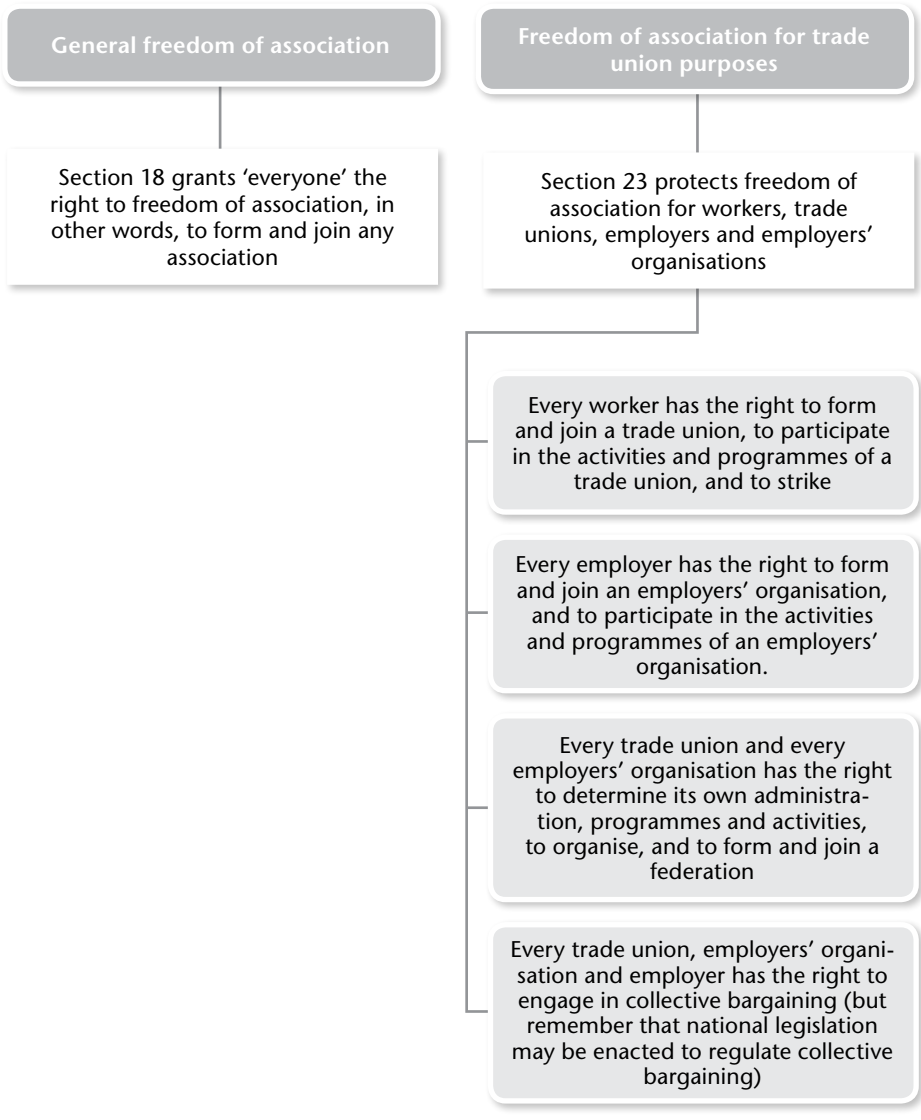
- form and join trade unions of their choice,
- to participate in these unions' lawful activities,
- to organise and bargain collectively with the employer, and
- to strike.

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[18] 9 of 1991.
[19] 66 of 1995.
[20] For example, the alliance between COSATU, the SACP and the ANC, and the close relationship between the EFF and AMCU.

2.1 Protection in terms of the Constitution

The Constitution distinguishes between the following two types of freedom of association:



2.2 Protection in terms of ILO Conventions

The South African government signed and ratified the two most important ILO Conventions on freedom of association and collective bargaining, namely:

- Conventions 87[21] and 98[22] in 1996.
- Convention 87 guarantees to all employers and workers, including supervisors, the right to freely establish and join organisations of their own choice, subject only to the rules of the organisation.
- Convention 98 deals with the right to organise and bargain collectively. This Convention protects workers against acts of discrimination and victimisation by their employers on account of their trade union membership or activities. The Convention also protects unions and employers' organisations against any acts of interference by each other or each other's agents.

2.3 Protection in terms of the Labour Relations Act

2.3.1 *Purpose of enactment of the LRA*

The LRA is the cornerstone of South African labour law and was enacted to, amongst other things:

- give effect to the rights entrenched in section 23 of the Constitution,
- give effect to the obligations incurred by South Africa as a consequence of its membership of the ILO,
- promote social justice, labour peace and workplace democracy, and
- promote orderly collective bargaining.

The LRA must be interpreted to give effect to its primary purpose, in compliance with the Constitution and in compliance with public international law obligations of the Republic.

2.3.2 *Specific protection of the right to freedom of association*

The LRA protects freedom of association for employees, employers, trade unions and employers' organisations, by determining the following:

Every employee has the right to form and join a union—trade union membership is only subject to the constitution of the *union*.
Every union member has the rights to participate in the lawful activities of a union and stand for election, and if eligible, to be appointed as a union representative or officer.
An *employer* may not discriminate against an employee for exercising the right to freedom of association. For example, an employer may not require an employee or applicant for a job:

[21] Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948.

[22] Right to Organise and Collective Bargaining Convention No 98 of 1949.

- not to become a member of a union,
- to give up membership of a particular union, or
- prejudice an employee or job applicant for past, present or anticipated union membership.

No-one may give or promise an advantage to an employee or a work-seeker in exchange for that person not exercising her/his right to freedom of association.

Every trade union has the right to:
- determine its constitution and rules,
- hold elections for office-bearers,
- plan and organise its administration and lawful activities,
- join federations,[23] and also
- affiliate with and participate in the affairs of international organisations.

Any dismissal for exercising the right to freedom of association is automatically unfair.

2.3.3 *Limited protection of the right to freedom of association*

The LRA applies to employees as defined in section 213 and does *not* apply to members of the:

- National Defence Force,
- National Intelligence Agency,
- South African Secret Services,
- South African National Academy of Intelligence, and
- Comsec.[24]

This led to the question whether groups excluded from the LRA, such as the Defence Force, are entitled to form and join trade unions. Although they are excluded from the LRA's protection of freedom of association, they might still be protected by the constitutional guarantee in this regard.

The matter came before the Constitutional Court which found that although *uniformed* members of the South African Defence Force, the Secret Service and the Intelligence Service are excluded from the protection of the LRA, they can claim the right to freedom of association under section 23 of the Constitution (but remember that *non-uniformed* members of the Defence Force are civil servants and fall under the LRA).

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[23] The largest union federations are COSATU, the Federation of Unions of South Africa ('FEDUSA') and the National Council of Trade Unions ('NACTU').

[24] It seems that the EEA was not amended (as the LRA and the BCEA) due to an oversight. The State Security Agency which consists of a variety of institutions, has not been added. It thus does not refer to the State Security Agency. See ch 2, n 21 above.

Another group with limited freedom of association is managerial employees, who must balance the right to freedom of association with the common-law duty to act in good faith towards their employers. If a manager, for example, divulges information to the trade union that she/he acquired by virtue of the managerial position, she/he may be disciplined.

(*a*) Employers' right to freedom of association

Employers also have the right to form and join employers' organisations and to participate in their lawful activities. These rights include the employers' organisations' right to:

- determine its constitutions and rules,
- hold elections for office-bearers,
- plan and organise administration and lawful activities,
- join federations,[25] and also
- affiliate with and participate in the affairs of international organisations.

Any discrimination against the employer for exercising any right conferred by the LRA is prohibited.

(*b*) Disputes about freedom of association

Disputes about the interpretation or application of the right to freedom of association should be referred for conciliation to a bargaining council, a statutory council,[26] or the CCMA (if no council exists).

If the dispute remains unresolved, it should be referred to the Labour Court for adjudication.

3. TRADE UNION SECURITY ARRANGEMENTS

3.1 Permissibility

The Constitution allows for 'union security arrangements contained in collective agreements'. This refers to the so-called 'closed-shop' and 'agency-shop' agreements which infringe an employee's right to freedom of association. The only limits set in the Constitution are that such agreements must:

- be contained in a collective agreement, and
- comply with the general limitation clause of the Constitution.

These two types of union security arrangements are illustrated by way of the following example:

> **Example:** K employs 100 employees. Of these, 60 belong to trade union T. These members pay a monthly membership fee of R20. Of the other 40 employees, 10 belong to union R and 30 are non-unionised. Every year with

[25] See n 23 above.

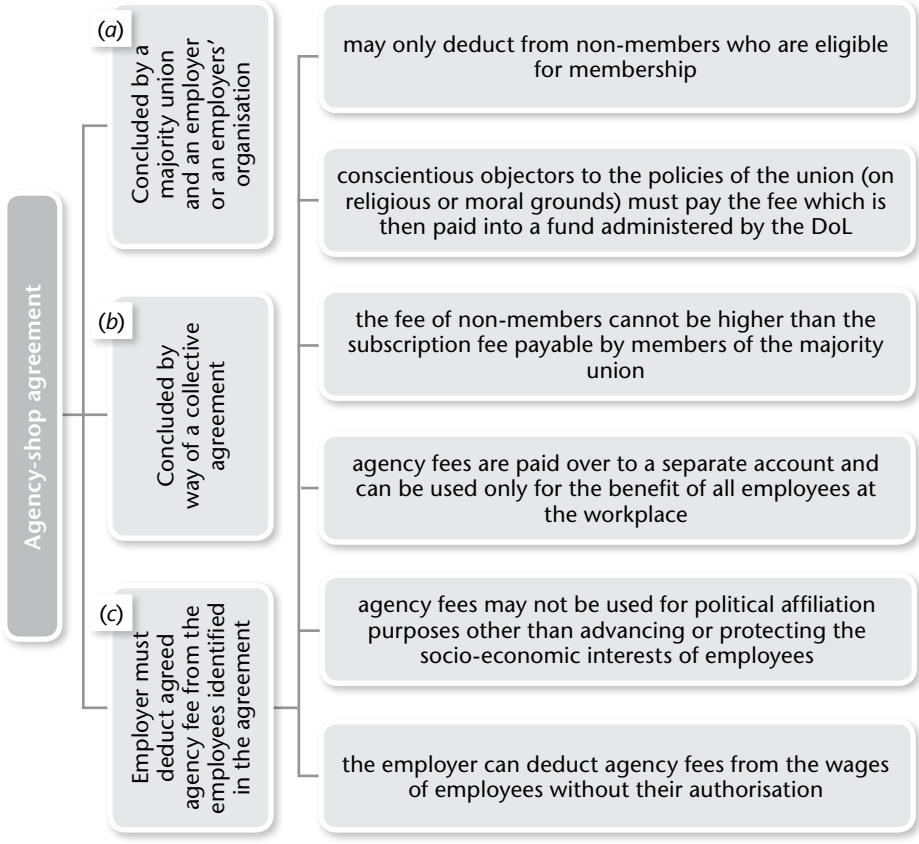
[26] This type of council is established where no bargaining council exists (ss 39–43). Very few councils of this type exist in practice.

wage negotiations, T negotiates with K, and the increase agreed on, is applied across the board. T feels that it does all the hard work which *both* union and non-union members benefit from. If T concludes an agency-shop agreement with K, it will mean that K will deduct an agency fee of R20 from the salaries of all of the other 40 employees and pay it over to T. These 40 employees do not have to become members of T. However, the members of R will pay their own membership fee for R as well as the R20 agency fee.

If K and T conclude a closed-shop agreement, it will mean that all other 40 employees of K must become members of T. R will no longer be allowed to operate in the workplace. All 100 employees will have to pay the R20 membership fee to T.

3.2 Agency-shop agreement

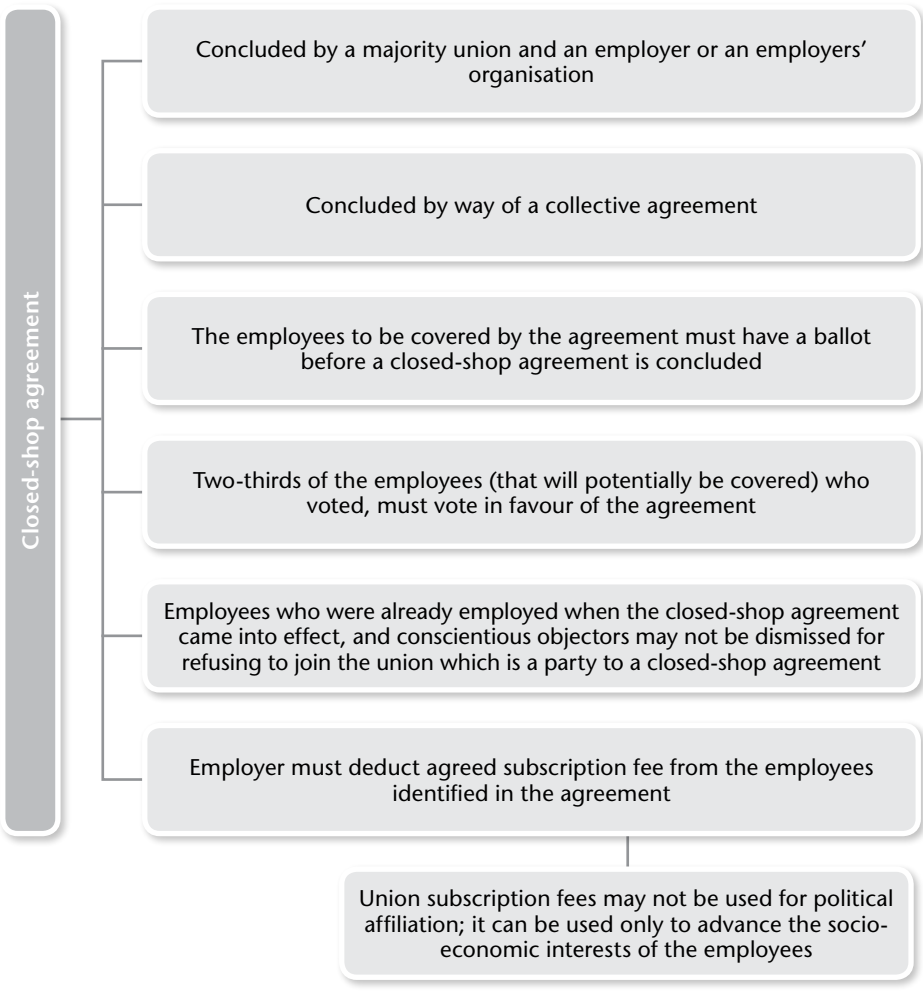
Agency-shop agreements are regulated by s 25 as follows:[27]



[27] In the case of *Solidarity & others v Minister of Public Service & Administration & others* (2004) 25 *ILJ* (LC), the Labour Court held that an agency-shop agreement that did not fully comply with the provisions of s 25(3), was not valid and therefore not binding.

3.3 Closed-shop agreement

Closed-shop agreements are regulated by section 26 as follows:



A closed-shop agreement may be terminated if a majority of the employees vote for its termination.

It is not unfair to dismiss an employee after being employed, and knowing that a closed-shop agreement is applicable, when she/he then refuses to join a union which is a party to a closed-shop agreement, or who is refused union membership, or has been expelled from a union which is a party to the agreement, provided that the refusal or expulsion is in accordance with the union's constitution and that the reason for the refusal or expulsion is fair.

Pre-entry closed-shops are *not* allowed in South Africa. Thus, only *post-entry* closed-shop agreements are recognised by the LRA.

An employee may not be required to be a member of a majority union *before* the commencement of employment. The latter is called a *post*-entry closed-shop agreement. The opposite of this is a *pre*-entry closed-shop agreement, that is, a closed-shop agreement that requires an employee to be a member of a majority trade union *before* employment.

Disputes about the application or interpretation of an agency-shop or closed-shop agreement may be referred to the CCMA for conciliation, failing which it may be arbitrated. A bargaining council does not have jurisdiction to resolve this type of dispute.

4. ORGANISATIONAL RIGHTS

4.1 Purpose of organisational rights

Organisational rights are granted to unions by the LRA to enable them to function more effectively and to build support at the workplace. It is important to note that only *registered* trade unions can exercise organisational rights.

While the LRA does not compel trade unions and employers' organisations to register, it however, encourages registration by granting most of the organisational rights *only* to registered unions.

For instance, only a registered union may:

- conclude collective agreements which are enforceable in terms of the LRA,
- apply for the establishment of a bargaining or a statutory council,
- apply for the establishment of a workplace forum,
- authorise a picket by its members,
- exercise organisational rights, and
- represent its members at the CCMA.

4.2 Types of organisational rights

The LRA provides for five organisational rights:

- the right of access to the premises of the employer,
- the right to have trade union membership fees deducted by way of a stop order,
- the right to elect shop stewards,
- the right of shop stewards to get time off for trade union activities, and
- the right to disclosure of information.

These rights would entail the following:

Organisational right	Content of the right
Access to the workplace (section 12)	Allows the union to: • enter the employer's premises to recruit members, communicate with members and also to serve its members' interests, • hold meetings with employees at the workplace, but outside working hours, and • let members vote at the employer's premises in union elections or ballots.
Stop order facilities (section 13)	• Authorisation to implement stop orders to the employer must be in writing. • The employer should start with deductions (as agreed to) as soon as possible and pay the money over to the union not later than the 15th day of each month. • An employee may revoke her/his stop order authorisation by giving the employer and the union written notice to that effect.
Election of shop stewards (section 14)	• The number of shop stewards to be elected depends upon the size of the workforce. • The number of shop stewards increases on a sliding scale in accordance with the number of union members employed in the workplace. • Shop stewards have the right to assist and represent employees, and monitor the employer's compliance with the law. • Shop stewards are entitled to reasonable time off with pay during working hours to perform union functions. • Shop stewards are employed by the employer, not the union.
Leave of absence for union activities (section 15)	• Shop stewards are entitled to paid leave to perform their functions on behalf of the union during working hours. • Details about such leave and payment are normally arranged between the employer and the union.
Disclosure of information (section 16)	Only relevant information must be disclosed, that is, information that will allow shop stewards to perform union functions effectively and engage effectively in collective bargaining. The employer cannot be expected to disclose information which: • is not available, • is not relevant to the issue/s under discussion, • is legally privileged, • could harm the employer's business interests if disclosed, and • is private personal information relating to an employee (unless the employee has consented to disclosure of such information).

4.3 Level of representation

Entitlement of unions to organisational rights depends on the level of representation of the trade union in the workplace, which can be either *majority* representation or *sufficient* representation.

If a union represents the majority of workers, it will have access to *all* organisational rights. If the union is *sufficiently* representative, it will have access only to certain organisational rights.

However, it is important to note that the Amendment Act contains specific amendments with regard to section 21 of the LRA.

These include that the commissioner, in determining the representativeness of a trade union, must also have regard to the composition of the workforce, including:

- temporary employment services (TES),
- employees,
- employees employed on fixed-term contracts,
- part-time employees, or
- employees in other categories of non-standard employment categories.

The effect of this provision is that when determining union representation, the number of non-standard employees may also be taken into account. In the past the above categories of employees were excluded and often exploited due to their vulnerable status.

4.4 Different levels of representation by unions for different rights

Representation	Organisational rights
Union has majority representation Union represents 51% or more of all employees in the workplace.	• Access to the workplace • Membership fees deducted from wages • Can elect shop stewards • Shop stewards get leave for union activities • Disclosure of information
Union is sufficiently represented Union represents less than the majority of employees in the workplace. The LRA does not define 'sufficiently representative' but gives guidelines (approximately 30%).	• Access to the workplace • Membership fees deducted from wages • Union representatives may get leave for trade union activities
Union is a member of a bargaining council	• Access to the workplace • Membership fees deducted from wages
Minority union	• Union may enforce rights through collective bargaining and industrial action (two or more trade unions may act jointly to acquire rights)

4.5 Acquisition of organisational rights

Trade unions may acquire organisational rights in the following ways:

4.5.1 *Through collective agreement*

The LRA makes provision for a registered trade union and an employer or employers' organisation to conclude a collective agreement that regulates organisational rights. This means that, even if the trade union is not representative, it could have organisational rights on which the parties agreed.

4.5.2 *Through membership of a bargaining council*

A registered trade union that is party to a bargaining council, automatically acquires the two rights of access to the premises and to have trade union subscriptions deducted by stop order, in respect of all workplaces falling within the jurisdiction of the bargaining council. A union acquires these rights irrespective of whether it is sufficiently representative or not.

4.5.3 *Through strike action*

A union, including a minority union, may strike in support of a demand for organisational rights even if it does not meet the statutory threshold for acquiring such rights.[28]

4.5.4 *Through the section 21 procedure*

Step 1: Trade union to notify the employer

This process entails that the registered trade union must notify the employer in writing that it seeks to exercise organisational rights.

The notice must contain the following information:

- the workplace in which the union seeks to exercise the rights,
- the representation of the trade union in that workplace,
- the rights that the trade union wants to exercise, and
- the manner in which the trade union wants to exercise those rights.

The notice must also be accompanied by a certified copy of the trade union's registration certificate.

Step 2: Conclusion of a collective agreement

The employer must meet with the union within 30 days of receipt of the notice, and must endeavour to reach a collective agreement to regulate the matter.

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[28] See *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC).

Step 3: If no collective agreement is reached

If the parties fail to conclude a collective agreement, either of the parties can refer the dispute in writing to the CCMA for conciliation, and if conciliation fails, either party may request that the dispute be arbitrated.

Step 4: Duties of the commissioner

In making the award in terms of section 21, the commissioner:

- **MUST** seek to minimise the proliferation of trade union representation in a single workplace, and where possible, to encourage a system of a representative trade union in a workplace,
- **MUST** seek to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered union,
- **MUST** consider the:
  - **nature** of the workplace,
  - **nature** of the organisational right or rights that the registered trade union seeks to exercise,
  - **nature** of the sector in which the workplace is situated, the organisational history at the workplace or any other workplace of the employer, and
  - **composition** of the workforce in the workplace taking into account the extent to which there are employees assigned to work by temporary employment services, employees employed on a fixed-term contracts, part-time employees or employees in other categories of non-standard employment.

Step 5: Other powers of commissioner to resolve the dispute

The commissioner:

- **MAY** withdraw any of the organisational rights once conferred which are exercised by any other registered trade union in respect of that workplace, if that other union has ceased to be a representative union.
- **MAY** grant certain majority rights to a non-majority union. This will be possible, in terms of section 21 of the Amendment Act, and only where:
  - there is no majority union in the workplace, and
  - the non-majority union already has the following organisational rights:
    - acess to the workplace,
    - membership fees deducted from wages, and
    - leave for union activities.

> **Example:** Union MN (UMN) has 40% representation in the workplace and has the rights of access to the workplace, deduction of membership fees from wages and leave for union activities. Union OP (UOP) has 10% representation and no organisational rights. There is no union

with majority representation in the workplace. UMN (and not UOP) can apply by way of section 21 to now also obtain the right to elect shop stewards. Once it has obtained that right, UMN may apply (also in terms of section 21) to obtain the right to disclosure of information.

Assume that UOP obtains majority status a few months later, UMN will then lose its entitlement to elect shop stewards and access to information.

This amendment gives smaller unions more opportunities to access organisational rights.

- In order to determine the membership or support of the registered trade union, the commissioner **MAY**:
  - make any necessary inquiries,
  - where appropriate, conduct a ballot of the relevant employees, and
  - take into account any other relevant information.

Step 6: Possible awards

A commissioner **MAY** in arbitration, grant the following rights to a registered union or two or more unions who act jointly to obtain organisational rights:[29]

- access to the workplace,
- deduction of membership fees, and
- leave for trade union activities,

Step 7: Other matters

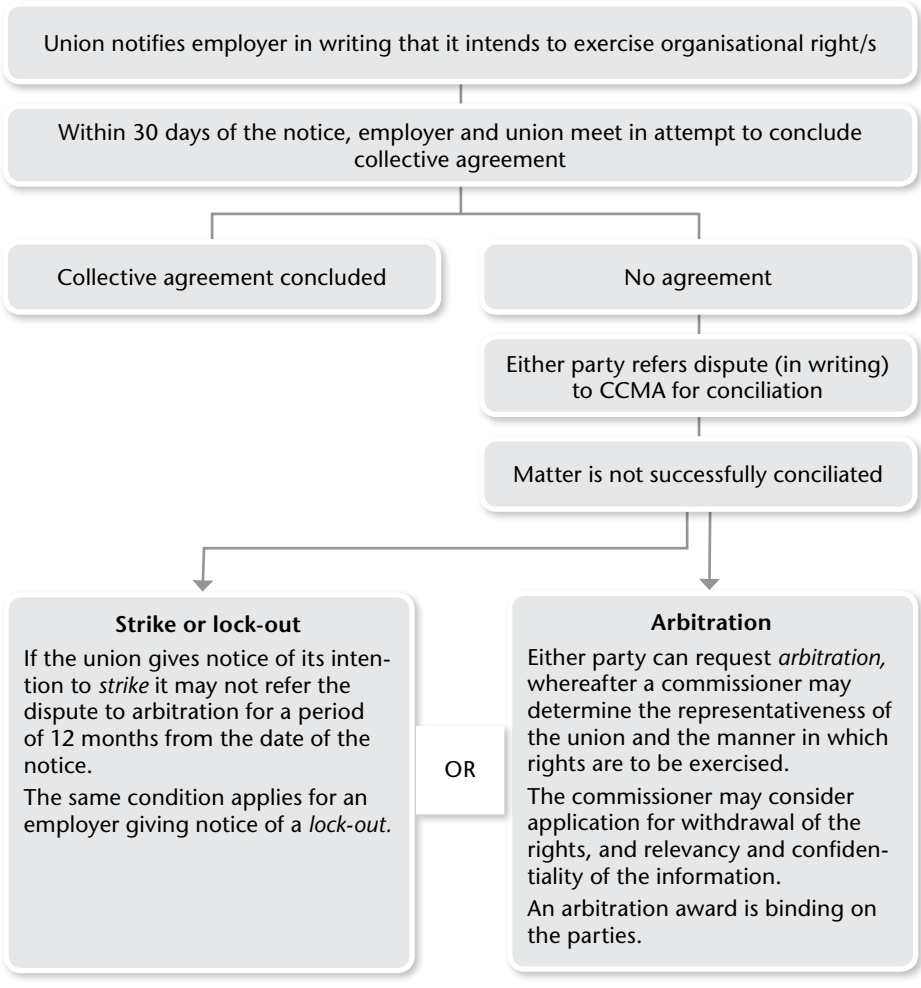
The employer must co-operate with the commissioner and make available any information and facilities that are reasonably necessary to obtain organisational rights.

An employer who alleges that a union is no longer a representative union, may apply to the CCMA to withdraw any of the organisational rights previously granted.

A union that exercises organisational rights in respect of employees of a temporary employment service/TES may do so at the workplace of the temporary employment service or of the client of the temporary employment service/TES.

The section 21 procedure is further illustrated in the flow chart on the next page.

[29] Trade unions will do this when they do not meet thresholds of representation established by a collective agreement. The Labour Court will only award organisational rights when all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings and that, as a result of the co-operation, they represent a substantial number of employees.



4.6 Dispute resolution for organisational rights

Entitlement to organisational rights has been discussed above. If there is a dispute about the interpretation of organisational rights, any party may refer the dispute in writing to the CCMA for conciliation and, if conciliation fails, for arbitration.

In terms of the Amendment Act, an arbitration award may be made binding on employers, clients of temporary employment services/TES and any person other than the employer who controls access to the workplace if the person has been given an opportunity to participate in such arbitration proceedings.

Disputes about disclosure of information follow the same route. However, the commissioner must first decide on whether the information is relevant or not. If the information is found to be relevant, and if it is confidential and if disclosed my cause substantial harm to the employee or employer, or private

personal information relating to an employee, the commissioner must *balance* the harm that the disclosure is likely to cause against the harm caused by non-disclosure.

Thus, in determining the dispute, the commissioner must strike a balance between the employer's right to privacy and the interests of sound collective bargaining. The commissioner has a fairly wide discretion to make a suitable award to achieve this.

5. RELATIONSHIP BETWEEN UNIONS AND ITS MEMBERS

The relationship between a union and its members is regulated by that union's constitution. Such constitution prescribes the rules and procedures that must be followed by the union and its members. Both parties have a duty to observe the constitution of a union.[30] In *FAWU v Ngcobo and another*,[31] the Supreme Court of Appeal held that a trade union is liable to its members for damages for failing to represent them. This decision was confirmed by the Constitutional Court in *FAWU v Ngcobo and another*.[32]

In terms of the LRA a constitution of a union must, amongst other things:

- indicate that the trade union is not an association for gain,
- should provide the procedure for:
  - qualification for membership,
  - termination of membership or removal of office bearers,
  - membership fees and other payments by members,
  - the manner in which decisions are to be taken, and
  - the circumstances under which office-bearers or trade union representatives may be removed from office.

The constitution of a union may not include a provision that discriminates directly or indirectly against any person.

6. REGISTRATION OF UNIONS

Registration is not a requirement for an organisation to qualify as a union. However, to encourage registration, the LRA grants statutory benefits to registered trade unions. As mentioned in paragraph 4.1 above, only registered trade unions may acquire organisational rights, may conclude a binding collective agreement, may apply for the establishment of a workplace forum, may apply for the establishment of a bargaining council, and represent its members at the CCMA.

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[30] See *NUMSA and others v COSATU and others* [2014] ZAGPJHC 59.
[31] (2013) 34 *ILJ* 1383.
[32] [2013] ZACC 36.

The requirements for registration of a union are set out in section 95 as follows:

- it must adopt a name or abbreviation which is not so close to that of any other union so as to cause confusion,
- it must adopt a constitution that complies with certain requirements,
- it must have an address in South Africa, and
- it must be independent from any interference or influence by the employer.

The registration procedure is outlined in section 96. Once registered, a trade union acquires legal personality and can act in its own name.

The next chapter deals with collective bargaining.[33]

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Indicate the *correct* statement:
   In terms of the LRA, a trade union which is *not* registered can …
   (*a*) exercise organisational rights.
   (*b*) conclude a collective agreement which is recognised by the LRA.
   (*c*) form and join a trade union federation of its own choice.
   (*d*) represent its members at the CCMA.
2. Trade union XYZ concluded a closed-shop agreement with ABC Company. Mr G has just been employed by ABC Company and has persistently refused to be a member of trade union XYZ because he feels that joining a trade union is against his religious belief.
   (*a*) Can Mr G be dismissed for refusing to join trade union XYZ?
   (*b*) Assume that Mr G wishes to join trade union XYZ, but his application is refused on the basis that he is gay. Can Mr G be dismissed because he is not a member of trade union XYZ?
3. Mention five organisational rights and the level of representation required in order for a union to acquire each of them.

✓ Feedback

1. Option (*c*) is the *correct* answer. In order to form and join a trade union federation, it is not a requirement that the union be registered. Options (*a*), (*b*) and (*d*) are *incorrect* because in order to exercise those rights, a union must be registered.

2 (*a*) Mr G cannot be dismissed for refusing to join trade union XYZ because his refusal to join the union is based on a conscientious ground. However, if Mr G's refusal to join trade union XYZ was not based on any conscientious reason, Mr G can be dismissed.

(*b*) Mr G cannot be dismissed because his refusal to join the trade union as a member is based on unfair discrimination (the fact that he is gay) which is prohibited in terms of the LRA.

[33] See specifically ch 11, para 3 below.

3. Organisational rights and the level of representation required:
   - Access into the workplace: sufficient representation
   - Election of trade union representatives: majority representation
   - Leave for trade union representatives: sufficient representation
   - Stop order facilities: sufficient representation
   - Disclosure of information: majority representation

RECOMMENDED READING

1. Budeli M 'Understanding the right to freedom of association: Components and scope' (2010) 31(1) *Obiter* l6
2. Budeli M 'Workers' right to freedom of association and trade unionism: A historical perspective' (2009) 15(2) *Fundamina* 57
3. Chapters II, III and VI of the LRA
4. Madima T 'Freedom of association and the concept of compulsory trade union membership' (1994) 3 *TSAR* 545
5. Simamba BH 'The International Labour Organization and the right to collective bargaining: An African perspective' (1989) 106 *SALJ* 517
6. Solomon M 'Labour law under the new constitutional dispensation' (1997) XXXVIII *Codicillus* 24

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Collective bargaining

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1. INTRODUCTION

One of the primary objectives of the LRA is to promote orderly collective bargaining. And, very importantly, collective bargaining is the core of collective labour law.

Neither the Constitution nor the LRA defines 'collective bargaining'. The process of collective bargaining entails negotiations between two or more parties, namely a union/s on the one hand, and an employer/employers' organisation on the other hand about terms and conditions of employment

and any other matters of mutual interest between the parties. Unlike mere consultation, collective bargaining presumes a willingness by each party, not only to listen to and consider the representations of the other party, but also to abandon its own fixed positions where possible, in order to find common ground.

Collective bargaining should be understood as a process and should not be confused with the place where such bargaining takes place.

The word 'collective' refers to the fact that employees join together in trade unions to increase their power in bargaining with employers over wages, working conditions and any other matters of mutual interest between them.[1] It is important to note that only unions can engage in collective bargaining. Although a single employer can engage in collective bargaining, an individual employee cannot engage in collective bargaining.

If successful, collective bargaining leads to the conclusion of a collective agreement. If it is not successful, there are several options available to parties. For instance, the union may embark on strike action and the employer may resort to a lock-out.

2. IS THERE A DUTY TO BARGAIN?

The inclusion of the right to *engage in* collective bargaining in the Constitution[2] does *not* create a *duty* for either of the parties to bargain with the other.[3] Moreover, the LRA does not compel parties to bargain with each other. However, the LRA *encourages* collective bargaining through, for example:

- the granting of organisational rights,
- the right to establish bargaining institutions, and
- through closed-shop and agency-shop agreements.

Should an employer refuse to bargain, the Act allows for strike action by employees, in an endeavour to convince the employer to bargain. A refusal to bargain includes:[4]

- the employer's refusal to recognise a union as a bargaining agent,
- the employer's refusal to establish a bargaining council,
- the employer's withdrawal of recognition of a collective bargaining agent,
- the employer's resignation as a party to a bargaining council, and
- the employer disputing appropriate bargaining units, levels and topics.

Refusal to bargain by either of the parties can result in power play in order to convince the other party to negotiate. If an employer refuses to negotiate with a union, the union can strike provided that the strike takes place in accordance with the requirements of the LRA.

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[1] A Steenkamp *et al* 'The right to bargain collectively' (2004) 25 *ILJ* 943.
[2] Section 23(5).
[3] *South African National Defence Union (SANDU) v Minister of Defence* (2007) 28 *ILJ* 1909 (CC).
[4] Section 64(2).

Disputes regarding a refusal to bargain must first be referred to the CCMA for an advisory award. An advisory award provides guidance only; it is *not* binding on the parties.[5]

3. BARGAINING AGENTS

Collective bargaining is performed by bargaining agents, namely unions and an employer or employers' organisation.

A union is defined as an association of employees whose principal purpose is to regulate the relations between employers or employers' organisations and employees. Only employees may be members of a union. Job seekers and ex-employees may not be members of a union.

To qualify as a union, an association of employees need not be registered. However, registration is beneficial since only a registered union is entitled to certain rights, such as to:

- conclude a collective agreement enforceable under the LRA,
- acquire organisational rights,
- be a member of a bargaining council, statutory council and workplace forum, and
- conclude closed-shop and agency-shop agreements.

To participate in collective bargaining as a bargaining agent, a union should be recognised by the employer. The LRA obliges the employer to grant rights of recognition only to registered unions which are 'representative' at the workplace.

The LRA does not define an employer. However, an employers' organisation is defined in section 213 as 'any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade union'.

4. STATUTORY BARGAINING STRUCTURES

The LRA creates two statutory bargaining structures namely, a bargaining council and a statutory council. They are called statutory bargaining structures because they are established in terms of the LRA.

4.1 Bargaining council

One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area by adopting a constitution and by obtaining registration for the council.[6] The State may also be a party to a bargaining council if it is an employer in the sector in which a bargaining council has been established. Once a bargaining

[5] Although part of alternative dispute resolution, an advisory arbitration is more than mediation. It allows parties to debate their case without fear of a final decision.

[6] Section 29.

council is established and registered, it has jurisdiction within the sector and geographical area for which it has been registered.

There is no legal duty on the parties to establish a bargaining council. However, a refusal to establish a bargaining council constitutes a refusal to bargain[7] and a trade union may embark on a strike to force the employer to agree to the establishment of a bargaining council.

4.1.1 *The constitution of a bargaining council*

Section 30 of the LRA outlines the topics that the constitution of a bargaining council must address:

- the appointment of representatives of the parties to the council,
- the representation of small and medium enterprises,
- the circumstances under which representatives must vacate their offices and procedures for replacing them,
- rules governing council's meetings,
- decision-making procedures,
- procedure for exemption from collective agreements,
- delegation of its powers and functions, and
- procedures for changing the constitution and winding up the bargaining council.

4.1.2 *Registration of a bargaining council*

Once the parties have agreed on the establishment of a bargaining council and have adopted a constitution, they may apply to the Registrar for the registration of a bargaining council. The parties do this by submitting to the Registrar of Labour Relations:

- a prescribed registration form properly completed,
- a copy of the proposed constitution, and
- any other information that may assist the Registrar in determining whether or not the bargaining council meets the requirements for registration.

The Registrar may also request any additional information that she/he considers relevant and important in support of the application. After receiving the application, the Registrar must publish a notice in the *Government Gazette* advising the general public of the application and that they may object to the application within 30 days. A copy of such notice must also be sent to NEDLAC.

The objection for registration of a bargaining council may be based on the following grounds:

- that the applicant has not complied with the provisions of section 29 of the LRA,

[7] Section 64(2)(ii).

- that the sector and area in respect of which the application is made is not appropriate, and
- that the applicant is not sufficiently representative in the sector and area in respect of which the application is made.

If there is an objection, the applicant has 14 days to respond to the objection and must satisfy the Registrar that a copy of the response has been served to the person who objected. The Registrar must send the application and any objections, responses and any other information to NEDLAC for consideration as soon as possible.

Within 90 days of receiving the documents from the Registrar, NEDLAC must:

- consider the appropriateness of the sector and area in respect of which the application is made,
- demarcate the appropriate sector and area in respect of which the bargaining council should be registered, and
- report to the Registrar in writing.

If NEDLAC fails to agree on the demarcation of the sector and area for registration purposes, the MoL must demarcate the appropriate sector and area and advise the Registrar.

If the Registrar is satisfied that the applicant complied with the requirements for registration, the council must be registered. If the Registrar is not satisfied that the applicant complied with the registration requirements, the Registrar must notify the applicant in writing of the decision and must also provide reasons for such decision.

4.1.3 *Powers and functions of a bargaining council*

The powers and functions of a bargaining council are outlined in section 28 of the LRA as follows:[8]

- to conclude collective agreements,
- to enforce such collective agreements,
- to prevent and resolve labour disputes,[9]
- to promote and establish training and education schemes,
- to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes,
- to develop proposals for consideration by NEDLAC,
- to determine by collective agreement matters which may not be resolved through industrial action,

[8] The functions of a statutory council are narrower than those of a bargaining council.

[9] In terms of s 51(*b*) and (*c*) of the Amendment Act, a bargaining council may, by collective agreement, provide for the payment of a dispute resolution levy and charge a fee from parties to a dispute in circumstances in which the CCMA is entitled to charge a fee.

- to provide industrial support services within the sector, and
- to extend its services to workers in the informal sector and home workers.

4.1.4 *Disputes that the LRA requires a bargaining council to resolve*

Type of dispute	Bargaining council jurisdiction
Disputes about freedom of association	Only a bargaining council can conciliate these disputes, failing which they should be referred to the Labour Court for adjudication
Disputes of interest in an essential service	A bargaining council can conciliate and arbitrate these disputes
Disputes about severance pay	A bargaining council can conciliate and arbitrate these disputes
Disputes about unfair labour practices	A bargaining council can conciliate unfair labour practice disputes provided that they do not relate to discrimination. Disputes about discrimination must be referred to the CCMA for conciliation, failing which they must go to the Labour Court for adjudication
Disputes that may lead to a strike or lock-out	Only a bargaining council can conciliate these disputes
Dismissal disputes, if the reason for dismissal is based on: • operational requirements, • participating in an unprotected strike, and • reasons connected to a closed-shop agreement	Only a bargaining council can conciliate these disputes
Disputes based on misconduct and incapacity	A bargaining council may conciliate and arbitrate these disputes by way of the con-arb procedure

4.1.5 *Levels of bargaining*

Collective bargaining can take place at plant level,[10] sector level[11] or industry level.[12] However, the LRA encourages collective bargaining at *sector* or *industry* level.

Moreover, a distinction should be made between centralised and decentralised bargaining. *Centralised* bargaining takes place for the benefit of employees across a whole sector and in a defined geographical area,[13] whereas

[10] Plant level bargaining refers to bargaining that takes place between the employees (normally represented by unions) and the employer at a specific plant or factory.
[11] Sectoral bargaining refers to bargaining that takes place in a specific sector of the economy and linked to a specific geographical area.
[12] Industry-wide bargaining refers to bargaining for a whole industry, eg, mining or motor manufacturers, normally on national level.
[13] AJ van der Walt *et al Labour Law in context* (2012) 187.

decentralised bargaining takes place between an individual employer and one/more unions with reference only to employees in the employer's workplace/s.

Provision is made for the establishment of bargaining councils for a particular sector. It is at this level where bargaining will take place in bargaining councils. Moreover, bargaining councils can be established in the private as well as the public sector (the private sector is the economic sector in which the State is not the employer). In the public sector the State is the employer.[14]

4.2 Statutory council

A representative union or a representative employers' organisation may apply to the Registrar for the establishment of a statutory council. A statutory council may only be established in a sector or area where there is *no* bargaining council registered. For the purpose of the establishment of a statutory council, a representative union refers to a registered union or two or more registered unions representing 30% of the employees employed in the sector and the area in which the application is made. A representative employers' organisation refers to a registered employers' organisation whose members employ at least 30% of employees in the sector or area in which the application is made. The procedure for registering a statutory council is similar to that of a bargaining council.

4.2.1 *Powers and functions of a statutory council*

The main powers and functions of a statutory council are:

- to resolve disputes,
- to promote and establish training and education schemes,
- to establish and administer pension, provident, medical, sick pay, holiday, unemployment schemes or funds or any similar schemes for the benefit of its members, and
- to conclude collective agreements to give effect to its functions.

5. COLLECTIVE AGREEMENTS

The main goal of collective bargaining between an employer and a union is to reach consensus about certain matters and formalise their relationship by means of a collective agreement. A collective agreement regulates the rights and duties of parties as well as the terms and conditions of employment of workers.

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[14] In the public service the Public Service Co-ordinating Bargaining Council co-ordinates the activities of the four main bargaining councils in this sector, namely, the General Public Service Sector Bargaining Council, the Public Health and Social Development Sectoral Bargaining Council, the Education Labour Relations Council, and the Safety and Security Sectoral Bargaining Council.

'Collective agreement' is defined in the LRA[15] as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered unions on the one hand and one or more employers or registered employers' organisations on the other hand.

There are three important elements that distinguish a collective agreement from any other agreement between employees and employers:

- a collective agreement must be in writing,[16]
- only a registered union can be a party to a collective agreement, and
- a collective agreement must regulate terms and conditions of employment or any other matter of mutual interest between a trade union and the employer or employers' organisation/s.

A collective agreement binds:

- the parties to the agreement,
- each party to the agreement and the members of every other party to the agreement in so far as the provisions are applicable to them,
- members of a registered union and employers who are members of a registered employers' organisation that are party to the collective agreement if it regulates:
- terms and conditions of employment, or
- the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employer,
- employees who are *not* members of the registered union/s party to the agreement are bound by the agreement if:
  - the employees are identified in the agreement,
  - the agreement expressly binds the employees, and
  - the trade union/s represent the majority of all the employees employed in the workplace.

In *Chamber of Mines v AMCU & others,*[17] the Labour Court had to deal with the constitutionality of sections 23(1)(*d*) of the LRA, read with s 65(1)(*a*) and the definition of a workplace in section 213. AMCU argued that the extension of collective agreement to those employees who are not members of unions party to a collective agreement, violates the constitutional right to engage in collective bargaining (section 23(5) of the Constitution). The Labour Court held that section 23(1)(*d*) is not unconstitutional since it constitutes a justifiable limitation on the right to engage in collective bargaining and to strike.

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[15] Section 213.

[16] This was confirmed in S*A Post Office Ltd v Communication Workers Union & others* (2010) 31 *ILJ* 997 (LC).

[17] [2014] ZALCJHB 223.

A collective agreement varies any contract of employment between an employee and an employer if they are both bound by the collective agreement.[18]

The most *common* collective agreements are the closed-shop and agency-shop agreements discussed in chapter 10 above.

5.1 Bargaining council's collective agreements

One of the main functions of a bargaining council is to negotiate and conclude collective agreements on behalf of its members. Collective agreements concluded by a bargaining council may regulate terms and conditions of employment or any other matter of mutual interest between the parties.

Collective agreements concluded by a bargaining council are binding on:

- parties to the bargaining council who are also parties to the agreement,
- parties to the council who are not parties to the agreement, and
- parties who are not members of the council and not parties to the agreement.

5.2 Parties to the bargaining council who are also parties to the agreement

A bargaining council's collective agreement is binding on a union and an employers' organisation which are *parties* to that bargaining council and which were also involved in the conclusion of such collective agreements, as well as their members.[19]

5.3 Parties to the council who are not parties to the agreement

By virtue of being a member of a bargaining council, unions and employers' organisations and their members may be bound by collective agreements concluded by the council even if they are *not* parties to those agreements if this is provided for in the *constitution* of the council.[20] If this is not provided in the constitution, they may be bound by such collective agreements as a result of the *extension* of the council's collective agreements to non-parties in terms of section 32 of the LRA.

5.4 Parties who are not members of the council and not parties to the agreement

Parties who are *not* members of a bargaining council and who were not involved in the conclusion of a bargaining council agreement but fall within the sector and area of jurisdiction of such council may be bound by the councils' collective agreements through extension in terms of section 32 of the LRA.

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[18] See ch 4, para 6.1 above.
[19] Section 31.
[20] *Ibid*.

5.5 Extension of bargain councils' agreements to non-parties

Section 32 of the LRA provides that bargaining councils' collective agreements may be extended to non-parties that are *within* its registered scope. Once extended, the council's agreements are binding on employers and employees to whom they are extended despite the fact that they are *not* members of the council.

The requirements and procedures for the extension of bargaining councils' agreements to non-parties are as follows:[21]

- The extension must be authorised by the MoL if one/more registered unions that represent the majority of the unions that are parties to a bargaining council, or an employers' organisation whose members employ the majority of all employees by the members of the employers' organisations that are party to the bargaining council, vote in favour of such extension.
- The request for extension should be made in writing.
- The MoL must extend council's collective agreements by publishing the request of such extension in the Government Gazette within 60 days of receiving the request.
- The notice must specify the date and the period for which the collective agreement will be binding on non-parties specified on the notice.

5.6 Disputes about collective agreements

Section 24(1) of the LRA provides that every collective agreement (excluding closed-shop or agency-shop agreements) must contain a procedure for the resolution of a dispute about the application or interpretation of that collective agreement. The LRA provides that such procedure must require the parties to first attempt to resolve their dispute through conciliation, and only if the dispute remains unresolved, by arbitration. If a collective agreement does not include a dispute resolution procedure, or if the procedure is not operative, or any of the parties to the collective agreement has frustrated the dispute resolution procedure, the dispute may be referred to the CCMA. The dispute about the application and interpretation of a collective agreement may not be the subject of a strike or lock-out.[22]

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. With regard to collective agreements, which *one* of the following statements is *correct*?
   (*a*) Only a registered trade union can be a party to a collective agreement.
   (*b*) Only a majority trade union can conclude a collective agreement with the employer.

---

[21] Section 32.

[22] Because they must finally be resolved through arbitration, employees may not strike over these disputes.

(*c*) Collective agreements do not need to be in writing.
(*d*) Collective agreements must regulate only terms and conditions of employment.

2. Explain a bargaining council's jurisdiction with regard to disputes relating to freedom of association.
3. Trade Union A is a majority trade union and the only trade union recognised by employer B. Trade Union A would like to bargain with the employer. However, employer B argues that it does not have any duty to bargain with union and therefore refuses to bargain with it. Advise the union on the options available to it.

✓ Feedback

1. Option (*a*) is the *correct* answer. Only a registered trade union can conclude a collective agreement with the employer. Option (*b*) is *incorrect*. Even minority trade unions can conclude a collective agreement. Option (*c*) is *incorrect*. A collective agreement must always be in writing. Option (*d*) is *incorrect*. A collective agreement must regulate terms and conditions of employment or any other matter of mutual interest between the parties.
2. Only a bargaining council can conciliate disputes regarding freedom of association, failing which they should be referred to the Labour Court for adjudication. A bargaining council does not have jurisdiction to arbitrate such disputes.
3. Collective bargaining is voluntary in South Africa. Both the Constitution and the LRA do not compel trade unions and employers to bargain with each other. However, Trade Union A can embark on strike action to force the employer to bargain with it. The Union will, however, have to follow all procedural requirements for a strike in order for it to be protected. See also the *NUMSA v Bader Bop* case.[23]

RECOMMENDED READING

1. Brassey M 'Labour Law after Marikana: Is institutionalized collective bargaining in SA wilting? If so, should we be glad or sad?' (2013) 34 *ILJ* 823
2. Chapter III of the LRA
3. Cheadle H 'Collective bargaining and the LRA' *Law Democracy and Development* (2005) 9(2) 147
4. Grogan J 'No duty to bargain: Military Union back in line' (2007) 23(2) *Employment Law* 3
5. Kruger J & Tshoose CI 'The impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) *PER* 16(4) 286
6. Vettori S 'A judicially enforceable duty to bargain' *De Jure* 38(2) (2005) 382

[23] *National Union of Metal Workers of South Africa and others v Bader Bop (Pty) Ltd and another* 2003 (3) SA 513 (CC).

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Workplace forums

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1. INTRODUCTION

In the previous chapter, we dealt with the collective bargaining process and bargaining structures. Collective bargaining is by its nature *an adversarial process* and does not cater for individual employees' needs as it often takes place at central level. In recognising this shortcoming of collective bargaining, the LRA introduced the workplace forum (hereafter a 'forum').[1]

> A forum is an in-house institution promoting workers' participation in decision-making at the workplace. Forums are intended to deal with non-wage-related issues such as restructuring, introduction of new technology, new work methods, and the like.

Although forums are not collective bargaining structures, they provide *all* employees with the opportunity to participate in the decision-making process irrespective of their union membership. It is important *not* to confuse a union and a forum. The Table below sets out the differences between unions and forums.

[1] One of the main objectives of the LRA is to promote employees' participation in decision-making in the workplace.

Trade union	Forum
• A union is a juristic body • A union deals with wage-related issues • A union can embark on industrial action	• A forum is not a juristic body • A forum deals with non-wage-related issues • A forum cannot embark on industrial action

2. ESTABLISHMENT OF A FORUM

Who may establish a forum?	The establishment of a forum is voluntary in nature. Only registered unions or unions acting jointly, representing the majority of all employees employed in the workplace, may apply for the establishment of a forum.* The nomination, election and removal from office of members of the forum are governed by the constitution of the applicant union (that is, a union- based forum).
Where may a forum be established?	A forum may be established in any workplace of employers with more than 100 employees.
Who would qualify as employees?	For the purpose of a forum, an employee is defined as: 'any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace: • represent the employer in dealings with the workplace forum; or • determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace.'
How will a forum be established?	A forum may be established either through: • a collective agreement, • the intervention of the CCMA, or • an application by a union.
The procedure for the establishment of a forum by way of collective agreement	Application must be made to the CCMA. • If the CCMA is satisfied that all the requirements are met, it must appoint a commissioner to assist the parties to establish a forum by means of a collective agreement or, failing that, to establish a forum in terms of the LRA. • The commissioner must then convene a meeting with the applicant, the employer and any registered union that has members employed in the workplace, in order to facilitate the conclusion of a collective agreement those parties, or at least, between the applicant and the employer. • If a collective agreement is concluded, the provisions of the LRA will not apply (that is, establishment through a collective agreement).

The procedure for establishment of a forum where no collective agreement is concluded	If a collective agreement is not concluded, the commissioner must meet with the applicant, the employer or any registered trade union that has members employed in the workplace in order to facilitate the agreement between them, or at least, between the applicant and the employer, on the provisions of a constitution of a forum. If no agreement is reached on the provisions of a constitution, the commissioner must establish a forum and determine the provisions of the constitution in accordance with the LRA. After a forum has been established, the commissioner must set a date for the election of the first members of the forum and appoint an election officer to conduct the election (that is, establishment through the intervention of the CCMA).

* The union may choose forum members from its elected representatives/shop stewards.

3. MEETINGS OF A FORUM

The LRA requires a forum to meet regularly to ensure its effective functioning. Once a forum is established, the employer is required to meet with it on a regular basis unless the constitution of the forum provides otherwise.

In addition, members of a forum must meet with employees to report on its general activities and any other matters discussed with the employer.

All meetings of a forum must be held during working hours at a time and place agreed upon by a forum and the employer, without loss of pay on the part of employees.

4. FUNCTIONS OF A FORUM

The main functions of a forum are:

- to promote the interests of all employees in the workplace (again, not just union members),
- to enhance efficiency in the workplace,
- to consult on certain matters, and
- to jointly make decision on specific matters.

5. CONSULTATION

5.1 What is consultation?

> Consultation entails that the employer **allows** the forum to make representations and to advance alternative proposals, *and considers and responds* to these and, if the employer disagrees with them, it must state the reasons for disagreeing.

Consultation must take place *before* the employer implements any proposal. The purpose of consultation is to attempt to *reach consensus*. If during consultation the employer and the forum do not reach consensus, nothing prevents

the employer from implementing a decision on which it has consulted the forum. However, if the employer and the forum do not reach consensus, the employer must use any agreed procedure to resolve any differences before implementing the employer's proposal.

5.2 Matters for consultation

The LRA provides that a forum is entitled to be consulted by the employer about proposals (unless they are regulated by a collective agreement) relating to:

- restructuring the workplace (for example, the introduction of new technology and new work methods),
- changes in the organisation of work,
- total or partial plant closure,
- mergers and transfers of ownership in so far as they have an impact on the employees,
- the retrenchment of employees,
- exemption from any collective agreement or law,
- job grading,
- criteria for merit increases or the payment of discretionary bonuses,
- education and training,
- product development plans, and
- export promotion.

In a workplace where there is a bargaining council, such council may confer on a forum the right to be consulted about additional matters in workplaces that fall within the registered scope of that bargaining council. A representative union and an employer may conclude a collective agreement granting a forum the right to be consulted about additional matters in that workplace.

6. JOINT DECISION-MAKING

6.1 What is joint decision-making?

> Joint decision-making requires the employer to consult and reach consensus with a forum.

6.2 Matters for joint decision-making

Matters for joint decision-making relate to:

- disciplinary codes and procedures,
- the proper regulation of the workplace (except for work-related performance),
- measures designed to protect and advance persons disadvantaged by unfair discrimination, and
- changes by employer-representatives on boards of employer-controlled schemes with regard to social benefits.

A representative union and the employer may also enter into a collective agreement conferring on the forum the right to joint decision-making in respect of *additional* matters or *removing* some matters. They may also enter into a collective agreement removing any of the matters referred to in the above list of matters requiring joint decision-making.

In fulfilling its duties to consult and to have joint decision-making, an employer is required to disclose all relevant information that will allow the forum to participate effectively in consultation and joint decision-making. However, the employer is not obliged to disclose information:

- that is legally privileged,
- that the employer may not disclose without contravening a law or court order,
- that is confidential and, if disclosed, may cause substantial harm to the employee or the employer, and
- private personal information relating to an employee (unless the employee has consented to the disclosure).

Disputes about disclosure of information must be referred to the CCMA. If parties fail to resolve the dispute through conciliation, any party to the dispute may request arbitration. The commissioner will not compel the employer to disclose 'irrelevant' information.

Despite the potential important influence that a forum may have on a workplace, few such forums are found in practice. This is so due to employers viewing forums as an inroad to managerial prerogative, and unions being concerned that forums will undermine collective bargaining structures.

7. ORGANISATIONAL RIGHTS OF WORKPLACE FORUMS

The LRA requires the employer to:

- allow members of the forum reasonable time off (with pay) to perform their functions and to receive training related to those functions,
- provide facilities for the forum to perform its functions,
- provide for the designation of full-time members of the forum if there are more than 1000 employees in such a workplace, and
- allow office bearers or officials of a representative trade union to attend a forum's meetings.

A forum is entitled to the above rights unless, if it has been established in terms of a collective agreement, the terms agreed to in the collective agreement will be applicable.

8. DISPUTE RESOLUTION

Unless there is a collective agreement, any party to a dispute regarding the interpretation and application of any matter regarding a forum, may refer

the dispute to the CCMA in writing. The CCMA must attempt to resolve the dispute through conciliation failing which any party to the dispute may request that it be resolved through arbitration.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Section 86 of the LRA provides that, in the absence of a collective agreement providing otherwise, an employer is obliged to consult and reach consensus with workplace forums about certain matters. Which *one* of the following is *not* included in the list of matters for joint decision-making in terms of section 86?
   (*a*) Disciplinary codes and procedures.
   (*b*) Workplace regulation, insofar as it does not apply to conduct which is not related to work performance of employees.
   (*c*) Restructuring the workplace, including the introduction of new technology.
   (*d*) Measures designed to protect and advance persons disadvantaged by unfair discrimination.
2. Company A has 105 employees of which 10 are managerial employees. Although not registered, Trade union X represents the majority of employees at Company A. Trade union X informs you that it intends to establish a forum. Advise Trade Union X on the possibility of establishing a forum.

✓ Feedback

1. Option (*c*) is the *correct* answer since it is not one of the matters for joint decision-making listed in section 86. Options (*a*), (*b*) and (*d*) are *incorrect* because they are some of the matters for joint decision-making listed in section 86.
2. Firstly, although trade union X is representing the majority of employees at Company A, it cannot establish a forum because there are less than 100 employees at Company A. When calculating employees for forum purposes, managerial employees are excluded. This means that Trade union X represents 95 employees. Secondly, Trade union X is not registered as required by the LRA.

RECOMMENDED READING

1. Chapter V of the LRA
2. Manamela ME 'Regulating workplace forums in South Africa' (2002) 14 *SA Merc LJ* 728
3. Van der Walt R 'Have workplace forums contributed to worker participation? Some management perceptions' *South African Journal of Business Management* (2008) 39(2) 45.

13

Strikes and lock-outs

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1. INTRODUCTION

At the end of a collective bargaining session or process, parties may either reach an agreement or fail to do so. If an agreement is reached, a collective agreement is concluded. However, if no agreement is reached, parties may agree on mediation or arbitration, or decide to exert pressure on each other through industrial action.

Industrial action for employees can take the form of strikes, secondary strikes, pickets and protest action, while employers have recourse to lock-outs.

In matters of industrial action it is important to know what type of action to take. Different types of industrial action serve different purposes. The purpose behind the action of the employer or the employees will determine the type of action to be taken, as illustrated below:

Employees' action	Purpose
Strike	to remedy a *grievance* or resolve any *matter of mutual interest* between employees and employers
Secondary strike	to strike in support of another strike (known as the primary strike) in order to put pressure on the primary employer to accede to the demands of its striking employees
Picket	to peacefully demonstrate support for any protected strike or opposition against any lock-out
Protest action	to promote or defend the socio-economic interests of workers

Employer's action	Purpose
Lock-out	to compel employees to accept a demand in respect of any matter of mutual interest between employer and employees

In this chapter the focus will be only on strikes and lock-outs. Pickets and protest action will be discussed in the next chapter.

Both strikes and lock-outs are essential elements of collective bargaining. However, such rights should be used as measures of last resort. Strikes are used by employees to back up their demands in promoting and defending their employment-related interests, and lock-outs are used by employers to back up their employment-related demands.

In the past few years South Africa has seen a high level of industrial action, including a strike in the mining industry which went on for more than five months. It is, therefore, important to have an understanding of this area of the law.[1]

2. LEGISLATIVE PROTECTION OF THE RIGHT TO STRIKE AND LOCK-OUT

The right to strike is clearly protected in South Africa through the Constitution, which guarantees that:

> 'Every worker has the right … to strike.'

The Constitution does not give employers the *right* to lock out employees.[2] The lock-out is *implied* in the Constitution's express protection of the right to bargain collectively.

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[1] The DoL has reported that working days lost to work stoppages in 2010 were the highest ever, with approximately 20 674 737 working days lost from about 74 work stoppages (51 in 2009) (Department of Labour *Annual Report, Industrial Action Report* (2010) 3) available at http://www.labour.gov.za/downloads/report/2010/revised.pdf). Working days lost in 2012 were estimated at 3 309 884 where 241 391 workers participated across all economic sectors (57.5% workers involved were from the mining sector) (Annual Industrial Action Report 2012 available at www.labour.gov.za).

[2] Note that s 27(5) of the Interim Constitution, 1993 included the right of employers to have 'recourse to a lock-out', but this right was not included in the final Constitution.

However, the LRA provides in section 64(1) that every employee has the right to strike, and every employer has *recourse* to a lock-out.

Neither the right to strike nor the right to a lock-out is directly protected in terms of an ILO Convention, but it is indirectly done through ILO Convention 87 and ILO Convention 98, which were both ratified by South Africa.

Legislative protection of the right to strike and recourse to a lock-out means that the employees partaking in that action will be protected against dismissal. In the case of a protected strike or lock-out (it used to be called a 'legal' strike or lock-out under the 1956 LRA), the parties taking part in the action are not guilty of breach of contract and cannot be dismissed for that reason.[3] The court may also not order an interdict to stop the action from continuing, and the participants in the strike will not be held liable for compensation for the work stoppage. These aspects are discussed in more detail below.

3. PROTECTED INDUSTRIAL ACTION

The right to strike and lock-out should comply with the law in order to be protected. Certain requirements must be met to ensure that the action is protected, namely:

- **Requirement 1: Definition of a strike and lock-out**
  The parties should ensure that their action complies with the definition of a strike or lock-out, therefore they must avoid the inherent limitations in the definitions of both strikes and lock-outs.
- **Requirement 2: Procedural requirements for the protection of strikes and lock-outs in terms of section 64**
  The parties should comply with the procedure prescribed by the LRA in section 64. In certain limited circumstances employers and employees will be exempted from complying with these procedures.[4]
- **Requirement 3: Prohibitions or limitations on strikes and lock-outs in terms of section 65**
  The parties should ensure that none of the prohibitions against industrial action as contained in section 65 of the LRA are applicable to their issue in dispute. These restrictions relate to the *nature* of the particular dispute between the parties and whether the nature is such that it allows for industrial action. For example, employees can go on strike only if the dispute is one of 'interest', meaning a dispute about a *change* to an *existing* right or about *creating* a new right. Employees may not strike about a dispute of 'right'. This is a dispute about the application and interpretation of an

[3] An exception exists in cases of misconduct committed during strike action and if, as a result of the prolonged industrial action, the employer suffers economically and needs to dismiss employees based on the operational requirements of the business.

[4] Section 64(3) provides for circumstances in which there is no need to comply with the procedural requirements. See para 5.4 below.

existing right (for example, a dispute about unfair dismissal), which dispute must be referred to arbitration for resolution.[5]

Below is a checklist to control if all three requirements have been successfully complied with. If so, the collective action will be protected.

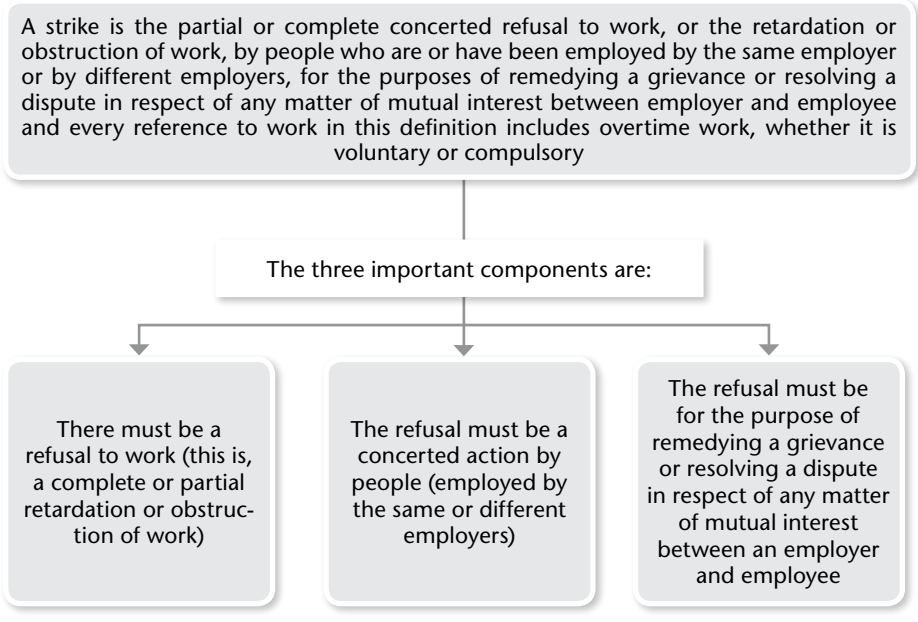
Requirement	Description	Required answer
1	Does the action comply with the *definition* of a strike or lock-out?	Yes
2	Have the *procedural requirements been* complied with?	Yes
3	Are there any *prohibitions* against the action?	No

4. REQUIREMENT 1: THE ACTION SHOULD COMPLY WITH THE DEFINITION OF A STRIKE AND A LOCK-OUT

4.1 What does this requirement entail?

It is important that the actions taken by employees and employers fall within the definitions of a strike or lock-out. Action that does not amount to a strike or a lock-out will *not* enjoy protection in terms of the LRA.

4.2 What is the definition of a strike?



[5] These are disputes better suited to resolution by third-party determination than by industrial action.

The definition of a strike and its three important components are illustrated below. It is important that the action taken by the employees comply with the definition, because any intentional refusal to work will amount to misconduct unless it can be regarded as strike action in terms of the above definition.[6]

4.2.1 *Refusal to work*

Two issues are important here:

<table>
<tr><th>What is a refusal?</th><th>What is work?</th></tr>
<tr><td>The refusal may be partial (employees perform only some of their duties),* or</td><td rowspan="4">The refusal to work must be:
• in relation to work which employees are contractually obliged to perform, and
• not contrary to the law or a collective agreement.
For example, if employees are required by a collective agreement to work overtime and they refuse, it will amount to a refusal to work. If the employees have no obligation to work overtime and they refuse, it will not be a refusal because it was not work which they were contractually required to perform.</td></tr>
<tr><td>complete (employees do not perform any of their duties), or</td></tr>
<tr><td>involve the retardation of work (employees work, but at a reduced pace), or</td></tr>
<tr><td>an obstruction of work (employees disturb production through their actions).</td></tr>
</table>

* Examples of partial strikes are 'work-to-rule' (doing only the essential aspects of the work) and 'go-slows' (working very slowly).

4.2.2 *Concerted action by people employed by the same or different employers*

Although the Constitution grants individual workers the right to strike, the right itself cannot be exercised individually. The action must be:

- 'concerted',
- 'by persons', and
- constitute collective action.

More than one person must be involved in order for the action to constitute a strike. The action must be carried out by people *acting together* who are or have been employed by the same employer or by different employers.

4.2.3 *To remedy a grievance or resolve an issue in dispute in respect of a matter of mutual interest between employer and employees*

Two issues are, again, important here:

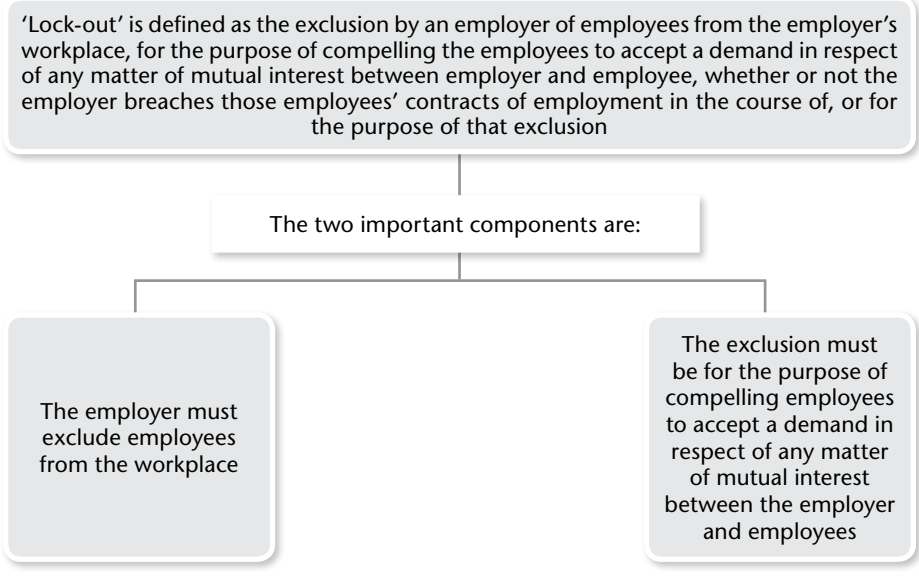
[6] Intentional refusal to work in the case of protected protest action will also not amount to misconduct. See ch 14 below.

What should the purpose of the refusal be?	Against whom must the refusal be directed?
The refusal to work must be for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest.	The action is directed at the employer/s. If, for example, employees refuse to work because they have a demand against the local taxi association, that will not amount to strike action. An exception exists in respect of secondary strikes, which are discussed in paragraph 7 below. Where there is no grievance or dispute against the employer, there cannot be a strike.
While the concept of 'mutual interest' is not defined in the LRA, it had been described as: '… whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned …'	
Matters of mutual interest may include, for example: • terms and conditions of employment, • health and safety issues, • the negotiation of disciplinary and grievance procedures, and • wage increases.	
An important indication that a matter is one of mutual interest, is if the matter can be dealt with through collective bargaining.	
For example, political issues or demands against the State do not qualify unless the State is the employer and the demands relate to the State's role as employer.*	

* These should be dealt with by way of protest action which will be discussed in ch 14 below.

4.3 What is the definition of a lock-out?

While employees have the right to strike in terms of the Constitution and the LRA, employers do not have a *right* to lock-out but have *recourse* to a lock-out in terms of section 64 of the LRA.



4.3.1 *Exclusion of the employees by the employer*

There must be an exclusion of employees from the employer's workplace in order for an action to constitute a lock-out. This normally happens when the employer closes the workplace entrance or gates and refuses to permit employees to enter the premises. In practice, this allows the employer to refuse to pay the employees their remuneration. This is in line with the LRA, which states that the employer is *not* obliged to remunerate an employee for services not rendered during a protected strike or protected lock-out. Put differently, the principle of 'no work, no pay' applies. In terms of the definition of a lock-out, the employer cannot exclude only one employee; it must be a group of employees.

4.3.2 *For the purpose of compelling employees to accept a demand in respect of any matter of mutual interest between the employer and employees*

The purpose of the action by the employer must be to compel employees to accept a demand in respect of a matter of mutual interest. If it is for a different purpose, the action will not constitute a lock-out and will constitute breach of contract. 'Matters of mutual interest'[7] with regard to strikes are also 'matters of mutual interest' in the case of lock-outs.

5. REQUIREMENT 2: PROCEDURAL REQUIREMENTS FOR THE PROTECTION OF STRIKES AND LOCK-OUTS IN TERMS OF SECTION 64

5.1 What does this requirement entail?

Compliance of section section 64(1) means that:

- the issue in dispute must be referred for conciliation,[8]
- a certificate of outcome must be issued or 30 days must have gone by before the strike can start, and
- the prescribed notice must be given to the employer in the case of a strike, and to the trade union (or the employees if there is no union) in the case of a lock-out.

---

[7] See para 4.2.3 above.

[8] Section 64(1)(*a*). Take note that it has been widely reported in the media that the Labour Relations Amendment Act may be referred back to Parliament to include a compulsory section on secret ballots (as opposed to a ballot by way of a show of hands) to be a procedural requirement before a strike may be called. It has also been suggested that, in certain circumstances, the Labour Court should be enabled to intervene in lengthy and violent strikes, or when the strike is becoming dysfunctional. It has also been mooted that when a strike gets violent, it should lose its protected status. The Amendment Act was, however, not referred back to Parliament, but to NEDLAC instead.

5.2 What is an issue in dispute?

The issue in dispute must fall within the definition of a strike (or lock-out).[9] The LRA defines an 'issue in dispute' as:

> '… the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out.'

In other words, the demand, grievance or dispute about which the employees are striking (or the employer is locking-out) must relate to a matter of mutual interest.

The LRA requires that parties must try to resolve the issue. It is, therefore, required that the parties first refer the dispute to a bargaining council (if there is one for that sector), and if no bargaining council exists, the dispute must be referred to the CCMA for conciliation.

5.3 What is a certificate of outcome?

The bargaining council or the CCMA must attempt to resolve the dispute through conciliation within 30 days of the referral. If the parties to the dispute reach an agreement, the dispute is resolved. If no agreement is reached, the conciliator must issue a certificate to indicate that the matter has not been resolved. After this (or after 30 days have gone by since referral of the dispute for conciliation), the parties can give notice of the proposed strike (or lock-out).

5.4 What is prescribed notice?

If conciliation fails, or 30 days have passed since the referral of the dispute, at least 48 hours' written notice must be given of the commencement of the strike or lock-out. If the State is the employer, at least seven days' notice must be given. If the employer is a member of an employers' organisation, notice must be given to the employers' organisation.

In case of a proposed lock-out, the employer must give notice to the union involved in the dispute, or to the employees directly if there is no union.

The LRA does not prescribe what details the notice must contain; it only regulates that it must be in writing and must be issued 48 hours before commencement of the strike.

There are some exceptions where the parties do not need to follow the procedures prescribed by the LRA. The parties to a dispute need not follow the prescribed procedural requirements in terms of section 64(1) under the following circumstances:

- if the parties to the dispute are members of a bargaining council and the dispute followed the procedure set by that council's constitution,

[9] See paras 4.2 and 4.3 above.

- if the parties concluded a collective agreement with prescribed procedures to be followed before they strike or lock-out, and they have complied with that agreement,
- if an employer implements an unprotected lock-out and the employees strike in response to that (the same would apply if the employer locked-out the employees in response to an unprotected strike,
- if a strike takes place after the employer has unilaterally changed the terms and conditions of employment, and the employer fails to rectify this despite prior warning, and
- if an employer refuses to bargain with a union, the dispute must first be referred for conciliation and then for advisory arbitration before notice of a strike can be given.

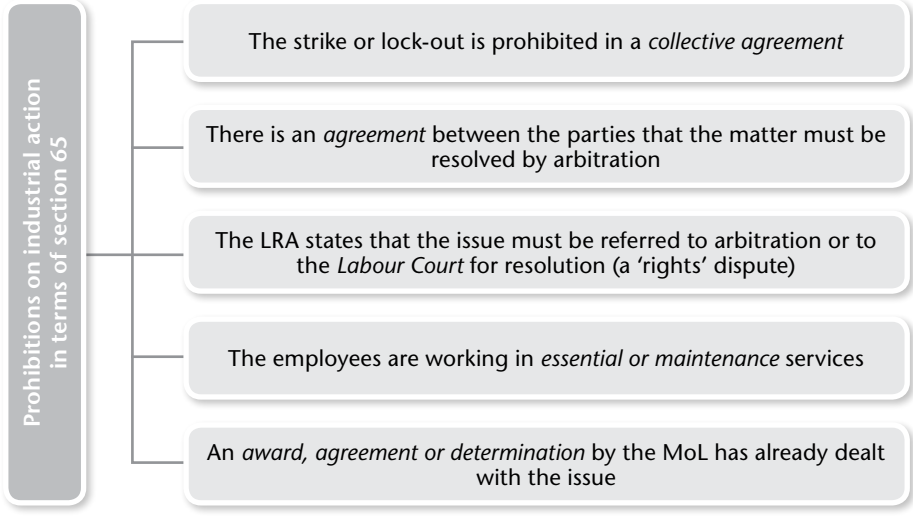
6. REQUIREMENT 3: PROHIBITIONS OR LIMITATIONS ON STRIKES AND LOCK-OUTS IN TERMS OF SECTION 65

6.1 What does this requirement entail?

In certain circumstances employees may not strike at all (and thus employers would also not be able to lock out employees). That would be where section 65 of the LRA prohibits strikes and lock-outs.

If a strike or lock-out is prohibited in terms of section 65, and the parties continue with industrial action, it will be *unprotected* even if the procedures discussed above have been followed and the action complies with the definition of a strike (or lock-out).

Section 65 prescribes circumstances under which employees may not strike and an employer may not institute a lock-out.



6.2 Where a collective agreement prohibits a strike or lock-out

In accordance with the LRA's objective to promote orderly collective bargaining, parties to a dispute who have previously agreed that they will not resort to industrial action over certain issues, cannot do so. If the parties carry on with industrial action, such action will be *unprotected*. The agreement must, however, be a collective agreement as defined in the LRA, and will bind the parties only for the duration of the collective agreement.

6.3 Where an agreement prescribes arbitration

Section 65 of the LRA refers to an 'agreement' and not only a collective agreement. This means that the parties are bound by *any* agreement which requires that an issue in dispute must be referred for arbitration. A strike or lock-out regarding such an issue will then be prohibited and *unprotected*.

6.4 Where a dispute must be referred to arbitration or the Labour Court

The LRA provides that, if a party has a right in terms of the Act to refer the issue in dispute (a 'rights' dispute) for arbitration or adjudication, such a party may not resort to a strike or lock-out in order to resolve the dispute.

Despite this rule, the LRA provides for two exceptions when strike action about a rights dispute will be allowed:[10]

Exception 1	Exception 2
In the case of employees who want to enforce their demands in respect of organisational rights, the LRA gives them a choice of options between arbitration and strike action. Once a union opts for the strike route and gives notice of its intention to strike, it forfeits the right to refer the dispute to arbitration within 12 months from the date of the notice.	In the case of a large-scale retrenchment by a large employer, in which the union wants to challenge the substantive fairness of the dismissals, it may do so by either referring the matter to the Labour Court for adjudication or by embarking on strike action. Once it has chosen the strike route it cannot change back to adjudication.

6.5 Where an award or a collective agreement or determination regulates the issue in dispute

The LRA provides that no-one may take part in a strike or lock-out if that person is bound by an arbitration award which regulates the issue in dispute. The reason for this is that an arbitrator's award is final and binding.

The LRA also prohibits a strike or lock-out if parties are bound by a collective agreement that regulates the issue in dispute. The reason for this is that,

[10] See ch 10, para 4.6 and ch 9, para 3.6 above.

once parties have settled a matter through a collective agreement, they are bound by the terms of that agreement.

The same applies to parties bound by a determination made by the MoL.

6.6 Where employees are engaged in essential and maintenance services

Employees who are engaged in the provision of essential and maintenance services are prohibited from striking. This is mainly because the provision of such services is important either to society or the employer.

Where there is a collective bargaining dispute in an essential service or maintenance service, it must be referred for interest arbitration. The arbitrator is tasked to achieve a rational outcome of the dispute.

Two definitions are important in this context, namely:

Essential service	Maintenance service
An 'essential service' means a service, of which the interruption endangers the life, personal safety or health of the whole or any part of the population and also includes the Parliamentary Service and the South African Police Service.	A 'maintenance service' is a service of which the interruption of that service has the effect of material physical destruction to any working area, plant or machinery. This could be, for example, the bottle-washing machinery in a brewery, which can be damaged if it stops for more than 30 minutes. The brewery does not perform an essential service, but the washing machinery operators perform a maintenance service.

6.6.1 *Essential services*

Whether a service qualifies as an essential[11] or a maintenance service[12] is determined by the Essential Services Committee (hereafter 'ESC'). The SAPS and Parliamentary Services are specifically included in the definition of 'essential service'.

Other examples of services that have been designated as essential services are:

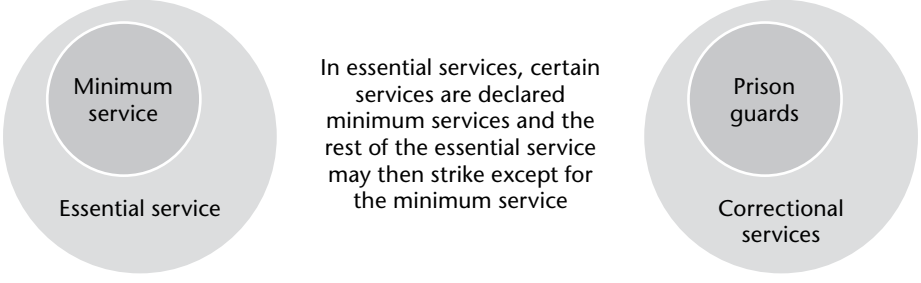
- the regulation and control of air traffic,
- municipal traffic policing,
- the supply and distribution of water,
- the generation, transmission and distribution of power,
- fire fighting,
- correctional services,
- public health services, and
- blood transfusion services provided by the South African Blood Transfusion Service.

[11] Section 213.
[12] Section 75(1).

Although employees engaged in essential services are prohibited from striking, the LRA makes provision for an exception, namely where there is a *minimum* services agreement in place.

Employers and unions involved in essential services can conclude collective agreements providing for the maintenance of certain 'minimum services' as an essential service. This minimum service will not be able to strike while the rest of the 'essential services' may.

> **Example:** In Correctional Services, the prison guards would, for example, perform a minimum service that must be maintained at all times. If this is allocated as such, it will mean that they may not strike, but employees in other sections of Correctional Services may strike, such as the kitchen, the switchboard operator or the foreman of the store.



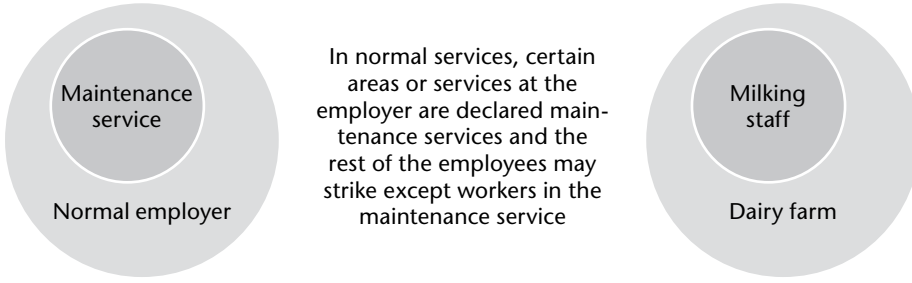
6.6.2 *Maintenance services*

The LRA also recognises that certain areas of the workplace (even if the employer is not performing an essential service) must be maintained during a strike in order to prevent large-scale damage. The washing machinery and its operators in the brewery is one example. Another example would be a dairy farm. The farm workers do not perform an essential service and cannot be designated as such. However, if the workers who do the milking should strike and not milk the cows, the latter could get ill and even die.

The employer and union may agree that a certain level of service will be maintained during a strike or lock-out. If no such agreement exists, the ESC may designate a service as a maintenance service (for example, milking the cows) and, once designated, employees involved in the designated maintenance service may not strike or be locked out. If approved by the ESC, employees in essential services, generally, may strike or be locked out, but not the employees who provide minimum services.

Moreover, once a *part* of the business has been designated as a maintenance service, the employer will not be allowed during the strike to use replacement labour in *that part* of the business. If a strike is about terms and conditions of

employment, the outcome of the strike will also determine the changes to the terms and conditions of employees in minimum services.

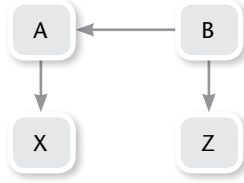


Maintenance services are not the same as minimum services. A minimum service is a part of an essential service, designated as such by a collective agreement. A maintenance service is also designated as such by a collective agreement, but does not necessarily form part of an essential service.

The Amendment Act substituted section 72 and introduced a new section which, amongst others, provides for the negotiation and conciliation of minimum service agreements. A minimum service designation will not apply if the majority of employees voted against it.

7. SECONDARY STRIKES

An example of a secondary strike is set out below:



Example: Company A is a paper manufacturer whose main function is to process wood into pulp. A is in dispute about wages with trade union X at the workplace. Factory B fells, cuts and supplies raw wood to A. Trade union Z is the only union in the workplace of B. If the members of Z strike in support of the wage demand by members of X, that will amount to a secondary strike. The strike by members of Z will impact on B, but also put pressure on A, because B will not be able to provide A with raw wood, which may bring A's operation to a halt.

In order to understand how secondary strikes work, the following terms should be clarified with reference to the above example:

- A is the primary employer and B is the secondary employer.

- The wage dispute between A and X will constitute the primary dispute, and the strike by members of X will constitute the primary strike action.
- The strike by members of Z at the workplace of B is a secondary strike.

The secondary strike, therefore, takes place when the members of Z at employer B (not the primary employer A) strike in support of demands by members of X against their employer A. The purpose of the strike by members of Z at B is in support of the strike by members of X at A. B's inability to supply the raw wood will influence A's operation (which may have financial consequences for A) and thereby exert pressure on A to accede to the demands of X.

In order for a secondary strike to be protected, the LRA sets the following requirements:

- the *primary strike must be protected,*
- strikers must give their employer seven days' *written notice* of the commencement of the strike, and
- the *harm to the secondary employer must not be more than what is required to make an impact on the primary employer.*

These requirements are explained in the diagram on the next page.

8. LEGAL CONSEQUENCES OF PROTECTED STRIKES AND LOCK-OUTS

If all the requirements for a protected strike or lock-out have been met successfully, the strike or lock-out will be protected.

An employee taking part in a protected strike and an employer having a protected lock-out will be entitled to the following protection:

- An employee may *not be dismissed* except for misconduct or the operational requirements of the business.
- The employer's or employee's action does not constitute a delict or breach of contract.
- An employer may not discriminate against an employee because of her/his involvement in the strike.
- No claims for compensation can be instituted against employees or employers.

8.1 Dismissal only for misconduct and operational requirements

If an employer dismisses employees who took part in a protected strike, the dismissals would be automatically unfair.

The employer may, however, fairly dismiss employees who engage in unlawful conduct (misconduct) during such a protected strike. If, for example, the striking employees assault or intimidate co-employees or damage property, the employer may dismiss such employees.

Protection

The secondary strike will be protected only if the primary strike is protected.

Notice

The secondary employer must receive seven days written notice of the commencement of the secondary strike. This is to give the secondary employer an opportunity to put pressure on the primary employer to accept the demands of the primary strikers.

If the secondary strike is part of a strike about dismissals for operational reasons, or the secondary employer is the State, 14 days' written notice must be given to the secondary employer before the strike can commence.

Proportionality

The nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that it may have on the business of the primary employer.

This requirement protects the secondary employer and ensures that the secondary strike does not cause significant harm to the secondary employer without having any effect on the primary employer.

The LRA permits the Labour Court to consider the 'proportionality' of the proposed secondary strike in relation to the primary employer by weighing up the potential effect of the secondary strike on the primary employer against the potential effect of the strike on the secondary employer. If the secondary employer is of the opinion that the requirements for the secondary strike have not been met, the employer may approach the Labour Court for an interdict to prevent or limit the secondary strike.

In the example above, the secondary strike would not have a proportional effect on A if B supplied only 2% of A's raw wood. While in such instance the secondary strike may bring great financial loss for B, it will have very little impact on A.

Moreover, the employer may lay criminal charges against these employees or apply for an interdict to prevent such actions. The employer may also institute civil proceedings to recover any loss incurred. If the employer dismisses employees who are engaged in a protected strike based on their misconduct during the strike, that employer must ensure that the dismissals are fair and in line with the requirements for a fair dismissal based on misconduct.

Another reason for which employees may be dismissed during a protected strike, is on the basis of the operational requirements of the business. The substantive fairness of such a dismissal will still be subject to the court's scrutiny to determine whether the reason given was the real reason for dismissal. If the employer dismisses employees who are engaged in a protected strike based on operational reasons, the procedures prescribed in terms of the LRA for such dismissals must be followed.

8.2 Delict or breach of contract (civil liability)

Under common law, employees who strike are guilty of serious breach of contract, and the employer is entitled to summarily dismiss them. However, in terms of the LRA, a person does *not* commit a delict (an unlawful act) or breach of contract by engaging in either a protected strike or lock-out.

The LRA further provides that no civil legal action may be instituted against any person because of that person's participation in a protected strike or lock-out. Put differently, if the prescribed procedural requirements have been complied with and there are no limitations or prohibitions against the action, the action will be protected against civil liability.

Furthermore, the employer cannot interdict anyone from taking part in a protected strike. The same rules apply if an employer implements a protected lock-out.

8.3 Protection against discrimination

No employer may do anything that will discriminate against, or prejudice, those workers on strike. For example, employers may not give financial benefits or bonuses to workers who are *not* on strike, or withdraw discretionary bonuses from those on strike.

8.4 Protection against claims for compensation by employers

Employers of employees on a protected strike may not approach the Labour Court for compensation due to any loss caused by a protected strike.

8.5 Remuneration and replacement labour

Two important consequences flowing from protected strikes and lock-outs relate to:

- remuneration and whether 'no work, no pay' applies, and
- the use or not of replacement labour.

8.5.1 *No remuneration*

The common-law rule of 'no work, no pay' applies to strikes and lock-outs. This rule is based on the fact that the contract of employment is reciprocal in nature, that is, performance by the employer (payment of salaries) depends on performance by the employee (making her/his services available). The position is retained by the LRA, which provides that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or lock-out.

There is, however, one exception to this rule. If the employees' remuneration includes payment *in kind* in the form of accommodation, the provision of food and other basic amenities of life, the employer may not withhold such payment in kind during a strike or lock-out. However, the employees must request that payment in kind continues. The employer may recover the monetary value of the payment in kind from the employees after the end of the strike or lock-out by way of civil proceedings instituted in the Labour Court.

8.5.2 *Replacement labour*

Employers are permitted to use replacement labour during a protected strike, unless the whole or part of the employer's business is a maintenance service (as discussed above).

However, employers cannot use replacement labour if they embark on an offensive lock-out (a lock-out initiated *before* a strike commences). They can only use replacement labour in the case of a defensive lock-out (that is, a lock-out in response to a strike).

9. CONSEQUENCES OF UNPROTECTED STRIKES AND LOCK-OUTS

If employers and employees do not comply with the requirements for protection, the action will be unprotected and will have certain consequences discussed below.

9.1 Consequence 1: Interdict

If a strike or lock-out does not comply with the provisions of sections 64 and 65, it will be unprotected. In such a case, the Labour Court has the jurisdiction to grant an interdict or an order restraining any person from participating in, or acting in contemplation or in furtherance of an unprotected strike. An interdict or order against an unprotected lock-out may also be granted. The Labour Court has exclusive jurisdiction in this regard.

9.2 Consequence 2: Compensation

The Labour Court may order the payment of 'just and equitable compensation' to either employees or employers who suffered any loss caused by an unprotected strike or lock-out.

Compensation will, however, not be granted unless the claimant can prove that it suffered a loss and that the loss resulted from the strike or lock-out. In deciding whether to grant the order for payment of compensation, the Labour Court must have regard to:

- whether attempts were made to comply with the provisions of sections 64 and 65,
- the extent of those attempts, and
- whether the strike or lock-out was premeditated.

Other factors to be considered are whether the strike or lock-out was in response to unjustified conduct by the other party to the dispute, and whether there was compliance with an interdict which had been obtained.

The Labour Court must also take into account the interests of orderly collective bargaining, the duration of the strike or lock-out, and the financial position of the employer, union or employees.

9.3 Consequence 3: Dismissal of strikers

Strikers who participate in an unprotected strike, or certain forms of conduct in contemplation or furtherance of an unprotected strike, may be dismissed. Participation in unprotected action will be the reason for such a dismissal.

The Code: Dismissal provides that participation in an unprotected strike constitutes misconduct. However, as in the case of any other act of misconduct, participation in an unprotected strike does not necessarily justify dismissal. The dismissal will only be fair if it is *both* substantively and procedurally fair. These are discussed below.

9.3.1 *Substantive fairness*

The substantive fairness of a dismissal relates to whether there are valid or fair reasons for the dismissal. The Code: Dismissal requires that the substantive fairness of the dismissal of strikers who participated in an unprotected strike must be evaluated in the light of the factors set out below.

(*a*) The seriousness of the failure to comply with the LRA

If there is deliberate or serious non-compliance with the procedures prescribed by the LRA, the dismissal will probably be fair. However, minor technical factors such as non-compliance with time limits or incorrectly completed forms may be condoned, and would not constitute serious non-compliance.

(*b*) Attempts to comply with the provisions of the LRA

If the union and the employees genuinely attempted to comply with the provisions of the LRA, it would not be seen to justify the substantive fairness of the dismissal. For example, if the union, in the notice to strike, inaccurately

formulated the dispute, it would not be sufficient to dismiss strikers. The onus of justifying non-compliance with the LRA rests upon the strikers.

(*c*) Unjustified conduct by the employer

Any unfair conduct by the employer will influence the substantive fairness of a dismissal. This may happen, for example, if the strike was in response to the employer's unfair bargaining tactics, or if the strike was in reaction to unfair practices against individual employees. In these instances, dismissal would not be justified.

9.3.2 *Procedural fairness*

The Code: Dismissal requires that the dismissal of strikers engaged in an unprotected strike must be procedurally fair, and it sets out the following procedure to be followed.

(*a*) Contact with the union

If strikers are union members, employers are required to contact a union official 'at the earliest opportunity' before dismissing strikers, in order to discuss the course of action the employer intends to follow. The purpose of this is to give the union an opportunity to persuade the employer not to dismiss the strikers, and for the workers to return to work.

(*b*) Issuing an ultimatum

The employer must give the strikers an ultimatum before dismissing them. The purpose of an ultimatum is to convince strikers to return to work. Such ultimatum must comply with the following requirements:

- The ultimatum must be communicated to the strikers in a medium they understand and, if necessary, in their own language.
- The ultimatum must be clear and unambiguous, leaving no doubt as to what is expected of the employees.
- The time set in the ultimatum should be reasonable. This means that there must be sufficient time from the moment of issuing the ultimatum to enable the workers to receive and digest the ultimatum, as well as for them to hold meaningful discussions with their union and to take rational decisions.
- If the ultimatum is communicated to a collective bargaining representative (a union representative) within a reasonable time, it would constitute sufficient notice to employees.

Once the strikers have complied with the ultimatum, the employer cannot take disciplinary action against them for the act of striking. However, if they elect not to make representations, their dismissal will be considered to be procedurally fair.

In circumstances where it cannot reasonably be expected from the employer to issue an ultimatum, the employer may summarily dismiss the strikers.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which one of the following statements regarding strikes is correct?
   (*a*) In terms of the Constitution, employees have recourse to strike.
   (*b*) A strike exists only if there is a complete refusal to work.
   (*c*) At least 30 days notice must be given before the commencement of a strike.
   (*d*) The dispute about which employees strike must relate to a matter of mutual interest between employers and employees
2. Discuss the procedural requirements which a secondary strike must comply with in order to be protected.
3. The Kgokaganang Municipality has changed the shift system for employees working within its electricity department. Employees within this department are unhappy about the change and are considering engaging in a strike to force the employer to revert to the old shift system.
   Advise the employees on whether they can go on strike in support of their demand.

✓ Feedback

1. Option (*d*) is the *correct* answer because it contains a correct statement regarding strikes. There must be a dispute that relates to a matter of mutual interest between employers and employees. Options (*a*)–(*c*) are *incorrect*. In terms of the Constitution, employees have the *right* to strike and employers have a *recourse* to lock-out. A strike exists not only if there is a complete refusal to work but also a partial refusal to work. At least 48 hours notice must be given before the commencement of a strike and not 30 days notice. See paragraphs 4.2 and 5.4 above.
2. The *primary strike must be protected*. The secondary strike will be protected only if the primary strike is protected. The primary strike must have crossed all the requirements. Strikers must give their employer seven days' *written notice* of the commencement of the strike. The purpose of this notice is to give the secondary employer an opportunity to put pressure on the primary employer to accept the demands of primary strikers. The *harm to the secondary employer must not be more than what is required to make an impact on the primary employer.* The purpose of this requirement is to protect the secondary employer against serious harm. See paragraph 7 above.
3. The Constitution and the LRA guarantee the right to strike to employees. However, this right is not unlimited. It is limited by, *inter alia*, section 65, which states that a strike will be unprotected in certain circumstances.

These circumstances include employees engaged in essential and maintenance services.

'Essential services' are defined as services, the interruption of which would endanger the life, personal safety or health of the whole or any part of the population. The ESC has, amongst other things, designated the generation, transmission and distribution of power, as essential services. The electricity department of the municipality will fall under this category. However, in terms of section 72, employers and employees in essential services can conclude an agreement providing for the maintenance of certain minimum services. If such an agreement is ratified by the ESC, employees may strike or be locked-out, but not those employees who perform the minimum services. Terms and conditions of employment of such employees will also not be subject to arbitration in terms of section 74, but will be determined by the outcome of the strike by that part of the workforce not engaged in the minimum services.

Employees of the Kgokaganang Municipality cannot go on strike unless they have complied with the provisions of section 72. See paragraph 6.6 above.

RECOMMENDED READING

1. Le Roux PAK 'Protected strikes and the LRA' (2011) *CLL* 20(8) 71
2. Manamela ME & Budeli M 'Employees' Right to strike and violence in South Africa' XLVI *CILSA* (2013) 308
3. Mischke C 'Striking in support of unlawful demands—The LAC examines "strikes" which fall outside the ambit of the Labour Relations Act' (2006) *CLL* 16(3) 21
4. Ngcukaitobi T 'Strike law, structural violence and inequality in the Platinum Hills of Marikana' (2013) 34 *ILJ* 836
5. Norton D 'When is a secondary strike reasonable? The connections between separate employers' (2008) *CLL* 18(3) 21

14

Pickets and protest action

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1. INTRODUCTION

Other forms of industrial action by employees (apart from strike action) are pickets and protest action. It is important to be able to differentiate pickets and protest action from strikes as their purposes are different.

- The purpose of a *picket* is to peacefully demonstrate support for any protected strike or opposition against any lock-out.

- The purpose of *protest action* is to promote or defend the socio-economic interests of workers.

Similar to strikes, employees engaging in pickets and protest action must ensure that their actions are protected by the LRA. These aspects are discussed in more detail below.

2. REQUIREMENTS FOR PROTECTED PICKETS

2.1 Introduction

A picket takes place when, for example, employees on strike stand at/near their workplace in order to persuade others, such as employees *not* on strike, or endeavouring to convince customers and suppliers of the employer not to deal with their employer. A picket is generally used by employees to gain publicity for and support for their demands. The recognition of the right to picket shows that constitutional rights of freedom of association and freedom of assembly are respected.

In order for a picket to be protected:

- The parties should ensure that their action complies with the definition or purpose of a picket.
- The parties should comply with the procedure prescribed by the LRA in section 69.

2.2 Definition of a picket

A picket is an example of conduct in contemplation or furtherance of a strike. The right to picket is recognised and protected in the following legislation:

- it is guaranteed by the Constitution,
- it is regulated by the LRA, and
- it is regulated by the Code: Picketing,[1] contained in the LRA.
  - This Code serves as a guide for those who want to participate in, or organise a picket, and others who may be affected by the picket, but it does not impose any duties.
  - The Code: Picketing states the purpose of a picket as follows:

    > 'The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike or lock-out. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.'

[1] See ch 1, para 4.

2.3 Procedural requirements for protection of a picket

A picket taking place in compliance with the provisions of section 69 will be protected if it is:

- authorised by a registered trade union,
- for the purpose of peacefully demonstrating, and
- in support of *any protected* strike or in opposition to *any* lock-out.

Authorised by a registered trade union

- Unregistered trade unions and employees acting on their own cannot authorise a picket; such a picket will not be protected by the LRA.
- This is to ensure that trade unions take responsibility for the conduct of their members taking part in a picket.
- The authorisation of a picket must be in accordance with the trade union's constitution.
- The authorisation must be formal and in writing and must be accompanied by a resolution authorising the picket.
- These documents should then be served on the employer before the commencement of a picket.

For the purpose of peacefully demonstrating

A picket must be peaceful in order to enjoy the protection of the LRA. Intimidation and violent conduct will result in civil and criminal liability. Picketers may:

- carry placards,
- chant slogans,
- sing, and
- dance,

but they may not do any of the following:

- physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises, or
- commit any action which may be unlawful, including but not limited to any action which is, or may be perceived, to be violent.

In support of any protected strike or in opposition to any lock-out

A picket must be:

- in support of a protected strike, or
- in opposition to any lock-out.

Pickets in support of unprotected strikes will not fall under section 69. However, pickets in opposition to any lock-out (protected or unprotected) are covered under the section. Pickets in support of a secondary strike will also fall under section 69. A picket for any other purpose will fall beyond the protection of the LRA, but may fall under the protection of the Constitution.

2.4 Where can a picket take place?

> A picket may be held in any place to which the public has access, but outside the premises of an employer or, with the permission of the employer, inside the employer's premises.

The employer may not unreasonably withhold permission to picket. The object of obtaining permission is to protect employers from the disruption which a picket may cause. If the trade union feels that permission is being withheld unreasonably, the CCMA may be requested to attempt to secure an agreement between the parties on the rules of access to the employer's premises. If this fails, the CCMA may establish the necessary rules. The CCMA will grant access only if it is satisfied that the employer has unreasonably denied access.

The Amendment Act introduced a provision in terms of which rules established by the CCMA, may provide for picketing by employees in a place which is owned or controlled by a person *other* than the employer, if that person has had an opportunity to make representations to the Commission before the rules are established.

The Code: Picketing lists the following as some of the factors that should be considered in determining the reasonableness of the employer's decision in granting access or not:

- the nature of the workplace and its situation,
- the number of employees proposed to take part in the picket on the employer's premises, and
- the undertaking by the union to exercise control over the picket.

If the CCMA allows a picket inside the employer's premises, but the employer refuses to allow picketers access in accordance with these rules, the union may refer a dispute to the CCMA for conciliation. If conciliation fails, the matter may be referred to the Labour Court for adjudication.

2.5 Picketing rules and conduct during a picket

Section 69 of the LRA does not regulate the conduct of the picketers and the employer during a picket. The employer and the trade union must agree on picketing rules. The Code: Picketing contains a number of matters that may be included in such an agreement. If the parties cannot agree on the picketing rules, either the employer or the trade union may request the CCMA to attempt to secure an agreement on the rules for the picket. If agreement cannot be reached, the CCMA can establish the rules with which the parties must comply.

> The following must be done by the registered trade union for a picket:
> - It must appoint a convenor to oversee the picket.
> - The convenor must be a member or an official of the trade union.

- The convenor must always have at hand copies of section 69 of the LRA, the guidelines, any collective agreement or rules regulating pickets, the resolution, and formal authorisation of the picket by the registered trade union.
- The convenor must notify the employer, the responsible person appointed in terms of the Regulation of Gatherings Act,[2] the police and public officials of the proposed picket.
- The notice should contain:
  - confirmation that the picket complies with section 69,
  - the name, address and telephone number of the trade union and the convenor,
  - details of the picket, including details of the employer being picketed,
  - the date of the commencement of the picket, and
  - the location of the picket.
- On receipt of the notification, the employer must, in turn, provide the convenor with the name, address and telephone number of the person appointed by the employer to represent it in any matters arising from the picket.
- The registered union must also appoint marshals to monitor the picket. The marshals must have at hand the telephone numbers of the convenor, the trade union office and anyone appointed to oversee the picket in the absence of the convenor, and should wear armbands to identify themselves as marshals.
  - In terms of the Code: Picketing, the police should not become actively involved in the picket, except to uphold the law, preserve peace and enforce the law.

2.6 Legal consequences of protected and unprotected pickets

2.6.1 *Delict or breach of contract*

A person taking part in a protected picket does not commit a delict or a breach of contract. The employer may therefore not sue such a person or trade union for damages caused by a picket. The court may however grant an interdict or order to stop a picket that does not comply with provisions of the Act (section 68(1)).

2.6.2 *Disciplinary action*

No disciplinary action may be taken against an employee for participating in a protected picket. However, if employees commit acts of misconduct (for example, intimidating or threatening others) during a picket, the employer may take disciplinary action against them. Such employees may even be fairly dismissed.[3]

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[2] See ch 9, n 24 above.
[3] See ch 9, para 1.2.4 above.

If the picket does not comply with provisions of sections 69(1) and (2) or the picketing rules, it will be unprotected.

If the employees engaged in a picket or the employer breach picketing rules, the dispute may be referred for conciliation, and if that fails, to the Labour Court for adjudication.

3. REQUIREMENTS FOR PROTECTED PROTEST ACTION

There are two requirements for protected protest action, namely:

- trade unions or federations of trade unions should ensure that their action complies with the definition or purpose of protest action, and
- trade unions or federations of trade unions should comply with the procedure prescribed by section 77 of the LRA.

3.1 Definition of protest action

'Protest action' is defined in the LRA as follows:

> '... the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike ...'

Trade unions play an important role, not only in employment-related matters, but also in the wider society. Trade unions often get involved in and influence policy decisions that have an impact on society. One of the purposes of the LRA is 'to advance economic development, social justice, labour peace and the democratisation of the workplace', and trade unions play an important role in achieving this purpose. However, strike action cannot be used in furthering these aims. Instead, the LRA affords trade unions and workers the right to take part in protest action as a form of industrial action. Protest action is the successor of 'stay-aways', which were used in the past to bring about political change in the country.[4]

The obvious difference between a strike and protest action is in their *purposes*.

The purpose of a strike	The purpose of protest action
is to remedy a grievance or resolve a dispute in respect of any matter of mutual interest between employer and employees.	is to promote or defend the socio-economic interests of workers. Since no definition of 'socio-economic interests' is provided in the LRA, the determination of its meaning is left to the courts. Educational and e-toll reforms are two examples of socio-economic matters. However, protest action for purely political purposes is not sanctioned by the LRA.

[4] Stay-aways are often used in protest against government action, inaction or policies. Such action was used in the 1980s and 1990s in protest against apartheid government policies. Through stay-aways, unions and union federations such as COSATU, challenged the apartheid government and tried to force employers to put pressure on government to introduce political changes in the country.

3.2 Procedural requirements for the protection of a protest action

Since protest action may have serious impact on the economy of the country, it is important that it be regulated. Section 77 of the LRA provides that every employee *who is not engaged in an essential or maintenance service* may take part in protest action if the following requirements are met:

- the action must be called by a registered trade union or federation of trade unions,
- NEDLAC must be given notice of the protest action, including the nature and reasons for the protest action,
- the matter giving rise to the protest action must have been considered by NEDLAC or any other appropriate forum, and
- NEDLAC must have been given at least 14 days' notice of the intention to proceed with the action.

3.2.1 *Action called by registered trade union or federation of trade unions*

Although employees have the right to engage in protest action, only a *registered* trade union or *registered* federation of trade unions may call a protest action.

3.2.2 *Notice of protest action to NEDLAC*

The union or federation of trade unions must serve notice on NEDLAC which states the reason and nature of the protest action. The purpose for this notice is to enable the parties at NEDLAC (organised labour, organised business and government) to attempt to resolve the matter.

3.2.3 *NEDLAC or any appropriate forum must consider the matter giving rise to protest action*

NEDLAC or any other appropriate forum in which parties concerned are able to participate must have considered the matter giving rise to the intended protest action in order to resolve the matter. An example of an appropriate forum in this case is a bargaining council with jurisdiction over the matter.

3.2.4 *Notice to NEDLAC of intention to proceed with action*

The trade union or federation must serve NEDLAC with another notice of its intention to proceed with the proposed protest action 14 days before the commencement of the protest action.

3.3 Legal consequences of protected and unprotected protest action

In terms of the LRA, protest action will be protected in the same manner as protected strikes and lock-outs if the above requirements are complied with.

Protection entails immunity against civil claims and against the dismissal of those who took part in protest action. However, the protection against dismissal will be forfeited if employees took part in unprotected protest action, that is, if the above requirements are not complied with. Furthermore, in terms of section 77(4) there will be no protection if:

- employees participate in a protest action or any conduct in contemplation or furtherance thereof in breach of an order of the Labour Court, and
- employees act in contempt of an order of the Labour Court made in terms of this section.

If the procedural requirements for a protected protest action are *not* met, the action may be prohibited by interdict, damages may be claimed from employees who participated in the action, and they may be fairly dismissed. Nonetheless, section 77(2) provides that even if all the prescribed requirements are met, the Labour Court may grant an order prohibiting the continuation of protest action. If an employee continues with protest action in breach of such order, protection against dismissal or disciplinary action is forfeited.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements is *correct* regarding pickets?
   (*a*) A picket may only be used to support a protected strike.
   (*b*) Employees acting on their own may authorise a picket.
   (*c*) Picketers may prevent customers from gaining access to the employer's premises.
   (*d*) Marshals must be appointed to monitor the picket.
2. Explain the purpose of a picket.
3. Members of trade unions affiliated to one of the biggest federations of trade unions, the South African Employees' Congress, want to stop working for two days in order to pressurise government to stop the e-tolling in Gauteng. Discuss the nature of the action in which they can engage and the procedure to be followed in order for the action to be protected.

✓ Feedback

1. Option (*d*) is the *correct* option as it contains the correct statement regarding pickets. A trade union authoring the picket must appoint marshals to monitor the picket. Options (*a*)–(*c*) are *incorrect*. A picket can also be used in support of a protected strike. A picket can only be authorised by a registered trade union and not by employees on their own. A picket must be peaceful and, therefore, picketers nay not prevent customers from gaining access to the employer's premises.
2. The purpose of the picket is to peacefully encourage non-striking employees and members of the public to oppose a lock-out or to support strikers involved in a protected strike. This may be in the form of encouraging

employees not to work during the strike or lock-out or to dissuade replacement labour from working. A picket may also be used to persuade members of the public or other employers and their employees not to do business with the employer.

3. As the purpose of the proposed industrial action is to bring about socio-economic change, the action by members of trade unions affiliated to the South African Employees' Congress is protest action. They cannot strike because the demand by the employees is not a matter of mutual interest between an employer and employees. It has to do with the socio-economic rights of the workers. It must be noted that only a registered trade union or a registered federation of unions can call for protest action and employees engaged in essential services or maintenance services may not take part in protest action.

   The procedure to be followed for the action to be protected is provided in section 77 of the LRA:
   - notice must be served on NEDLAC,
   - the notice must contain the reasons for and the nature of the protest action to allow NEDLAC or another forum to attempt to resolve the matter,
   - the matter giving rise to the action must have been considered by NEDLAC, and
   - notice of intention to proceed with the action must be served on NEDLAC at least 14 days before commencement of the action.

   If the above requirements are complied with, the protest action will be protected in the same way as protected strikes and lock-outs.

RECOMMENDED READING

1. Cassim R 'The legal status of political protest action under the Labour Relations Act 66 of 1995' (2008) 29 *ILJ* 2349
2. Le Roux PAK 'When strike pickets get too noisy—The protection of the third party interests' (2010) *CLL* (20) 3 27
3. Le Roux PAK & Mischke C 'Picketing and the dismissal of strikers: Three new Labour Court decisions' (2006) CLL 16 (5)

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SECOND EDITION

LABOUR LAW Rules!

ARBEIDSREG *Beslis!*
UMTHETHO WASASEBENZI *Uyabusa!*
UMTHETHO WA BABEREGI *Uyabusa!*
MOLAO WA BAS˘*UMI o a Bus˘a!*
IMITSETFO YETEBASEBENTI *Iyabusa!*
MELAO YA BASEBETSI *ya Busa!*
MOLAO WA BADIRI *o a Busa!*
MULAWO YA VHASHUMI *ndi ya Ndeme!*
UMTHETHO WABESEBENZI *e Uyalawula!*
NAWU WA VATIRHI *wa Fuma!*

LABOUR LAW Rules! provides a highly accessible text on labour, equity, social security and skills development laws. It discusses these laws against a background of the country supporting the principle of 'decent work', high unemployment, the insufficient creation of sustainable and decent jobs, income inequality, all exacerbated by an increase in atypical work, skills shortages, as well as insufficient enforcement of laws.

The book is aimed principally at students who engage with labour law – a compulsory subject for LLB students, and increasingly so for BCom students at South African universities – for the first time during their studies. In addition, IR and HR practitioners, line managers, supervisors and union officials will all find the book useful.

Broadly, the contents cover the individual employment relationship in linear fashion from the time the contract of employment is concluded (and sometimes even earlier), through the course of the relationship during which an employee's conditions of employment must comply with minimum terms within a framework of 'regulated flexibility', and during which an employee is protected against unfair labour practices and unfair discrimination, up to the termination of employment when an employee is protected against unfair dismissal. Terminating the contract of employment for reasons other than dismissal such as resignation and retirement are also discussed. The rules of collective bargaining, a different scenario with different rules from the individual employment relationship, are also explained and interpreted. The rules of social security laws are explained by following the three themes of these laws, namely to prevent workplace injuries, to compensate injured or ill workers and to integrate them back into the workplace.

The text reflects recent statutory and other developments, and current debates. Cases and other examples are used to explain legal principles and the keen reader is provided with additional recommended reading.

At the start of each part, a recap and an outlook is given on the previous and the coming part to keep the reader in the picture and to provide some focus. At the end of each chapter, self-assessment questions and feedback are provided as well as additional recommended reading.

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