
third edition
LABOUR LAW
RULES!
M McGREGOR & A DEKKER (EDS) / M BUDELI-NEMAKONDE /
W GERMISHUYS-BURCHELL / ME MANAMELA /
TE MANAMELA / CI TSHOOSE

LABOUR LAW
Rules!

Dedicated to our students

LABOUR LAW
Rules!

THIRD EDITION

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Foreword

This now well established labour law text has been updated to reflect the law as of September 2017. LABOUR LAW *Rules!* is recognised as an accessible legal text on labour, equity, social security and skills development laws. New commentary dealing with transfers of contracts of employment when a business is sold as a going concern or in circumstances of insolvency has been added. The text reflects recent statutory and other developments, and current debates. Cases and other examples are used to explain legal principles.

This thoroughly updated Third Edition renders it completely current, with reference to the latest in legislation and case law.

The book successfully lays a sound basis for basic labour law. Moreover, it enables students to integrate various concepts and sources in order to develop critical analytical skills. In this way, the book enables emerging scholars to assist in shaping future workplace laws. The book can also 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.

The innovative approach again breaks new ground in the accessible 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.

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Preface

'The expert in anything was once a beginner.'

(African proverb)

This rings true for any new field of study. The journey to explore a dynamic field such as labour law is highly rewarding. The concepts of work and workplaces and their challenges are well known. Not everyone, however, understands the underlying rules and their correct application.

This book contains a basic discussion and is an essential tool for any keen reader on the topic.

It is crucial that everyone has a basic knowledge of the subject today since all employers and workers are affected by these laws.

The main labour laws, namely, the Basic Conditions of Employment Act, 1997, the Labour Relations Act, 1995, the Employment Equity Act, 1998 and other laws related to social security such as the Occupational Health and Safety Act, 1993 had been revised over the last couple of years. Moreover, new laws such as the Employment Tax Incentive Act, 2013 and the Employment Services Act, 2014 had been enacted.

The effects of these amendments and new laws are coming through by case law and pose challenges in practise and hence the need for a third edition of LABOUR LAW *Rules!*

The book is still aimed mainly as a teaching tool for students—legal and non-legal—who encounter labour law for the first time in their studies. It may also be useful for IR and HR practitioners and consultants, line managers, supervisors, CCMA commissioners, union officials, bargaining council and private arbitrators or anybody interested in getting a basic overview of the current labour law landscape in South Africa.

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

The text reflects materials available to us at September 2017.

As always our sincere gratitude goes to Simon Sephton of *Siber* **Ink** and to Gawie du Toit.

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Pretoria *September 2017*

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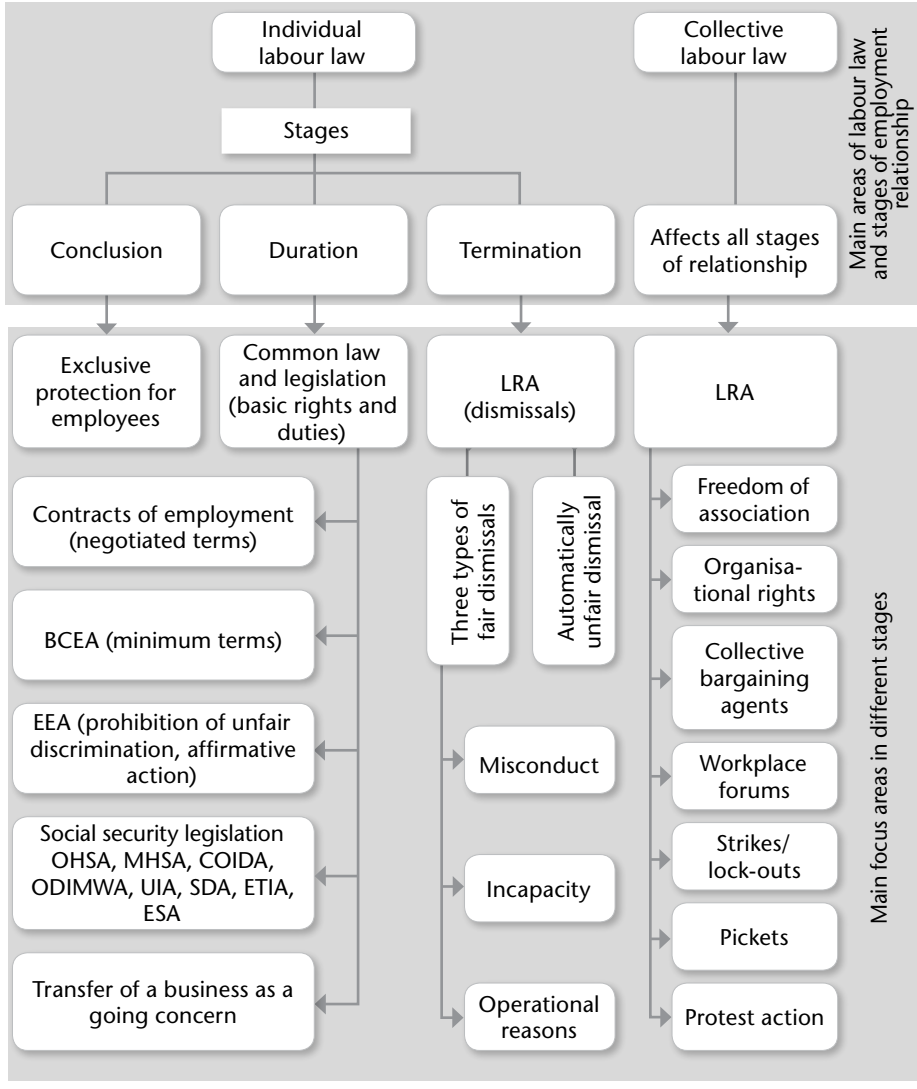
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BIRD'S-EYE VIEW: LABOUR LAW *Rules!*

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 contract 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 yet the principles of the law of contract apply only to a limited extent to this relationship. Labour law is protective and softens the principles of the law of contract as far as the employment relationship is concerned.

In an employment contract the employer is in a stronger bargaining position than the employee 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 **Chapter 1** which gives a brief historical background to labour law and provides an overview of the current labour law landscape. It explains the tripartite manner of making labour laws and discusses the scope of labour laws.

[1] P Davies & MR Freedland *Kahn-Freund's Labour and the Law* (1983) at 6. This is still the case almost 30 years later (A Rycroft & R le Roux 'Decolonising the labour law curriculum' (2017) 37 *ILJ* 1473, 1487).

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 (for the first time in the history of the country) descended on the mining areas in the Witwatersrand, Kimberley and Pilgrim's Rest.

Employees worked and stayed in poor conditions. They earned low wages and the workplace was unsafe and 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. They encouraged local workers to organise and act collectively in demanding better working conditions. This resulted in increased tension between workers and employers, which culminated in large-scale, violent riots on the Witwatersrand in the early 1920s which in turn led to the promulgation of 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]

[1] 11 of 1924.
[2] 36 of 1937.
[3] 28 of 1956.

Labour legislation under the apartheid system, differentiated between black and white workers and for a long period of time 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 included under the protective scope of the Industrial Conciliation Act.w The Act was also renamed the Labour Relations Act (hereafter the '1956 LRA').[6] This Act also established the Industrial Court[7] (the precursor to the Labour Court) which played an important role in incorporating fairness in labour law through their jurisprudence and wide interpretations of the concept of an 'unfair labour practice'. The latter concept was introduced to the 1956 Act by the Wiehahn Commission.

2. FAIRNESS INTRODUCED INTO LABOUR LAW

The principle of fairness was carried into the new labour dispensation. The concept of an 'unfair labour practice' as interpreted by the Industrial Court has been integrated into the Labour Relations Act[8] (hereafter 'LRA') in various ways. The LRA therefore no longer contains a non-specific and open-ended definition of an 'unfair labour practice' as most unfair actions have been dealt with in specific sections of the LRA and the current concept of an 'unfair labour practice' has limited application.[9]

Fairness in labour law is further strengthened by the Constitution which guarantees the right of 'everyone' to fair labour practices.[10]

Fairness is different from lawfulness. The common law and law of contract endorse lawfulnesswhich 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.

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[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 (Chair) (1982).
[6] 28 of 1956.
[7] It also laid the foundation for the rules on unfair dismissal at a time when there was almost no statutory regulation on dismissal.
[8] 66 of 1995. See ch 6 below, where unfair labour practices are discussed in detail.
[9] Sections 185 and 186(2).
[10] Of 1996, s 23(1).
[11] Meaning 'without guarantees about the quality'.
[12] The Consumer Protection Act 68 of 2008 applies here.

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. In this book the employment relationship is divided into three stages, namely, the *pre-employment stage*, the *employment stage* and the *termination stage*.

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 a job. The law requires that an employer should act fairly 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. For example, when determining terms and conditions of employment or when existing employees are promoted or when benefits are granted to them. The employer must act fairly in dealings with the employee, no favouritism may be showed towards any employee and consistency in treatment is key.

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, 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]

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[13] 55 of 1998.
[14] Section 9 of the EEA.
[15] See ch 9, para 1 below.
[16] See ch 9, para 2.5 below.

3. LABOUR LEGISLATION IN SOUTH AFRICA

The main current labour laws are:

- the LRA,
- the Basic Conditions of the Employment Act[17] (hereafter 'BCEA'), and
- the EEA.

Other Acts (especially social security laws) that impact on the employment relationship will also be referred to and discussed in the book. These are the:

- Occupational Health and Safety Act[18] (hereafter 'OHSA'),
- Compensation for Occupational Injuries and Diseases Act[19] (hereafter 'COIDA'),
- Mine Health and Safety Act[20] (hereafter 'MHSA'),
- Occupational Diseases in Mines and Works Act[21] (hereafter 'ODIMWA'),
- Unemployment Insurance Act[22] (hereafter 'UIA'),
- Unemployment Insurance Contribution Act[23] (hereafter 'UICA'),
- Skills Development Act[24] (hereafter 'SDA'),
- Skills Development Levies Act[25] (hereafter 'SDLA'),
- Employment Services Act[26] (hereafter 'ESA'), and
- Employment Tax Incentive Act[27] (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 (hereafter 'DoHET'); the MHSA falls under the Department of Mineral Resources (hereafter 'DoMR'); the ODIMWA resorts under the Department of Health (hereafter 'DoH'); and the ETIA under the Department of Finance.

All South African labour legislation is designed in line with the principles of the International Labour Organization (hereafter 'ILO').

South Africa is a member State of the ILO and has ratified most of the core ILO Conventions. This means that South Africa undertook to comply with the principles contained in these Conventions. These conventions include the Unemployment Convention[28] (hereafter 'ILO Convention 2'), the

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[17] 75 of 1997.
[18] 85 of 1993.
[19] 130 of 1993.
[20] 26 of 1996.
[21] 78 of 1973.
[22] 63 of 2001.
[23] 4 of 2002.
[24] 97 of 1998.
[25] 9 of 1999.
[26] 4 of 2014.
[27] 26 of 2013. The Protection of Personal Information Act 4 of 2013 focuses on the protection of private information but will not be discussed.
[28] 2 of 1919.

Forced Labour Convention[29] (hereafter 'ILO Convention 29'), the Freedom of Association and Protection of the Right to Organize Convention[30] (hereafter 'ILO Convention 87'), the Right to Organize and Collective Bargaining Convention[31] (hereafter 'ILO Convention 98'), the Equal Remuneration Convention[32] (hereafter 'ILO Convention 100'), the Discrimination (Employment and Occupation) Convention[33] (hereafter 'ILO Convention 111'), the Maternity Protection Convention[34] (hereafter 'ILO Convention 183'), the Convention on Social Security (Minimum Standards)[35] (hereafter 'ILO Convention 102') and the Benefits in the Case of Employment Injury Convention[36] (hereafter 'ILO Convention 121'). These will be discussed in this book where compliance with ILO Conventions is reflected in South African legislation.

Moreover, South Africa has endorsed the Decent Work Country Programme of the ILO.[37] 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 has also ratified a number of United Nation (hereafter 'UN') Conventions, for example, the Convention on the Rights of Persons with Disabilities.[38] South Africa will constantly have to ensure that existing labour practices and laws comply with the international instruments that government has endorsed and ratified.

LABOUR LAW *Rules!* discusses labour law in the 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 volatile/uncertain economic and policy circumstances. Labour law can therefore not be studied without some background knowledge of the social, economic and

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[29] 29 of 1930.
[30] 87 of 1948.
[31] 98 of 1949.
[32] 100 of 1951.
[33] 111 of 1958.
[34] 183 of 2000.
[35] 102 of 1952.
[36] 121 of 1964.
[37] See 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.
[38] 61/106 of 2007.

political context of the country. Fifthly, the dynamics within the ranks of labour are changing. Traditional alliances have and are crumbling, small unions[39] have come to the fore (splitting off bigger unions) while bigger unions' membership is declining and, currently, we have a multi-union labour landscape. A new federation of unions has been formed recently, the South African Federation of Trade Unions ('SAFTU') vowing to be a voice for the growing numbers of marginalised and unorganised workers in South Africa. SAFTU has been formed after NUMSA has been expelled from COSATU. It is the second largest federation after the Congress of South African Trade Unions ('COSATU'), with the Federation of Unions of South Africa ('FEDUSA') in the third place. Strikes are common, lengthy and plenty[40] and some unions are considering a political future.[41] 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, state capture and corruption. Communities feel their interests are not represented and that the ruling party shows a lack of accountability.[42]

4. THE ECONOMIC LANDSCAPE IN SOUTH AFRICA

4.1 Unemployment in South Africa

Currently the official unemployment rate is 27.7% (a 13-year high)[43] while the unofficial unemployment rate is estimated to be much higher. Only 43% of adults have jobs. Amongst the youth (15–24 years of age) the unemployment rate is especially high at 54.3% and this will worsen because of the education system which is failing many pupils by not delivering quality education.[44] While many in the latter group are studying, many are neither studying nor working. A total of 14.3 million of people are economically inactive.[45]

The National Development Plan (hereafter 'NDP') aims to reduce the dependency of the unemployed on the employed by absorbing more of the working-age population into jobs.

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[39] For example, the Association of Mineworkers and Construction Union ('AMCU').

[40] For example, 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, taxi and farming sectors.

[41] For example, NUMSA has broken ties with COSATU, the ANC and the South African Communist Party ('SACP') and suggested that it may become a political party at some stage. It basically wants to form a (political) workers' party to advance working-class problems. Recently, the SACP has seemed to be moving away from the ANC.

[42] J Kane-Berman 'How to fix the future' @Liberty—The Policy Bulletin of the IRR (13 May 2014).

[43] Quarterly Labour Force Survey Q1: 2017 Statistics South Africa (1 June 2017).

[44] T Cohen 'Not the worst of job crisis yet' *Business Day* (5-06-2017).

[45] M Molopyane 'Quarterly labour force figures paint a grim picture' available at https:/www.moneyweb.co.za/moneyweb-opinion/what-the-first-number-quarters-of-2017-tell-us/ of 6 June 2017 (accessed on 6 June 2017).

This ideal seems unlikely with the youth being a major contributor to the working-age population but largely dependent on the State and others for survival.[46]

Skills development is key in the fight against unemployment and Deputy President Ramaphosa stated that the major impact which technological change will have on society and the economy should be kept in mind when planning for training and skills development.[47]

4.2 Non-standard employment

Labour legislation is protective in nature. It is therefore important to know who qualifies as an employee in order to 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.

The number of atypical and non-standard workers is also on the increase. Generally, atypical work is described as different from formal/normal/full time/indefinite/traditional employment. Atypical work includes part-time work, temporary employees, fixed-term workers, 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 are not able to participate in social security schemes such as medical aid and pension. They 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.[48]

4.3 The National Development Plan

In response to these challenges, government adopted the NDP. This Plan wants to alleviate poverty and inequality. South Africa has one of the worst

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[46] L Moloi 'Is there a "perfect storm" on the horizon?' *Fast FACTS IRR* SARRI 1 (July 2014).

[47] Address by the Deputy President at the National Skills Conference, Pretoria (24 March 2017) available at http://www.polity.org.za/article/sa-cyril-ramaphosa-address-by-south … (accessed on 4 May 2017).

[48] ES Fourie 'Non-standard workers: The South African context, International Law and regulation by the European Union' (2008) 11(4) *PELJ* 10. See also chs 2 and 7 below.

wealth distribution rates in the world with the wealthiest 20% of people in the country currently consuming 65% of total expenditure and the poorest 20% consuming less than 3% of the total expenditure.[49]

The NDP was preceded by the National Growth Path ('NGP') but the latter did not receive good support. The NDP has identified 10 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,
- unemployment needs to be reduced to 6% by 2030,
- levels of corruption are high, and
- society remains divided.[50]

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.[51] Very little has resulted from this call from NEDLAC's side.

Instead, far-reaching amendments to the LRA, the BCEA, the EEA and the MHSA had been effected. In this book, the important provisions of these Acts are discussed.

4.4 National minimum wage

Another important development in South Africa is the introduction of a national minimum wage.[52] In this context it must be noted that a number of sectoral determinations already make provision for minimum wages, par-

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[49] 'The World Bank in South Africa' available at https://www.worldbank.org/en/country/southafrica/over (accessed on 12 July 2017).

[50] The NDP is also not supported by the whole of government. It was argued that South Africa needed a different and bolder set of policy alternatives to drive investment, growth, job creation and social and economic reforms. It has been argued that the solution to poverty is to allow people to earn money and barriers that stop poor people from earning money should be removed. Another priority is to liberalise the labour market and scrap most labour laws except for basic health and safety requirements to allow the poor to 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 (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).

[51] On NEDLAC, see para 5 below.

[52] S Deakin 'Labour law, economic development, and the minimum wage: Comparative reflections on the South African debate' (2017) 38 *ILJ* 1.

ticularly for vulnerable employees such as farm and domestic workers. The introduction of such a wage has both pros and cons and was investigated by NEDLAC 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 has 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.

Early in 2017, Deputy President Ramaphosa and most of the major trade unions and trade union federations signed an agreement for a national minimum wage.

4.5 Economic labour legislation

New laws also saw the light, namely, the Employment Tax Incentive Act ('ETIA'),[53] which provides tax incentives to encourage private sector employers to employ young people, that is, 18 to 29 years old. Thousands of young people had been employed under this Act and the end date of the incentive of 31 December 2016 has been extended to 28 February 2019.[54] The incentive has been capped to R20 million per year per employer. Allowances are also granted to learnerships and the period for these allowances has recently been extended to 31 March 2022.

Moreover, the Employment Services Act ('ESA'),[55] has set up a free Public Employment Service which registers work seekers after screening by the DoL.[56]

5. THE ROLE OF NEDLAC IN LABOUR LAW

Although labour laws deal with the employment relationship between the employer and employee, the State is also indirectly involved in this relationship. 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

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[53] See n 27 above.

[54] https://crs.co.za/wp-content/uploads/2017/01/CRS-news-Flash_January-2017_SOUTHAFRICA-Taxation-Laws-Amendment-Bill.pdf (accessed on 6 May 2017).

[55] See n 26 above.

[56] The employment of foreign nationals is dealt with only if a foreign national has a work permit issued in terms of the Immigration Act 13 of 2002.

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 where government comes together with organised business, organised labour and organised community groupings (generally) on a national level to discuss and try to reach consensus on issues of social and economic policy. NEDLAC aims to:

- make economic decisions more inclusive, and
- promote the goals of economic growth and social equity.

NEDLAC's work is conducted in four chambers which discuss different aspects of social and economic policy.[57] These are the Labour Market Chamber (which considers all new labour laws and changes to existing laws before they are submitted to Parliament), the Trade and Industry Chamber, the Development Chamber and the Public Finance and Monetary Policy Chamber.

NEDLAC has been criticised for time wasted in its deliberations, parties' inability to reach consensus on recommendations because representatives from government and labour are not mandated (these representatives then have 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 NEDLAC is at a 'tipping point' since it became less effective and more adversarial in recent years.[58]

6. 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 important to realise that a holistic view of labour law 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 specific labour legislation (codified), there are other sources as well, such as:

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

Though it is impossible to discuss all these various sources in detail in this book, 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,

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[57] The chambers are required to meet at least six times in each financial year. The chambers report to a management committee, which oversees the work programme and administrative issues.

[58] A Smith 'Addressing South Africa's labour market challenges—a future role for social dialogue and tripartism?' *The Dispute Resolution Digest* (2014) 81.

and these are discussed in detail. All three 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 mentioned below.

6.1 Codes issued in terms of the LRA

- Code of Good Practice: Dismissal[59] (hereafter 'Code: Dismissal'),
- Code of Good Practice on Dismissal Based on Operational Requirements[60] (hereafter 'Code: Dismissal Operational Requirements'),
- Code of Good Practice on Picketing[61] (hereafter 'Code: Picketing'),
- Code of Good Practice on the Handling of Sexual Harassment Cases (hereafter 'Code: LRA Sexual Harassment'),[62]
- Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (hereafter 'Code: Equal Pay),[63]
- Code of Good Practice: Who is an Employee?[64] (hereafter 'Code: Who is an Employee?'), and
- Code of Good Practice: Key Aspects of HIV/AIDS and Employment[65] (hereafter 'Code: LRA HIV/AIDS').

6.2 Codes issued in terms of the EEA

- Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[66] (hereafter 'Code: EEA Sexual Harassment'),
- Code of Good Practice on HIV and AIDS and the World of Work[67] (hereafter 'Code: EEA HIV/AIDS'),
- Code of Good Practice on the Employment of People with Disabilities[68] (hereafter 'Code: Disabilities'),
- Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices[69] (hereafter 'Code: Integration'), and
- Code of Good Practice: Preparation, Implementation and Monitoring Employment Equity Plans (hereafter 'Code: Employment Equity Plans').[70]

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[59] Schedule 8 of the LRA, attached as Annexure B at the back of the book.
[60] GN 1517, *GG* 20245, dated 16 July 1999, attached as Annexure B at the back of the book.
[61] GN 765, *GG* 18887, dated 15 May 1998.
[62] GN 1367, *GG* 19049, dated 17 July 1998.
[63] GN 448, *GG* 38837, dated 1 June 2015.
[64] GN 1774, *GG* 29445, dated 1 December 2006.
[65] GN R 1298, *GG* 21815, dated 1 December 2000. This Code is not included in the Amended LRA and yet it has not been formally repealed since publication of the Code: EEA HIV/AIDS.
[66] GN 1357, *GG* 27865, dated 4 August 2005.
[67] GN R 451, *GG* 35435, dated 15 June 2012.
[68] GN 1345, *GG* 23702, dated 19 August 2002 (as corrected by GN 1064 *GG* 23718, dated 19 August 2002).
[69] GN 1358 *GG* 272866, dated 4 August 2005.
[70] GNR 1394 *GG* 20626, dated 23 November 1999.

6.3 Codes issued in terms of the BCEA

- Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child[71] (hereafter 'Code: Protection Birth'), and
- Code of Good Practice on the Arrangement of Working Time[72] (hereafter 'Code: Arrangement of Working Time').

7. FINDING YOUR WAY THROUGH THE BOOK

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 xiii 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 (strikes). 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 or a collective agreement, 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.[73]

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 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 (decision/pronouncement). 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 for appeal against the decision by the court *a quo*.[74]

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[71] GNR 1441, *GG* 19453, dated 13 November 1998.
[72] GenN 1440, *GG* 19453, dated 13 November 1998.
[73] See ch 6 below.
[74] These will be discussed in more detail in ch 10 below.

This book therefore consists of five 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
- Part V: Annexures

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. Finally, Part V contains Annexures which are important in practice and which can assist readers with a better understanding of the law.

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 and the Annexures at the back of the book are also read while studying a particular chapter.

Every chapter also has some questions and feedback for students to help them test their understanding of a particular topic. There are three types of questions per chapter, namely one multiple-choice question, one short question and one case study. Every chapter also contains a list of further recommended reading for the reader who would like to improve their understanding and current debate around a theme. The journey through the employment relationship will be easier if employees and employers alike know their labour law rules.

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, where 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,
- the actions (or omissions) of the employer that will be regarded as unfair labour practices, and
- the position of employees when a business is transferred as a going concern.

Part II consists of seven chapters. **Chapter 2** deals with the exclusive protection provided by labour laws for employees. It clarifies the tests for determining the difference between an employee and an independent contractor and also looks at the specific protection afforded to non-standard employees, namely temporary employees, fixed-term employees and part-time employees. **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. These minimum standards apply to all employment contracts. Employers are allowed to provide better terms and conditions

of employment than those set by the BCEA but not worse. **Chapter 5** focuses on the EEA, which prohibits unfair discrimination in the workplace and regulates the implementation of affirmative action measures. In **Chapter 6** unfair labour practices (unfair acts or omissions by an employer against an individual employee) are concerned. Unfair labour practices are one of the aspects regulated by the LRA. **Chapter 7** deals with social security and discusses all relevant social insurance legislation. 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, namely prevention, compensation and rehabilitation. The legislation aimed at prevention are the OHSA and the MHSA. Legislation aimed at compensation are the COIDA, the ODIMWA, the UIA and the UICA. The SDA, the SDLA, the ETIA and the ESA deal with reintegration. Finally, **Chapter 8** explores the legal principles of sections 197 and 197A of the LRA which will apply when a business is transferred as a going concern. Section 197 contains important measures to ensure that employees' terms and conditions of employment are not negatively affected when business ownership changes. This chapter is a new addition to the book.

2

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1. WHO IS AN EMPLOYEE?

The LRA[1] defines an 'employee' as follows:

> '… 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; and any other person who in any manner assists in carrying on or conducting the business of an employer. …'[2]

Labour law is like an umbrella which provides protection, and only employees would fall under the protection of the 'umbrella'. People not covered by labour laws will not be protected and will have to find protection in terms of another law or a contract of employment.[3]

The labour law umbrella, for example, protects employees against unfair dismissal or exploitation and victimisation in the workplace. For this reason one of the primary aims of the LRA is to promote sound relations between employers and employees in the workplace.[4]

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 (also referred to as the contract of work or in terms of the common law as the *locatio conductio operis*);
- an employee is appointed to render personal services in terms of a job description (also referred to as the contract of service or in terms of the common law as the *locatio conductio operarum*).

The following example illustrates this close resemblance:

> **Example:** X appoints Zonzo, a handyman, to fix the gutters and the roof of a house. X's gardener Sibu is also asked to fix things around the house. Although Zonzo and Sibu are doing similar jobs, Zonzo could be an independent contractor and Sibu could be an employee.

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[1] Section 213.

[2] This part of the definition seems to widen the scope of part (*a*) of the definition, but the courts have held that in the context of the tests developed by the courts (the tests are discussed below) independent contractors are still to be excluded from the definition of 'employee'.

[3] People who do not qualify as employees may sometimes receive protection under section 23 of the Constitution. See the discussion in paras 5.1 and 5.2 below.

[4] Section 1.

The LRA,[5] the BCEA,[6] the EEA[7] and the SDA[8] all use the same definition of 'employee',[9] which is wide enough to include both employees in the private and public sector and it includes domestic and farm workers as employees.[10]

There are certain categories of employees which can more easily be confused with independent contractors, for example, temporary employees, casual workers, fixed-term contract workers, part-time employees, seasonal workers or those working from home.[11] 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 tests are listed and discussed below.

2. GUIDELINES TO DISTINGUISH BETWEEN EMPLOYEES AND INDEPENDENT CONTRACTORS

The courts have developed five tests to distinguish between employees and independent contractors. These are:

- the control test,
- the organisation test,
- the dominant impression test,
- the economic capacity test, and
- the reality test.[12]

Control 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.

Organisation test

This test looks at whether the person is part and parcel of the business/ 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.

Dominant impression test

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).

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[5] Section 213.
[6] Section 1. See ch 4 below.
[7] Section 1. See ch 5 below.
[8] Section 1. See ch 7 below.
[9] However, the definitions of 'employee' contained in the UIA, the COIDA, and the OHSA differ from these. See ch 7 below.
[10] See the definitions of 'domestic worker' and 'farm worker' in s 1 of the BCEA.
[11] Also called atypical employees.
[12] See *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

Economic capacity test

In *Niselow v Liberty Life*[13] the court added a so-called 'economic capacity test', in terms of which an employee's income-earning capacity is solely dedicated to the employer.

Reality test

Some writers also argue that the courts have created another test, the so-called 'reality test'. The court in *Denel (Pty) Ltd v Gerber*[14] said that when determining the true status of a worker, the court will look at the 'substance of the relationship as opposed to the form thereof'. This is what the dominant-impression test also does as an objective reality test.[15]

The LRA also added a Code: Who is an Employee? to assist with providing clarity on who will be an employee. The Code incorporates the tests developed by the courts but it goes further and provides guidance for their possible interpretation. For example, as far as the control test 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 in order for an employment relationship to exist, and
- the tools of trade provided by the employer should not be interpreted narrowly and may range from a modem or cellphone package to a set of screwdrivers.

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 and all factors should be taken into account when determining the nature of the relationship.[16]

The following table (developed from case law on the subject) compares an employee to an independent contractor and points out the differences between the two. The following table can be used to assist in the application of the dominant impression test.[17]

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[13] (1996) 17 *ILJ* 673 (LAC).
[14] (2005) 26 *ILJ* 1256 (LAC).
[15] Also see *Vermooten v Department of Public Enterprises and others* (2017) 38 *ILJ* 607 (LAC).
[16] Code: Who is an Employee?, item 27.
[17] 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 a 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 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 at least 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 show on a balance of probabilities that Richard was not an employee:

- Richard did not form part of the organisation;
- the area manager was a mere contact person for practical arrangements;
- Richard was not under the control of the employer, Paper Palace;
- the job necessitated him to work on Sundays and to be available to sell newspapers from 05h00–15h00;
- the employer did not control what he did, so he could choose to to sit under a tree for the duration of the time if he wanted;
- 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 dominant impression test indicated that Richard was not an employee. He could thus not pursue his claim in terms of labour law since he was an independent contractor.

Even though these tests helped in distinguishing an employee from an independent contractor, they 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 show that an employment relationship existed. This burden of proof, placed on the employee, meant that access to the 'umbrella' of protection of labour laws was not easy.

As a result, the LRA and the BCEA had been amended in 2002 to include a rebuttable presumption as to who 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)[18] 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 (normally the employer) then has the opportunity to show, on a balance of probabilities, that no employment relationship exists.[19] The presumptions, however, do not apply to people earning more than the threshold amount determined by the MoL in terms of the BCEA (section 83A(2)).

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;
(*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;

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

[19] 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)).

(*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.'

It can be safely stated that the courts have generally been 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 go beyond what the contract provides and look at the relationship as a whole to extend the reach of the umbrella's protection as far as possible. The courts look at the substance of the relationship between the parties rather than the form or the label attached thereto. Sometimes employers frame an employment contract as an agreement with an independent contractor just to avoid the application of labour laws to the relationship. For example, in *Mokoena v MEC, Gauteng Department of Health*[20] the Labour Court had to determine whether the applicants who were engaged with the department on fixed-term contracts as volunteering community health workers were employees or independent contractors. The department argued that they were independent service providers who rendered their services as volunteers and the volunteers argued the contrary. The Labour Court stated that the workers' status had to be inferred from an objective evaluation of the work relationship and not just by looking at the written agreement between the parties. It looked at a number of factors including the fact that the applicants received training from the department; they were required to report for duty at a particular time and to sign an attendance register; they were paid stipends (a fixed regular amount); and they were monitored and were given material to use in performance of their duties. The court concluded that the applicants were employees of the department.[21]

3. WHEN DOES THE EMPLOYMENT RELATIONSHIP START?

An important question is whether a person becomes an employee upon concluding a contract of employment with the employer (in other words when the offer for employment is accepted) *or* whether it only happens at the time she/he commences work. This was answered in *Wyeth SA (Pty) Ltd v Manqele*[22] where the employee accepted an employment offer but before he could commence with his duties his contract was terminated. The question was whether it constituted a dismissal or not. The employer argued that, based on the

[20] (2016) 37 *ILJ* 1445 (LC).
[21] In making its decision the Labour Court adopted the approach followed by the Labour Appeal Court in *State Information Technology Agency (Pty) Ltd v CCMA & others* [2008] 7 BLLR 611 (LAC) where it was held that in determining whether a person is an employee or not, there are three primary criteria to be applied, namely, an employer's right to supervision and control; whether the employee forms an integral part of the organisation with the employer; and the extent to which the employee is economically dependent upon the employer.
[22] [2005] 6 BLLR 523 (LAC).

definition of section 213 of the LRA, an employee is only someone who renders his services. The employee has not rendered any services and was therefore not entitled to remuneration; that meant he was not an employee in terms of the LRA. The court held that the definition of an employee in section 213 of the LRA can be read to include a person who has concluded a contract of employment and where the commencement is deferred to a future date. The court took into account the fact that section 23 of the Constitution affords 'everyone' the right to fair labour practices. The court held that the focus of labour law should be on fair labour practices and justice for employees and employers and that entails that 'work' should not be narrowly constructed. When an interpretation needs to be done, the definition of 'employee', the contract of employment, the Code, and the presumptions must all be considered together.

The court therefore held that people who have signed contracts of employment, but have not yet started working, were employees for purposes of the LRA.

4. NON-STANDARD EMPLOYEES

Various terms are used for different categories of employees which lead to further confusion. For example, terms such as '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'.

Amendments to the LRA have for the first time brought clarification on these concepts. The Act now determines that 'non-standard forms of employment' relate to temporary employees, fixed-term employees and part-time employees. These categories of employees and the protection they now have are discussed below.

Chapter IX of the LRA regulates non-standard employment, extends more protection to vulnerable workers and promotes decent work.

The Act now defines different categories of non-standard employees, regulates their employment status and rights.

The Act creates three categories of non-standard employees:

- employees provided by a temporary employment service (hereafter 'TES'/ labour brokers) or so-called temporary employees,
- fixed-term employees, and
- part-time employees.

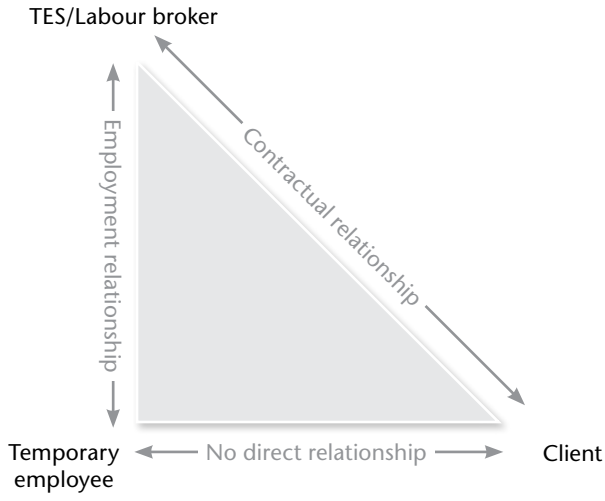
4.1 Temporary employment service ('TES')

4.1.1 *Who is a temporary employee?*

A temporary employee is employed by a temporary employment service and a TES is defined 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.'

This refers to employees supplied to a client by a TES/labour broker, on temporary basis or to render a temporary service for the client. Such a relationship is characterised by its triangular form as it involves three parties, namely, the employee, the TES/labour broker and the client. In this relationship, the TES is the employer of the placed employee even though the employee performs work for the client and at the client's workplace.[23]



In order to protect temporary employees the LRA sets a restriction on the duration of the use of labour brokers and temporary employees supplied to clients.

An employer may appoint a temporary employee to a client for a period of three months or less or as a substitute for an employee of the client who is temporarily absent and then the period may be for longer than three months (for example, due to the employee being on maternity or sabbatical leave).

The Act makes provision that certain services may be declared to be a temporary service and then it would be allowed to appoint employees on fixed-terms for longer than three months even though they would earn less than the BCEA threshold. That may only be done by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the MoL.[24]

Employees who earn more than the BCEA threshold of R205 433 are excluded from the protection provided by the LRA for non-standard employees. The effect of the restriction on the appointment of temporary employees

[23] Up to date no determination in this regard has been made.
[24] Section 198A(1)(c).

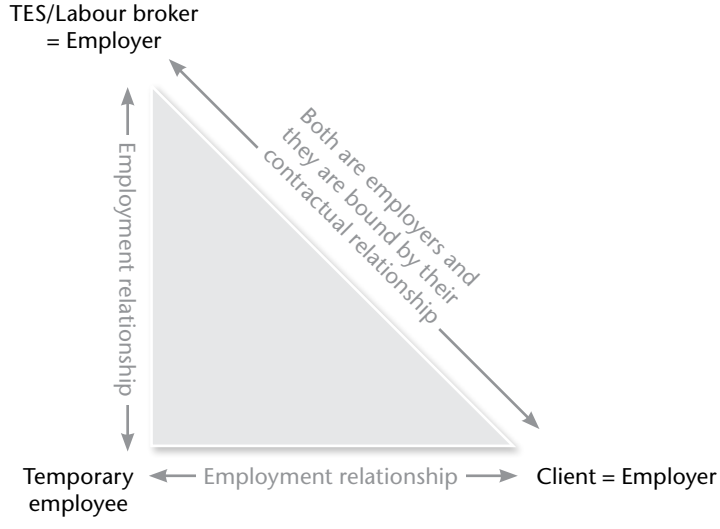
through labour brokers has the affect that for as long as the parties comply with the Act and appoint temporary employees for the right reasons (for limited and unlimited periods of time), the temporary employee is regarded as an employee of the TES. The TES/labour broker is responsible for its statutory obligations regarding the placed worker for as long as the employee renders a temporary service to the client.

If there is non-compliance, for example, where the employee is not or no longer 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. The word 'deemed' means 'regarded as' or 'held to be'. This meaning in the context of who then becomes the employer of the placed employee has been interpreted differently and has as a result created some confusion. The question is whether the client becomes the new employer of the placed employee by operation of the law or whether both the client and the TES/labour broker are joint employers of the employee for purposes of the LRA.

The Labour Court has stated in *Assign Services (Pty) Ltd v CCMA & others*[25] that the deeming provision makes the client with whom the employee is placed the employer but only for the purposes of the LRA and for no other purpose. According to the court, this provision does not affect the existence and continuation of the contract of employment between the placed employee and the TES/labour broker.

This view supports the argument that both the client and the TES/labour broker become employers of the placed employee for purposes of the LRA because of the deeming provision.

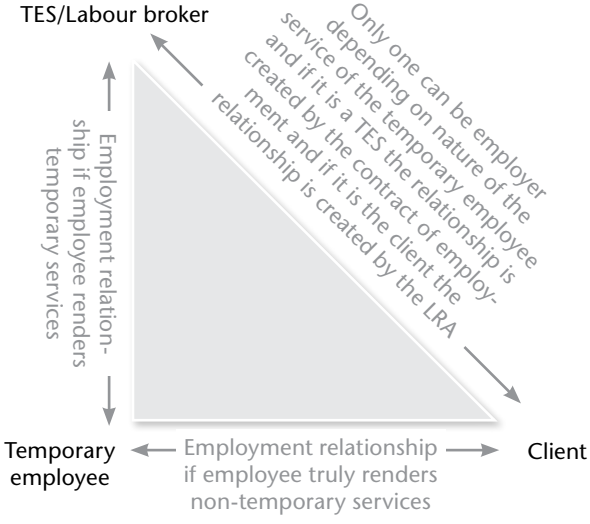
It can be illustrated as follows:



[25] (2015) 36 *ILJ* 2853 (LC).

When the decision of the Labour Court was taken on appeal in *NUMSA v Assign Services & others,*[26] the Labour Appeal Court interpreted the deeming provision differently and subsequently set aside the decision of the Labour Court agreeing with the determination initially made by the CCMA that the term 'deemed' means that the client becomes the sole employer of the employee as soon as the three months period comes to an end. According to the Labour Appeal Court, an employee who performs a temporary service for the client, is the employee of the TES/labour broker and the employee who is not performing such temporary service (or if the work is found not to be temporary) the client is deemed to be the employee of that client. What this means is that the question of who becomes the employer, is not answered by looking at the person who performs the work or even by looking at the person who places that employee or the person who receives the service, but by the *nature* of the service being performed. Thus, an employee who does not provide a temporary service as defined by the Act is not an employee of the TES/labour broker. The aim of the deeming provision is to restrict the employment of vulnerable workers by the TES/labour brokers to genuine 'temporary work'. The deeming provision does *not* create dual or parallel employers. The purpose of the deeming provision is also not to transfer the contract of employment between the TES/labour broker and the worker to the client, but to create a statutory employment relationship between the client and the placed worker. The court held that there were no grounds to keep the TES as the employer once the client assumes all the responsibilities that lay with the TES before the three months' period expired.

This can be illustrated as follows:



[26] *Numsa v Assign Services & others* (JA96/15) [2017] ZALAC 44 (10 July 2017) at paras 35–37.

This is intended to prevent the exploitation of placed workers, for example, where the TES/labour broker makes the employee to work for the client for an unreasonably long period of time without the client giving her/him permanent employment even though the nature of the work requires a permanent employee.[27]

An employee who is deemed to be an employee of the client must be treated 'on the whole' not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. This is to ensure that the deemed employee is treated the same as the other employees of the client. In this way, the employee is integrated into the business of the employer in the same way as other permanent employees of the client.

The client will also assume all the responsibilities that the TES had before the expiration of the three-month period.

4.2 Fixed-term employees

4.2.1 *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 BCEA threshold of R205 433 per year.
- Employees of an employer that employs fewer than 10 employees, or an employer that employs fewer 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.

4.2.2 *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. The employer who wants to offer an employee

[27] Assign Services is likely to appeal to the Constitutional Court.

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.

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 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 last 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 specific period,
- is employed to perform seasonal work,
- is employed for an 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 the term. If the fixed-term contract is for longer than three months, including the period of any previous contracts, the employer must prove that that the reasons for fixing the term were acceptable to both parties.

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 'same work' means that the work is identical or interchangeable and 'similar work' means that the work is sufficiently similar that workers may reasonably be considered to be performing the same job, even if the work is not identical or interchangeable. 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. This is to promote the

notion of equal pay for equal work. In other words, the terms and conditions of employment must be the same or equal if the work performed is the same or similar.

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 prior to the expiry date of the contract). This severance pay is calculated according to the formula in the BCEA (currently, one week's remuneration for each completed year of service at the end of the fixed-term contract).[28]

For example if Power Plus is appointed to build a power station and it takes five years, the fixed-term workers who were appointed for this purpose will receive five weeks' severance pay when the project is completed. Employers will also be required to give employees on fixed-term contracts equal access to opportunities to apply for available vacancies.

All fixed-term and permanent employees must be given equal access to opportunities to apply for vacancies. The means preference may not be given to permanent employees during the appointment process.

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

If a fixed-term contract does not comply with the above provisions, then:

- it is not a fixed-term contract,
- the employment is for an indefinite or permanent period and the fixed-term contract worker will become a permanent employee of the employer, and
- the employee must be treated as a permanent employee.

4.3 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.[29] This will typically be a domestic, casual or piece worker. The remuneration is determined by the actual time worked and the employee is, for example, paid per hour.

Since a part-time employee is still 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

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[28] See ch 4, para 3.3.3.

[29] 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.

employer can provide valid reasons justifying such different treatment. A 'comparable full-time employee' is an employee who is paid for a full day, who is considered to be a full-time employee according to custom and practice and who performs the same or similar work as the part-time employee.

The 'no less favourable standard' would take into account factors such as the remuneration a person receives as compared to another person in full-time employment. The term 'no less favourable' does not mean identical or the same, for example, in certain instances the employee may be paid remuneration instead of having access to benefits such as retirement benefits and medical aid.

Differentiation may be allowed on the basis of factors such as seniority, experience or length of service, merit, quality or quantity of work and any other similar criteria that is not prohibited under the equal pay provision as provided for by the EEA.[30] However, affordability is not considered to be a justifiable ground.

Employers are required to allow part-time employees to apply for job opportunities and to give them training and skills development which are on the whole not less favourable than those given to comparable full-time employees.

These provisions, however, will not apply to:

- employees earning more than R205 433 per year (as currently prescribed by the BCEA),
- employees who ordinarily work fewer than 24 hours a month for a particular employer,
- employees during the first three months of employment, or
- an employer who employs fewer than 10 employees or fewer than 50 employees and whose business has been in operation for less than two years.

5. CATEGORIES OF EMPLOYEES EXCLUDED FROM THE LRA

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:[31]

- members of the National Defence Force, and
- members of the State Security Agency.[32]

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[30] See ch 5, para 4.1.5 below.

[31] Section 2.

[32] 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). 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.[33]

A distinction has been made between protection provided for illegal workers in terms of the Constitution and protection afforded to employees in terms of the LRA.

6. PROTECTION AND REGULATION OF ILLEGAL AND FOREIGN WORKERS

6.1 Illegal workers

It is important to understand that in terms of the common law illegal employment contracts or contracts in terms whereof people are employed to perform illegal work are void and unenforceable. This would, for example, be where someone is employed to steal or to be a prostitute or where a contract is concluded with a seven-year old child.

> **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.

The Constitution has come to the rescue of some illegal workers by developing the common-law prinicples so that some illegal workers will be able to receive some form of protection against unfair conduct by the illegal employer. This was the case in the series of *Kylie* cases. The matter was first heard at the CCMA,[34] then the Labour Court[35] and finally resolved by the Labour Appeal Court.[36] This case concerned the alleged unfair dismissal of a prostitute. The commissioner held that the CCMA did not have jurisdiction to hear the matter since it could only deal with cases where a lawful employment contract existed between the parties. The matter went on review to the Labour Court where the common-law principle that courts should not encourage illegal activities was upheld.

This decision was overruled by the Labour Appeal Court. The court held that even though the common law determines that a court may not assist a party where performance had been made in terms of an illegal contract, the courts have a discretion to relax this principle in order to do 'simple justice between man and man'. In other words, the court determined that although

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[33] Section 3 of the BCEA. See also ch 4, para 2 below.

[34] *Kylie and Van Zyl t/a Brigittes* (2007) 28 *ILJ* 470 (CCMA).

[35] *Kylie v CCMA & others* (2008) 29 *ILJ* 1918 (LC).

[36] *Kylie v CCMA & others* (2010) 31 *ILJ* 1600 (LAC) which seems to be a mere oversight on the part of the legislature.

a prostitute, as an illegal worker, can never conclude a valid employment contract and consequently never have access to the LRA remedies, she can still access the protection afforded by the Constitution in terms of section 23. This is possible because the common-law principle has been relaxed and a court may sometimes assist illegal workers. The court further held that the criminalisation of prostitution does not necessarily deny a sex worker the protection of the Constitution.

The purpose of the LRA 'is to advance economic development, social justice, labour, peace and the democratisation of the work place' and that would be achieved by giving effect to section 23 of the Constitution. Sex workers form part of a vulnerable class of workers by the nature of the work that they perform and are often exploited, abused and assaulted. Section 10 of the Constitution protects the dignity of 'everyone' and section 23 ensures that 'everyone' is entitled to fair labour practices. This protection would therefore extend even to sex workers. In fact, 'dignity' is also one of the core values of the Constitution and someone's dignity is undermined when she/he is denied access to the other fundamental rights. Since section 23 provides fair labour practices to 'everyone' and not just 'employees', *Kylie* also qualified for this protection.

The Constitutional Court has previously held that people performing in terms of an agreement 'akin to an employee relationship' and which 'in many respects mirrors those of people employed under a contract of employment' are deserving of this protection.[37]

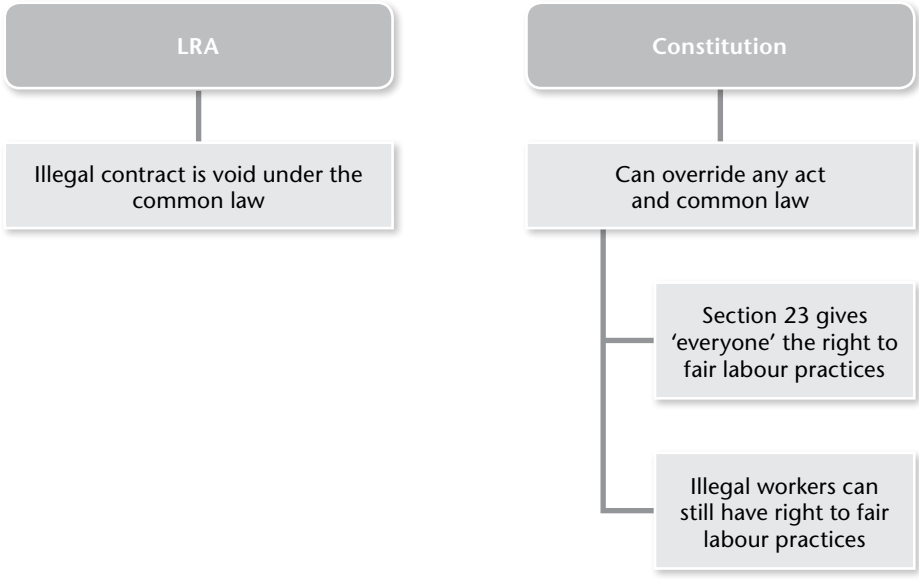
The court therefore decided that *Kylie* was entitled to protection in terms of the Constitution despite being excluded from the LRA. This provided some controversy as far as the appropriate relief was concerned. Since the LRA does not recognise the illegal contract, the employer's conduct did not amount to a dismissal. Reinstatement as a remedy would also not be possible because that would amount to the court ordering the continuation of an illegal contract. The court decided to award *Kylie* an amount of money (a *solatium*), not in terms of the principles of unfair dismissal found in the LRA but in terms of the Constitution. The reason was to compensate her for the fact that her dignity was negatively affected because the 'employer' failed to follow a fair procedure in terminating her services.

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. The current position is illustrated.

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[37] *South African National Defence Force v Minister of Defence & another* 1999 (6) BCLR 615 (CC).



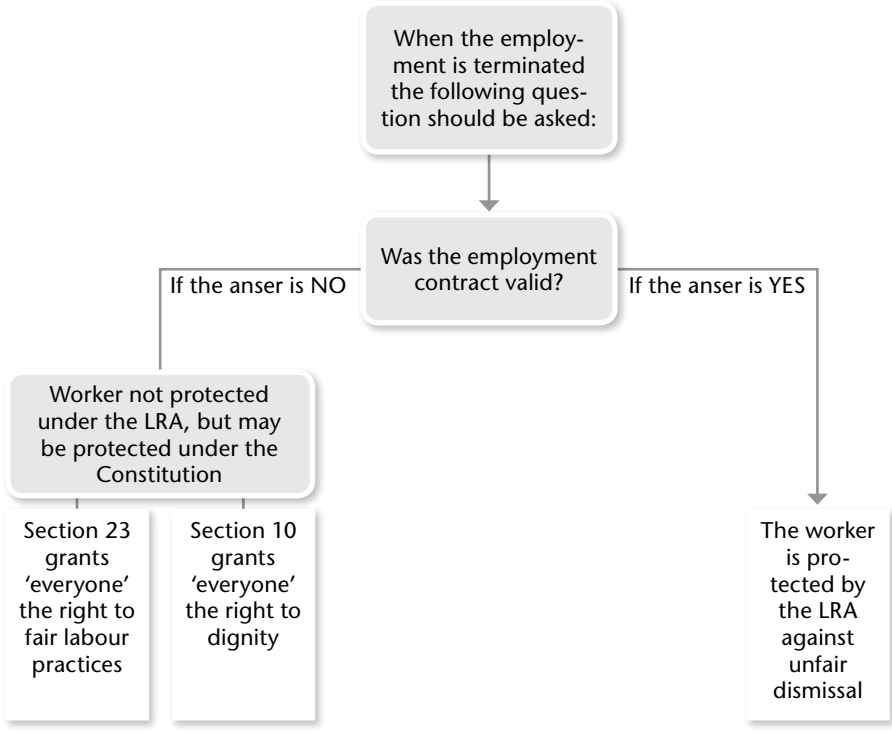
6.2 Foreign workers

Similar to the *Kylie* case, in *Discovery Health Limited v CCMA & others*[38] the court had to decide whether an employee with a valid contract of employment, but without a valid work permit, could claim unfair dismissal in the Labour Court. It held that illegal foreigners will not receive protection under labour legislation since they are not employees but 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[39] and fair labour practices.[40]

The court, similarly to *Kylie*, looked at the wrong committed against the worker and not only at the unlawful conduct. The Immigration Act[41] prohibits employment of an illegal foreigner.[42] Any employer who knowingly employs an illegal foreigner or a foreigner in contravention of the Immigration Act, commits an offence,[43] but an employer may not intentionally hire workers not authorised to work in terms of the Act in order to escape its obligations in terms of the employment contract.[44] An employer who employs an illegal foreigner may not refuse to pay that worker on the basis that the worker is an

[38] (2008) 29 *ILJ* 1480 (LC).
[39] Section 10.
[40] Section 23(1).
[41] 13 of 2002.
[42] Section 38 of the Immigration Act prohibits the employment of illegal foreigners and foreigners contrary to the provisions of the Act.
[43] Section 49 of the Immigration Act.
[44] See C Bosch 'Can unauthorised workers be regarded as employees for the purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342, 1349–1350.

illegal foreigner and the employer will not escape liability by relying on the illegal relationship. An illegal foreigner may still be able to enforce her/his contractual rights against the employer. The diagram below summarises the position more clearly.[45]



6.3 Employment Services Act[46] ('ESA') and foreign workers

6.3.1 *Purpose of the Act*

The primary objective of the ESA is to promote employment and to regulate the employment of foreign nationals. The Act also aims to reduce unemployment and provide education and training to unskilled workers and work-seekers.

The ESA provides for the establishment of the Public Employment Services ('PES') and its functions which are outlined in paragraph 8.5 below.

6.3.2 *Regulation of employment of foreigners*

The ESA defines a 'foreign national' as:

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

[45] *Dunwell Property Services CC v Sibande & others* [2012] 2 BLLR 131 (LAC).
[46] 4 of 2014.

A foreign national 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.

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. Anyone who contravenes the Act in this regard shall be guilty of a criminal offence.

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. These have not yet been issued.
- first make use of the free Public Employment Service ('PES') which will keep a register of all vacant posts and job seekers.[47]

6.3.3 *Protection of foreign employees*

The ESA allows foreign employees employed without a work permit to enforce any claim they may have in terms of any statute or employment relationship against an employer or anyone who the law considers liable, if unfairly dismissed.[48]

The onus is on the employer to comply with relevant legislation when employing foreign nationals.

The Act further prohibits employers to allow foreign nationals to:

- perform work which they are not authorised to perform in terms of their permits,
- engage in work contrary to the terms of their work permits, or
- do work contrary to the worker's will.

7. 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'.

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[47] 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 the placement of foreign workers.

[48] See *Discovery Health* discussed in para 6.2 above.

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 a TES/labour broker.[49]

8. THE POSITION OF A TEMPORARY EMPLOYMENT SERVICE ('TES')/LABOUR BROKER

8.1 Issues regarding a TES/labour broker

Trade unions have been calling for an outright ban on labour brokers to increase the protection of workers against abuse, exploitation, low wages and their inadequate protection. The legislature has introduced changes that extend protection to these workers.

8.2 Registration of labour brokers

A TES is required to register in accordance with regulations published by the MoL before it can conduct its business.[50] This is to prevent abuse of employees associated with so-called 'bakkie-brigades' or 'fly-by-night' labour brokers.

8.3 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 take action against the TES/labour broker or the client or even both. A labour inspector is empowered to enforce the provisions or compliance with the BCEA against either of the two parties or both.

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[49] Refer to the discussion of a TES and temporary employees in para 4.1 above.

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

The client assumes all the responsibilities when the deeming provision is triggered although the exact meaning of this will only be finalised once the *Assign Services* matter has been finally resolved.

8.4 Specific duties and prohibitions

Apart from the compulsory registration of a TES the Act provides further protection by:

- compelling the TES to provide the temporary employee with written particulars of employment in ine with the requirements of 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 to which the client belongs.

8.5 Private and public employment agencies

The ESA provides for two types of employment agencies:

Public Employment Services
• Will match work-seekers with work opportunities; register work-seekers, vacancies and other work opportunities; advise work-seekers on relevant education and training; offer vocational and career counselling; assess work-seekers to determine suitability, 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) • May also not deduct any money from the employee's salary for her/his placement with a client • 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:

- Employment Services Board: its function is to advise the MoL on various issues regarding a TES and protected work for people with disabilities.
- Productivity South Africa: its objective will be to promote a culture of productivity in workplaces.
- Protected Employment Enterprises: it will be responsible to promote work and employment opportunities for people with disabilities.

9. EMPLOYMENT TAX INCENTIVE ACT[51] ('ETIA')

The Act provides for subsidies to private sector employers who employ young people aged between 18 and 29. The aim is to support employment growth by activating the labour market for the youth. Domestic workers are not covered by the Act. The ETIA defines an '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 incentive of the ETIA has been extended to 28 February 2019. Money for learnerships has been extended to 31 March 2022.

The focus in chapter 3 below will turn to the relationship between employers and employees.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements about employees placed by a TES/labour broker is *correct*?
   (*a*) The employee who performs a 'temporary service' for the client is considered to be the employee of the TES/labour broker.
   (*b*) The ESA prohibits the use of labour brokers in the workplace.
   (*c*) The purpose of the deeming provision is to give the employee a choice whether to work for the client or labour broker.
   (*d*) The TES/labour broker is has no statutory obligations towards the employee.
2. Explain why it is important to be able to draw a distinction between 'employees' and other workers such as independent contractors.
3. X employs Z a foreign national as a driver, without verifying the validity of Z's work permit. Three months later, X is informed by Z's closest friend and co-employee Y, that Z has told him that his work permit was not valid. Upon hearing that, X calls Z to his office and informs him that his employment will be terminated with immediate effect and that he will not receive his salary for the month. Do you think Z will have any recourse against X for dismissing him and for refusing to pay his salary?

✓ Feedback

1. Statement (*a*) is *correct*. The employee who performs a 'temporary service' for the client is considered to be the employee of the TES/labour broker.

   Statement (*b*) is incorrect. The ESA regulates these but do not prohibit the use thereof.

   Statement (*c*) is incorrect. The purpose of the deeming provision is not to award the employee a choice between employers. In terms of the Assign

[51] Also discussed in ch 7 below.

Services case the deemed provision creates a statutory transfer of the contract and the employee does not have a choice in the matter.

Statement (*d*) is incorrect. The TES/labour broker is responsible for its statutory obligations regarding the placed worker for as long as the employment relationship exists.

2. It is important to draw a distinction between employees and other workers who do not qualify as employees, such as so-called 'independent contractors' because only employees are protected by labour laws.
3. The ESA allows foreign employees employed without a work permit to enforce any claim they may have in terms of any law or employment relationship against the employer or anyone who the law considers liable. The fact that a foreign national is employed without a valid work permit will not stop him from claiming relief, if unfairly dismissed and where the employer refuses to pay her/him a salary. In other words, Z may still be able to enforce his contractual rights against employer X.

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
2. Brassey M 'The nature of employment' (1990) 11 *ILJ* 889
3. Cohen T 'Placing substance over form—identifying the true parties to an employment relationship' (2008) 29 *ILJ* 863
4. Cohen T 'The effect of the Labour Relations Amendment Bill 2012 on non-standard employment relationships' (2014) 35 *ILJ* 2607
5. Du Toit D & Ronnie R 'Regulating the informal economy: Unpacking the oxymoron—from worker protection to worker empowerment' (2014) 35 *ILJ* 1802
6. Le Roux R 'The meaning of "worker" and the road towards diversification: Reflecting on *Discovery*, *SITA* & *"Kylie"*' (2009) 30 *ILJ* 49

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The impact of the common law on the contract of employment

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1. INTRODUCTION

The common law, the Constitution and labour legislation all impact on the employment relationship. This chapter focuses on the common-law impact on the employment relationship, which impact is limited as compared to that of labour legislation. Common-law principles are still applicable to the modern day employment relationship, particularly where legislation is silent on a particular issue.

Employers and employees have certain rights and corresponding duties flowing from the common law even if parties do not agree or specifically include them in their contracts of employment. Workplace customs, traditions and practices may also impact on the contract of employment. It is important to be aware of the impact of the common law on the contract of employment but it is at the same time important to bear in mind that the LRA and the BCEA have to a large extent included these principles and rules into the current legislative framework. The employment contract remains a contract and the question has been raised whether an employee who was dismissed can choose to institute a claim for breach of contract (in the High Court) instead of claiming for unfair dismissal in terms of the LRA.

> In *Chirwa v Transnet Ltd & other*s [2008] 2 BLLR 97 (CC) at para 41 the Constitutional Court held that labour legislation, such as the LRA and BCEA, are purpose-built for employment disputes and should, in the first instance, deal with labour disputes.

The effect of this ruling is that employers and employees should first seek a remedy in terms of the BCEA or LRA before relying on breach of contract where a common-law duty was not complied with.

An employee will still be allowed to rely on the common law and claim breach of the employment contract where no statutory protection or remedy is available. It is against this background that this chapter should be studied.

2. DUTIES OF THE EMPLOYER AND THE EMPLOYEE

The common-law duties of the employer and the employee are very broad. These duties are also included or further extended in 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 as long as the employee tenders her/his services. If the employee does not tender her/his services the principle of 'no work, no pay' applies.

The common law does not prescribe what form remuneration must take but it normally takes the form of money or payment in kind.[1]

The employer who does not pay the employee as agreed (including paying on time and the correct amount) contravenes the BCEA and is entitled to refuse to work or to approach the DoL or the Labour Court for relief.[2]

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[1] The BCEA's definition of remuneration recognises payment in money, or in kind, or in both forms. Payment in kind occurs where an employee receives something of value (a certain benefit) in the place of money, for example, food.

[2] See ch 4, para 3.3.1 below.

2.1.2 *To provide the employee with work*

The employer is generally not required to provide the employee with work to do. In other words, if the employer appoints a typist and does not give her any typing work, she must be paid even though she sits behind her desk the whole day with nothing to do. There is an exception to this rule where, in certain special instances, the employer must provide the employee with work to do. This would be 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. The duty to provide the employee with work 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 this common-law duty.

2.1.3 *To provide safe working conditions*

Employers have a duty to provide their employees with a safe work environment as far as reasonably practical. 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 is enhanced and extended by legislation, such as the OHSA, MHSA and the EEA.[3]

Only if an employee is precluded from a claim in terms of the COIDA, the affected employee may lodge a claim against the employer under common law. This will only succeed if the employee can prove that the employer was negligent in failing to provide a reasonably safe work environment.

> **Example:** In *MEC for the Department of Health, Free State Province v D* [2014] 12 BLLR 1155 (SCA) a female employee (medical doctor) on duty was raped by an intruder who gained access to the hospital premises. The Supreme Court of Appeal stated that she could not claim damages under COIDA because the rape bore no relation to her employment and was not incidental to such employment. It held further that the employer neglected to provide safe working conditions and she should not be precluded from suing the employer. The employer failed to provide her with reasonable protection measures against rape and rape directed to women is a risk inherent in employment in South Africa.

2.1.4 *To deal fairly with the employee*

This common-law duty still applies to the employment relationship but when the employer breaches this duty the employee will probably not seek common-law relief for breach of contract as there are other, more suitable measures

[3] The duty to provide safe working conditions includes the protection of an employee against any form of harassment (physical and psychological) in terms of the EEA.

available to enforce fair dealings with the employee. The LRA, for example, protects employees against unfair labour practices and against unfair dismissal.

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 or capacity and time at the disposal of the employer or as it is more commonly referred to 'tendering her/his services'. This includes that the employee enters and remains in the employer's service. The employee who fails to do so will not receive any remuneration from the employer (as indicated in paragraph 2.1.1 above). There might be exceptions, such as when an employee is on approved leave.[4]

2.2.2 *To work competently and diligently*

When the employee enters into employment, 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 LRA also provides for compliance with this duty and an employee who does not work competently and diligently exposes her-/himself to the employer's remedies for misconduct or incapacity.[5]

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 insubordination and breach of contract, for example, where an employee refuses to obey a lawful and reasonable instruction by the employer. The LRA regards insubordination as a form of misconduct which can lead to dismissal if substantive and procedural fairness warrants this.[6] There is an exception to this rule in that an employee may refuse 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*

An employment relationship is built on trust and confidence and it is an implicit duty that an employee owes her/his employer a duty of good faith, also referred to as a 'fiduciary' duty. It includes, for example, the duty not to work against the employer's interests, not to compete with the employer, not to make profit at the expense of the employer, to devote hours of work to promoting the employer's business and to act honestly. A disclosure of

[4] Also see ch 10, para 1.2.1 below where abscondment and desertion as misconduct are discussed.

[5] See ch 10, paras 1 and 2 below for a discussion of misconduct and incapacity.

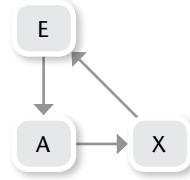
[6] See ch 10, para 1.2.2 below.

confidential information (such as trade secrets or information that is damaging to the employer) by the employee will amount to breach of this duty. The duty to act in good faith (for example, to promote and protect the business and reputation of the employer) may be extended beyond employment, for example, through a restraint of trade agreement (discussed in paragraph 4.4 below).

3. DOCTRINE OF VICARIOUS LIABILITY

The doctrine of vicarious liability is regulated by the common law and not by labour legislation and 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 and scope of business.

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. It does not mean that the employer will not have recourse against such employee(s). Depending on the circumstances, the employer can discipline the employee(s) for misconduct and even claim repayment in this regard.[7]

In order for the employer to be held vicariously 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 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 and each case must be judged on its own merits. The fact that the employee's wrongful action was expressly forbidden by the employer,[8] or constituted a criminal act,[9] might also not absolve the employer from being held vicariously liable.[10] It

[7] Section 34 of the BCEA regulates deductions made from an employee's salary.
[8] *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 756–757.
[9] *Minister of Justice v Khoza* 1966 (1) SA 410 (A); *Mhlongo v Minister of Police* 1978 (2) SA 55 (A).
[10] *Viljoen v Smith* (1997) 18 *ILJ* 61 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1997 (2) SA 591 (W).

is important 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, the client 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*[11] 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. The court held that the employer was not vicariously liable for the injuries sustained by the unauthorised passenger because:[12]

> '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. …'

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.

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.

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[11] (2003) 24 *ILJ* 1084 (SCA).
[12] At 1095A.

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. The following requirements must be met in order for the contract of employment to be valid:

- There must be agreement between the parties, for example, if an employer forces an employee to work, it will amount to slavery.[13] The employment contract like any other contract is created through offer and acceptance. The contract arises when the parties agree about the essential terms of the contract. If an employee, for example, refuses to accept the employer's terms would mean that no agreement and no employment relationship is established.
- 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 minor 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/him 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.

The validity or existence of a contract of employment may also depend on an external factor such as a particular condition. In such a case, a condition must first be met before a contract of employment can come into existence. If a contract of employment is subject to a 'suspensive condition,' for example, where a job seeker must first obtain a work permit or a driver's licence before she/he can be appointed, the condition must be fulfilled before the contract can come into existence. Here the condition impacts on the formation of the contract. A contract of employment may also be subject to a 'resolutive condition,' such as where a job seeker is offered employment but subject to a positive outcome of a particular process that has to take place before a person can be considered to fully appointed, for example, a vetting process. In this case, a contract of employment will commence immediately but its continuation will depend on the results of the vetting process. If the results come out negative the contract automatically stops to exist by operation of the law. A condition must be lawful and free of unfair discrimination.

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

Example: In *Nogcantsi v Mnguma Municipality and others* [2017] 4 BLLR 358 (LAC) the appellant responded to an advertised position, attended interviews and was offered a job as protection officer by the municipality. However, the employment offer was subject to a 'vetting and screening process' conducted by the employer. In terms of the offer the contract would be 'automatically terminated' should the results of the process come out negative. The results came out negative and the contract was terminated. The court held that this did not constitute a dismissal as the employment contract automatically terminated by operation of law and such condition was not impermissible under the LRA. A contract of employment may even stipulate that an employee must retain a certain professional accreditation throughout her/his period of employment with the employer. A contravention might not necessarily lead to an automatic termination of employment but may constitute a ground for discipline or dismissal due to incapacity (discussed in chapter 10 below).

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 certainty to have it in writing. A contract of employment will be valid if concluded in writing or orally, and its terms may be either express, tacit or implied.[14] There is certain information that the employer is obliged to provide to the employee in writing in terms of the BCEA.

The information that must be given to the employee in writing includes the following: (*a*) the full name and address of the employer; (*b*) the name and occupation of the employee; (*c*) the place of work; (*d*) the date on which employment began; (*e*) the employee's ordinary days and hours of work; (*f*) the employee's wage; (*g*) the rate of pay for overtime work; (*h*) any other cash payments to which the employee is entitled; (*i*) any payment in kind and the value thereof; (*j*) the frequency of remuneration; (*k*) any deductions to be made from the employee's remuneration; (*l*) the leave to which the employee is entitled; (*m*) the period of notice required to terminate employment; (*n*) any period of employment with a previous employer that counts towards the employee's period of employment; and (*o*) a list of any other documents that form part of the contract of employment.[15]

[14] *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 legislation, irrespective of the parties' intention.

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

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.[16]

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 and reasonable.

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 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 and the court in *Chirwa* also determined that the tailor-made dispute-resolution measures of labour legislation should be used instead of the common-law remedy of breach of contract.

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.

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

The following is an example of a restraint-of-trade clause in an employment contract:

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

[16] Section 30. This obligation does not apply to employers who employ fewer than five employees (s 28).

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.[17] A restraint-of-trade clause is lawful and enforceable, unless it is unreasonable. For example, a restraint-of-trade clause that is so strict as to prevent an ex-employee from earning a living would be unenforceable.

In *Magna Alloys & Research SA (Pty) Ltd v Ellis*[18] the court had to rule on the enforceability of a restraint-of-trade agreement and balanced 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. The following questions should be considered in determining the reasonableness of a restraint of trade clause:[19]

- Is there an interest deserving of protection at the termination of the agreement? The employer must prove the existence of a protectable interest.
- 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. Thus the inquiry into the reasonableness of a restraint of trade entails a value judgment based on two considerations, namely:

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.

For example, it would be unreasonable to restrain a former employee from using her/his knowledge, skill or experience to make a living because public

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[17] *Reeves & another v Marfield Insurance Brokers CC & another* 1996 (3) SA 766 (A) at 772; *Walter McNaughtan (Pty) Ltd v Schwartz & others* 2004 (3) SA 381.
[18] 1984 (4) SA 874 (A).
[19] *Nampesca (SA) Products (Pty) Ltd v Zaderer* (1999) 20 *ILJ* 549 (C).

policy requires that people should be free to compete fairly in the market place to sell their skills and knowledge to their own best advantage.[20]

The information must be useful; not be public knowledge and property; it must be known only to a restricted number of people or a close circle; and it must be of economic value to the employer.[21] In *Labournet (Pty) Ltd v Jankielsohn & another*[22] the Labour Appeal Court stated that the employer who fails to prove that there is a 'protectable interest' will not be able to rely on a restraint of trade. The court confirmed that an employee cannot be restrained from taking away experience, skills or knowledge even if those were acquired as a result of her/his employment. The employer who wants to enforce the restraint of trade on the grounds of protecting certain information (for example, trade secrets or business connections) must show that the information is capable of being applicable in trade or industry).

An employer who unfairly dismisses an employee who is subjected to a restraint clause will *not* be allowed to benefit from that restraint and it would be unenforceable. If an employee is dismissed for operational reasons, it would be a factor to be taken into consideration to determine the reasonableness of upholding the restraint.[23]

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 statutory provisions and applicable collective agreements.

An employer may not unilaterally change terms and conditions of employment as that would amount to repudiation and breach of contract. 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 only 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,

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[20] *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T) at 507D–H.
[21] *Walter McNaughten (Pty) Ltd v Schwartz and others* 2004 (3) SA 381 (C) 389.
[22] (2017) 38 *ILJ* 1302 (LAC).
[23] *Info DB Computers v Newby* 1996 *ILJ* 32 (W) at 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.

- by means of a collective agreement between the employer and trade union(s),[24]
- by operation of law, for example, the BCEA,[25] and
- through a sectoral determination issued by the MoL.[26]

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 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 established 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.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements regarding the formation of a valid contract of employment is *correct*?
   (*a*) If a contract of employment meets all the requirements for a valid contract such contract comes into existence upon its conclusion.
   (*b*) A contract of employment must be in writing in order to be valid.
   (*c*) Where parties agree that the existence of a contract of employment depends on a 'resolutive condition' the contract comes into existence when the condition is fulfilled.
   (*d*) Where parties agree that the existence of a contract of employment depends on a 'suspensive condition' the contract comes into existence immediately but it will automatically terminate if the condition is not fulfilled.

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[24] See ch 11 below.

[25] This application is most evident when dealing with the BCEA and collective agreements, which are discussed in ch 4, paras 5.1–5.3 below.

[26] In terms of s 50 of the BCEA (see ch 4, para 5.3 below).

2. Which two interests/rights will a court endeavour to balance in determining whether a restraint of trade is enforceable?
3. John was employed by company XX as a labour relations officer dealing mainly with employee wellness issues. John was in no way involved in procuring, billing or retaining clients neither did he ever come across any such information in his performance of his day-to-day duties. John's contract of employment contains a clause which states that he may not use nor disclose confidential company information or trade secrets should he leave the company. After working for company XX for more than ten years, John resigns to join another company as a procurement officer. Company XX informs John about its intention to enforce the restraint of trade to stop him from joining the new employer as he might use company XX's trade secrets in performing his duties at the new company. Do you think company XX will succeed in its effort to enforce the restraint of trade against John in this regard? Substantiate your answer.

✓ Feedback

1. Statement (*a*) is *correct*. If a contract of employment meets all the requirements for a valid contract such contract comes into existence immediately, upon its conclusion.

   Statement (*b*) is incorrect. There are no formalities for the formation of a valid contract of employment. Therefore a contract of employment does not have to be in writing in order for it to be valid.

   Statement (*c*) is incorrect. Where parties agree that the existence of a contract of employment depends on a 'resolutive condition' the contract comes into existence immediately but it will automatically terminate if the condition is not fulfilled.

   Statement (*d*) is incorrect. Where parties agree that the existence of a contract of employment depends on a 'suspensive condition' the contract will only come into existence when the condition is fulfilled.
2. The two interests/rights which a court will endeavour to balance in determining whether a restraint of trade is enforceable are the public interest which requires parties to comply with contractual obligations even if these are unreasonable or unfair and the right of all people to be permitted as far as possible to engage in commerce or the profession of their own choice.
3. Company XX will not succeed in enforcing a restraint of trade against John as the company does not have an interest deserving of protection as far as he is concerned. John was not involved in procurement duties and he never even came across information relevant to procurement or trade secrets at the time he was working for company XX. It will be unreasonable to allow company XX to enforce the restraint of trade against John. In fact, it sounds like company XX is merely trying to stop John from using his knowledge and skills to make a living. Public policy requires

people to compete fairly in the market place to sell their skills and knowledge to their own advantage and John should be allowed to do that. What company XX intends to do is against public policy.

RECOMMENDED READING

1. Botha MM & Millard D 'The past, present and future of vicarious liability in South Africa' (2012) 45(2) *De Jure* 225
2. Calitz K 'Restraint of trade agreements in employment contracts: Time for *pacta sunt servanda* to bow out?' (2011) 22(1) *Stell LR* 50
3. Idensohn K 'The nature and scope of employees' fiduciary duties' (2012) 33 *ILJ* 1539
4. Le Roux R 'Vicarious liability: Revisiting an old acquaintance' (2003) 24 *ILJ* 1879
5. Pretorius P 'Covenants in restraint of trade: A synthesis of traditional common law and constitutional approaches' (2009) 30(1) *Obiter* 154

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1. INTRODUCTION

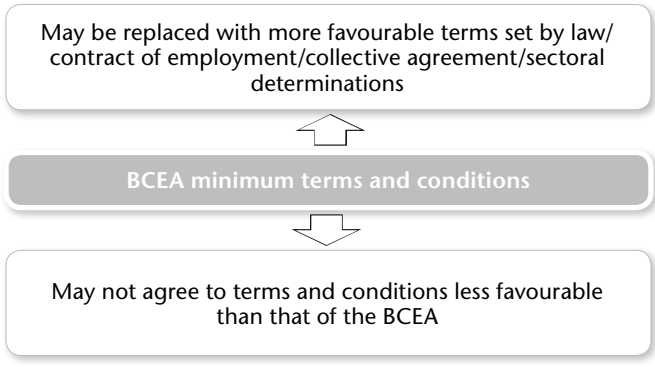
In addition to the impact of the common law, the law of contract and workplace practices on the employment relationship, legislation also has an important impact on the employer-employee relationship.

Moreover, see paragraph 5 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 BCEA 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 on work by children, ensures decent work for all workers and protects the working relationship by prohibiting exploitative practices by employers.[1]

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

The BCEA gives effect to the constitutional right to fair labour practices.[2] The BCEA is applicable to almost all employees and only the following employees are excluded from the Act, notably:

- members of the National Defence Force,
- members of the State Security Agency,[3]
- 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, that is, certain groups of people who are excluded from certain chapters of the Act. The partial exceptions are listed in the summary of the regulations below.

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[1] The Act was amended by the Basic Conditions of Employment Amendment Act 20 of 2013 (hereafter the 'Amendment Act') which came into operation on 1 September 2014.
[2] Section 23(1) of the Constitution.
[3] See ch 2, n 32 above.

3. MINIMUM CONDITIONS OF EMPLOYMENT

3.1 Working time

This part of the BCEA must be read in conjunction with the 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.[4] Employers are required to endeavour to reduce the maximum ordinary hours to 40 hours a week and 8 hours a day, through collective bargaining and sectoral determinations.[5]

The partial exclusions contained in chapter 2 of the BCEA include 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. Chapter 2 of the BCEA does not apply to them.

	Regulation
Working hours (s 9)	• 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. • 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.
Lunch (s 14)	• An employee is entitled to a meal interval of at least 1 hour after 5 hours of continuous work. • The meal interval can, by agreement, be reduced to 30 minutes, or be done away with if the employee works fewer than 6 hours per day.
Overtime (s 10)	• Maximum of 10 hours per week. • These may be increased to a maximum of 15 hours a week by a collective agreement. • An employee may work overtime only by agreement. • An employee working overtime has to be paid 1½ times the normal pay or get 1½ hours time off for every hour worked. • 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 (ss 16; 18)	• The employee has to be paid double the normal rate of pay for work performed on a Sunday or public holiday. • If the employee normally works on Sundays, the employee has to be paid 1½ times the normal rate. In terms of the Public Holidays Act 36 of 1994, an employee may exchange a public holiday for any other working day which is agreed to by the employer. • An employer may elect to give the employee 2 hours time off for every hour worked in stead of double-pay.

[4] See ch 1, para 6.3 above.
[5] Section 9(3) and Sch 1 of the BCEA.
[6] Section 6(1)(*a*).

	Regulation
Night work (s 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. An employee who performs night work 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.
Rest periods (s 15)	The BCEA makes provision for both daily and weekly 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, must include Sundays.
Compressed working week (s 11)	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 5 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. • 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 and not followed.

Example: Ruth works for Packaging CC from Monday to Friday from 8h00 to 17h00. There is no mention of overtime in her contract. She is told by her supervisor on Monday that they have an unexpected urgent order and that all employees will have to work until 22h00 for the next three days without extra pay. Ruth refuses quite legitimately to work such overtime as the BCEA stipulates that overtime can only be worked by agreement and that overtime per day may not exceed 12 hours (together with her ordinary hours) per day. If Ruth works overtime, she will be working 14 hours per day which is not allowed. The fact that Ruth will not be paid one-and-a-half times her normal pay is further not allowed as the BCEA requires this or time off.

3.2 Leave

The BCEA provides for four types of leave which an employer must allow an employee to take. Other types of leave, for example study leave, may be included in the employment contract but is not compulsory in terms of the BCEA.

In recent years there have been a few interesting developments regarding leave. In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others*[7] an employee requested a month's unpaid leave to attend sangoma training. The employee was fearful of her life if she ignored the calling after seeing visions of her ancestors and sincerely believed that she was sick. The employer refused. The employee who had to heed to this calling had no choice but to attend the training and be away from work for five weeks without permission. She was consequently dismissed. The court held it to be unfair. The employer's refusal to grant her unpaid leave forced her to stay away without permission as she feared for her life if she ignored her ancestors. The court held that the employer should have appreciated the kind of society we live in and should have accommodated the employee in stead of trivialising her beliefs.

As far as maternity leave is concerned the Code: Protection during Pregnancy and after Birth should also be taken into account as it is designed to protect mothers-to-be and mothers against potential hazards in the work environment during pregnancy, after the birth and while breastfeeding.[8] There is also increasing calls for paternity leave to be extended.[9]

The BCEA provides for four types of leave which an employer must allow an employee to take. Other types of leave for example study leave, may be included in the employment contract but is not compulsory. 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 them and the employer in terms of their contracts of employment.

	Regulation
Annual leave (section 20)	An employer must give an employee a minimum of 21 consecutive (calendar) days' paid vacation leave (excluding public holidays) per year. This would amount to 15 working days. Employers and employees may agree on additional leave, either paid or unpaid and that would be allowed since it is more beneficial than the minimums provided for in the Act. The employer and employee may however not agree to less days than the minimums prescribed.
Maternity leave (section 25)	An employee is entitled to 4 consecutive months' unpaid maternity leave, which may commence at: • any time from 4 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. An employer may decide to pay an employee during maternity leave which is allowed since it is more beneficial than the provisions of the Act. If an

[7] (2014) 35 *ILJ* 406 (SCA).
[8] Chapter 1, para 6.3 above.
[9] A Ferreira & J Norval GOLEGAL 'Paternity leave a step closer to becoming law' available at http://www.golegal.co.za/tag/parental-leave (accessed on 18 August 2017).

	Regulation
Maternity leave (*cont*)	employee does not receive paid maternity leave she may claim maternity benefits from the UIA. An employee may not work for 6 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 6 weeks' leave after the miscarriage or still birth. The BCEA does not make provision for paternity leave but it is possibly covered under family responsibility leave.
Family responsibility leave (section 27)	An employee is entitled to 3 days' family responsibility leave for every 12 months worked. Family responsibility leave may be taken when an employee's: • child is born or is sick, or • in the event of the death of the employee's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or siblings (brothers and sisters). No provision is made for leave to be taken in the event of death of in-laws or members of an extended family. This type of leave is available only for employees who have worked for longer than 4 months and who work at least 4 days a week. Employers may agree to more than the minimum of 3 days' family responsibility leave but not less.
Sick leave (sections 22; 23)	A sick-leave cycle is three-years. The number of days' sick leave in a sick-leave cycle is calculated as the number of days that an employee would normally work in six weeks. For example, if an employee works 5 days a week, she/he would work 30 days in 6 weeks and that would entitle her/him to 30 days' sick leave in 3 years. If an employee has been absent from work for more than 2 consecutive days or on more than 2 occasions in an eight-week period, the employer may request the employee to submit a medical certificate. Such a certificate may be issued and signed by a medical doctor or another person who is certified to diagnose and treat patients and is registered with a professional council.

Example: Annah is absent from work from Tuesday to Friday. When requested by her employer to provide a medical certificate on the Monday when she resumed work, she said that she could not find a lift to take her to a doctor or another person to provide her with a sick note. The employer need not pay Annah for the four days of sick leave as the BCEA stipulates that she must produce a sick note if she has been absent from work for more than two consecutive days.

3.3 Other matters

3.3.1 *Wages*

The BCEA does not contain provisions about minimum wages for employees. These are set by collective agreements concluded in bargaining councils and ministerial and sectoral determinations. Employers and employees will then be bound to pay these minimum wages. For example, minimum wages for vulnerable employees such as farm and domestic workers who are currently regulated by way of sectoral determination.

On 7 February 2017 a national minimum wage has been agreed on by Deputy President Ramaphosa and the majority of trade unions and trade union federations. A NEDLAC task team was set up to finalise proposed legislation in this regard. It is envisaged that the minimum wage will come into effect in May 2018.[10] The national minimum wage was set as R20 an hour or R3 500 for employees working 40 hours per week and about R3 900 for those working 45 hours per week.[11]

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.[12]

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.[13]

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 her/his intention to terminate the contract. Notice must adhere to the notice periods required in terms of the contract of employment and if the contract does not make any provision for a notice period, the BCEA provides minimum notice periods, which both the employer and the employee have to comply with.[14] The BCEA provides that a contract of employment must be terminated in writing[15] 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.[16]

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[10] See ch 1, para 4.4 above.

[11] Available at https:/www.thepresidency.gov.za/speeches/statement-deputy-president-cyril-ramaphosa-finalisation-agreements-labour-stability-and (accessed on 6 June 2017). See also S Deakin 'Labour law, economic development, and the minimum wage: Comparative reflections on the South African debate' (2017) 38 *ILJ* 1.

[12] Section 32.

[13] Sections 32–35.

[14] Section 37.

[15] The courts have been lenient about the requirement of notice in writing. In *Sihlali v South African Broadcasting Corporation Ltd* (J700/08) (2010) 31 *ILJ* 1477 (LC) the Labour Court held that notice by sms was sufficient. See also see ch 9, para 2.2 below on termination of the contract of employment.

[16] Section 37(2)(b).

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.[17]

It is possible to vary the notice period by contract. A contract can from the first day of conclusion stipulate that 30 days' notice is required. As long as the employer and employee must both comply with the notice period it will be allowed. Lily concludes a written employment contract with ABC in terms whereof a month's notice is required. Lily wants to resign after two months. She must then give a month's notice. Daniel commenced work at ABC at the same time as Lily but he did not sign any contract. He also wants to resign after a month. The minimum notice periods set in terms of the BCEA will apply to him and he will have to give one week's notice.

3.3.3 *Severance pay*

When an employee is dismissed based on the operational requirements of the employer in terms of the LRA,[18] 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.[19] For example, if an employee has worked at a particular employer for six years and seven months 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.[20]

In terms of the LRA, if an employee's fixed-term contract is justifiably extended beyond 24 months, such employee will receive on expiry a severance package of one week's salary per completed year of service.[21]

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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[17] Section 38.

[18] See ch 10, para 3 below. 'Operational requirements' include reasons based on the economic, (eg, financial difficulties due to a decrease in the demand for particular products), technological (eg, new machinery to replace employees), structural (eg, a restructuring of the business) or similar (eg, a breakdown in the trust relationship between employee and employer) needs of the employer.It is also called retrenchment or redundancy.

[19] Section 41.

[20] Section 41(4). Also see ch 10, para 3.4 below.

[21] Section 198B(10) of the LRA. See ch 2, para 4.2.2 above.

3.3.5 *Payments of contributions to benefit funds*

An employer is not entitled to make any deductions from an employee's salary unless an employee agrees thereto or the deduction is justified in terms of a law, collective agreement, court order or arbitration award.[22]

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 after the deduction has been made.

An employer may deduct money from the employee's salary to reimburse an employer for loss or damage *only* if:

- the loss or damage occurred in the course of employment and was due to the fault of the employee;
- the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;
- the total amount of the debt does not exceed the actual amount of the loss or damage; and
- the total deductions from the employee's remuneration do not exceed one-quarter of the employee's remuneration in money.[23]

3.4 Prohibition of work by children

In terms of the Children's Act[24] a child becomes a major at the age of 18 years. The BCEA however only prohibits employment of children who are under the age of 15 years or the minimum school leaving age.[25] Despite this exception, it prohibits a person from requiring or permitting a child (in other words those older than 15 years or who have left school) to perform work or to provide services that are:

- inappropriate for her/his age, and
- place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development.[26]

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

The BCEA allows for the MoL to make regulations to protect the health and safety of child workers. For example, the Regulations on Hazardous Work

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[22] Section 34(1).
[23] Section 34(2).
[24] 38 of 2005.
[25] Section 43(1). In terms of the South African Schools Act 84 of 1996 a child is subject to compulsory schooling until the last school day of the calendar year in which such learner reaches the age of 15 years or the ninth grade, whichever occurs first.
[26] 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.

by Children,[27] children who are younger than 15 years old or still subject to compulsory schooling are allowed to:

- work in the performance of advertising, artistic or cultural activities,
- collect contributions on behalf of a fund-raising organisation,
- perform voluntary work for a church, charitable organisation or amateur sports club, and
- do work that is appropriate for a person of that age as part of her/his schooling.[28]

Again, contravention of this section constitutes a criminal offence.

Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities[29] provides further that:

- remuneration must be paid to the parent/guardian of the child,
- the maximum hours of work are four hours a day for a child older than 10 years and three hours a day for a child younger than 10 years,
- 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),
- nutritious food and drinks 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 on advice of the Employment Conditions Commission ('ECC'), may make regulations to bring the BCEA 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.[30]

3.5 Prohibition of forced labour

Forced or compulsory labour is prohibited under the BCEA.[31] Contravention of this section constitutes a criminal offence.

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[27] Regulations on Hazardous Work by Children NR 7, *GG* 32862, dated 15 January 2010 (item 5). See also ss 44–45 of the BCEA.

[28] The regulations will also apply to children older than 15 years of age who work. See n 25 above.

[29] GN 882, *GG* 2942, dated 28 November 2006. See also para 5.3 below for a discussion on sectoral determinations.

[30] 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.

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

3.6 Prohibition of exploitative practices by employers to secure work by employees

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 in respect of employment or the allocation of work, or
- require employees to purchase goods, services or products from the employer or from any person nominated by the employer in order to secure work.[32]

4. ENFORCEMENT OF THE BCEA

4.1 Courts

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 (such as an interdict) for breach of prohibited conduct:[33]

- 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 is a breach of confidentiality, obstruction, undue influence or fraud.

The Labour Court may enforce the BCEA by:[34]

- making a compliance order an order of court;
- 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 consolidation of various claims is 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

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[32] Section 33A(1).
[33] Section 77.
[34] Section 73(1); 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 hefty maximum fines (not involving an underpayment) while Table II provides for maximum fines where underpayment has occurred.

the BCEA, if such a claim has not prescribed.[35] Legal proceedings regarding a labour dispute may, therefore, consist of one or more matters stemming from *different* employment acts.

4.2 Inspectors

The BCEA provides for the appointment of labour inspectors who must monitor and enforce compliance with the BCEA (and other employment laws such as the OHSA).[36] 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 to comply with a particular provision.[37] The Director-General may apply to the Labour Court for the written undertaking to be made a compliance order and to set a specified period within which the employer must comply with such order.[38]

Inspectors may *not* issue compliance orders in the following cases:[39]

- where there is a dispute about an 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.

Example: Lerato receives R120 000 per year. The employer did not pay her salary for April and May. She earns less than the BCEA threshold and will therefore approach the DoL which will issue the employer with a compliance order. Ronny receives R300 000 per year and has also not received his salary for April and May. He must approach the Labour Court to obtain a compliance order as the DoL does not have jurisdiction to issue compliance orders for employees earning more than the BCEA threshold. Ministerial

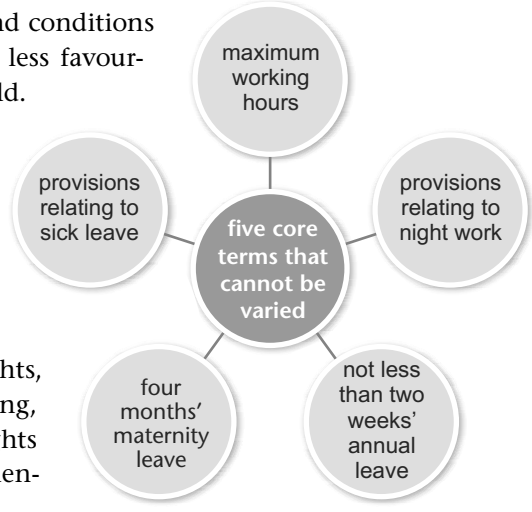
[35] Section 74(2).
[36] Section 63. By either meeting with the employer or serving the document on the employer.
[37] Section 68(1); 68(1A). The inspector may endeavour to get agreement between the employer and the employee about the amount owed, may arrange for such payment to the employee, may receive payment at the written request of the employee (on behalf of the latter) and must then provide a receipt for the payment.
[38] Sections 68–69. A compliance order may set out dates for representations, compliance and related issues.
[39] Section 70.

determinations exist for the special public works programme, small businesses and the welfare sector, which are typically non-unionised.

Employers may not object to or appeal to the Labour Court against a compliance order issued by the DoL because these processes were previously abused by employers to delay matters.[40] This prohibition ensures improved enforcement of the Act.

5. 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's 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.

5.1 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 purposes of the Act.[41] It may replace or exclude a basic condition of employment only to the extent allowed by the BCEA or a sectoral determination.

5.2 Variation by way of a ministerial determination

A ministerial determination[42] 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. It must be made on advice of the ECC.

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[40] However, the Director-General has greater powers in this regard.
[41] Section 49.
[42] Section 50.

5.3 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.[43]

There is for example a ministerial determination for small businesses[44] whereby certain minimum conditions of service have been relaxed for employers with fewer than ten employees.[45]

One of the variations made by this determination is, for example, that in a small businesses overtime may not exceed fifteen hours overtime a week. Payment for overtime is also at least one and one third times the employee's wage for the first ten hours of overtime worked in any week and at least one and one half times the employee's wage for any overtime in excess of ten hours worked in a week.

Such a determination, for example, exists for domestic workers (as indicated in footnote 45 below) which sets minimum terms and conditions customised for their specific job environment.

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 or upon the request of an employers' or employees' organisation in a particular sector or area and after consideration of representations by the public. Moreover, the ECC has to advise the MoL on a range of 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.

Sectoral determinations may not cover employees and employers who are bound by a collective agreement concluded at a bargaining or statutory council and it may not regulate any matter already regulated by a sectoral determination for a sector and area which has been in effect for less than 12 months.[46]

Other examples of sectoral determinations are found in industries such as farming, private security, contract cleaning and hospitality sectors. These determinations often set different minimum wages for urban and rural areas.

Minimum wages in these determinations are generally amended annually to keep abreast (at least) of inflation. These are all sectors that are not well organised and not able to effectively bargain collectively.

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[43] Sections 55(1); 55(7); 55(8).

[44] GN R1295, *GG* 20587, dated 5 November 1999.

[45] This determination excludes domestic workers. A separate sectoral determination has been issued by the Minister for Domestic Workers (Sectoral Determination 7: Domestic Worker Sector (GN R1068, *GG* 23732, dated 15 August 2002)).

[46] Section 55(4).

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements with regards to the BCEA is *incorrect*?
   (*a*) The BCEA establishes and enforces basic, minimum conditions of employment.
   (*b*) The BCEA regulates the variation of minimum conditions within a framework of 'regulated flexibility'.
   (*c*) The BCEA ensures decent work for all workers including children.
   (*d*) The BCEA is applicable to all employees.
2. Mr M has been working for three months for Employer X when his baby is born. He requests paternity leave, alternatively one weeks' family responsibility leave to assist his wife with the new-born baby. Advise him on the leave he is entitled to.
3. Peter is dismissed by his employer due to computers that are to be installed which will lead to the redundancy of some employees. He has worked for employer XYZ for 10 years. Peter wants severance pay but his employer offers him alternative employment after discussions with Employer ABC. Peter says that he had heard rumours that ABC does not treat its employees well and insists on severance pay.

✓ Feedback

1. Statement (*d*) is *incorrect*. Certain employees are excluded, for example, members of the National Defence Force, members of the State Security Agency, unpaid volunteers working for charities and independent contractors.

   Statement (*a*) is correct. Minimum conditions may, however, be varied by collective agreement, and sectoral or ministerial determinations.

   Statement (*b*) is correct. The concept 'regulated flexibility' attempts to strike a balance between employees' interest in their work security and employers' interest in workplace flexibility.

   Statement (*c*) is correct. Decent work is a concept from the ILO which South Africa (as a member state) has embraced.
2. The BCEA does not make provision for paternity leave but an employee is entitled to three days' family responsibility leave per year which may be used. Only employees working at least four days a week and who have been working for longer than four months for a specific employer, are entitled to this leave. This may be taken when an employee's child is born, is sick or passes away. Mr M is by law not entitled to any family responsibility leave as he has only worked for three months for Employer X. He may, however, request annual leave if it would suit the employer.
3. An employer must pay an employee severance pay equal to at least one week's pay for each completed year of continuous service with that employer in terms of the BCEA. However, an employer may offer such an employee alternative employment within its own workplace or any

other employer instead of severance pay. An employee who unreasonably refuses to accept an offer of alternative employment with that employer or another employer, is not entitled to severance pay. Peter will lose his severance pay if he cannot show good reason why he wants the severance pay and refuses the alternative work with Employer ABC.

RECOMMENDED READING

1. Deacon S 'Labour law, economic development, and the minimum wage: Comparative reflections on the South African debate' (2017) 38 *ILJ 1*
2. Doncaster L 'Leave for working fathers in the SADC region' (2015) 36 *ILJ* 2474
3. Godfrey S 'The Basic Conditions of Employment Act Amendments: Enabling redistribution' (2014) 35 *ILJ* 2587
4. Mokoena K 'Are uber drivers employees? A look at emerging business models and whether they can be accommodated by South African labour law' (2016) 37 *ILJ* 1574
5. Theron J 'Decent work and the crisis of labour law in South Africa' (2014) 35 *ILJ* 1829

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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 workers from collective bargaining; the Mines and Works Act[2] which provided for job reservation for white workers; 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 entrenched 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.

> Section 9 reads 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).'

[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.

The Constitution acknowledges South Africa's discriminatory past and holds the country's founding values to be human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racism and non-sexism. The wording of the Constitution on equality — that it still has to be achieved — indicates that equality has been embraced as a goal. Section 9 provides for the prohibition of unfair discrimination and also authorises affirmative action.

One of the measures which was put into place to achieve this is the EEA. The relevant sections of the EEA gives content to the Constitution and read as follows:

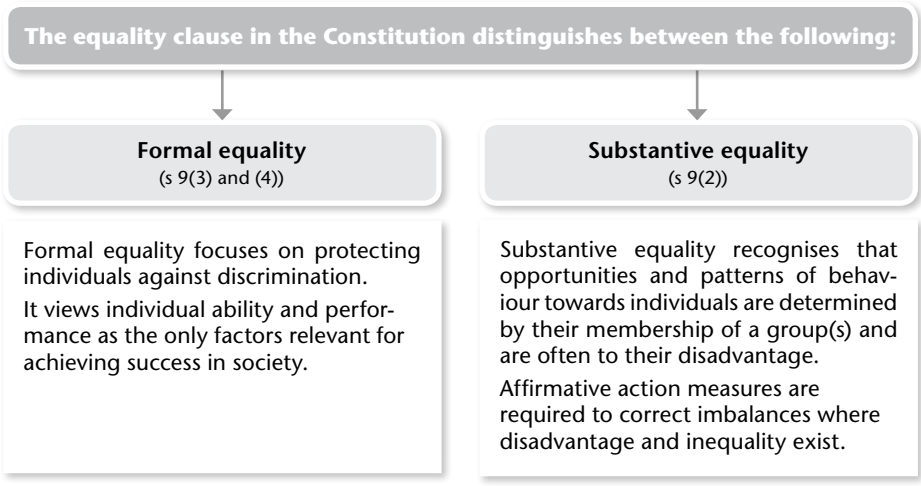
> **'5 Elimination of unfair discrimination**
> Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
>
> Prohibition of unfair discrimination
> (1) No person may unfairly discriminate, directly or indirectly, 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 are discussed it is important to clarify basic concepts in relation to equality. The EEA has been amended by the Employment Equity Amendment Act (hereafter the 'Amendment Act')[6] which came into operation on 1 August 2014 and the most important amendments will be dealt with below.

[6] 47 of 2013. Employment Equity Regulations (hereafter 'Regulations') GN 494, *GG* 37873, dated 1 August 2014 came into operation on the same date.

2. BASIC TERMINOLOGY

2.1 Formal and substantive equality



2.2 Differentiation and discrimination, and direct and indirect discrimination

2.2.1 *Differentiation*

People in the workplace are frequently treated differently, for example, when people apply for promotion. Differentiation is acceptable if it is based on valid grounds and serves a legitimate purpose. Differentiation in pay levels does not in itself constitute discrimination if it is based on acceptable reasons such as expertise and skills.[7]

2.2.2 *Discrimination*

This is a particular form of differentiation based on an unlawful ground, even if there is not a specific intention to discriminate. Intention is relevant when the court decides on the relief to be awarded.[8] There can be distinguished between direct and indirect discrmination as follows:

- Direct discrimination is usually easy to detect and identify. It occurs if someone is clearly treated differently because of a certain characteristic, for example, race or gender. For example, where an employee is not promoted simply because she/he is disabled, or divorced.
- Indirect discrimination is often disguised and hard to detect. It occurs when criteria that appear to be neutral, negatively and disproportionately,

[7] See para 4.1.5 below.

[8] In the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 *ILJ* 285 (LC) only monthly-paid employees were covered by a specific (superior) pension fund. The court found the fact that only eight black employees out of a total of 50 who had been paid monthly, was disproportional and constituted indirect unfair discrimination against the black employees.

affect a certain group, for example, gay or Hindu people. For example, where a requirement is that candidates be physically strong, it favours more men than women. Unless this criterion can be justified by the requirements of the job, it will amount to indirect discrimination.

2.3 Specified, unspecified/unlisted and arbitrary grounds of discrimination

The EEA prohibits unfair discrimination in any employment policy or practice. There are 19 grounds listed in section 6(1) but the list is non-exhaustive. This means that it is possible that other unspecified/unlisted grounds for discrimination (not contained in the list) can exist. This is similar to the non-exhaustive list of constitutional grounds for prohibition of discrimination.[9] The list of prohibited grounds in the EEA is identical to the constitutional list, but the EEA lists three additional grounds, namely, family responsibility, HIV status and political opinion. What the listed grounds have in common is the potential to demean and belittle people and infringe their dignity.

The Amendment Act has further changed section 6(1) to include, in addition to the existing list, a reference to '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 would cover any arbitrary ground. The listed/unlisted grounds relate to an individual's personal attributes such as biological characteristics (for example, age, race and sex), or their associational, intellectual or religious beliefs. It may be asked whether 'an arbitrary ground' is a ground totally different to the listed and unlisted grounds. In the past, it was cautioned that care should be taken in determining an 'arbitrary ground'.

Discrimination cases are most often based on one of the listed grounds (or a combination of such grounds), for example, race,[10] conscience and professional ethics,[11] sex/gender,[12] pregnancy,[13] age (increasingly so as older people

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[9] See s 9(3) of the Constitution in para 1 above.

[10] See, eg, *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 (Vereeniging van Regslui vir Afrikaans as Amicus Curiae)* (2014) 35 *ILJ* 416 (SCA); *SA Police Service v Solidarity obo Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (2014) 35 *ILJ* 2981 (CC). The *Barnard* cases will be discussed briefly in para 5.1 below. See also *Biggar v City of Johannesburg (Emergency Management Services)* (2017) 38 *ILJ* 1806 (LC).

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

[12] See, eg, *Media24 Ltd & another v Grobler* (2005) 26 *ILJ* 1007 (SCA); *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC); *SAMWU & another v Nelson Mandela Bay Municipality* (2016) 37 *ILJ* 1203 (LC).

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

want to carry on working for longer),[14] disability,[15] (for example, being blind, having facial scars or a speech disorder), belief, political or cultural affiliation, birth, family responsibility,[16] sexual orientation,[17] bad body odour,[18] religion or cultural belief,[19] language, and HIV/AIDS.[20]

Below are two interesting examples of discrimination cases based on listed grounds:

Example: In *City of Cape Town v Freddie & others* (2016) 37 *ILJ* 1364 (LAC) the court had to determine whether an employee was fairly dismissed for making racial slurs and if it amounted to unfair discrimination. A Coloured male employee, Freddie was disciplined for insubordination. In reaction thereto he sent a series of emails relating to his senior (also a Coloured male) accusing him of being an incompetent manager and calling him, for example, 'a racist of the highest order' and 'even more than Verwoerd'. Freddie was dismissed after a disciplinary enquiry for directing racial slurs at his senior. The matter ultimately went on appeal to the Labour Appeal Court which held that the dismissal of Freddie was fair and that racism in the workplace was a 'plague and a cancer' which needed to be rooted out. Freddie's accusations were false and his senior had no racist feelings at all towards Freddie or any other employee.

Example: In *Correctional Services v Police & Prisons Civil Rights Union* (2011) 32 *ILJ* 2629 (LAC) 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 such locks. The officers alleged that their dismissals constituted unfair discrimination based on sincerely held religious and cultural beliefs. Three officers followed the Rastafarian 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

[14] See, eg, *Karan t/a Karan Beef Feedlot & another* (2010) 31 *ILJ* 2449 (LC).

[15] See, eg, *Singh v Minister of Justice & Constitutional Development (SA National Council for the Blind as Amicus Curiae)* (2013) 34 *ILJ* 2807 (EqC); *Smith v Kit Kat Group (Pty) Ltd* (2017) 38 *ILJ* 483 (LC).

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

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

[18] *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel* (2017)38 *ILJ* 702 (CCMA). See also para 4.1.3(*b*) 'Liability of employer's for employees' conduct'.

[19] See, eg, *SA Clothing & Textile Workers Union & others v Berg River Textiles—A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC); *Mbhele & Fidelity Security Services Ltd* (2016) 37 *ILJ* 1935 (CCMA).

[20] 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 9, para 4.7 below).

they were training to become traditional healers. The employer's view was that male officers who wore dreadlocks might have affected the security of prisoners by the latter grabbing them by their locks and possibly providing the latter with dagga. The court found that this view was unsupported by evidence. The court also 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. and the instruction to cut the dreadlocks was found to be unjustifiable and unreasonable in the circumstances.

This case could also have been argued on appearance-based unfair discrimination,[21] a new concept which is coming to the fore.

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,[22] qualifications, tertiary teaching and research experience,[23] mental health/illness,[24] temporary employment status, parenthood,[25] geographical location[26] and a criminal record.[27]

Example: In *MIA v State Information Technology Agency (Pty) Ltd* (2015) 36 *ILJ* 1905 (LC) it was found that the employer's maternity leave policy unfairly discriminated against the applicant, a male who would be the 'mother' in a same-sex couple of the baby they had in terms of a surrogacy agreement. It was found that the applicant was entitled to the same maternity leave as a natural/biological mother.

3. APPLICATION OF THE EEA

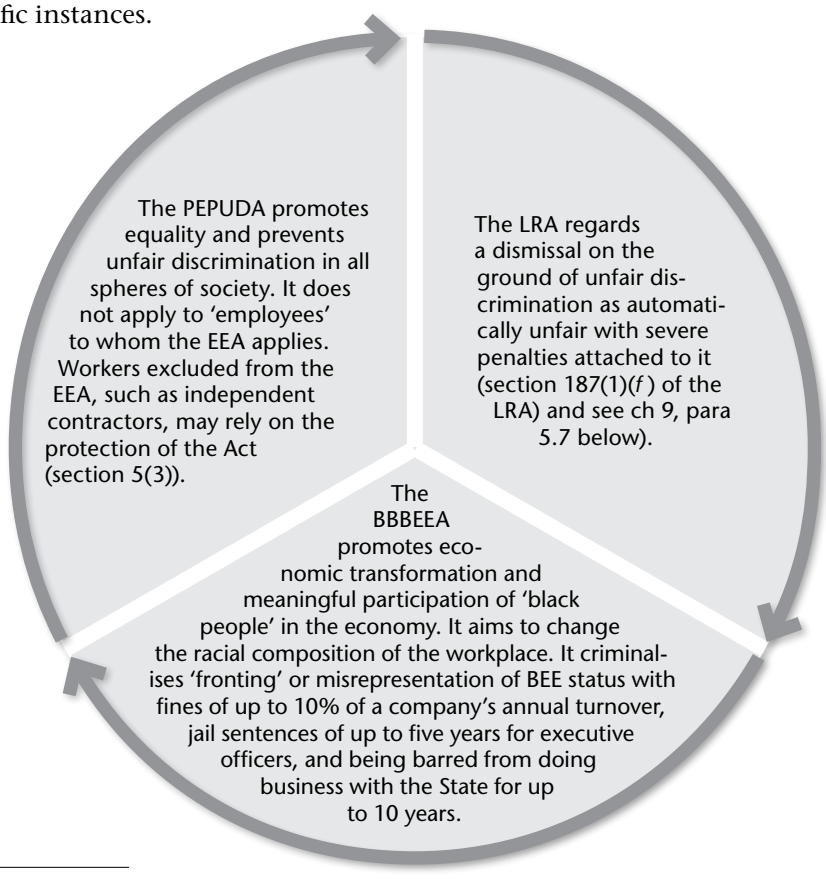
The EEA, in giving effect to the equality provisions of the Constitution, promotes the *achievement of equality* in the workplace and must be interpreted in accordance with ILO Convention 111 ratified by South Africa. It thus

[21] Tattoos, piercing, obesity, hair colour and having a youthful/playful/Prada look are at issue here.
[22] See *Larbi-Odam v Members of the Executive Committee for Education (North-West Province) & another* 1998 (1) SA 745 (CC).
[23] See *Stojce v University of KZN (Natal) & another* [2007] 3 BLLR 246 (LC).
[24] See *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* [2009] 1 BLLR 1181 (LAC).
[25] See *Wallace v Du Toit* [2006] 8 BLLR 757 (LC).
[26] *Duma v Minister of Correctional Services & others* (2016) 37 *ILJ* 1135 (LC).
[27] *Nombevu and Department of Rural Development & Land Reform* (2017) 38 *ILJ* 1446 (CCMA).

provides the foundation for non-discrimination and affirmative action in employment law. 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 and specifically excludes members of:[28]

- the National Defence Force,
- the National Intelligence Agency,
- the Secret Service,
- the National Academy of Intelligence, and
- directors and staff of Comsec.

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[29] (hereafter 'PEPUDA'), the LRA and the Broad-Based Black Economic Empowerment Act[30] (hereafter 'BBBEEA'). These Acts deal with inequality fairly similar to the EEA but only in certain specific instances.



[28] Section 4(3).
[29] 4 of 2000.
[30] 53 of 2003.

The EEA follows the Constitution in that it subscribes to both formal and substantive equality.[31] The EEA has a two-fold purpose, as shown in paragraph 3 above and discussed below.

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

4.1 Establishing unfair discrimination

Section 6(1) of the EEA provides that 'no person'[32] may unfairly discriminate against an employee[33] in 'any employment policy or practice'.[34] Once differentiation on a specified, unspecified/unlisted or arbitrary ground has been established and it has been shown that the ground is the reason or 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.

4.1.1 *Onus*

(*a*) 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 changed the provisions regarding the onus of proof for unfair discrimination. It distinguishes between unfair discrimination alleged on *listed* and on *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 —

[31] See para 2.1 above.

[32] 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 manager of a pension fund or medical aid fund.

[33] 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.

[34] 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.

(*a*) the conduct complained of is not rational;
(*b*) the conduct complained of amounts to discrimination; and
(*c*) the discrimination is unfair.'

(*b*) Listed grounds

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

Stage 1: Complainant	Stage 2: Other party
During the first stage the complainant has to show that there was differentiation between her/him and another person, for example, a co-employee. The complainant must lay a factual foundation for the claim which must be done by showing that the listed ground is the reason for the differentiation.	The onus now shifts to the other party 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 • 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.

(*c*) Arbitrary and unlisted grounds

For unfair discrimination alleged on an arbitrary/unlisted ground, the stages are discussed below. The process contains an additional step where the employer carries an additional burden of proof.

Stage 1: Complainant	Stage 2: Complainant	Stage 3: Other party
• 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/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 provide clarity on what the onus entails but until then there is uncertainty about, firstly, the possible wide scope of justification over and above the justifications mentioned in section 6(2) (inherent requirements of a job and affirmative action). There is also uncertainty about, secondly, the requirements in section 11(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.

4.1.2 *Justification grounds for discrimination*

As mentioned above, section 6(2) provides two grounds of justification for allegedly unfair discrimination, namely:[35]

- affirmative action, and
- inherent job requirements.

(*a*) 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 5.2.2 below for a table with details on designated groups and designated 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.

(*b*) 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 may be 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 or that a primary-school teacher must be young and female. It could however be a valid inherent job requirement that a teacher or lecturer must not have a speech disability.

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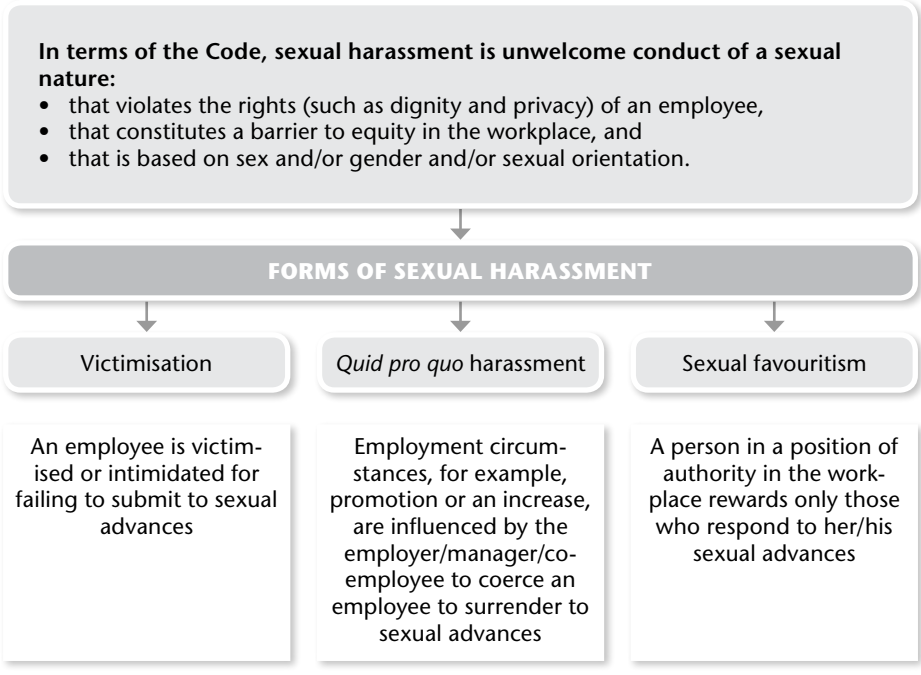
[35] See *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 *ILJ* 2774 (LAC) where the judge found that the EEA may consider other defences against unfair discrimination besides the two defences listed in the Act. Only time will tell what other defences may be used.

4.1.3 *Other specific forms of discrimination prohibited*

(*a*) Harassment as unfair discrimination

Any type of harassment is regarded as unfair discrimination in terms of the EEA.[36] The term itself is not defined in the Act but the PEPUDA and the Code: EEA Sexual Harassment provide definitions for 'harassment'.

The most common form of harassment found in the workplace is sexual harassment. Conduct constituting sexual harassment would include physical conduct, verbal conduct and non-verbal conduct.



Example: In *UASA obo Zulu and Transnet Pipelines* (2008) 29 *ILJ* 1803 (ARB) the court strongly condemned sexual harassment as having no place in a civilised society. Here, a male employee 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 on many occasions 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

[36] 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 (eg, cell phones and laptops) may be attached. It is not clear to what extent this Act applies (if at all) in the workplace.

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 spelled 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.

The Code: Sexual Harassment attempts to provide guidance to employers on how to deal with the occurrence of sexual harassment and how to curtail such conduct in the workplace.

Example: In *Media24 Ltd & another v Grobler* (2005) 26 *ILJ* 1007 (SCA) Grobler was harassed by her manager and eventually she suffered from depression and other trauma. Her complaints were ignored by her employer for months and she had no other option but to resign. The court found that Grobler could submit a claim for discrimination in terms of the EEA, as well as a claim for an automatically unfair constructive dismissal and she also has a common-law claim against the employer for vicarious liability.[37]

(*b*) 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.[38] The employer must then consult all relevant parties and take the necessary steps to eliminate such conduct. In addition, the EEA stipulates that every employer must take steps in an attempt to eliminate unfair discrimination in any employment policy/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.

The employer will be deemed to be liable for a contravention by its employee(s) 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.

In *Ntsabo v Real Security CC*[39] 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

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[37] See chs 3 above; 9 below. The manager's harassment was regarded as delictual conduct performed in the course and scope of employment, since the employer's lack of action despite complaints by Grobler showed that they condoned the manager's actions.

[38] Section 60.

[39] (2008) 29 *ILJ* 1803 (ARB).

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.

Example: In *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel*[40] the barman being called unclean, smelly, untidy and having a bad body odour, found it deeply offending. The court found that it impaired his dignity and constituted unfair discrimination. This was in contrast to the rest of his roommates who had not been judged in such a manner. Although the HR manager reprimanded some of the complaining employees the court held that it did not constitute 'all that was reasonably practicable' and the employer was held accountable for the unfair discrimination. The commissioner stated that unfair discrimination and prejudice are 'evils that must be eradicated' from society and respect for human dignity must be restored. The applicant was awarded compensation. However, in *Ngwabe and Imvula Quality Protection (Pty) Ltd*[41] an employee, in a discussion with the MD of the company, referred to a co-employee with only one eye as 'one-eye' either to identify him to the MD or possibly as a joke in poor taste. This was found not to constitute unfair discrimination as the employee has offered an apology and admitted that it was wrong of him to address the person as such. He was also disciplined and issued with a written warning. It was held that even if the term was a 'mild' form of discrimination, the employer has taken the necessary steps and could therefore not be held liable.

In order to further prevent harassment in the workplace, the Code: EEA 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.

[40] (2017) 38 *ILJ* 702 (CCMA).
[41] (2017) 38 *ILJ* 724 (CCMA).

- 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.

Example: In *Simmers v Campbell Scientific Africa (Pty) Ltd* (2014) 35 *ILJ* 2866 (LC) and *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 *ILJ* 116 (LAC) three employees travelled outside South Africa for business. After dinner one evening one of the males asked the female contractor whether she wanted a lover for the night, which she declined. He, however, persisted and aksed her about her boyfriend, complained that he was lonely and also gave her his room number should she change her mind later. There was no physical contact between them and the advances and questions occurred in a technically speaking 'single' but drawn-out event. The matter was reported to the employer upon their return and the male employee was dismissed for sexual harassment and unprofessional conduct. The Labour Appeal Court held that the real question was whether there had been unwelcome advances of a sexual nature and found that the advances/questions by the male employer were indeed of a sexual nature and constituted sexual harassment. The conduct was more than a man just trying his luck with a woman and his dismissal was appropriate.

4.1.4 *Testing employees and applicants for employment*

The EEA regulates the testing of employees in the workplace.[42] Testing may be used to evaluate the suitability of applicants for employment and existing employees in certain circumstances.

The Act distinguishes between general medical testing,[43] and also specifically HIV/AIDS.[44] It also regulates psychological and other similar assessments.[45] 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

[42] Section 7.
[43] Section 1.
[44] Section 7(2).
[45] Section 8.

in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits, or the inherent requirements of a job.[46]

> **Example:** In *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 37 *ILJ* 449 (LC) a working pharmaceutical sales representative refused to undergo a psychiatric examination for bipolar disorder. Though her condition was well under control as she was undergoing therapy and used medicine, her condition was generally known in the company. However, the CEO only at a certain stage became aware of it and gave the instruction under the pretence of establishing her fitness for work. Her psychologist was of the opinion that her condition would not affect her ability to work effectively. The employer failed to make out a 'threshold health qualification' that it was an inherent requirement of her job to undergo such an examination. Her subsequent dismissal for disobeying the instruction was automatically unfair. Singling her out while she was functioning well at work had a stigmatising effect on her and was unfairly discriminatory. There was no objective basis doubting her ability to perform but for her disorder. The employee was awarded compensation equivalent to 12 months' remuneration for the automatically unfair dismissal and general damages for unfair discrimination.

(*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 employees, is not biased against any employee or group and has been certified by the Health Professions Council or another body authorised by law, namely, the Health Professions Act.[47]

(*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.[48]

The Act does not stipulate the grounds upon which the Labour Court may authorise the testing of an employee to determine her/his HIV status and prescribes only the conditions that the court can impose when it authorises the HIV testing of an employee.[49] In *Joy Mining Machinery, a Division of Harnischfeger*

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[46] Section 7(1).
[47] 56 of 1974.
[48] Section 7(2). The Code: HIV/AIDS elaborates on the requirements of the EEA (see ch 1, para 6 above).
[49] 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.

(SA) (Pty) Ltd v NUMSA[50] the following factors were stipulated as circumstances under which HIV testing would be allowed:

- to prevent unfair discrimination,
- where the employer needed testing to determine the extent of HIV in the workplace 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 to determine the prevalence of HIV at its workplace to be pro-active in prevention amongst employees, and to treat the symptoms and 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 if testing is done voluntarily and anonymously, the judge in *Irvin & Johnson Ltd v Trawler & Line Fishing Union & others*[51] 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.

4.1.5 *Equal pay for equal work or work of equal value*

The Amendment Act introduced equal pay for the same or equal work into legislation. Previoulsy, disputes about equal pay were argued on the basis of less favourable treatment for employees performing the same/similar work. The same principle applies with regard to pay for work of equal value.

> **Example:** In *Mangena v Fila South Africa (Pty) Ltd* [2009] 12 BLLR 1224 (LC) Shabalala (a black male) alleged that he was paid less than McMullin (a white female co-employee) for doing the same work. The court took into account ILO Convention 100 as South Africa has ratified this Convention on equal pay between men and women. The judge, moreover, extended the Convention to include other grounds than sex, 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.

[50] (2002) 23 *ILJ* 391 (LC).
[51] (2003) 24 *ILJ* 771 (LC).

To claim equal pay for work that is the same/similar, the claimant must:

- identify a comparator; and
- establish that the work done by the comparator is the same as or similar to that of the claimant (such a comparison may ignore infrequent or unimportant differences).

Where the claim is for equal pay for work of equal value, the claimant must:

- identify a comparator;
- establish that the jobs of the comparator and claimant, while different, are of equal value, taking into account the required degree of skill, physical and mental effort, responsibility and other relevant factors; and
- lay a proper factual foundation to enable the court to assess the value to be attributed to the work in question and to the tasks associated with it.

The claimant must then establish a link between the differentiation (being the difference in remuneration for the same work or work of equal value) and a specified/unspecified ground, for example, race or gender. Once such a link is established, the employer must show that the discrimination is not unfair.

The Amendment Act determines that an employee cannot compare her/his job with that of an employee at another employer and a comparison can only be done using another person at the same employer.

The Amendment Act also makes provision for the MoL to prescribe the method and criteria for assessing work of equal value and the method and criteria for assessing work of equal value and work that is the same. These assessment guidelines were established by way of Regulations and also by publishing the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value.[52]

The EEA Regulations drawn up with the assistance of ILO experts[53] provide further clarity on equal pay claims. It states the following on the same work and work of equal pay:

> Work is the same when work done by one employee:
> - is the *same* as the work of another employee at the same employer;
> - is *identical* or *interchangeable*; or
> - is *substantially the same* or is *so sufficiently similar* that the employees can *reasonably* be considered to be doing the same job (even if their work is *not identical or interchangeable*).

[52] GN 448, *GG* 38837, dated 1 June 2015. The courts will likely rely on the Regulations where there are differences with the Code as the former carries more weight than the latter.

[53] GN R595, *GG* 37873, dated 1 August 2014.

Work is of of equal value when two employees at the same employer do *different* jobs, but their respective jobs are objectively accorded the same value in terms of certain factors, namely:

- the responsibility demanded of the work, including people, finances and material;
- the skills, qualifications (including formal and informal prior learning and experience) required to perform the work;
- the physical, mental and emotional effort required by the work;
- the conditions under which work is done (including physical environment, psychological conditions, the time at and place where work is done); and
- any other relevant factor.[54]

Differentiation in pay and other terms based on one or more of the listed grounds will be fair and rational if it is established that its application is not biased against an employee or group of employees on the basis of race, gender, disability or any ground in section 6(1) of the EEA and has been applied proportionately.

Moreover, employers must take steps to eliminate differences in the terms and conditions of employment (including pay) of employees performing work of equal value if such differences are directly/indirectly based on a listed ground and must also ensure that employees are not paid differently for work of equal value on the basis of their race, gender or disability.

The Regulations also include a list of factors that may justify different pay (and other conditions) as fair and justifiable. These include:

- seniority or length of service;
- qualifications, ability, competence/potential above the minimum required for the job;
- performance, quality or quantity of work, provided that employees are equally subject to the employer's performance evaluation system and that such 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 reach the same level;
- if an employee is employed temporarily to gain experience/training resultantly receives different pay and other terms;
- a shortage of relevant skills or the market value of a specific job classification; and
- any other relevant factor that is not unfairly discriminatory.

[54] Such assessment must be done free from bias based on race, gender, disability, any other listed ground or any arbitrary ground that is prohibited in terms of s 6(1). Employers may also justify the value of a job by reference to a ministerial sectoral determination.

The Code: Equal pay for equal work provides a *process* for evaluating jobs as follows. The employer must:

- undertake an audit to identify inequalities in pay/remuneration between gender, races, disability and any other listed/ arbitary ground;
- identify the jobs that would be subjected to the audit;
- ensure that job profiles/descriptions exist and are current before evaluating jobs;
- utilise a job evaluation and/or grading system that is fair/transparent and does not have the effect of discriminating unfairly on any listed/ arbitrary ground;
- compare jobs that are the same/similar/of equal value in the employer's own organisation (including female-dominated jobs that may have been undervalued due to discriminatory grounds);
- select a method of comparing pay/remuneration (both in money and kind) in the relevant jobs by using either the average or median earning of employees in the relevant jobs as the basis for pay/remuneration comparisons or by using another method that will compare pay/remuneration in a fair and rational manner;
- identify the reasons for differentiating in pay/remuneration and determine whether they are justifiable;
- where differentiation is found not to be justifiable, determine how to address inequalities identified without reducing the pay/remuneration of employees to bring about equal remuneration; and
- monitor and review the process annually.

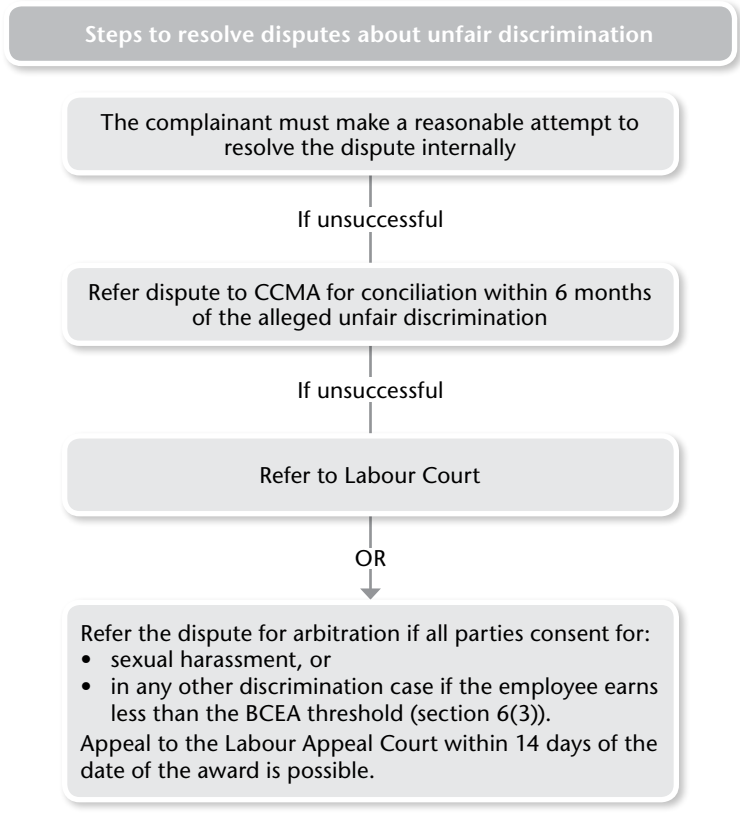
The use of job evaluation in itself, does not ensure the absence of discrimination. The Code, just like the Regulations, suggest that employers may be required to establish the value of both male- and female-dominated jobs in order to ascertain whether particular jobs have been undervalued and to align female-dominated jobs with comparable male-dominated jobs in an organisation.

The Code emphasises that employers should steer clear of remuneration based on sexual stereotyping of women's work, traditional job evaluation methods designed on the basis of male-dominated jobs and be aware of the weaker bargaining power of women workers.

The Code: Equal Pay must be read with the EEA Regulations and the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices.[55]

[55] The Code does not make explicit provision for a comparator or the notion 'market value' which may be used frequently as a defence when listing the factors for justifying differentiation.

4.1.6 *Resolution of unfair discrimination disputes*



The Labour Court has wide jurisdiction to determine disputes and 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) but an award of damages may not exceed the amount stated in terms of section 6(3) of the BCEA.[56]

5. SECOND PURPOSE OF THE EEA: AFFIRMATIVE ACTION

5.1 Outline of affirmative action

Affirmative action measures are part of a broader strategy to promote the achievement of equality as set out in the Constitution.

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. Essentially,

[56] Section 48.

affirmative action is a tool to be used temporarily to achieve 'equitable representation' in the workplace. Thus, for affirmative action measures to be rational it must fulfil three requirements. 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.[57]

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.

The series of *Barnard* cases[58] 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.

Barnard: The Labour Court

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 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.

Barnard	SAPS
1	0

Barnard: The Labour Appeal Court

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

[57] *Minister of Finance v Van Heerden & another* 2004 (6) SA 121 (CC) at para 37 the court applied the so-called rationality test by asking these three questions. However, the test has been criticised as it lacks the elements of fairness and proportionality.

[58] See n 10 above.

compromised, it was his prerogative and should he be incorrect, he was answerable to his accounting authority. It was held that 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	SAPS
0	1

Barnard: The Supreme Court of Appeal

Barnard appealed to the Supreme Court of Appeal. The court concluded that the NC did not deal with all relevant issues and his 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, in order to redress past imbalances by way of affirmative action, race has to be taken into account in a fair manner.

Barnard	SAPS
1	0

Barnard: The Constitutional Court

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.[59]

Barnard	SAPS
0	1

5.2 The contents of affirmative action measures

Affirmative action measures must be designed to:[60]

- 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 them 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). *Solidarity*

[59] Solidarity who represented Barnard subsequently laid 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 the elimination of racial discrimination.

[60] Section 15(2).

& others v Department of Correctional Services & others[61] confirmed that the primary distinction between quotas and numerical targets lies in the flexibility of the standards. Over and above this, targets should not reflect the composition of the EAP but that of the population as a whole. Where regional demographics differ greatly from national demographics, the former should be used in a practical and rational manner. The use of regional demographics is important because of the uneven distribution of racial sub-groups in provincial populations.

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 who are not from the designated groups.[62] This implies some measure of protection for people who belong to non-designated groups.

5.2.1 *Designated employers*

As mentioned above, only designated employers need to apply affirmative action measures.[63] 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.[64] Such employers have specific duties in designing EEPs.

Forms are provided (in the Regulations issued in terms of the EEA) 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 designated employees, employment barriers that adversely affect people from designated groups and to compile a *profile* of the workforce in each occupational level. The designation of employees are done on a self-classification basis. Employees must complete Form EEA1 where they declare their race, gender, nationality and disability. The EEA1 form is included as Annexure A under Part V of the book.
- *Consulting* to ensure the interests of employees from across all occupational levels at the workplace, from both the designated as well as the non-designated group are taken into account.[65]
- *Disclosing* of relevant information to the consulting parties to allow for effective consultation.[66]

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[61] (2016) 37 *ILJ* 1995 (CC).
[62] Section 14(4).
[63] See the table below.
[64] The Code: Employment Equity Plans provides guidelines and the Regulations provide employers with a template to draw up and implement measures.
[65] Sections 16; 17.
[66] Secton 18. Section 16 of the LRA applies with regard to disclosure of information (see ch 10, para 3.4 below).

- *Preparing and implementing* a detailed EEP[67] including, amongst other things, 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.
- *Reporting* to the Director-General of the DoL on the progress made on an annual basis.[68]
- *Displaying a summary of the EEA* in the workplace.[69]
- *Providing a copy* of its EEP to employees.[70]
- *Establishing and keeping records* of the workforce.[71]
- *Submitting a statement to* the Employment Conditions Commission ('ECC')[72] on its employees' incomes and benefits at each level of the workforce, with a view to reduce disproportionate income differentials.[73]

Failure to comply with the duties set out above may lead to fines for employers and to state contracts being refused or cancelled.[74] 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.

5.2.2 *Beneficiaries of affirmative action*

(*a*) Citizenship

While the EEA was initially silent on whether South African citizenship is required of members of the designated groups to benefit from affirmative action, amendments to the Act[75] have refined the definition of 'designated groups' to apply to South African *citizens* only.

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

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[67] Section 20. The Director-General may impose a fine on a designated employer if no EEP exists.
[68] 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.
[69] Section 25.
[70] Section *25*.
[71] Section 26.
[72] See s 59 of the BCEA.
[73] Sections 27(1)–27(2). This will enable the ECC to make recommendations on income differentials to the MoL.
[74] Section 53(5).
[75] Section 1.

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 or after 27 April 1994 even though they would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies 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 BBBEE.† The term 'black people' includes Africans, Coloureds and Indians. The Amendment Act provides that temporary employees who are in the employment of a client for longer than three months, to be deemed to be employees of the client for purposes of affirmative action.**	• 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 • 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

* Criticism on the Amendment Act is that it had not addressed real transformation because the emphasis is still very much on race.

† See *Chinese Association of South Africa & others v Minister of Labour & others* (59251/2007) [2008] [ZAGPHC] 174 in which permanent residents of Chinese descent in South African prior to 27 April 1994 were declared to fall within the ambit of the definition of 'black people' in s 1 of the EEA (and the BBBEEA).

** Section 57.

(*b*) 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.*[76] 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.

(*c*) Degrees of disadvantage

The notion of 'degrees' of disadvantage is not found in the EEA but comes from the courts.[77] In *Fourie v Provincial Commissioner of the SA Police Service (North*

[76] Note 57 above at para 85*ff*.

[77] The Constitutional Court in *Solidarity & others and Department of Correctional Services & others* (n 10 above) also recognised the fact that this notion is foreign to the EEA. 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. The court

West Province)[78] the Labour Court found that there were different degrees of disadvantage between black people and white women in the workplace. 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 historical imbalances and the fact that the apartheid system was designed to protect white people to the detriment of particularly African employees.

The fact that the white female employees was not promoted was found to be rational and fair in the circumstances.

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.[79] I has been argued that the racial basis for affirmative action be re-evaluated and class or socio-economic factors be considered to redress inequalities.[80]

(*d*) What does 'suitably qualified' mean?

Only members of designated groups who are 'suitably qualified' can benefit from affirmative action. When determining whether a person is suitably qualified for a job, an employer must view *all* the following factors and *any one* of, or *any combination* of these factors may indicate an ability to do the job:[81]

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

5.2.3 *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

emphasised South Africa's huge diversity and stressed the fact that the EEA sought to achieve the constitutional objective of every workplace to be 'broadly representative' of the people of South Africa and all sub-groups that fall under 'black people' must also be equitably represented at all occupational levels.

[78] (2004) 25 *ILJ* 1716 (LC).

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

[80] The latest CEE *Annual Report* 2016–2017 at 1 emphasised that the pace of transformation has been slow and that '… not much has changed'.

[81] Section 20(3). The employer may not unfairly discriminate against someone solely the 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.

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.

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.[82]

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 have serious financial implications for such employers and had been criticised as disproportionate to the offence(s), as they are based on the Competition Commission's fines.

Assessment of compliance with the EEA has been simplified but made tighter.[83] It only looks at the extent to which suitably qualified people from the designated groups are equitably represented within each occupational level in the workforce. It evaluates this in relation to:

- the demographic profile of the national *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,
- 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.

The CEE *Annual Report* 2016–2017 stated that it is envisaged that section 53 of the EEA which deals with state contracts will be promulgated. This will ensure

[82] Section 45.
[83] Section 42.

that employers who want to do business with the State, can only do so if a compliance certificate has been issued.[84]

Lastly, a designated employer may raise any reasonable ground to justify its failure to comply with an EEP 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.[85]

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

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements regarding affirmative action is *incorrect*?
   (*a*) Affirmative action measures create a right to be appointed or promoted to a post.
   (*b*) Affirmative action measures must promote the achievement of equality.
   (*c*) Affirmative action measures must enhance diversity in the workplace.
   (*d*) Affirmative action measures must include skills development strategies.
2. The EEA allows psychological testing of an employee only in certain circumstances. Discuss the factors which will indicate that psychological testing is justifiable.
3. Write brief notes on whether being Roman-Catholic is an inherent requirement of the job as a teacher at a Roman-Catholic School in terms of the EEA. Use examples in your answer to explain.

✓ Feedback

1. Statement (*a*) is *incorrect.* Affirmative action measures do not create a right to be appointed or promoted to a post. It can only be used as a defence against a claim ofw unfair discrimination.

   Statement (*b*) is correct. Section 1 of the Constitution states that the achievement of equality is a founding value of the country. Affirmative action measures under the EEA are an example of this endeavour to achieve equality.

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[84] CEE *Annual Report* 2016–2017 at 5.

[85] 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.

Statement (*c*) is correct. The Preamble of the Constitution states that South Africa belongs to all who live in it united in its diversity. The EEA confirms that affirmative action measures must include measures to further diversity in the workplace.

Statement (*d*) is correct. There is a serious skills shortage in South Africa. The EEA addresses and emphasises this in stating that affirmative action measures must implement appropriate training measures, including measures for skills development.

2. The EEA provides four factors to show that psychological testing is valid. It must be scientifically shown that the test used is valid and reliable. The test must be able to be applied fairly to all employees, not be biased against any employee or group and, lastly, such a test must have been certified by the Health Professions Council or another body authorised by the Health Professions Act to certify such tests.
3. The EEA does not define 'inherent requirements of the job' but the courts have interpreted this concept restrictively in that only a requirement/characteristic/feature that cannot be removed from a job description (without seriously changing the nature of the job) will be regarded as an inherent requirement. In fact, it has been held that there is a duty on the courts to examine very carefully whether or not a particular requirement is essential for the effective compliance of the specific job. For example, it is an inherent job requirement that security guards who perform body searchers for women should be female and for men they should be male. The exclusion of males or females — as relevant — will therefore not amount to unfair discrimination. Moreover, it is not an inherent requirement that a crane driver/life saver must be male, or that a fire fighter may not be female or that a pilot should be younger than 60 years of age. In the latter instance, it is rather a pilot's fitness to fly, clear vision and the absence of colour blindness that are inherent requirements of the job. It is thus likely that the requirement of being Roman-Catholic for the teaching job at a Roman-Catholic school is justifiable as the school is likely to teach specific religious principles and a teacher who believes and practices these principles is needed.

RECOMMENDED READING

1. Moodley D & Whitear-Nel N 'Some thoughts on claims for compensation and damages for automatically unfair dismissals and discrimination' (2015) 36 *ILJ* 907
2. McGregor M 'Determining the validity of an employment equity plan: Guidance by the Labour Court *Solidarity v Minister of Safety & Security (Police & Prisons Civil Rights Union as Amicus Curiae)* (2016) 37 *ILJ* 1012 (LC)' (2016) 79(4) *THRHR* 698

3. McGregor M ' "Do you want a lover tonight" Does this question constitute sexual harassment? *Simmers v Campbell Scientific Africa (Pty) Ltd; Campbell Scientific Africa (Pty) Ltd & A Simmers'* (2016) 79(2) *THRHR* 322
4. Le Roux PAK 'The *Barnard* decision—what it means: Differences in the decisions of the Constitutional Court in key judgement on affirmative action' (2014) 24(2)*Contemporary Labour Law* 11
5. Rycroft A 'Inherent requirements of the job' (2015) 36 *ILJ* 900
6. Louw A 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality," "equity" and "dignity" in post-apartheid South Africa) (Part 1)' (2015) *PELJ* 18(3) 594; Louw A 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) (Part 2)' (2015) *PELJ* 18(3) 669

6

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

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1. INTRODUCTION

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.

An unfair labour practice is not an all-encompassing term that can be used to refer to any unfair or unaccommodating conduct in the employment relationship—it has a very specific meaning as will be discussed in this chapter.

2. DIFFERENCES BETWEEN CONSTITUTIONAL AND LRA PROTECTION

In the context of fair and unfair labour practices, it is important to distinguish between the wording in the Constitution and the LRA in this regard.

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 Constitution is the highest law in the country and contains a general guarantee to 'everyone' to fair labour practices. 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 unfair labour practice is the opposite of a fair 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 works very hard but never gets the recognition he deserves and in fact the employer makes no secret that he does not like him. Robert feels that this is unfair and this unfairness infringes his right to fair labour practices. He lodges a claim for an unfair labour practice at the CCMA. Robert understands the word 'unfair' in the wide context as we would use it in everyday language. The employer may not be very kind but that does not amount to an unfair labour practice in terms of the definition of the

LRA or to an infringement of his right to fair labour practices in terms of the Constitution.[1]

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, and • 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, and • an employee cannot commit an unfair labour practice towards an employer; only an employer can commit an unfair labour practice towards an employee.

3. DEFINITION OF AN UNFAIR LABOUR PRACTICE

The notion of unfair labour practice provides the employee with remedies should the employer act unfairly against the employee during the course of the employment relationship. Simply put, an unfair labour practice can be committed only during the existence of the employment relationship.[2] 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) 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.'

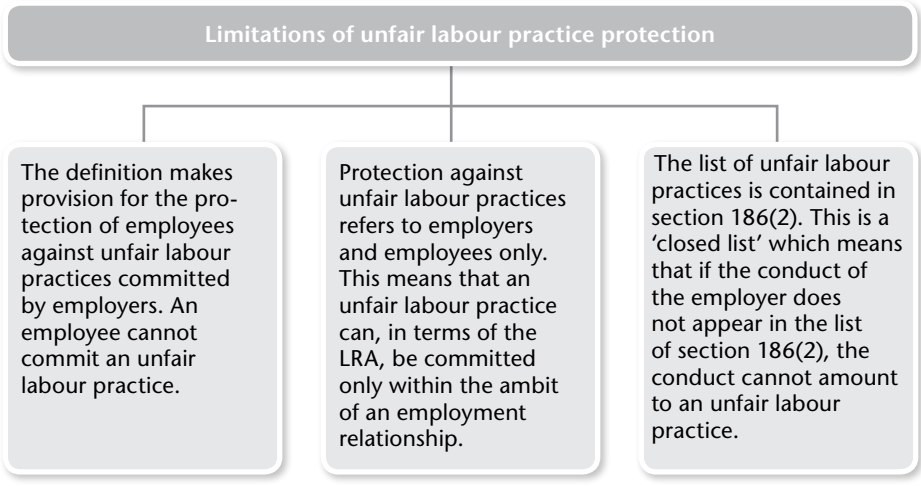
Under the old Labour Relations Act employers had a right to bring unfair labour practice claims against employees for practically any conduct on

[1] See ch 2, para 6 above where the court extended s 23 protection to illegal and invalid employment contracts.
[2] *Sithole v Nogwaza NO and others* [1999] 12 BLLR 1348 (LC).

the part of employees other than a strike. Under the new LRA, 1995 only employees are protected against unfair labour practices.

4. EXTENT AND SCOPE 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 THE ELEMENTS OF THE DEFINITION OF UNFAIR LABOUR PRACTICES

5.1 The unfair conduct of the employer relating to promotion

It is very difficult to prove that an employer acted unfairly with regard to promotion. In practice the employee must prove an omission (a failure to act) on behalf of the employer. Disappointment as a result of an employer's decision does not automatically mean that the employer acted unfairly.[3] In *Ncane v Lyster NO & others*[4] it was clear that when promoting employees, an employer must abide by the law and its own objective criteria that it has set for promotion; eligible employees must have a fair opportunity to compete for a post. The protection relating to promotion is thus enjoyed by existing employees.[5]

Promotion falls within the managerial prerogative. The employer will probably 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

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[3] *Nelson Mandela Bay Metropolitan Municipality v Mkumatela & others* [2016] 6 BLLR 585 (LAC); *Mathibeli v Minister of Labour* [2015] 3 BLLR 267 (LAC).
[4] (2017) 38 *ILJ* 907 (LAC).
[5] *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) at para 47.

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.[6]

Example: In *Gebhardt v Education Labour Relations Council & others* (2013) 34 *ILJ* 1183 (LC) Gebhardt (a white female) whose hearing was severely impaired applied for promotion along with a coloured female colleague. Gebhardt was recommended for promotion but the employer chose to appoint the coloured female because she was from a designated group and the employer had to comply with its EEP. Gebhardt complained since she was also from a designated group as 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.

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.

[6] 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.

For example, in *SA Police Service v Salukazana & others*[7] 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*[8] 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).[9]

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

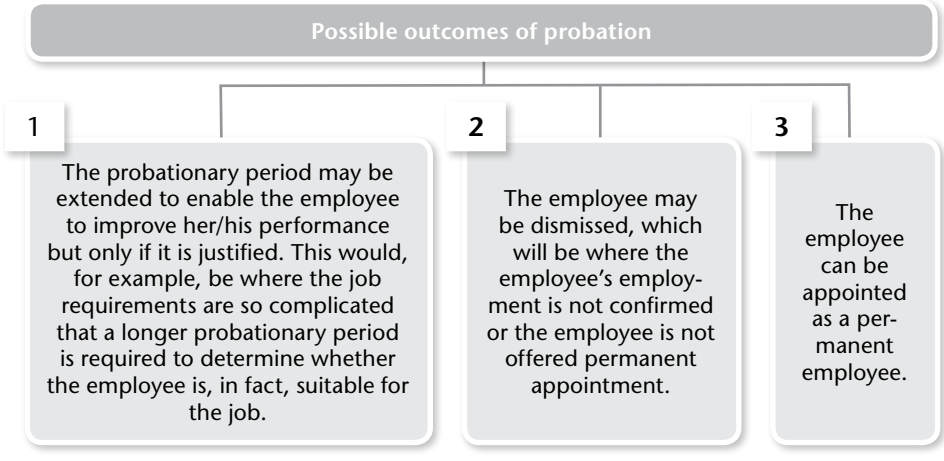
[7] (2010) 31 *ILJ* 2465 (LC).
[8] (2008) 29 *ILJ* 2708 (LAC).
[9] See chs 9; 10 below where fair procedures for dismissals are discussed. The same procedures would apply for demotion.

conclusion of the probationary period and replace them with newly hired employees.

The Code: Dismissal, also deals with probation and 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 (box 1 above) or the dismissal of the employee (box 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*[10] 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,

[10] [1995] 3 BLLR 24 (LAC).

- 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.

> **Example:** In *Mdluli & SA Police Service* (2003) 24 *ILJ* 1186 (BCA) 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).

> **Example:** In *Schoeman v Samsung Electronic SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) the employer changed Schoeman's commission structure to her detriment and she claimed that this was an unfair labour practice. The

court held that commission was *not* a benefit but formed 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 CCMA 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.

Example: In *United Association of South Africa obo Members/De Keur Landgoed (Edms) Bpk* (2014) 23 (CCMA) 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 commissioner 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.

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

[11] *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).

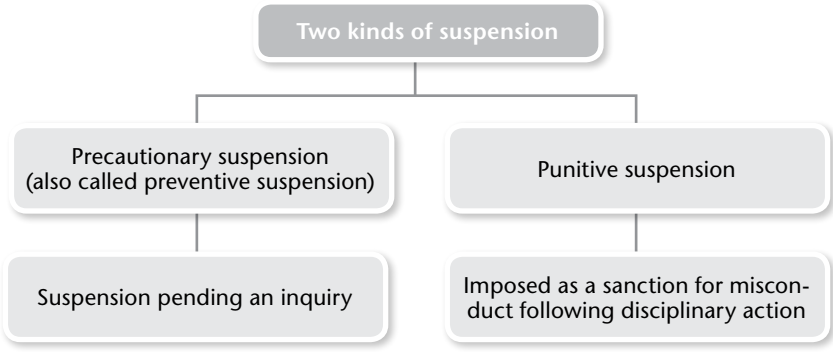
[12] [2013] 5 BLLR 434 (LAC).

reason for this and she/he must consult and negotiate with the employees before it can be taken away.

More examples of unfair conduct by the employer with regard to benefits include, being excluded from a pay progression policy,[13] deductions from an applicant's accrued leave pay to make up his 'salary' while he was at home on standby to fly (on the employer's request)[14] and refusing to pay an acting allowance for an employee acting as regional manager which allowance was payable in terms of the employee's contract of employment.[15]

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 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 suspended with full pay pending the disciplinary inquiry. He was charged with misconduct for receiving payment from a contractor without the employer's knowledge. The employee also had been criminally charged. The employee requested a postponement of the inquiry pending the outcome of the criminal prosecution. The employer granted the postponement pending the outcome of the

[13] *Western Cape Gambling & Racing Board v CCMA & others* (2015) 36 *ILJ* 2166 (LC).
[14] *SA Police Service v Gebashe & others* (2016) 36 *ILJ* 1628 (LAC).
[15] *Konigkramer and National Regulator for Compulsory Specifications* (2015) 36 2421 (CCMA).
[16] [2009] 3 BLLR 254 (LC).

prosecution, but wanted to discontinue 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 had no reason to exclude the employee from the workplace and a suspension under these circumstances amounted to an unfair labour practice.

In *Mashego v Mpumalanga Provincial Legislature & others*[19] it was held that an opportunity to state her/his case was not required to show why one should not be suspended.

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 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. In *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] (2015) 36 *ILJ* 458 (LC).

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 personnel 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. In *National Union of Metalworkers of SA and Transnet SOC Ltd*[22] members of non-recognised unions wore their union T-shirts to work. It was held that the employer was entitled to ensure that relationships with recognised unions were not undermined by other non-recognised unions. These rules were there to have order and to ensure a productive working environment. These employees received final written warnings which had been found not to constitute unfair labour practices.

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 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.[23] The purpose of this protection is to promote a culture of openness and accountability without fear of reprisal. The

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[20] (2009) 30 *ILJ* 2196 (CCMA).
[21] (2014) 35 *ILJ* 656 (LAC).
[22] (2016) 37 *ILJ* 755 (BCA).
[23] These remedies are over and above the unfair labour practice remedies provided for in the LRA.

Protected Disclosures Amendment Act[24] expands the scope of the PDA to be broader than the traditional employment relationship and to include disclosures made by independent contractors, consultants and agents.[25]

If an employee suffers an occupational detriment because she/he made a protected disclosure in terms of the PDA, it will amount to an unfair labour practice.[26] 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.

These two concepts are defined in terms of the PDA.

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 (the LRA specifically classifies a dismissal as a result of a protected disclosure as automatically unfair despite being defined as an occupational detriment by the PDA (see chapter 9, paragraph 4.9), • 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,

[24] Protected Disclosures Amendment Act 5 of 2017.

[25] Section 1(*g*).

[26] 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 9, para 5.9 below.

Occupational detriment (*cont*)

- 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.

Disputes concerning unfair labour practices arising from alleged occupational detriment must be referred for adjudication by the Labour Court or High Court.

Protected disclosure

- 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 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*[27] 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*[28] 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

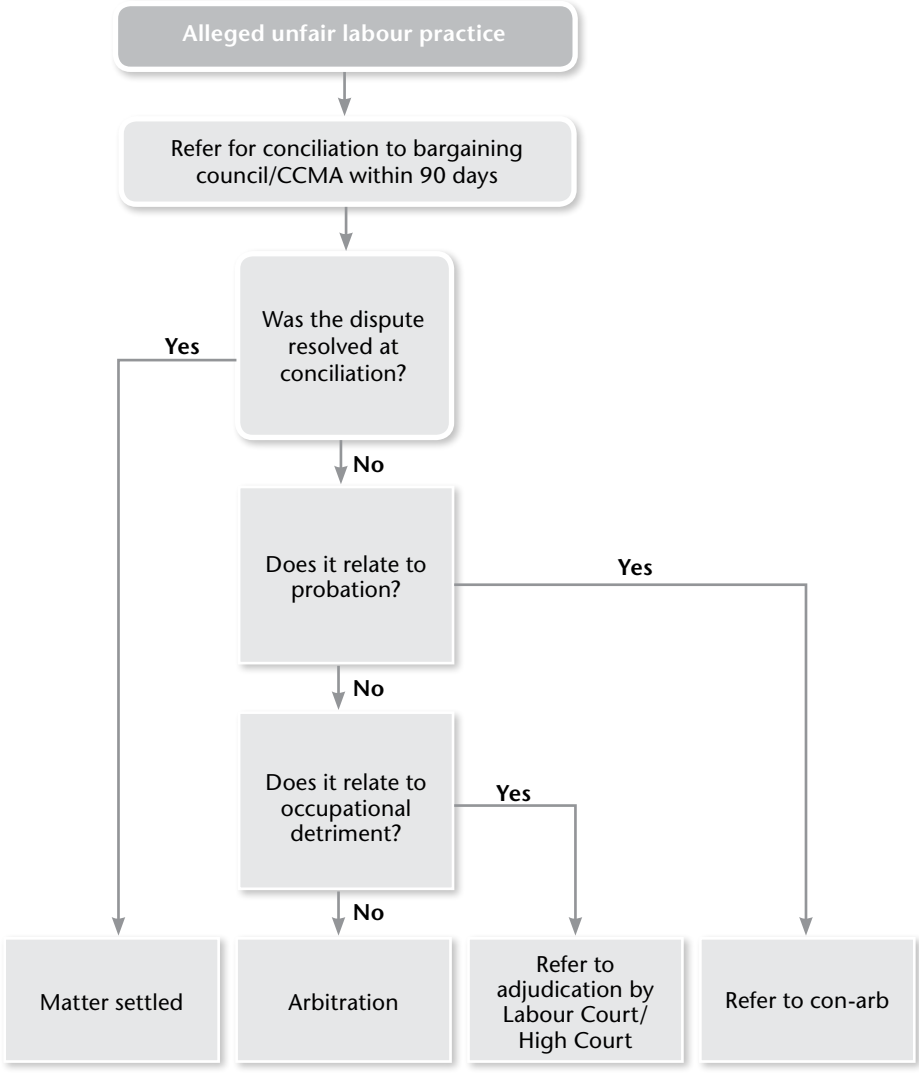
[27] [2008] 5 BLLR 458 (LC).

[28] [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).

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.

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 regards to an unfair labour practice, which *one* of the following statement is *incorrect*?
   (*a*) 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.

(*b*) Disputes about unfair labour practices must be referred in writing to a bargaining council or, if no council has jurisdiction, to the CCMA.

(*c*) The right to fair labour practices in terms of the Constitution is limited to the list of actions included in the definition of an unfair labour practice and it only protects workers who fall within the definition of an employee.

(*d*) 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 have to prove that the employer failed to act when she/he expected the employer to do so with regard to training.

2. Can a legitimate expectation for promotion be created when employees are allowed to act in higher positions for considerable periods?
3. Distinguish between a precautionary and a punitive suspension.

✓ Feedback

1. Statement (*c*) is *incorrect*. The right to fair labour practices in terms of the Constitution is wide and it protects 'everyone' in other words, workers who are not employees in terms of the LRA, are also protected.

   Statement (*a*) is correct. An unfair labour practice can only take place while an employee is still in employment, and therefore, an unfair dismissal can never be an unfair labour practice.

   Statement (*b*) is correct as disputes about unfair labour practices must be referred in writing to a bargaining council or, if no council has jurisdiction, to the CCMA.

   Statement (*d*) is correct. 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 have to prove that the employer failed to act when she/he expected the employer to do so with regards to training.
2. Generally, acting in a position does not entitle an employee to be promoted to such a post. However, an employee can raise a legitimate expectation to be appointed to a higher position, if such expectation was created by the employer, and if the employee had the necessary skill/experience for the post in question.
3. A precautionary suspension may be implemented to allow an employer to investigate the employee's alleged misconduct and to decide whether disciplinary action should be taken against the employee. It is usually with pay. Moreover, there must be a *prima facie* reason to believe that the employee has committed serious misconduct and there must be some objectively justifiable reason for excluding the employee from the workplace. A precautionary suspension should be used only when there is a reasonable concern that the employee will interfere with investigations or pose some

other threat. In contrast, a punitive suspension without pay could be used as an alternative to a sanction of dismissal in an attempt to correct the behaviour of the employee.

RECOMMENDED READING

1. Conradie M 'The constitutional right to fair labour practices: A consideration of the influence and continued importance of the historical regulation of (un)fair labour practices pre-1977' (2016) 22(2) *Fundamina* 163
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. Fourie E 'What constitutes a benefit by virtue of section 186(2) of the Labour Relations Act 66 of 1995? *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR 434 (LAC)' (2015) 18(1) *PELJ* 3300
4. Le Roux R 'Benefits: Have we found the way out of the labyrinth?' (2015) 36 *ILJ* 888
5. Norton D 'When is a suspension an unfair labour practice? A review of court decisions' (2013) 34 *ILJ* 1694

7

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1. INTRODUCTION

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. Social security is therefore an important mechanism for poverty alleviation and income redistribution in South Africa and protected in terms of the Constitution.

Social security consists of social assistance and social insurance. Social assistance refers to the grant payments made by the state to the poor, for example, the old-age grant. Social insurance refers to the funds which are created through contributions by employer and employees and from which an employee may claim money under certain circumstances.

However, this social safety net is not perfect. The current social insurance and social assistance system has some shortcomings which result in inadequate protection for many workers. These shortcomings are discussed in more detail in this chapter.

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.

Social security forms part of any labour law discussion since 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.

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 to access these benefits.

2. DEFINITIONS

The concept of social security refers to the policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, disability and old age, by way of contributory (social insurance) and non-contributory (social assistance) schemes.[1]

Social security is provided through measures of *social assistance* and *social insurance* as can be seen from the definition above.

2.1 Social assistance

Social assistance is sometimes also called 'welfare' where the State pays grants to the poor. The South African Social Security Agency (hereafter 'SASSA') was established by the government under the South African Social Security Agency Act[2] as an institution for the administration and payment of social assistance. The tables on the next page summarise the various grants available and their requirements.

Social assistance in South Africa is mainly concerned with the payment of grants. Eligibility to these grants is not linked to employment but to income.[3]

> **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.

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[1] White Paper for Social Welfare GN 1108, *GG* 18166, dated 8 August 1997.
[2] 9 of 2004.
[3] Section 5 of the SAA.

CHILD GRANTS		
Child Support Grant	**Foster Care Grant**	**Care Dependency Grant**
• the primary care giver must be a South African citizen, permanent resident or refugee; • both the applicant and the child must reside in South Africa; • applicant must be the primary care giver; • the child/children must have been born after 31/12/1993; • the applicant and spouse must meet the means test; • cannot apply for more than six non-biological children; • child cannot be cared for in state institution.	• the applicant and child must be resident in South Africa; • court order indicating foster care status; • the foster parent must be a South African citizen, permanent resident or refugee; • child must remain in the care of the foster parent(s).	• the applicant must be a South African citizen, permanent resident or refugee; • the applicant and child must be resident in South Africa; • child must be under 18 years; • must submit a medical report confirming permanent, severe disability; • the applicant and spouse must meet the means test; • the child must not be permanently cared for in a State Institution.

OTHER GRANTS		
Disability Grant	**Grants for Older Persons**	**War Veteran's Grant**
The applicant: • must be a South African citizen, permanent resident or refugee; • must be resident in South Africa; • must be 18 to 59 years old; • must submit a medical report confirming disability; • this must not be older than 3 months; • spouse must meet the requirements of the means test; • must not be cared for in a State Institution; • must not be in receipt of another social grant in respect of him or herself.	The applicant: • must be a South African citizen, permanent resident or refugee; • must be resident in South Africa; • must be 60 years and over; • spouse must comply with the means test; • must not be maintained or cared for in a State Institution; • must not be in receipt of another social grant for him or herself; • must submit a 13 digit bar coded identity document.	The applicant: • must be a South African citizen/permanent resident • must be resident in South Africa; • must be 60 years and over or must be disabled; • must have fought in the Second World War or the Korean War; • spouse must meet the requirements of the means test; • must not be maintained or cared for in a State Institution; • must not be in receipt of another social grant in respect of himself or herself.

2.2 Social insurance

Social insurance entails that an employee contributes to an insurance fund and when the employee comes across a specific risk which affects her/his ability to earn an income (for example, she/he loses her/his employment or falls pregnant) the employee may claim some form of benefit from that insurance fund. Social insurance is normally linked to the employment relationship where both the employer and employees pay monthly contributions to the fund.[4]

> **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 employees' salary and pay that over to the fund.

Social insurance can be provided by State-funded and administrated funds or by way of private fund managers and they differ from each other as follows:

Characteristics of private social insurance schemes

- 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.

Characteristics of 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.

The main types of social insurance in South Africa are:

- unemployment insurance,
- occupational injuries and diseases insurance,
- occupational retirement insurance, and
- private insurance.

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[4] People who are not employed do 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.

3. SHORTCOMINGS IN THE PRESENT SOCIAL SECURITY SYSTEM

The South African social security system has some shortcomings and it cannot provide comprehensive 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 afford to join a pension scheme or medical aid and they are often also excluded from the COIDA and the UIA,
- the extent of inequality in the system between genders, races and rural and urban employees,
- social insurance 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 (hereafter 'DoH') for the ODIMWA and the Department of Mineral Resources (hereafter 'DoMR') for the MHSA. Further, the Department of Higher Education and Training (hereafter 'DoHET') is responsible for the skills development legislation.
- The system for the payment of social grants is also inefficient. Cash Paymaster Services (hereafter 'CPS') acts as the service provider for SASSA in making grant payments. The Constitutional Court declared the service contract between them invalid but had to suspend that ruling for 12 months when the Black Sash approached the court in March 2017 to prevent the non-payment of grants since the Department of Social Development did not put any measures in place to pay grants once CPS's contract ended.

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.[5] As a result of the Taylor Committee's recommendations, major reforms of the system were proposed although implementation of changes has been slow.

The need for reform has on several occasions been stressed by the Constitutional Court, for example, in *Government of the Republic of South Africa and others v Grootboom and others*[6] and *Minister of Health and others v Treatment Action Campaign and others*.[7] The Constitutional Court held in both 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 materi-

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[5] The Committee chaired by Prof V Taylor submitted its report 'Transforming the Present—Protecting the Future' (Draft Consolidated Report) in March 2002.

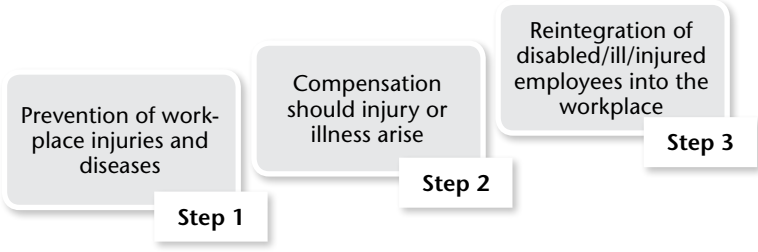
[6] [2000] 11 BCLR 1169 (CC).

[7] [2002] 10 BCLR 1033 (CC).

alise. 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. Despite efforts by the judiciary to make social assistance accessible, administrative delays in processing grants and corruption[8] coupled with a disregard of court orders,[9] tend to derail efforts aimed at advancing the social assistance rights of the poor.[10]

4. ELEMENTS OF PUBLIC WORKPLACE-RELATED SOCIAL SECURITY INSURANCE

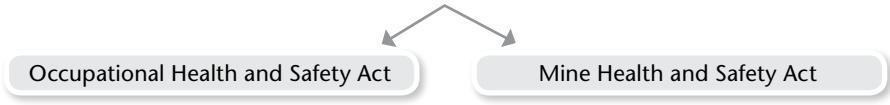
South Africa supports the ILO concept of 'decent work', as discussed in chapter 1 above. The notion of 'decent work' entails a three-pronged approach to workplace safety and security.



The legislation which were created to address these various aspects of workplace safety and security are discussed below with reference to these three steps.

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

Two acts are relevant in this regard, namely, the:



[8] T Reddy & A Sokomani 'Corruption and social grants in South Africa' (2008) Monograph 154 *Institute for Security Studies* 1–79 available at https://www.files.ethz.ch/isn/103619/MONO154FULL.PDF; Corruption watch 'No consciences in social grant fraud' (20 November 2014) available at http://www.corruptionwatch.org.za/no-consciences-in-social-grant-fraud/ (accessed on 6 July 2017).

[9] R De Beer & S Vettori 'The enforcement of socio-economic rights' 2007 *PELJ* 1, 2–3.

[10] *MEC Social Development, Eastern Cape v Mdodisa* [2010] 6 SA 415 (SCA). See also *Ngalo v The South African Social Security Agency (SASSA)* [2013] 2 All SA 347 (ECM); *Somyani v Member of the Executive Council for Welfare, Eastern Cape* (unreported SECLD 1144/01).

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 to ensure the safety of everyone at the workplace including the general public.

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 to ensure the safety of everyone at the workplace including the general public.

	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 service/'TES') are not regarded as employers by this 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.

* Also see ch 2, para 8 above.

5.1.2 *Duties*

The OHSA places duties on employers and 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 regards 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 Bigcomp Ltd employs 100 people whose work requires them to work with a computer the whole day. Company Bigcomp Ltd is concerned about the strain that this put on the eyes of the employees. 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, have to 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 Bigcomp Ltd may, therefore, decide that none of these preventative 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[11] 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.

[11] The MHSA 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.

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.[12] 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.

5.2.1 *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 DoMR administers this Act.

5.2.2 *Duties*

The Act provides duties for different role players at mines being worked and those not being worked.

(*a*) Duties of employers at mines *not* being worked

The Act requires of them to continuously take reasonable steps to prevent:

- injuries,
- ill-health,

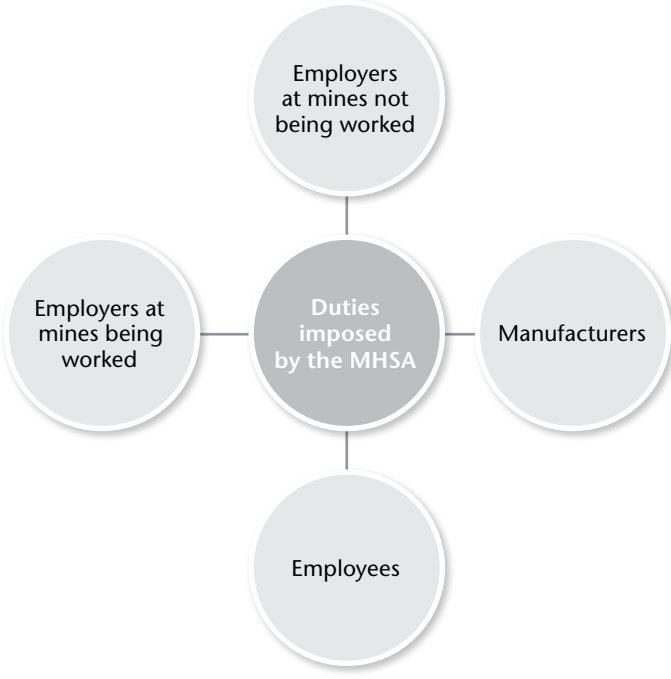
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[12] The following people may have such an interest: any person who was injured/suffered damage as a result of the incident, the employer involved in the incident, any person in respect of whom, in the opinion of the inspector, it can reasonably be 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.

- 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 as summarised below:

Duties of employees	Rights of employees
The employee must: • take reasonable care to protect her/his 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.	Employees have the right to: • information, • dispute their unfitness to perform work, • not pay for safety measures, • leave any workplace 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 which 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

- 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
- 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[13] some significant amendments are proposed with regard to these duties. These include, *inter alia*:

- The insertion of section 2B will require the employer of every mine that is being worked, to appoint a Chief Executive Officer ('CEO') if the employer is a company, and the CEO must personally perform all the functions of the employer, including making any appointments in terms of the Act;

[13] GN 37027, *GG* No 37027, dated 15 November 2013 (hereafter the 'Mine Health and Safety Bill').

- An amendment to section 10 will place an absolute duty on the employer to provide formal health and safety training which is effective 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.
- Amendments to sections 75, 76, 78 and 80 will remove the obligation on the MoMR to consult with the Mine Health and Safety Council (hereafter 'MHSC'), before issuing notices impacting on health and safety, amending schedules to the MHSA, and extending the provisions of other laws relating to health and safety, to mines. The removal of this obligation effectively removes an important component of the consultation process with interested and affected parties, who are represented on the MHSC.
- An amendment to section 92 provides that an employer which is a company and which is convicted of an offence in terms of any section of the MHSA, may be sentenced to a fine not exceeding 10% of the company's annual turnover for the period during which the company has failed to comply with the relevant provision or to imprisonment not exceeding 10 years.
- 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.[14]

(*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

[14] Section 98.

imprisonment. Any person adversely affected by a decision of an inspector may lodge an appeal against that decision to the Chief Inspector of Mines.[15]

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:

Compensation for Occupational Injuries and Diseases Act ('COIDA')	Occupational Diseases in Mines and Works Act ('ODIMWA')	Unemployment Insurance Act ('UIA')

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.[16] As a result of the 'decent work' agenda and in order to comply with international standards, improvement of the current system is necessary.[17]

> 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[18] 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.

[15] The Bill proposes more severe penalties for any company that is convicted of an offence in terms of the MHSA. For example, fines of up to a maximum of 10% of a company's annual turnover or imprisonment of up to a maximum of 10 years.

[16] These include ILO Conventions 102 and 121.

[17] Since the Taylor Committee Report's 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.

[18] A delict is a wrongful act that causes damages to another person. See the discussion of vicarious liability in ch 3, para 3 above.

The Act specifically excludes the following employees from its scope of application:

- workers who are disabled for less than three days,
- 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 in the example above, respectively, would have had to spend a large amount of money on legal costs to pursue and defend the matter.

The COIDA is 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.[19] 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. The employee will be entitled to compensation as long as she/he can proof that the injury or disease results from her/his job.

> **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. • Any work involving the handling of, or exposure to repetitive movements.	• Hearing impairment. • Hand-arm vibration syndrome (Raynaud's phenomenon). • 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.

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[19] 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.

(*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 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 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.[20]

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.

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[20] 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.

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 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 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*.[21] 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 five instances, namely, in cases of temporary unemployment arising from unemployment, illness, maternity

[21] [2011] 6 BLLR 527 (CC).

leave, and leave after adoption of a child. Dependants are entitled to benefits should the contributor pass away.

The UIA works on the principle that a central unemployment insurance fund is created which is funded by compulsory monthly contributions by from both employees and employers. The employer must deduct 1% of each employee's salary and it must also match that 1% from its own pocket. This 2% of the value of the employee's monthly salary must be paid over to the UIF. The UICA regulates the collection of contributions by the South African Revenue Service (hereafter 'SARS') on behalf of the DoL.

If an employee who contributed to the fund befalls one of the five events mentioned in the block above, she/he may claim benefits from the UIF. These events are when an employee:

- becomes unemployed,
- takes maternity leave,
- takes leave after adoption of a child,
- is unable to work for longer than 14 days as a result of illness, and
- passes away then her/his dependents may claim benefits.

The Act mostly covers workers in the formal sector although its scope of coverage had been extended in 2002 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.[22]

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

[22] 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.

eliminate poverty and reduce inequality by 2030.[23] 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.

The Unemployment Insurance Amendment Act[24] made a few significant changes, the most important being that its coverage extends to more categories of employees. Learners who were on 'learnerships', public servants and foreign nationals are now able to claim UIF benefits.[25]

Benefits will be paid to employees who lose income as a result of reduced working times.[26]

Contributors will be able to claim unemployment benefits for up to 365 days, instead of 238 days, if they have worked for a continuous four-year period.[27]

The Amendment Act also made some positive changes to improve the position of women who want to claim maternity or adoption benefits. They now have a year within which to submit the application for benefits.[28] A claim for full maternity benefits will not affect any other type of benefit under the Act.[29] Maternity benefits are set at a fixed rate of 66% of the earnings of the beneficiary subject to the maximum income threshold as set out in the Act.[30] Full maternity benefits can also be claimed by women who had a miscarriage in the third trimester of their pregnancy or a still birth.[31]

The period within which dependents of a deceased breadwinner can apply has been increased to 18 months.[32] Contributors can also nominate beneficiaries of their choice in the event of death, provided the deceased had no spouse, life partner or dependent children.[33]

Illness benefits can be claimed if you are off work for seven days.[34] No agency may ask a fee for assisting someone with a UIF claim.[35]

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[23] This was done after the National Growth Path ('NGP') did not receive enough support (see ch 1, para 4 above). Nonetheless, government has also 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.
[24] 10 of 2016.
[25] Section 3(1).
[26] Section 12(1)(b).
[27] Section 13(5).
[28] Section 25(1).
[29] Section 13(5).
[30] Section 12(3)(c).
[31] Section 24(5).
[32] Section 30(1)(b).
[33] Section 20(2A).
[34] Section 20(2)(a).
[35] Section 33(3).

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.[36] 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. 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.

South Africa suffers from a skills shortage that can be partly attributed to apartheid.[37] 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

[36] See ch 1, para 3 above.
[37] 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 the DoHET 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 things, 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).[38] 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:

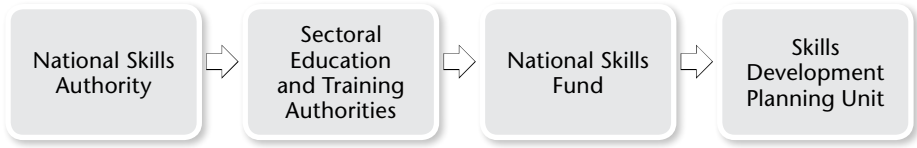
- the public service,
- religious or charity organisations,
- public entities that get more than 80% of their money from Parliament, and
- employers whose total pay to all its workers is less than R250 000 per year.

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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[38] See ch 1, para 5 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.



National Skills Authority ('NSA')

- The Minister of the DoHET 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.

National Skills Authority ('NSA')

- The Minister of the DoHET 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.

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 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[39] ('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 9 above).[40]

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. Businesses receive the amount as a deduction from the SARS on income tax

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,
- comply with the earning thresholds set out in the act, and
- were newly employed on/after 1 October 2013.

The ETIA's end date for the incentive had been extended from 31 December 2016 to 28 February 2019. Moreover, the incentive has been capped to R20 million per year per employer. The money allocated to learnerships has been extended to 31 March 2022.[41]

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[39] 26 of 2013.

[40] At the end of February 2015, 29 000 employers have employed 270 000 young people which will help increase their work experience (available at http://www.sanews.gov.za/south-africa/employment-tax-incentives-leads-to-270-000-new-jobs (accessed on 15 August 2017).

[41] See ch 2, para 8 above.

7.3 Employment Services Act[42] ('ESA')

The purposes of this Act is to promote employment and to improve access to the labour market for work seekers. It seeks to provide opportunities for new entrants to the labour market in order to gain work experience. This will enable them to improve their employment prospects.

It further aims to:

- improve the employment and re-employment prospects of employees facing retrenchments;
- facilitate access to education and training for work seekers, in particular vulnerable work seekers;
- promote employment, growth and workplace productivity; and
- facilitate the employment of foreign nationals in such a way as not to impact adversely on South African workers.

It mainly proposes 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.

[42] 4 of 2014. See also ch 2, para 6.3 above.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Under which of the following circumstances will a claim from the UIF not be allowed?
   (*a*) An employee is currently unemployed and receives no salary.
   (*b*) An employee is on adoption or maternity leave.
   (*c*) An employee loses his job as a result of resignation.
   (*d*) A person loses income as a result of the death of a breadwinner.
2. Themba works for mining company Engen (Pty) Ltd which mines coal in South Africa. On a daily basis Themba must contend with exposure to health related catastrophes such as exposure to dust, heavy metals, hazardous gases, loud noises and fumes. Does Themba have the right to refuse to work under these unsafe conditions?
3. What are the different types of social insurance programmes under the system of social security?
4. State whether the following is true or false and provide reasons for your answer: 'The Department of Home Affairs is responsible for the administration and payment of social assistance benefits.'

✓ Feedback

1. Statement (*c*) is *correct* since an employee is not allowed to claim from the UIF if she/he resigns.

   All the other statements constitute situations where a claim can be instituted in terms of the UIA.
2. The MHSA has a very specific provision that employees may refuse to work under unsafe conditions. Section 23 of the Act provides that an employee has the right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee or the health and safety representative responsible for that working place directs that employees to leave that working place. In addition, in view of the duty of the employer not to allow and permit employees to perform unsafe work, and the duty of employees to take responsibility for their own safety and the constitutional rights to life, bodily integrity and a safe environment, it is clear that all employees including Themba have the right to refuse to work under these unsafe conditions.
3. The main types of social insurance available include unemployment insurance, occupational injuries and diseases, occupational retirement insurance, and private insurance.
4. False. The South African Social Security Agency (SASSA) is responsible for the administration and payment of the social assistance benefits.

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 (accessed on 12 July 2017)
4. Tshoose C 'Placing the right to occupational health and safety within a human rights framework: Trends and challenges for South Africa' (2014) 47(2) *CILSA* 276
5. Tshoose C & Tsweledi B 'A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa' (2014) 18 *Law, Democracy & Development* 334
6 Van Der Byl C 'Background paper: Social protection, twenty-year review South Africa 1994–2004' available at http://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Review%20Documents/20YR%20Social%20Protection.pdf (accessed on 14 July 2017)

8

Transfer of a business as a going concern

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1. INTRODUCTION

Business takeovers, sales mergers, acquisitions and the like are common occurrences that affect the rights of both employers and employees. While employees on the one hand may be concerned about their job security, the employer on the other hand will naturally value things like business efficiency and profitability. These conflicting interests of employers and employees are not sufficiently regulated by common law.

At common law, a new employer was not obliged to take over the employment contracts of the employees of the old employer, when acquiring a

business as a going concern.[1] The acquisition and transfer of a business as a going concern led to termination of employment contracts and if the new employer wished to continue the operation with the same workers, it would have had to conclude new contracts of employment with them. The common law does not provide sufficient protection for employees during business transfers or in circumstances of insolvency. This inefficiency led to the increased protection now provided for by section 197. The previous section 197 regulated both transfers of solvent and insolvent businesses in the same provision. The 2002 Labour Relations Amendment Act replaced the previous section 197 and only transfers of solvent businesses are now regulated by section 197 whereas transfers of businesses in the context of insolvency are regulated by section 197A and the disclosure of information concerning insolvency is dealt with in section 197B.

Sections 197 and 197A are not the only sections in the LRA that afford protection to employees when a business is transferred as a going concern. If an employee terminates employment after a transfer in terms of section 197 or 197A because the new employer provided her/him with conditions or circumstances at work that are substantially less favourable than what she/he had with the old employer, such termination will amount to a constructive dismissal in terms of section 186(1) discussed in chapter 9 below. This protection is further extended by section 187(1)(g) which makes a dismissal where the reason for such dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A, automatically unfair. Automatically unfair dismissals are dealt with in chapter 9 below.

2. SECTIONS 197 AND 197A AND THEIR SCOPE OF APPLICATION

A transfer of a business as a going concern, and more specifically the transfer of a contract of employment, is regulated by sections 197 and 197A of the LRA. The purpose of section 197 is to establish work security and prevent unfair dismissals during transfers.

In *NEHAWU v University of Cape Town*[2] the Constitutional Court explained that the purpose of section 197 is to protect workers against unfair job losses while also facilitating commercial transactions. This is done on the one hand by safeguarding the workers' employment and, on the other, by guaranteeing the new owner of the business a workforce to continue with the operation of the business. The provisions of this section give effect to the constitutional right to fair labour practices in situations of business restructuring and reorganisation of employment and must be interpreted in this context. It provides security of employment in times of change. It further aims at minimising

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[1] *Aviation Union of SA & another v SA Airways Pty (Ltd) & others* 2012 (2) BCLR 117 (CC). The employer was only required to give employees the required notice in order for the termination to be lawful.

[2] [2003] 2 BCLR 154 (CC).

the tension and the resultant labour disputes that often arise from the sales of businesses that impact negatively on economic development and labour peace.[3]

Section 197, in line with the primary objects of the LRA, is aimed at protecting employees and their job security when businesses are sold or otherwise transferred as going concerns.[4] This section has been found to facilitate the transfer of employment *relationships* rather than just the transfer of employment *contracts*.

Section 197 only applies where *a business* is *transferred* as *a going concern*. Thus in order to determine whether section 197 is applicable one should first have to determine whether the specific transaction in question qualifies as a '*transfer*' of a '*business*' as a '*going concern*'. It is only once all three of these elements are found to be present simultaneously that the protection provided for in section 197 takes effect. It is for this reason that the scope and definition of each of these concepts are discussed below.

2.1 Business

The term 'business' as used in section 197(1)(*a*) has been the topic of a lot of debate and court cases because it is vague.

In terms of section 197(1)(*a*) a *business* is defined to include the whole or part of any business, trade, undertaking or service. Section 197 does not apply when any other entity which will not qualify as a business, is transferred.

It is clear from section 197(1)(*a*) that the *business* that is being transferred may either be the entire business or it may be a part of the business. The definition of a 'business' also includes a 'service' which would include the provision of 'assistance or benefit provided to someone' and 'an act of helping or benefitting another'.[5]

The courts have found that the term *business* in section 197, although not unlimited, carries a much wider meaning than the ordinary dictionary definition. The definition would not necessarily extend to all activities and may arguably exclude an operation that does not constitute an identifiable economic entity comprising of all elements usually associated with a business (these may include, for example, employees, assets, a client base and commercial activities).

The courts have looked for guidance on how to interpret this term and looked at the definition of an 'economic unity' which was used by the

[3] *NEHAWU v University of Cape Town* (see n 2 above).

[4] Although *NEHAWU v University of Cape Town* was decided under the previous s 197, it should be noted that the purpose of s 197 remains unchanged. See also *Foodgro (a Division of Leisurenet Ltd) v Keil* (1999) 20 *ILJ* 251 (LAC).

[5] *FAWU v The Cold Chain (Pty) Ltd* [2010] 1 BLLR 49 (LC).

European Court of Justice. An 'economic entity' is defined as *'an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'*. This definition emphasises the organisational component of the entity being transferred, rather than the nature of the business or the activity that it conducts.[6]

The definition of 'business' refers to the whole or part of any business, trade, undertaking or service. The meaning of 'service' came under scrutiny in *SAMWU v Rand Airport Management Co Ltd*[7] since it leads to the question whether the outsourcing of services will amount to a transfer of a business as a going concern.

> Outsourcing is most common in cases where an employer decides to contract out to an independent service provider its non-core activities which may include, amongst other things, services like gardening, cleaning, catering, information technology and payroll functions. The employer will then pay the independent contractor for performing the services, which had been contracted out to it.

The Labour Appeal Court held that the outsourcing to private contractors of the gardening and security functions constituted a 'service' for purposes of section 197(1)(*a*). However, it is very important to keep in mind that section 197 will only apply to these outsourced services if *all* of the requirements in this section are present. This means that an economic entity should be transferred as a going concern. All of the relevant elements and components that comprise the business should be examined to determine whether they are sufficiently linked and structured so as to comprise an economic entity capable of being transferred in terms of section 197.

There is another form of outsourcing, so-called second-generation outsourcing and it has been problematic for the courts to decide whether it will be regarded as a transfer of a business as a going concern.

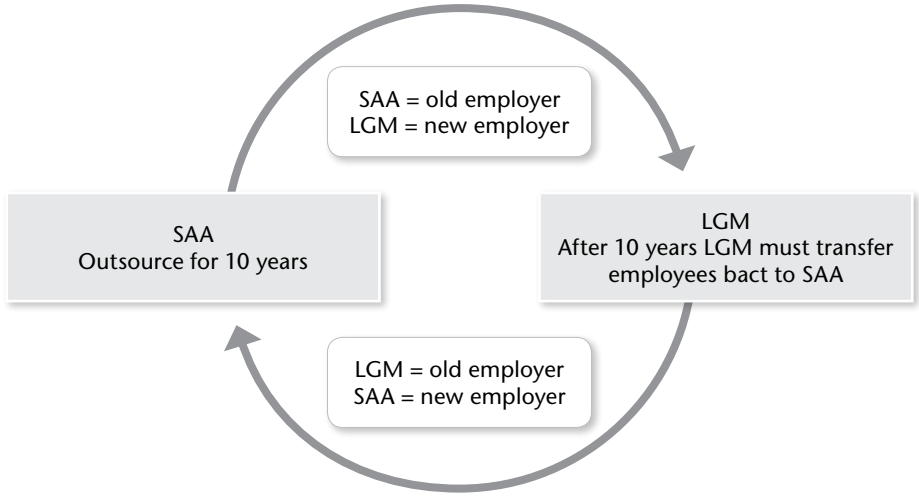
> A second-generation transfer is where A, for example, outsources its cafeteria to B on a three-year contract. After three years the services are transferred back to A.

In *Aviation Union of SA v SA Airways (Pty) Ltd*[8] the court dealt with a similar set of facts. SAA awarded a ten-year contract to LGM to run its facilities management operations. Upon expiry of the period the employees went back to work for SAA and the question was whether that movement back to SAA

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[6] *Süzen v Zehnacker Gebaudreinigung GmbH Krankenhausservice* [1997] IRLR 255 (ECJ).
[7] *SAMWU v Rand Airport Management Co Ltd* [2005] 3 BLLR 241 (LAC). The court referred to the 2002 amendments where the word 'business' was extended to include a 'service'.
[8] See n 1 above.

was a transfer of a service or not, since the initial transfer to LGM was a so-called 'first generation' outsourcing agreement and the one back to SAA was a 'second generation outsourcing' agreement. The Constitutional Court held that it does not matter whether a transaction is called a 'first-generation' contract or otherwise. The test to be applied is 'whether a business or part of a business is transferred as a going concern from one employer to another'. SAA initially decided to make use of LGM and if it decides to again provide the services in-house at a later stage, it is insourcing (which is actually a type of second-generation outsourcing). The court said that the emphasis should be on the purpose of section 197, which is to protect employees against unfair job losses when a business is transferred as a going concern and it therefore held that the insourcing or second-generation outsourcing agreements could fall within the ambit of section 197. It was noted by the Constitutional Court that it was misleading to only look at the 'generation' of the transfer. A transaction may not be covered by section 197 even if it is a first-generation outsourcing agreement or a 'fifth-generation' outsourcing agreement. It will fall under the scope of section 197 if in reality it entails a transfer of a business as a going concern. The effect of this judgment can be illustrated as follows:



2.2 Transfer

> In terms of section 197(1)(*b*) 'transfer' means the transfer of a business by one employer (hereafter 'the old employer') to another employer (hereafter 'the new employer') as a going concern.

To determine whether a transaction will constitute a *transfer* in terms of section 197 it is crucial to look at the true nature of the transaction.

Although transfers of businesses happen most often as a result of a sale of a business, the scope of section 197 is much wider and potentially apply to,

amongst other things, mergers, acquisitions, take-overs, restructuring, donations, outsourcing and second-generation outsourcing.[9]

A transfer in terms of section 197 means that the business must have changed hands through a sale or other transaction. In other words, the business must have moved from one person to the other. In *Rural Maintenance (Pty) Ltd v Maluti-A-Phofong Local Municipality*[10] the Constitutional Court confirmed the judgment by the Labour Appeal Court[11] that it cannot be said that a business has been transferred as a going concern unless the new employer is able to continue business seamlessly after the transfer.

A 'transfer' may also be effected by a series of two or more transactions.[12] The enquiry into the existence of a *transfer* depends ultimately on facts of each case and degree to which the business has moved between employers.

The transfer of control of a business, by means of the sale of shares, has been held not to constitute a transfer, this was due to the fact that there was no change in the identity of the employer.[13] Similarly, following a decision to sell some of the business' assets in an attempt to avoid liquidation was held not to constitute a transfer.[14]

It can be concluded that the important factor to be looked for in order to determine whether a *transfer* occurred is whether the business has *changed hands*, or has *moved from one employer to another.*

2.3 Going concern

The statutory definitions do not clarify the key concept of 'going concern'. In the absence of such a definition, it must be given its ordinary meaning, unless the context indicates otherwise.

It can only be said that a business was transferred as a *going concern* when the economic entity or business *retains its identity* after the transfer. This would be the case if the operation is actually resumed by the new employer, with the same or similar activities.[15] In other words, what has to be transferred is *a business in operation* so that 'the business remains the same *but for* the fact that it is now in different hands'.[16]

In *Schutte v Power Plus*[17] the meaning of (transferred) as a *going concern* was considered in some detail. The Labour Court, after taking into account European and English case law, described the proper approach to be followed

[9] *Schutte v Powerplus Performance (Pty) & another* [1999] 2 BLLR 169 (LC).
[10] [2017] 3 BLLR 258 (CC).
[11] *Maluti-A-Phofung Local Municipality v Rural Maintenance (Pty) Ltd* [2016] 1 BLLR 13 (LAC). See also *Rosond (Pty) Ltd v Western Platinum Ltd* (2017) 38 *ILJ* 454 (LC) at para 17.
[12] *Jenkin v Khumbula Media Connexion (Pty) Ltd* [2010] 12 BLLR 1295 (LC).
[13] *Long v Prism Holdings Ltd & another* (2012) 33 *ILJ* 1402 (LAC).
[14] *Kgethe v LMK Manufacturing (Pty) Ltd* [1998] 3 BLLR 248 (LAC).
[15] *NEHAWU v University of Cape Town & others (1)* [2000] 7 BLLR 803 (LC); [2002] 4 BLLR 311 (LAC).
[16] *NEHAWU v University of Cape Town* (see n 3 above).
[17] *Schutte v Powerplus Performance (Pty) & another* [1999] 2 BLLR 169 (LC).

when determining whether a business has been transferred as *a going concern*. The question as to whether a business was transferred as a *going concern* is ultimately a matter of fact and degree to be determined objectively in the light of the circumstances of each transaction. This will be done by weighing up the factors that are indicative of a transfer of a business against those that are not. Such an approach takes note of the substance and not the form of the transaction.

Some of the relevant factors to consider when determining whether a business was transferred as *a going concern* will include the following:

- What is transferred must be a business in operation so that the business remains the same but in different hands;
- The transfer or otherwise of assets both tangible and intangible;
- Whether or not workers are taken over by the new employer;
- Whether or not customers are transferred;
- Whether or not the same/similar business is being carried on by the new employer;
- Whether or not the business will be conducted at the same premises;
- Whether or not the debts of the business are taken over by the new employer; and
- Whether there has been an interruption of the operation of the business and, if so, the duration thereof.

It is very important to note that this list of factors is not exhaustive and that none of them individually or in isolation is necessarily decisive. All factors must be considered in an overall assessment. It is further important that each transaction must be considered on its own merits.

3. AUTOMATIC CONSEQUENCES OF SECTION 197 IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY

Once it has been established that a transaction falls within the scope of section 197, in other words, that it complies with the definition of a *transfer of a business as a going concern*, there are certain automatic consequences and these are discussed below.

3.1 Transfer of employment contracts

The new employer is automatically substituted in the place of the old employer in respect of all employment contracts that existed immediately before the transfer. The new employer steps into the shoes of the old employer and all contracts of employment continue between the new employer and employees. It is an obligation on the employer, prior to the transfer, to inform

the employees that their contracts of employment will be automatically transferred to the new employer by operation of law.

3.2 Transfer of all rights and obligations

All rights and obligations between the old employer and an employee at the time of the transfer continue to be in force as if they had been rights and obligations between the new employer and the employee.

> **Example:** In *MISA/SAMWU obo Members v Madikor Drie (Pty) Ltd* [2006] 1 BLLR 12 (LC) the old employer followed a policy in terms of which severance pay due to employees was more than the statutory minimum as provided for in the BCEA. After the business was sold as a going concern, the new employer unilaterally, and without consulting employees, changed the old employer's policy and decided to only pay retrenchment packages of one week's pay per completed year of service. The court found that the new employer took over all obligations including the employer's policy regarding severance pay.

3.3 Transfer of the former employer's actions

Anything done by the employer before the transfer, including dismissal, unfair labour practices or acts of unfair discrimination, is considered to have been done by the new employer. It could thus be said that the new employer 'inherits the sins' of the former/old employer.

> **Example:** In *NUMSA & another v Success Panelbeaters & Service Centre CC t/a Score Panelbeaters & Service Centre* (1999) 20 *ILJ* 1851 (LC) an employee who was unfairly dismissed obtained an order for reinstatement and compensation. However, by the time the order was granted, the business had been transferred as a going concern and was now in the hands of a new employer. The Labour Court held that the new employer was bound by the order which had been made against the old/former employer. The new employer was thus obliged to reinstate the employee on terms and conditions no less favourable than those he had with the former employer.

3.4 Continuity of employment

The transfer does not interrupt continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer. The Labour Appeal Court found that continuity of service is not a right or obligation between the old employer and employee but a 'factual calculation'. The employee's rights accruing from length of service will remain in existence unless it is expressly waived. This protective provision is particularly

important in the context of retrenchments and calculation of severance pay (see self-assessment questions below for a practical example).

3.5 Other consequences

The new employer complies with the above four requirements if it provides the employees with similar or different terms and conditions of employment that are, on the whole, not less favourable to the employees than what they had with the old employer. The position is different where employees' conditions of employment are determined by a collective agreement; in this case they will be entitled to the same conditions set out by the collective agreementafter the transfer unless it is changed by another collective agreement between the parties involved.[18]

Employees may further be transferred to a different pension, provident, retirement or similar fund provided that certain criteria in the Pensions Fund Act[19] are satisfied.

Another consequence flowing from the application of section 197 is that the new employer is bound by arbitration awards and collective agreements that bound the old employer immediately before the date of transfer.[20]

The date of transfer will be the date on which the new employer takes final and unconditional control and responsibility for the transferred business[21] and this date must be determined objectively.

4. CHANGING OF THE AUTOMATIC CONSEQUENCES OF SECTION 197

The consequences discussed in paragraph 3 above will automatically flow from a transfer of a business as a going concern. If the parties want different consequences than those prescribed by section 197, they must conclude a *written* agreement to this effect.

- This agreement must be concluded between, either the old employer, the new employer, or the old and new employers acting jointly on the one hand; and
- That is any person whom the employer is required to consult with in terms of a collective agreement. If there is no collective agreement it will be the relevant workplace forum and any registered trade union whose members will be affected by the transfer. Where there is no workplace forum the trade union will be the relevant party. Should there be no union the employees likely to be affected or their representatives will be the relevant parties In such a case, the employer party must disclose all relevant information that will allow the employee party to effectively engage in

[18] Section 197(3)(b) of the LRA.
[19] Section 14(1)(c) of the Pension Funds Act 24 of 1956.
[20] Section 197(5)(*a*) of the LRA.
[21] *Van der Velde v Business & Design Software (Pty) Ltd* [2006] 10 BLLR 995 (LC) at para 20.

negotiations. The parties may agree to have the old contract of employment replaced by a new contract, but the employees' rights they accrued from length of service will remain the same unless expressly waived.

It has been confirmed by the Labour Court on more than one occasion that the employees' consent was not required prior to the transfer of a business as a going concern. Section 197 does not create a right for employees or their representatives to be consulted prior to the transfer. The need for consultation with the employees or their representatives arises *only* if one of the employer parties seeks *an agreement to vary* the automatic consequences of the transfer.

5. APPORTIONMENT OF LIABILITY BETWEEN THE OLD AND NEW EMPLOYER

In order to clarify responsibilities and liabilities when a business is transferred as a going concern, the old employer must reach a *written* agreement with the new employer that stipulates (at least) the following:

- which employer will be liable for accrued leave pay of the transferred employees of the old employer;
- which employer will be liable for severance pay that would be payable to the transferred employees of the old employer in the event of a dismissal by reason of the new employer's operational requirements;
- which employer will be liable for other outstanding payments that had accrued to the transferred employees;
- in the case of the apportionment of liability between them, the terms of that apportionment;
- what provisions had been made for any payment contemplated above ; and
- what the (quantified) value of the above obligations or liabilities towards the employees are at the date of the transfer.

The primary purpose of this section's provision for a written agreement, is to protect the interests of employees. This is necessary especially where a business may be transferred with the intention of circumventing certain liabilities including the statutory liability to pay severance pay or any other payments that the old employer owes the transferring employees.

The old employer must disclose these terms to everyone employed by the new employer. The old employer must also take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of accrued leave pay, severance pay, and any other payments.

The employers will be jointly and severely liable for a period of 12 months after the transfer, should payments become payable due to retrenchment, liquidation or sequestration of the new employer.[22]

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[22] Section 197(8) provides for certain exemptions of liability for the old employer.

The old employer remains jointly and severally liable with the new employer in respect of any claim concerning any term or condition of employment that arose prior to the transfer. In respect of this there are no exceptions and no time limit of 12 months as is the case with payment due to retrenchment, liquidation or sequestration.

Section 197 does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for any offence.

6. TRANSFER OF CONTRACTS OF EMPLOYMENT IN CIRCUMSTANCES OF INSOLVENCY

Section 197A applies to a transfer of a business if the old employer is insolvent or if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

If a business is transferred under these circumstances and where there is no agreement to the contrary, the following will apply:

- The new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration; and
- The transfer does not interrupt the employee's continuity of service and contracts of employment continue with the new employer as if with the old employer.

Section 197A provides only for the transfer of employment contracts and continuity of service. This section does not provide for the additional responsibility of rights and obligations of and actions by the old employer. An employer who buys a business under circumstances of insolvency is already burdened with certain risks; to place on him the additional burden of taking responsibility for the old employer's obligations and actions could result in job losses due to liquidation of companies that might have been saved.[23]

In the case of a transfer as a result of insolvency or threatening insolvency all rights and obligations between the old employer and each employee and anything done before the transfer by the old employer in respect of each employee remain between the old employer and each employee. Unlike the situation where a solvent business is transferred as a going concern, the new employer does *not* take any responsibility for anything done by the old employer or any rights and obligations between the old employer and employees.

The new employer complies with the above if it employs employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer. Unless conditions of employment are determined by a collective agreement, conditions will remain as per the collective agreement.

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[23] A Govindjee *Labour Law in Context* (2017) at 183.

If an insolvent business is transferred, like in the case of a transfer of a solvent business as a going concern, employees may be transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer. The new employer will also be bound by the arbitration awards and collective agreements that bound the old employer immediately before its provisional winding-up or sequestration. Section 197A also does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

The Insolvency Act[24] provides for the suspension of employment contracts upon the granting of a liquidation order. It further provides for the termination of all contracts of employment for 45 days after the appointment of the trustee or liquidator.

7. SECTION 197B DISCLOSURE OF INFORMATION CONCERNING INSOLVENCY

If the employer is facing financial difficulties that may reasonably result in its winding-up or sequestration, the employer must advise the employees through their relevant representatives.[25] The Insolvency Act requires that copies of notice to surrender and of a petition for sequestration to be served on every registered trade union representing the debtor's employees and the employees themselves.[26]

An employer that applies to be wound up or sequestrated, must at the time of making the application, provide the relevant employee party with a copy of the application.[27] An employer that receives an application for its winding up or sequestration must supply a copy of the application to any relevant employee party, within two days of receipt, or if the proceedings are urgent, within 12 hours.

The Constitutional Court has noted that the section 197B requirement that an employer that receives an application for its winding-up or sequestration will also apply to domestic workers.[28]

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one/more* of the following statements is *correct* about a transfer of a business as a going concern?

(*a*) An employee who resigns after the new employer provides him with terms and conditions that are substantially less favourable than what he had with the old employer will be able to show that he was dismissed.

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[24] 24 of 1936.

[25] That is the consulting party contemplated in section 189(1) or the LRA; see para 4 above.

[26] See also ss 128; 129 and 136 of the new Companies Act 71 of 2008 with reference to business rescue proceedings and affected employees.

[27] Section 197B(2)(a).

[28] *Stratford v Investec Bank Ltd* (2015) 36 *ILJ* 583 (CC).

(*b*) An employee will be entitled to remain a beneficiary of the same pension fund after a transfer of a business as a going concern.

(*c*) It is automatically unfair to dismiss an employee for a reason related to a transfer of a business as a going concern.

(*d*) When an insolvent business is transferred as a going concern, all rights and obligations between the old employer and employees will be regarded as rights and obligations between the new employer and employees.

2. Briefly discuss the difference in consequences that will follow the transfer of a solvent business as opposed to a business in circumstances of insolvency.
3. Comfy Conferences (Pty) Ltd is in the business of providing conference facilities and accommodation. Comfy Conferences recently took a decision to outsource its gardening services to Green Gardens (Pty) Ltd. Mr Abrams, one of the gardeners who has been in the employ of Comfy Conferences for 13 years is very concerned that as a result of the outsourcing agreement, soon to be concluded, he will be without a job. Advise Mr Abrams.
4. Eleven months later, a very concerned Mr Abrams, who is now working for Green Gardens (Pty) Ltd visits you again. He tells you that Comfy Conferences' earlier decision to outsource its gardening services proved to be rather unsuccessful after which it decided to, once again, have its gardening services provided 'in-house'. Green Gardens (Pty) Ltd informed Mr Abrams that it will no longer be responsible for providing gardening services to Comfy Conferences, as a result of which Mr Abrams will no longer have a job at Green Gardens (Pty) Ltd. However, Green Gardens (Pty) Ltd offers to pay Mr Abrams severance pay, calculated on his 11 months' service with it. Advise Mr Abrams.

✓ Feedback

1. Statement (*a*) is *correct*. According to section 186(1)(f) dismissal means that an employee terminated employment with or without notice because the new employer, after a transfer in terms of sections 197 or 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

   Statement (*c*) is also *correct*. Section 187(1)(g) determines that a dismissal is automatically unfair if the reason for the dismissal is a transfer, or a reason related to a transfer, contemplated in sections 197 or 197A.

   Statement (*b*) is incorrect. Section 197(4) read with section 197(2) do not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer if the criteria in section 14(1)(*c*) of the Pension Funds Act are satisfied.

Statement (*d*) is incorrect. In terms of section 197A(2)(*b*) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee.

2. When a solvent business is transferred as a going concern in terms of section 197 all rights and obligations between the old employer and an employee at the time of the transfer continue to be in force as if they had been rights and obligations between the new employer and the employee. This is not the case where an insolvent business is transferred in terms of section 197A. Another consequence of a solvent business being transferred as a going concern is that anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer. The new employer does not assume this responsibility when an insolvent business is transferred in terms of section 197A. Unlike the situation where a solvent business is transferred in terms of section 197, the old employer during the transfer of an insolvent business in terms of section 197A is not required to conclude a written agreement about the value of outstanding payments and benefits owed to the employees and apportionment of liability with the new employer.

   When a solvent business is transferred employers will be jointly and severely liable for a period of 12 months after the transfer should payments become payable due to retrenchment, liquidation or sequestration of the new employer unless the old employer is able to show that it has complied with the provisions of this section. This will not apply to a transfer in circumstances of insolvency.

   In case of a solvent business being transferred, the old employer remains jointly and severally liable with the new employer in respect of any claim concerning any term or condition of employment that arose prior to the transfer. This is not applicable where an insolvent business is transferred in terms of section 197A.

3. It will be necessary to determine whether the outsourcing will amount to a transfer of a business as a going concern. If all three of these elements are simultaneously present, Mr Abrams will enjoy the protection provided for in section 197(2)—that is the automatic consequences provided for in this section—and other protection provided for in the LRA. In order to answer this question, a brief discussion about the meaning of each of the three concepts business, transfer and going concern is first required. Second, it will be necessary to apply the law to the set of facts to determine whether the transaction in question qualifies as a transfer of a business as a going concern. It is *then* required to come to a conclusion based on the above application of the law to the facts. If it is concluded that the

transaction indeed constitutes a transfer of a business as a going concern, section 197(2) will apply. This means that, *inter alia*, Mr Abram's contract will be transferred to Green Gardens (Pty) Ltd and the latter will step into the shoes of Comfy Conferences.

4. This question concerns the same legal issues discussed in question 3 above, that is, whether the transaction will amount to the transfer of a business as a going concern. This will depend on whether the termination of the outsourcing agreement stands to be considered as a simultaneous resumption by Comfy Conferences of the gardening service; whether such a service will comply with the definition of a business for purposes of section 197; whether such termination and subsequent insourcing will amount to a transfer from one employer to another; and whether such a business was transferred as a going concern. As mentioned above, section 197 and the protection it provides, will only apply once all three elements are found to be present simultaneously. It is very important to regard the substance rather than the form of the transaction. Irrespective of what such a transaction is called, it may be referred to as an insourcing agreement or a second-generation outsourcing agreement it will be a question of fact to be determined objectively after taking into consideration the specific circumstances of the matter. One of the consequences of section 197 is that Mr Abram's continuity of service will be preserved. If Green Gardens (Pty) Ltd were to pay severance pay in terms of the BCEA, if would have to pay Mr Abrams for his services of 13 years and 11 months (his service with both the old and new employer).

RECOMMENDED READING

1. Davis I 'Should section 197 of the LRA be amended to automatically protect employees when labour intensive services are outsourced or when a new service provider is appointed?' (2016) 37 *ILJ* 45
2. Swart C & Germishuys W 'Franchise agreements: the transfer of a business (franchise) as a going concern—*PE Pack 4100CC v Sanders & others*' (2014) 26 *SA Merc LJ* 533
3. Germishuys W & McGregor M 'The legal obligation to provide for employee-related contingent liabilities when an enterprise is sold as a going concern' (2014) 26 *SA Merc LJ* 436
4. 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

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 bird's-eye view at the beginning of the book to clarify the bigger picture of the employment relationship developing through its various stages. 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.

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.

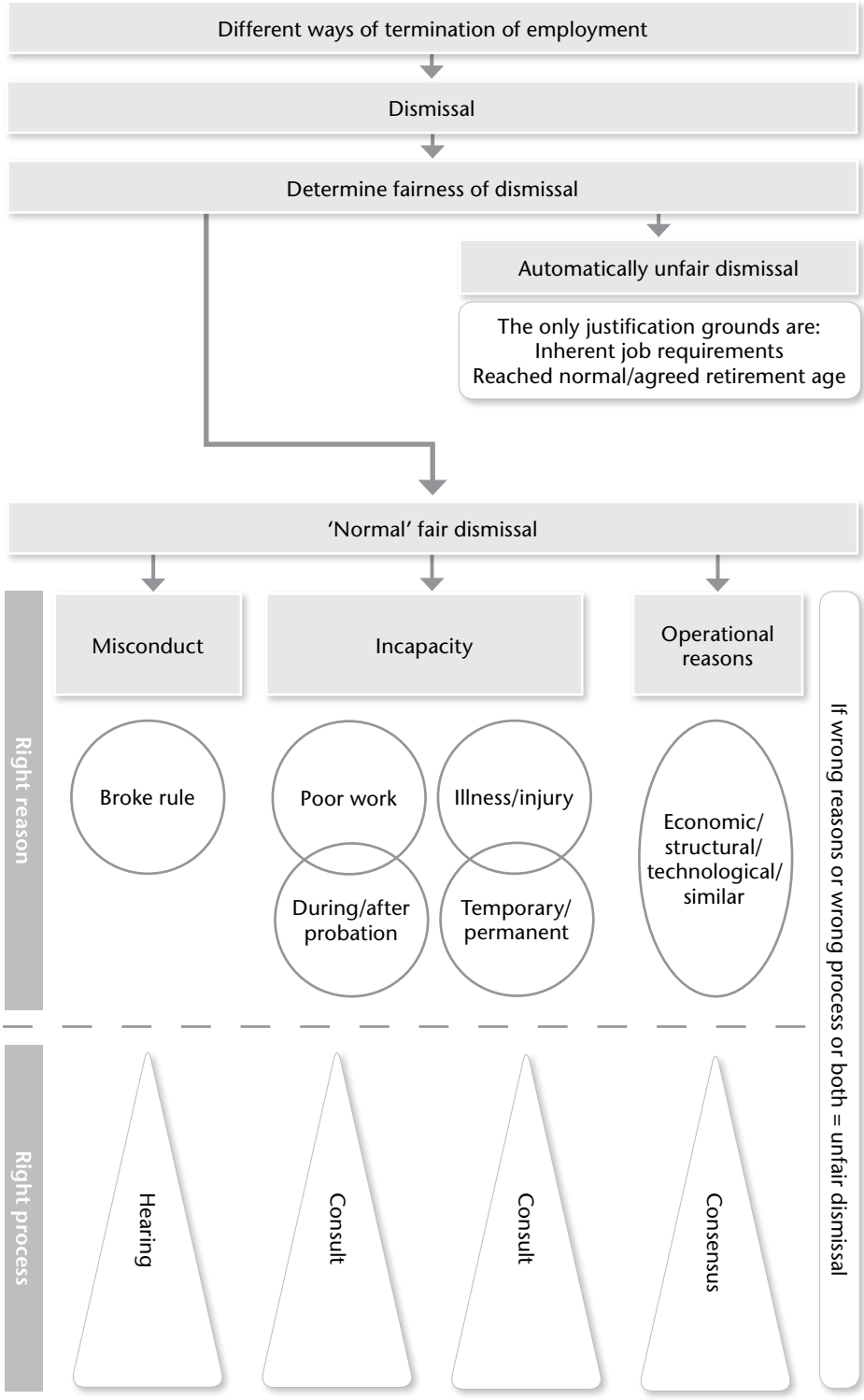
Misconduct is a 'fault' dismissal which implies that the employee is guilty of misbehaving which causes the dismissal. Incapacity and operational reasons are termed 'no-fault' dismissals, because the employee is regarded as a victim or caught in circumstances beyond her/his control but which nevertheless 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. 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 infringes a basic right or is as a result of discrimination it will be automatically unfair.

Part III consists of two chapters. **Chapter 9** 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 10 looks at the different ways in which an employee can be dismissed fairly. 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. We have also included an outline of the termination process on the next page which contains an instant summary of chapters 9 and 10. It will be useful to refer back to this outline while reading these two chapters.


Different ways of termination of employment
Dismissal
Determine fairness of dismissal
Automatically unfair dismissal
The only justification grounds are:
Inherent job requirements
Reached normal/agreed retirement age
'Normal' fair dismissal
Misconduct
Incapacity
Operational reasons
Right reason
Broke rule
Poor work
Illness/injury
During/after probation
Temporary/ permanent
Economic/ structural/ technological/ similar
Right process
Hearing
Consult
Consult
Consensus
If wrong reasons or wrong process or both = unfair dismissal

9

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1. WAYS OF TERMINATING THE EMPLOYMENT CONTRACT

The contract of employment can be terminated in many ways. The focus in the next two chapters will be on termination of the contract of employment through dismissal but there are also other (less adversarial) ways to terminate the contract of employment as discussed below. In order to ensure fairness in dismissals the LRA contains a Code of Good Practice: Dismissal as Schedule 8 to the Act. This Schedule is reproduced as Annexure B at the back of the book.

1.1 Resignation by the employee

The BCEA recognises that employees can resign and terminate their employment contracts by giving the required notice.[1] A resignation happens where an employee clearly and explicitly indicates that she/he no longer wants to continue with the employment relationship. In *African National Congress v Municipal Manager, George Local Municipality & others*[2] the court stated that a resignation must be 'unequivocally' communicated and conveyed to the other party to bring the cancellation into effect. This intention to no longer continue with the contract can be communicated orally or in writing or even in a text message.[3] Resignation must however be given in writing, if that is a requirement in terms of the agreement between the parties.

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 to work for the duration of the notice period or to terminate the contract and pay out the employee's remuneration for the notice period.[4] It is not necessary for the employer to communicate its acceptance of the resignation to the employee.[5]

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[1] See ch 4, para 3.3.2 above.
[2] (2010) 31 *ILJ* 69 (SCA).
[3] *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 *ILJ* 1477 (LC).
[4] *Uthingo Management (Pty) Ltd v Shear NO & others* [2009] 6 BLLR 590 (LC).
[5] See *Sihlali v SA Broadcasting Corporation Ltd* (see n 3 above), 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 without its permission.

In *Mnguti v CCMA & others* (2015) 36 *ILJ* 3111 (LC) the Labour Court held that the elements constituting a termination of employment are the following:

- The employee must clearly, unambiguously and unequivocally indicate an intention to the employer that she/he wants to leave employment;
- The employee's conduct must be unilateral and final; and
- The conduct of the employee, established holistically from the evidence, would leave a reasonable person with the belief that the employee had the intention to bring the employment relationship to an end, and then acted accordingly.

There is uncertainty about the validity of a so-called heat-of-the-moment resignation. In *Quinn/Singlehurst Hydraulics (SA) Ltd*[6] an employee resigned in the heat of the moment after the Managing Director of the employer company sent a co-employee to the employee's house to collect his office keys and to inform him not to return to work otherwise he would be arrested. The employee told the co-employee to tell the MD to 'stick his job' and that he would rather resign. The employer held it to be a resignation while the employee said that he never resigned or intended to do so. The commissioner held that the employee did not resign and that a reasonable person would not construe his words as a clear intention to discontinue the employment relationship.

In *SAMWU obo Hlonipho v South African Local Government Bargaining Council & others*[7] an employee was extremely upset when she learned about a staff meeting held in her absence where some of her grievances were openly discussed without her permission and her responsibilities unilaterally removed. She completed a form requesting early retirement and submitted it the very same day. According to the employee she became extremely upset and emotional and felt that she could no longer handle her working situation.

The court held that although the employee clearly over-reacted it was not a heat-of-the-moment resignation. She took time to download the early resignation request form from the internet, completed it and handed it to the employer. The court held that it was a calculated move by the employee with a clear intention to resign.

If an employee resigns without giving proper notice the employer will be able to claim damages from the employee. In *SA Music Rights Organisation Ltd v Mphatsoe*[8] 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.[9]

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[6] [2005] 6 BALR 673 (CCMA).
[7] JR 2159/09) [2013] ZALCJHB 48.
[8] [2009] 7 BLLR 696 (LC).
[9] [2009] 7 BLLR 696 (LC).

The employment contract comes to an end only at the end of the notice period and not when notice is given.[10]

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.[11]

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 notice 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. This would, for example, happen where an employee is appointed as a care-taker of a building and the building is destroyed by a fire. The death of an employee during the term of the contract is another event that will render the performance of service impossible and terminate the contract. For example where an employee is appointed as a nurse for an employer and the employer passes away, the employer's estate will still be liable to pay outstanding money which is due to the employee. The position would be different where the employee was employed by a legal entity for example a company, partnership or trust. The death of a director or manager or partner does not bring the employment contract to an end since the business entity continues.

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 sequestration or liquidation or an application can be brought by a creditor. 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

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[10] *Lottering & others v Stellenbosch Municipality* (2010) 31 *ILJ* 2923 (LC).

[11] See ch 2, para 4.2 above regarding the position of fixed-term employees and also para 2.3 of this chapter regarding the definition of dismissal which would also protect fixed-term employees where a reasonable expectation of renewal of a fixed-term contract was created.

payment or benefits during this period. The employee may claim compensation from the Unemployment Insurance Fund ('UIF').[12]

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 mentioned 45 days. Unless there was an agreement of continued employment, all the suspended contracts will automatically terminate after the date of insolvency.

The employee is entitled to severance pay in terms of section 41 of the BCEA.[13] Section 197A was enacted to protect employees' interest in the case of insolvency, business rescue and liquidation and these have been discussed in Chapter 8 above.[14]

1.6 Termination as a result of retirement

An employee retires once she/he has reached retirement age. There is no uniform, national or official retirement age and it will depend on what was agreed in the contract, the 'normal' practice in the workplace or the rules of the relevant pension fund. The employer and employee can also during the course of employment agree to a new retirement age or change the previously agreed to retirement age. An employer may not impose a 'normal' retirement age if there was no prior agreement about this, as it would amount to a unilateral introduction of a new condition of employment.[15] When there is a normal or agreed retirement age in the workplace and an employee then reaches the mandatory retirement age and does not retire, the employer may demand retirement.[16] This will not amount to discrimination based on age and is specifically excluded from the scope of an automatically unfair dismissal.[17] In *Karan t/a Karan Beef Feedlot v Randall*[18] the employer allowed the employee to work beyond the agreed retirement age. The court held that once an employee is allowed to continue working past the normal/agreed retirement and no new agreement is reached on a new retirement date or age, the employer would then not be able to dismiss the employee subsequently on the basis of her/his age. If there is a dispute, the onus will be on the employer to

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[12] See ch 7, para 6.3 above for a discussion of the UIA.
[13] Section 38 of the Insolvency Act 24 of 1936 and s 41(2) of the BCEA. See ch 4, para 3.3.3 above.
[14] See ch 8, para 7 above.
[15] *Rubin Sportswear v SACTAWU & others* (2004) 25 *ILJ* 1671 (LAC).
[16] *Thembane v Revertex Chemicals (Pty) Ltd* (1997) 18 *ILJ* 174 (LAC).
[17] *Rubenstein v Price's Daelite (Pty) Ltd* (2002) 23 *ILJ* 528 (LC).
[18] [2012] 11 BLLR 1093 (LAC).

prove that the employee has indeed reached the normal or agreed-to retirement age[19] and was therefore compelled to retire.

2. TERMINATION OF THE CONTRACT OF EMPLOYMENT THROUGH DISMISSAL

2.1 Definition of dismissal

In terms of section 185(*a*) of the LRA every employee has the right not to be unfairly dismissed. An employer is allowed to dismiss an employee under certain circumstances and these are regulated by the LRA.

'Dismissal' is defined in section 186(1) to include any of the following situations:

(*a*) where the employer has terminated the contract of employment (with or without notice);

(*b*) an employee who was employed in terms of a fixed-term contract of employment reasonably expected the employer to renew that 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; or

an employee who was employed in terms of a fixed-term contract of employment reasonably expected the employer to retain the employee in employment on an indefinite basis with contract terms similar to that of the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

(*c*) an employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment;

(*d*) 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;

(*e*) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or

(*f*) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

[19] *Rockliffe v Mincom (Pty) Ltd* (2008) 29 *ILJ* 399 (LC).

In section 186(1)(*e*) and (*f*) the definition of dismissal makes provision for two instances where the employee terminates the contract of employment (in other words, resigns). These forms of dismissal are also called constructive dismissal and are discussed in more detail below.

2.2 Termination of a contract by the employer, with or without notice

> **Example:** Employee N is found guilty of insubordination and after a disciplinary hearing on 28 February he is dismissed. The employer agrees to pay him his notice period instead of him having to work March.

The BCEA[20] determines that an employer must give notice to an employee when terminating employment and the Act provides minimum requirements for such periods.[21]

The LRA amended the definition of dismissal to refer to 'termination of *employment*' instead of 'termination of the *contract of employment*'. This provides protection against dismissal whether or not there is a formal or written contract of employment.

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).

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.

> **Example:** M catches N red-handed as N takes R1 000 cash from the cash register on 3 March. After a disciplinary hearing on 6 March, N is dismissed. Because it is a serious breach of contract, the employer summarily dismisses N. In other words, N just gets paid until 6 March and do not get notice pay or serve a notice period of one month's notice, which would have allowed him to work on the premises for another month.

In some instances there is a statutory termination of the contract of employment. For example, in terms of sections 14(1) and (2) of the Employment of Educators Act,[22] where an employee absents her-/himself from work without

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[20] See ch 4, para 3.3.2 above.
[21] Section 186(1)(*a*).
[22] 76 of 1998.

permission for a period exceeding 14 consecutive days, they are deemed to have been discharged from the employment of the Department of Education. Such a deeming provision brings the employment contract between the employer and employee to an end by operation of law.[23]

The above scenario is only possible in terms of an act and should not be equated to dismissal. An employee has a right not to be unfairly dismissed and cannot contract out of this right and a contract cannot provide for the default termination of a contract of employment. For example, in *SA Post Office Ltd v Mampeule*[24] 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 this effect. 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.

2.3 Refusal or failure by the employer to renew a fixed-term contract or to appoint an employee indefinitely where she/he reasonably expected it to happen

> **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.[25]

In chapter 2 above the protection provided by section 198B of the LRA to fixed-term employees who earn below the BCEA threshold, was discussed. Employees appointed on such a fixed-term contract who earn above the BCEA threshold have protection in terms of this part of the definition of dismissal. If an employee reasonably expects 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, or if an employee reasonably expects the employer to retain her/him in employment on an indefinite basis on the same or similar terms as the fixed-term contract, but the

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[23] *Minister van Onderwys en Kultuur v Louw* 1995 (4) SA 383 (A).
[24] (2010) 31 *ILJ* 2051 (LAC).
[25] Section 186(1)(*b*).

employer offered to retain her/him on less favourable terms or did not offer to retain the her/him, it will amount to 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 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*[26] 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, it was no more than a financial plan. She had a hope of renewal but the employer never created a reasonable expectation to this effect.

2.4 Refusal to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment

> **Example:** When F returned to work after four months of unpaid maternity leave, Employer G informed her that the lady acting in her position had been a far better worker and F was therefore no longer needed in the business.

In terms of the BCEA an employee is entitled to four consecutive months' (unpaid) maternity leave.[27] If an employer refuses to allow an employee to resume work after having taken maternity leave, it amounts to a dismissal.[28]

This specific reference to absence during maternity leave 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 maternity protection.[29] Also remember that a dismissal relating to pregnancy will be automatically unfair.[30] The matter of dismissal of a female employee for any reason relating to her pregnancy is discussed in paragraph 4 below, under automatically unfair dismissals.

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[26] (2010) 31 *ILJ* 1152 (LC).
[27] See ch 4, para 3.2 above.
[28] Section 186(1)(*c*).
[29] This Convention promotes the equality of all women in the workforce and the health and safety of the mother and child.
[30] See para 4.6 below.

In *Heath v AN Paneelkloppers*[31] a pregnant employee was sent away from the workplace when she refused to resign on the employer's insistence. According to the employer she was very emotional as a result of her pregnancy and this was the reason why he wanted her to resign. He offered that she could re-apply for her position three months after the baby's birth. The next day she was prevented from returning to the workplace because, according to the employer, the landlord from whom the employer rented the premises did not condone her falling pregnant outside wedlock. Her personal belongings which were left at the office were consequently delivered at her home. The court held that the law clearly protects employees against dismissal for reasons related to pregnancy. The real reason for the dismissal was that the employer did not want pregnant employees because it was inconvenient and the employer acted and behaved in such a manner as to effectively cause the termination of the employment.[32]

2.5 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'.[33]

This type of dismissal will not necessarily always 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 as long as the employer followed a fair procedure and can justify the selection of only some of the employees for re-employment.

In *NUM & others v MCC Group of Companies*[34] the employer and trade union concluded an agreement under which some employees would be re-instated and others not. The court held that under these circumstances selective re-employment would not be unfair because the employer did not act arbitrarily in not selecting certain employees for re-employment.

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[31] (2015) 36 *ILJ* 1301 (LC).
[32] See also *Mnguni v Gumbi* (2004) 25 *ILJ* 715 (LC).
[33] Section 186(1)(*d*).
[34] (JS 681/ 2010) [2015] ZALCJHB 64.

In *Chevron Engineering (Pty) Ltd v Nkambule & others*[35] the employees requested permission to bring an African traditional healer to the work premises to cleanse it of some 'muti' which was allegedly causing illness amongst the employees. The employer refused and the workers consequently went on strike. The employer issued three ultimatums, to no avail. He dismissed the employees and informed them that he will re-open a few days later and the employees may then apply for the jobs which will still be available but that he cannot guarantee re-employment to any particular ex-employee. The employer then put up two lists; one was of the 100 employees offered re-employment and the other list comprised the names of the 24 employees who were not offered re-employment. The court held that by selectively re-employing only some employees while all employees were engaged in the same conduct, the employer treated the respondents in a 'shameful manner'. There was no justification for this differentiation and the employer's conduct amounted to an unfair dismissal by way of selective re-employment.

2.6 Constructive dismissal

> **Example:** X works for Z as receptionist. Z has tried to kiss X against her will on a number of occasions and Z also keeps on sending nude 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.[36] Although the employee (and *not* the employer) terminates the contract, it is not done voluntarily. The employer's conduct made it impossible for the employee to continue working for the employer.

In order to succeed with a claim of constructive dismissal the employee will have to prove the intolerability of the working relationship. The courts have interpreted this to mean that resignation was a matter of last resort. There must have been no other motive for the resignation and the employee would have continued with the employment relationship if it had not been for the employer's unacceptable conduct.[37] This test is objective and the mere fact that an employee resigned because she/he felt aggrieved is not sufficient. In the matter of *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre*[38] the employee approached the Human Resources Manager and demanded to immediately have access to, and be permitted to review 24 months' of clock cards as she had a query about her overtime payments. The

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[35] [2004] 1 All SA 137 (SCA).
[36] Section 186(1)(*e*).
[37] *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC).
[38] (2008) 29 *ILJ* 356 (LC).

busy manager got angry with her and swore at her. She neither followed an internal grievance procedure nor reported the matter to her direct head but rather resigned and claimed constructive dismissal. The court found that her resignation did not constitute a constructive dismissal as the situation was far from intolerable. There were other avenues that could have been used to resolve the matter which she refused to follow.

In *Copeland and New Dawn Prophesy Business Solutions (Pty) Ltd* (2010) 31 *ILJ* 204 (CCMA) the court held that an employee alleging constructive dismissal had to show:

> '… 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 *Niland v Ntabeni NO & others*[39] an employee resigned and said the reason for this was the affair which his wife had with his employer. From the evidence it was clear that the employee had known about the affair for several years and had forgiven both his wife and his employer. The court held that it was not a constructive dismissal and the true reason for his resignation was the fact that he secured alternative employment at a competitor.

Not all constructive dismissals are unfair. In *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*[40] an employee resigned after the employer changed the commission structure of all employees which led to a reduction in his income. 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 unfair. The employer acted fairly under the circumstances where he had to apply a uniform commission structure in the workplace and he followed a fair process in implementing it. 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.

[39] (2017) 38 *ILJ* 1686 (LC).
[40] (1997) 18 *ILJ* 361 (LAC).

2.7 An employee being provided with less favourable terms after the transfer of a business

> **Example:** Peter works for Lloyd Construction. Lloyd Construction sells its business to John's Building Construction. John's Building Construction 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. Peter finds these working conditions unbearable and resigns from John's Building Construction.

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, which were designed specifically to protect the interests of employees who are transferred between employers.[41] 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 'constructive dismissal'.[42]

The LRA aims to protect job security 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.

In *Almazest (Pty) Ltd v Alexander & others*[43] the court held that where an employee's gross income was reduced by about 45% after a transfer of a business as a going concern, it was unreasonable and it did not amount to the requirements set by the Act, namely, that of 'similar conditions of service'.

3. FAIRNESS OF A DISMISSAL

> Remember to look at the outline of termination of employment at the beginning of this chapter.

The regulation of dismissal through legislation is important because employers must be able to run their businesses effectively and productively. The main provisions regarding dismissal are found in sections 186 and 188 the LRA, and the Code: Dismissal. The LRA forbids unfair and automatically unfair

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[41] See ch 8 above where s 197 is discussed.
[42] Section 186(1)(*f*).
[43] (P03/2013) [2015] ZALCPE 33.

dismissals.[44] A dismissal will be substantively fair if it is done for one of the following three reasons:

- misconduct of an employee,
- incapacity of an employee (incapacity as far as work performance is concerned or incapacity as a result of temporary or permanent illness/ disability),
- operational reasons of the employer (these are, financial, technological, structural or similar needs).

It will be procedurally fair if it is done according to the process provided for by the Act.

Both substantive and procedural fairness are required for a fair dismissal. A dismissal could be unfair when:

- it is for the wrong reason but a fair process was followed (since the process is determined by the reason, it will rarely happen that there is a wrong reason and a correct process);
- it is for the right reason, but the wrong (or no) process was followed; or
- it was for the wrong reason, and the wrong process (or no process) was followed.

The LRA also creates an automatically unfair dismissal which is a dismissal which infringes a basic right of an employee or is for a reason relating to discrimination. These are discussed in more detail below.

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.

Example: 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. If the employer indicates that Mary was not dismissed because of her pregnancy but because of misconduct it might not be an automatically unfair dismissal. During her maternity leave, the employer discovered that she previously stole money. Since the

[44] This is in line with the ILO 'decent work' guidelines. This also echoes the words of Kahn-Freund (quoted in ch 1 above) about the purpose of labour law, which is to balance the interests of employers and employees.

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 dismissal, the LRA ascribes to the principle of progressive discipline.[45] 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 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*[46] the employee was suspended without pay for three months as a penalty 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*[47] 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, infringed their right to freedom of association and were automatically unfair.

Another example can be found in *Cash Paymaster Services, North-West (Pty) Ltd v CCMA*.[48] An employee who attended a training programme organised by the employer had to hand in an assignment on CD. The CD was blank although the student insisted that the assignment was saved on the disc. It was found that the employee lied and she was dismissed. The commissioner held that the employee's misconduct was not of such a serious nature that it affected the trust relationship. The commissioner held that a written warning would have been a more appropriate sanction.

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[45] See the Code: Dismissal, items 3(2); 3(3).
[46] (2010) 31 *ILJ* 1313 (LAC).
[47] (2013) 34 *ILJ* 978 (LC).
[48] (2009) 30 *ILJ* 1587 (LC).

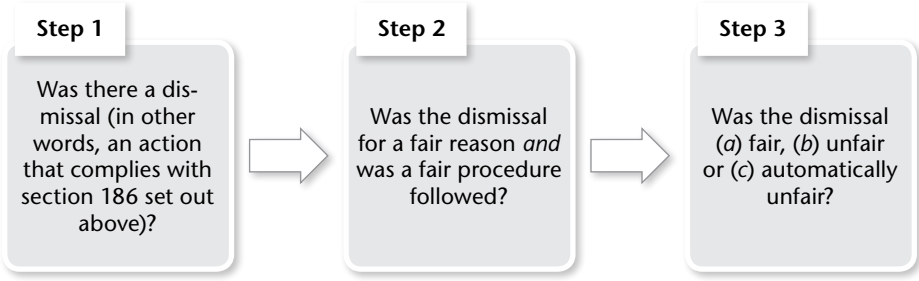
If an employee is dismissed and she/he feels that it was unfair, they must make use of the relevant dispute resolution institution stipulated by the LRA. The most important role players in this regard are:

- the CCMA, accredited agencies (for example, Tokiso) and bargaining councils, and
- the Labour Court and Labour Appeal Court.

As part of the discussion of automatically unfair dismissals specific dispute resolution routes will be discussed in paragraph 4.10 below.

3.1 Fairness of dismissal

Where an employee alleges that she/he has been unfairly dismissed, she/he must prove that the employer's conduct amounts to a dismissal as per the above definition. The onus then shifts to the employer to show that the dismissal was *not* unfair.



In Step 1 the obligation is on the employee[49] 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. Step 3 is the final determination on whether the dismissal is fair, unfair or even automatically unfair. The only way in which the employer will be able to prove that the dismissal was not unfair or automatically unfair will be to prove that:

- there was a fair reason for the dismissal (substantive fairness), and
- a fair procedure was followed (procedural fairness).

There are only three reasons for which an employee can be dismissed and the LRA prescribes a specific process for each of them.

[49] 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.

4. AUTOMATICALLY UNFAIR DISMISSAL

The LRA regards nine types of dismissals as automatically unfair. 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 protection 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;
> (*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.'

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 be used to justify an automatically unfair dismissal will be if:

- an inherent requirement of the job necessitates the infringement of a basic right which resulted in the dismissal, or

- an employee was dismissed because she/he had reached the normal or agreed-to retirement age.[50]

4.1 The employer acts contrary to section 5 (an employee's right to freedom of association)

Freedom of association is discussed in chapter 11 below 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.[51]

An important issue in this regard concerns *senior managerial employees'* right to freedom of association and specifically whether they can be dismissed when they refuse to resign as union officials. 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 as this would amount to an automatically unfair dismissal. In *IMATU & others v Rustenburg Transitional Council*[52] 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. If a conflict of interest then arises a senior managerial employee may be dismissed for breaching her/his duty to act in good faith and such a dismissal will not be automatically unfair.

4.2 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.[53] This protection extends to *protected* strikes only, as discussed in chapter 14 below.

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[50] 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.

[51] Section 187(1).

[52] (2000) 21 *ILJ* 377 (LC). See ch 11, para 2.5.3 below.

[53] Section 187(1)(*a*).

There are two exceptions to the rule where employees may be dismissed during a protected strike in cases of:

- misconduct, and/or
- operational reasons.

In *SATAWU & others v Collett Armed Security Services*[54] an employer was under the wrong impression that a strike was unprotected when it was not and dismissed a number of employees. These dismissals were automatically unfair and the employees received 13 months' salary as compensation.

4.3 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. The reason for this is that it would negate the effect of a strike if a non-striking employee could be forced to do another striking employee's work.[55]

If the employee however refuses to do her/his *own* work while the other employees are on strike, it will amount to insubordination.

4.4 Refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer

An employer may want to force employees to accept unfair terms and conditions of employment and threaten employees with dismissal if they refuse to accept these. The LRA prevents this with classifying this type of conduct as automatically unfair. In the past the LRA classified a dismissal to 'compel an employee to accept a demand made by the employer' as an automatically unfair dismissal. If an employer dismissed an employee to force the employee to accept a demand in respect of any matter of mutual interest between the employer and employee, it would have constituted an automatically unfair dismissal.[56] Such dismissal was regarded as such because an employer was 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*, whereas *terms and conditions* of employment may 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.

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[54] (JS 1280/09) [2013] ZALCJHB 239.
[55] Section 187(1)(*b*).
[56] Section 187(1)(*c*).

In *NUMSA & others v Fry's Metals (Pty) Ltd*[57] an employer wanted to change the shift system. The union refused 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 because 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 on 1 November with new employees willing to work the changed shift system. If half of the retrenched workers then returned remorseful and willing to accept the new system and were reappointed by the employer it 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 LRA was amended to now classify a dismissal as automatically unfair 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.

4.5 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.[58] This prohibits the victimisation of employees who exercise rights in terms of the LRA.

4.6 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

[57] (2001) 22 *ILJ* 701 (LC); *Fry's Metals v NUMSA & others* (2003) 42 *ILJ* 133 (LAC).
[58] Section 187(1)(*d*).

unfair dismissal.[59] This provision has given rise to more litigation than any other automatically unfair reason for dismissal.[60]

An example of this is found in *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)*.[61] 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 not the real 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.[62] The dismissal constituted an automatically unfair dismissal. This interpretation is correct and important since some employers still discriminate against 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*[63] a candidate attorney did not disclose her pregnancy during an interview for appointment. Once 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 her pregnancy has not amounted to deceit.

Section 6 of the EEA prohibits discrimination against job applicants on a number of grounds including pregnancy.[64] 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.

4.7 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.[65] The only two reasons why a dismissal on an arbitrary ground could be justified would be where it is done for reasons of an inherent requirement of the particular job, or age if

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[59] Section 187(1)(*e*).

[60] N Smit & M Olivier 'Discrimination based on pregnancy in employment law: The case of *Woolworths v Whitehead*' (2002) *TSAR* 783.

[61] (2010) 31 *ILJ* 180 (LC).

[62] See ch 4, para 3.2 above.

[63] (2000) 21 *ILJ* 402 (LC).

[64] See ch 5, para 2.3 above.

[65] Section 187(1)(*f*). Remember that s 6 of the EEA also prohibits unfair discrimination against employees. See ch 5, para 4 above.

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*[66] 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 not made any misrepresentations during his interview since he had a right to privacy and was, therefore, not obliged to disclose his HIV status during the interview. Moreover, the employee argued that by removing him from the premises, his dignity was impaired.[67]

The employer argued that the employee was severely ill and would not be able to do his work as stable-yard manager, trainer and riding instructor. The evidence, however, 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 as a result if his allergy. 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.[68]

In *Department of Correctional Services & another v POPCRU & others*[69] some male prison officers were dismissed for refusing to cut their dreadlocks. Three of them refused based on their religion as being Rastafarians and two because they were being called to become sangomas. The Supreme Court of Appeal found that the dismissals were automatically unfair since their dismissal resulted in unfair discrimination on the basis of religion and also gender since

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[66] (2011) 32 *ILJ* 1637 (LC).

[67] See also ch 5, para 2.3 above.

[68] 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 indignified and homeless.

[69] (2013) 34 *ILJ* 1375 (SCA).

female prison guards had been allowed to wear dreadlocks. The employer could not prove that an appearance with no dreadlocks was an inherent job requirement or that it affected the officers' ability to perform their duties by jeopardising prison safety measures.

4.8 Transfer of a business

Transfers of a business as a going concern was discussed in chapter 8 above. Dismissal because of a transfer of a business as a going concern will be automatically unfair.[70] For example, an employer who buys a business as a going concern is entitled to restructure the business.[71] But if, for example, all the transferred employees are dismissed as a result of the restructuring, that would probably be automatically unfair. The circumstances of each case will determine the period after the transfer for which this protection will last.

In *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd*[72] the employee was retrenched shortly after the company he worked for merged with another company. The employee claimed that his dismissal was automatically unfair because he was retrenched three weeks after the merger. The court held that the proximity of the transfer and the dismissal constituted a causal link between the dismissal and the transfer. The employer could not show good reason for the dismissal and it was found to be automatically unfair.

4.9 Protected disclosures

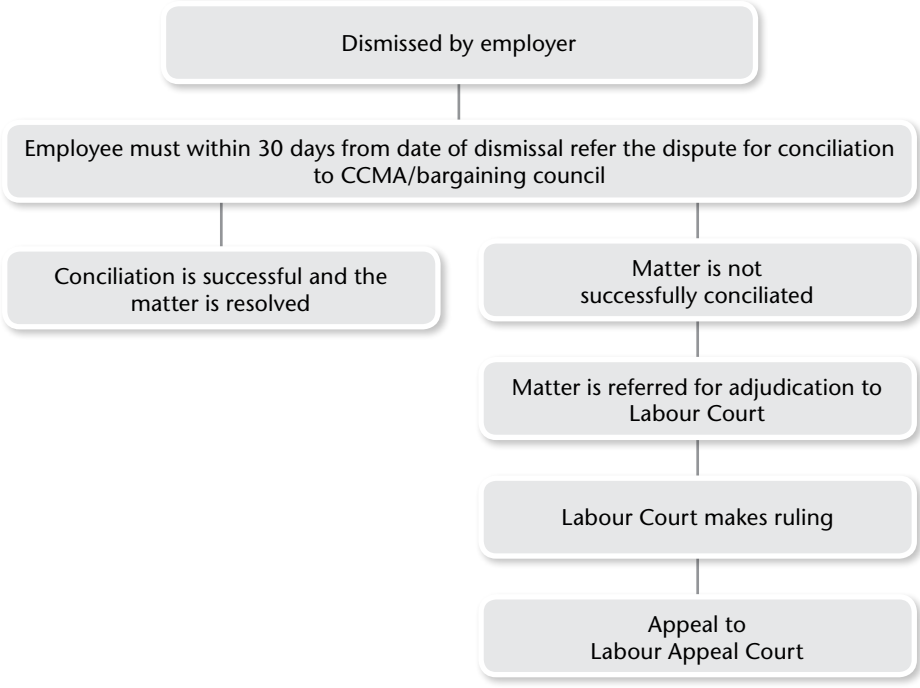
Dismissal for making a protected disclosure ('blowing the whistle') in terms of the PDA will be automatically unfair.[73] The PDA defines what actions will constitute a protected disclosure. A 'protected disclosure' is the disclosure of factual information in good faith about alleged criminal activity which the employee reasonably believe is true.[74]

In *Sekgobela v State Information Technology Agency (Pty) Ltd*[75] 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.

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[70] Section 187(1)(*g*).
[71] *Forecourt Express (Pty) Ltd v SATAWU* (2006) 27 *ILJ* 2537 (LAC).
[72] (2008) 29 *ILJ* 1564 (LC).
[73] Section 187(1)(*h*). See ch 6, para 5.8 above for a discussion of further case law in this regard.
[74] The definition was discussed in ch 6, para 5.8.2 above.
[75] (2008) 29 *ILJ* 1995 (LC).

4.10 Dispute resolution for an automatically unfair dismissal



In a dispute regarding an alleged automatically unfair dismissal, the employee must show that there was a dismissal and the reasons for it as set out above.[76] The employer must then show that it was not for one of those reasons. 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 necessitated 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 people employed in that capacity.

The compensation awarded to an employee whose dismissal is automatically unfair must be 'just and equitable' in the circumstances, but not more than the equivalent of 24 months' remuneration.[77]

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 earns less than the BCEA threshold, may also be referred to the CCMA.

The LRA as amended also makes provision for the appointment of an arbitrator to conduct a pre-dismissal inquiry into the conduct or capacity of an employee even in a dispute relating to a protected disclosure. If an employee

[76] Paragraphs 5.1–5.9 above.
[77] Section 194(3).

is suspended pending an investigation in this regard it will not amount to an occupational detriment.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Identify the *correct* statement:
   (*a*) It will constitute an automatically unfair dismissal where an employee is dismissed after participation in an unprotected strike.
   (*b*) It will constitute an automatically unfair dismissal where a lesbian employee is dismissed for insubordination.
   (*c*) It will constitute an automatically unfair dismissal where an employee is dismissed after making a protected disclosure.
   (*d*) It will constitute an automatically unfair dismissal where an employee is dismissed after the employee admitted he was guilty of misconduct.
2. Briefly discuss what an employee would have to prove if she/he claims to be constructively dismissed.
3. Thandi has been working at Succulent Steaks as a waitress for three years. After she falls pregnant the employer informs her that he is concerned about the fact that she must spend time on her feet and she should rather resign and stay at home. He would also consider re-appointing her once the baby has been born. Thandi cannot afford to lose her job. Moreover, Thandi suffers from high blood pressure as a result of the pregnancy and is booked off for three days. Upon her return the employer tells her that she is an unreliable worker and should look for a job where she can come and go as she pleases. Thandi asks you for advice on whether the employer's conduct is allowed by the LRA.

✓ Feedback

1. Statement (*c*) is *correct*.

   Statement (*a*) is not correct because dismissal after an unprotected strike is allowed as it breaches the contract of employment.

   Statement (*b*) is incorrect because the employee was not dismissed for being lesbian but for insubordination.

   Statement (*d*) is incorrect because a dismissal for misconduct will not be automatically unfair even if the employee confessed to it.
2. A constructive dismissal is a form of dismissal where the employee resigns because the employer made continued employment intolerable. The employee must show that she/he resigned as a matter of last resort. This means that they must show they did not want to resign but had no other option. They must also show that they exhausted internal grievance procedures. The test to determine 'intolerability' is an objective test.
3. If an employer refuses to allow an employee back from maternity leave it will constitute a dismissal. It will further be an automatically unfair dismissal because the reason for the dismissal is linked to the employee's

pregnancy. The employer was not really concerned about the baby but did not like the inconvenience of having a pregnant employee that would be away for four months on maternity leave.

RECOMMENDED READING

1. Le Roux PAK 'Automatic terminations of employment: The Labour Court's express sceptism' (2010) 19 *Contemporary Labour Law* 101
2. Rycroft A 'The intolerable relationship' (2012) 33 *ILJ* 2271
3. Mischke C 'HIV status and dismissal: Exploring when the two are related' (2011) 20 *Contemporary Labour Law* 86
4. Moodley D & Whitear-Nel N 'Some thoughts for compensation and damages for automatically unfair dismissals and discrimination: A discussion of *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 *ILJ* 1190 (LC)' (2015) 36 *ILJ* 907
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

10

Fair and unfair dismissals, and dispute resolution

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1. DISMISSAL FOR MISCONDUCT

Remember the outline of dismissal at the beginning of Chapter 9. In this chapter we will look at the reasons and processes to ensure that a fair dismissal takes place and will also discuss the consequences of an unfair dismissal.

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. It includes rules which are so well-known that the employer can reasonably expect the employee to be aware of them. These well-known rules would include not to steal or not to assault a co-employee or to act in the best interest of the employer. These apply implicitly and need not be included in the contract of employment.

> **Example:** David is employed as a mechanic by Elite Cars but also repairs cars for his own account after hours. This will constitute misconduct because David is breaching his common-law duty to act in the best interests of Elite Cars and he is also in competition with Elite Cars.

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

determines that all employers should adopt disciplinary rules to ensure that employees know the required standard of conduct.

These must be communicated to them in a manner that they understand which 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 set of facts:

> **Example:** Employer Elaine struck bad traffic on the way to work. When she arrived at the office she noticed employee Fatima busy on Facebook. She grabbed Fatima by the collar and later handed her 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 only Fatima was 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 in cases of dismissal for misconduct:[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 the 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.

---

[1] Items 2; 7.

[2] See the discussion of progressive discipline in ch 9, para 3 above.

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.

In *Edcon Ltd v Pillemer NO & others*[3] the court held that where an employer alleges that there was a breakdown in the trust relationship which resulted in dismissal as a sanction for misconduct, the employer must lead evidence to this effect, otherwise dismissal might not be an appropriate sanction. In *Bidserv Industrial Products (Pty) Ltd v CCMA & others*[4] the Labour Appeal Court, however, held that dishonesty is serious misconduct and 'destroys the substratum' of the employment relationship and warrants dismissal. In *Impala Platinum Ltd v Jansen & others*[5] the court confirmed that gross misconduct goes to the 'root of the employment relationship' and the employer is in such a situation not required to lead evidence with regard to the breakdown of the trust relationship. According to the court, 'no employer can be expected to retain a delinquent in employment' and dismissal under these circumstances would be jutsified.

1.2 Substantive fairness for different types of misconduct

It is impossible to list all types of misconduct that can occur at 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.

Case law provides examples of various forms of misconduct for which employees could be disciplined or dismissed. The examples are listed below and it first states the principle, whereafter an illustration and application are given in a set of facts.

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

[3] (2009) 30 *ILJ* 2642 (SCA).
[4] (2017) 38 *ILJ* 860 (LAC).
[5] (2017) 38 *ILJ* 896 (LAC).

late-coming but dismissal may be appropriate for repeated incidents of late-coming or poor time-keeping.

Abscondment or absence without leave ('AWOL') should be distinguished from desertion. The differences between these are illustrated below.

> **Example:** Rasheed works for Shoes Galore. After the Christmas holidays he does not return to work. Shoes Galore has endeavoured to contact him without success. He shows up two weeks later and informs Shoes Galore that he was in jail for drunken driving and he only got out on bail the previous day. Rasheed was absent without leave but never intended to terminate his employment relationship. The employer can therefore not assume that he resigned and should listen to his excuse. Shoes Galore would not be able to dismiss Rasheed although they do not have to pay him for his period of abscondment.

(*b*) Application

> **Example:** Sipho often pretends to have a migraine on a Friday and then takes sick leave. Freddy, a colleague of Sipho was also booked off sick but was seen shopping every day during his sick leave.
>
> Both Sipho and Freddy are abusing their sick leave and are dishonest. 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*[6] 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.

AWOL	Desertion
• If the employee does not want to terminate the employment contract, but stays away from work without leave. • It 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.

[6] (1995) 16 *ILJ* 1505 (LAC).

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

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,[7] religious discrimination,[8] sexism[9] 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*[10] an employee was dismissed for swearing at his superior. In this case the employees regularly and liberally used swear words on the shop floor and even the supervisor admitted to swearing from time to time.[11] The Labour Court found that dismissal was not appropriate in this case.

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 racially offensive e-mails or making racial remarks in the workplace constitute misconduct and warrants dismissal. In *SACCAWU obo Sikhundla and Radisson Blu Hotel Waterfront*[12] an employee who had made false allegations of racism against another employee was fairly dismissed. False accusations of racial discrimination against co-employees or the employer 'must be addressed zealously if such allegations are baseless'.[13]

In *NUMSA obo Smith and Hilfort Plastics—A Division of Astrapak Manufacturing Holdings (Pty) Ltd*[14] 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 were held to be unfair. The actions of the employees undermined workplace relations and constituted serious offences.

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[7] *NUM & another v CCMA & others* (2010) 31 *ILJ* 703 (LC).
[8] *Cronje v Toyota Manufacturing* (2001) 22 *ILJ* 735 (CCMA).
[9] *Rautenbach v Relyant Retail (Pty) Ltd* [2005] 8 BALR (CCMA).
[10] (2010) 31 *ILJ* 1425 (LC).
[11] 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.
[12] (2010) 31 *ILJ* 1500 (CCMA). See also *City of Cape Town v Freddie & others* (2016) 37 *ILJ* 1364 (C) which is discussed in ch 5, para 1.2.2 above.
[13] At para 45.
[14] (2014) 34 *ILJ* 325 (BCA).

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 an employee.

(*b*) Application

Dismissal as an appropriate sanction for theft is generally accepted. The application in circumstances where the *value* of the property stolen was minimal has been contentious.

In *Miyambo v CCMA & others*[15] an employee who stole a piece of scrap metal was fairly 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 *SACCAWU obo Bolashe and Pinzon Traders (Pty) Ltd*[16] 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 these circumstances.

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*[17] the employer experienced a 28% loss of clothing stock at a small branch. The employees at the branch refused to help the employer get to the root of the losses and 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'.[18] In *SACCAWU obo Molele & others/Mr Price*[19] the commissioner held that team misconduct may be relied on only if the employer has proved that it had

---

[15] (2010) 31 *ILJ* 2031 (LAC).
[16] (2010) 31 *ILJ* 1974 (CCMA).
[17] (2010) 31 *ILJ* 1787 (LAC).
[18] At para 57.
[19] [2010] 10 BALR 1105 (CCMA).

an effective system (such as video cameras) in place as well as processes for curbing theft or to reduce losses.[20]

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 even if it happens after hours, and/or off the employer's premises, provided that the link exists in the particular circumstances. This was the case in *NUM & others v ERGU Company Ltd*[21] where an employee who attacked his supervisor on the bus to work, was fairly dismissed. In *Moloto and Gazelle Plastics Management*[22] 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. In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others*[23] an employee did not disclose two criminal convictions in his employment application. When this was discovered after a long period of employment he was dismissed. The court held that this concealment of the true facts constituted misconduct and the long period of time between the application and discovery of the dishonesty does not negate the seriousness of the misconduct.

1.2.4 *Other forms of misconduct*

There are a number of other forms of misconduct that may warrant dismissal. The examples below are common forms of misconduct and are not discussed in detail:

- assault,[24]
- conflict of interest,[25]
- damage to property,[26]
- intimidation,[27]

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[20] At 1116E–1117A. See PAK le Roux 'Mass dismissals and "team misconduct"—When the whole is greater than the sum of its parts' (2010) 20(3) *Contemporary Labour Law* 81.

[21] (1986) 7 *ILJ* 739 (IC) at 743E–F.

[22] (2013) 34 *ILJ* 2999 (BCA).

[23] (2017) 38 *ILJ* 881 (LAC).

[24] *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madlala* [2008] 6 BLLR 535 (SCA).

[25] 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.

[26] *CEPPWAWU obo Malinga & others/Chemical Specialists Ltd* [2008] 10 BALR 907 (NBCCI). In *SATAWU v Garvis & others* (007/11) [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.

[27] *NUMSA obo Buthelezi & other/Innovatible Mining Products* [2008] 10 BALR 921 (MEIBC).

- sexual harassment,[28] and
- alcohol and drug abuse.[29]

1.3 Procedural fairnes

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:** Gina, an employee, assaulted her employer Hannah in the workplace in the presence of other employees. Hannah removed Gina from the premises and never communicated with her again. If Gina 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 that Gina (who was the one who had assaulted Hannah) must be compensated by Hannah. This is correct because Gina 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.

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.[30]

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

[28] *Christian v Colliers Properties* [2005] 5 BLLR 479. In *Media24 Ltd & another v Grobler* [2005] 3 ALL SA 297 (SCA) a female employee was sexually harassed, resigned and claimed constructive dismissal. The court found that her resignation was an automatically unfair constructive dismissal. The Supreme Court of Appeal acknowledged that the employee will also have a delictual claim against the employer based on vicarious liability. See ch 3, para 3 and ch 5, para 4.1.3(*a*) above.

[29] In the case of certain kinds of incapacity, eg, alcoholism/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 commissioner 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 (item 10(3)).

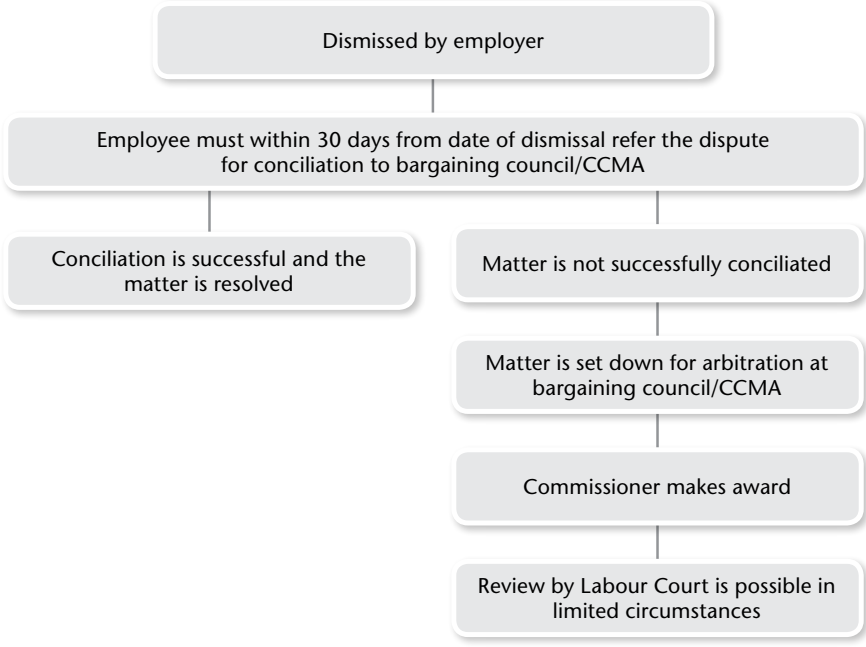
[30] The rule that an employee must get an opportunity to state a case in response to allegations, is called the *audi alteram partem* principle (item 4 of the Code: Dismissal).

Step	Action	Yes/No
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 pre-dismissal 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.

1.4 Dispute resolution for a dismissal based on misconduct



If an employee is of the opinion 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. A dispute for unfair dismissal is referred to the CCMA by way of Form 7.11, attached as Annexure C at the back of the book.

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).

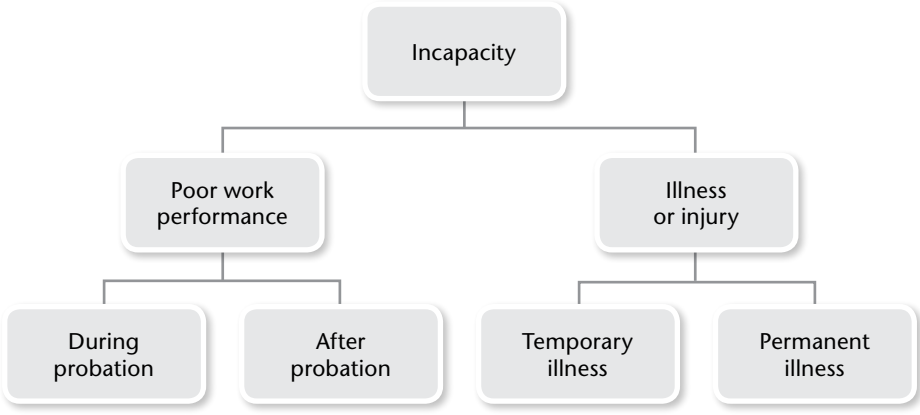
The LRA caps the amount of compensation that can be awarded for an unfair dismissal. A maximum of 12 months' salary can be awarded as compensation to an employee whose dismissal is found to be substantively and/or procedurally unfair.[31]

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 incapacity. Incapacity is regulated in terms of section 188 of the LRA, and it refers to cases where poor work performance, 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:** Dorah works at Beauty Hairdresser. She highlights a client's hair and it turns out purple instead of blonde. Is Dorah guilty of misconduct or poor work performance?

[31] Section 194(1).

This very fine line between incapacity and misconduct was illustrated in *Boss Logistics v Phopi & others*.[32] 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.[33]

Another example 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 and therefore drunk at work, the employer should rather consider incapacity (and not misconduct) as the ground for dismissal because the Code: Dismissal[34] requires employers to regard alcoholism and drug abuse as incapacity and recommends counselling and rehabilitation rather than dismissal.[35] The circumstances of each case will indicate whether it is a matter of misconduct or of incapacity based on substance abuse.[36]

Since dismissal for incapacity is regarded as a form of no-fault dismissal, the process is more accommodating and collaborative than the process for a misconduct dismissal. The act prescribes specific processes that must be followed when an employee is dismissed for incapacity during and after probation and also for dismissal as a result of temporary and permanent disabililty.

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 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.

[32] (2010) 31 *ILJ* 1644 (LC).
[33] At 1652H–1653B.
[34] Item 10(3).
[35] See n 29 above
[36] Items 9; 10.

- 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 employee cannot, the question is to what extent the employer must help the employee.

Example: Katrina is a permanent employee and Lettie 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 not to make Lettie's appointment permanent based on poor work performance. It might not be fair at this stage to dismiss Katrina for poor work performance and further training or assistance might be necessary.

The reason for dismissing a probationary employee can be 'less compelling' than those for dismissing an employee whose appointment has been confirmed.[37]

2.3 Poor work performance after probation

After probation and 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, and

[37] Item 8(1)(*j*).

- during this process the employee has the right to be heard and to be assisted by a union representative/a co-employee.

If the employee then continues to perform unsatisfactorily, she/he can be dismissed for poor work performance.

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 she/he is dismissed.

The Code: Dismissal specifically states that an employer should attempt to accommodate an employee injured on duty in the workplace.[38] This means 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 injury/disability.

The employer need not accommodate a qualified applicant or an employee with an injury/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/illness.[39] 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*[40] two employees insisted that they were too ill to work. They persisted with this while failing to provide any

[38] 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 part of the 'decent work' agenda, namely, to prevent injuries but also to provide compensation if an employee is injured.

[39] 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.

[40] (2013) 34 *ILJ* 2711 (BCA).

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*[41] an employee was dismissed for constantly arriving late for work. The arbitrator found the dismissal to be unfair beca`wuse the employer failed to take into account that the employee suffered from a medical condition which prevented him from driving a car and he therefore had to 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/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:
  - 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 (with the assistance of 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		

[41] (2013) 34 *ILJ* 1870 (BCA).

Did the employer take the following into account?	Yes/No	Finding
5. The degree of incapacity		Employer will have to be able to substantiate the answer if yes, or give a reason why not, if no.
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 discussion. 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.[42] For example, in *Tshaka and Vodacom (Pty) Ltd*[43] 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*[44] 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 still 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

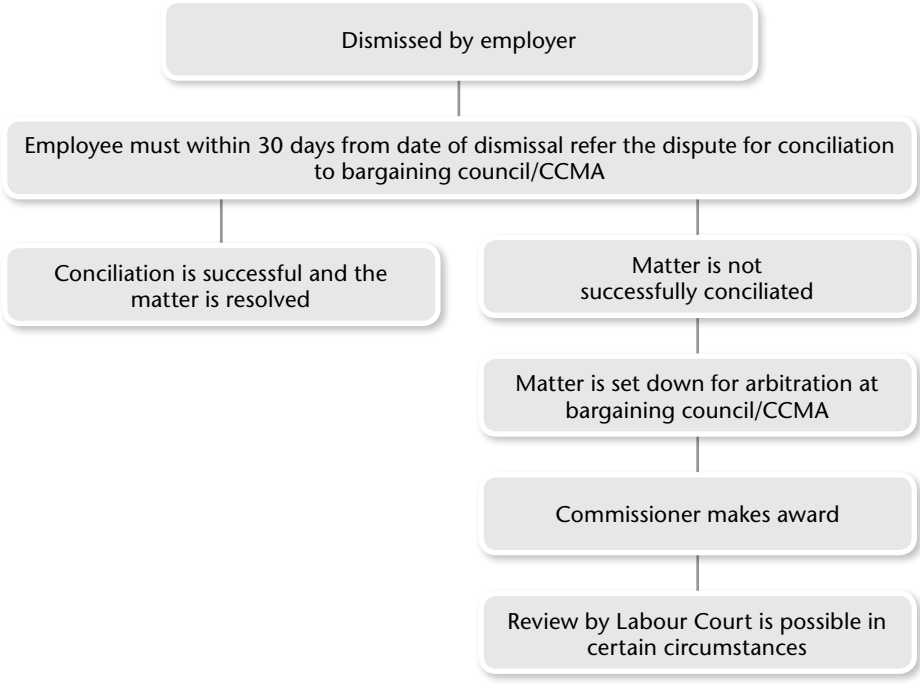
Integrated example: It has been said earlier that it is important not to put the law into separate compartments. In a practical situation the possible impact of the law in totality should be taken into account. This can be illustrated by way of an example where an employee has been injured.

Philemon works for Lerato as a painter. While painting he fell off the scaffolding, broke his neck and is now paralysed. Kenny also works as a painter for Lerato and also fell off the scaffolding. He only broke his arm.

[42] See items 9; 10; 11 of the Code: Disability.
[43] (2005) 26 *ILJ* 568 (CCMA).
[44] (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.

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 Philemon, who is permanently incapacitated, nor Kenny, who is temporarily incapacitated, can be dismissed unless Lerato complies with the requirements of substantive and procedural fairness as discussed above.
- BCEA: This Act regulates sick leave and will determine the period of absence of Philemon and Kenny.[45]
- EEA: This Act deals with the prohibition of discrimination on the basis of disability. People with disabilities also qualify as a designated group. This might be relevant depending on circumstances.[46]
- COIDA: Since both Philemon and Kenny were injured on duty they will probably qualify for compensation in terms of the COIDA.[47]
- If Philemon and Kenny do not qualify for a benefit in terms of the COIDA they may claim from the UIA.



[45] See ch 4, para 3.2 above.

[46] 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*)). Also see item 10(1) of the Code: Disability.

[47] See ch 7, para 6 above.

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[48] 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 relate to the financial management of the enterprise including financial 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. Two examples of similar needs are where an employee is incompatible with the workplace or co-employees and where there is a breakdown in the trust relationship between the employer and employee.

3.2 Number of employees affected and operational reasons

The number of employees that will be dismissed for operationl reasons will determine the process and related fairness requirements which should be followed. The LRA makes a distinction between:

- 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

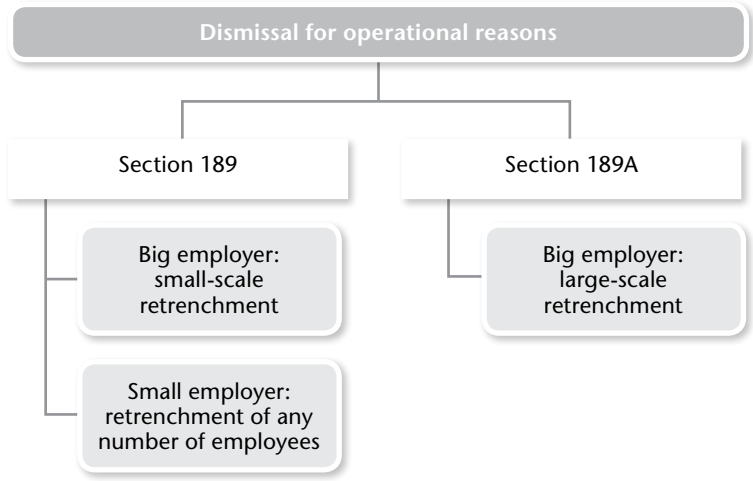
[48] Section 213.

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
- 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: Billy employs 500 employees and retrenches five employees. Sam employs 10 employees and retrenches six employees. Rupert 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.

- Billy is a big employer, but the retrenchment does not constitute a large-scale dismissal. The dismissal would therefore have to be in accordance with section 189.

- Sam is a small employer. The LRA does not make provision for a large-scale dismissal by a small employer. Sam, as a small employer, will therefore retrench employees in accordance with section 189 in this example (and in all further retrenchments).
- Rupert 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. Rupert 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 an 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 Eddie wants to buy a machine to make the business more profitable, that is Eddie's prerogative. If this means that five employees will lose their jobs, the question is whether the court or the employees can prevent Eddie from buying the machine.

3.3.1 *Economical, structural or technological needs*

The courts are generally hesitant to interfere in the business decisions of organisations. In *Kotze v Rebel Discount Liquor Group (Pty) Ltd*[49] 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.[50] Rather, the court itself should determine whether retrenchment had a reasonable basis and commercial rationale. Still later the court held that the retrenchment should remain a matter of last resort.[51]

In *Welch v Kulu Kenilworth (Pty) Ltd & others*[52] 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

[49] (2000) 21 *ILJ* 129 (LAC).
[50] *BMD Knitting Mills (Pty) Ltd v SACTWU* (2001) 22 *ILJ* 2264 (LAC).
[51] *CWIU & others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC).
[52] (2013) 34 *ILJ* 1804 (LC).

shareholders or directors of an increasingly insolvent company to 'fritter away their own resources to keep the entity afloat'.[53]

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 as follows.[54] According to section 189A, a dismissal will be substantively fair if:

- 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.

3.3.2 *Similar needs*

Another aspect that should be explained in more detail is the meaning of 'similar needs' as contained in the definition of operational needs. It can refer to situations where an employee is dismissed as a result of:

- a breakdown of the trust relationship,
- incompatibility, or
- changes to employee's terms and conditions of employment that are necessary.

(*a*) Breakdown of the 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.[55]

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[53] At 1804.

[54] This definition seems to have limited managerial prerogative to some extent as far as retrenchments are concerned (see *SATAWU v Old Mutual Life Assurance Company South Africa Ltd* [2005] 4 BLLR 378 (LC)).

[55] *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd* is an example where the court held that the dismissal of an employee on suspicion of theft, had been fair.

(*b*) Incompatibility

In *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd*[56] 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*[57] 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.

(*c*) Changes to employee's terms and conditions that are necessary

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.[58]

3.4 Procedural fairness in terms of section 189

The process for retrenchment is extensive and important to ensure fairness. The genuineness of the employer's operational needs will become clear through the transparency and cooperation, if any, during the negotiations. 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*[59] 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.[60]

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.

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[56] (1987) 8 *ILJ* 437 (IC).
[57] (1993) 14 *ILJ* 227 (IC).
[58] See ch 9 above where the case of *Fry's Metals* was discussed.
[59] (2010) 31 *ILJ* 1436 (LC).
[60] At para 30.

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 yet reached a final decision* to dismissbut has merely foreseen the possibility. In *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 *ILJ* 642 (LAC) the Labour Appeal Court interpreted this to mean 'at the earliest opportunity'.	
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 to 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. • 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 employee was told that the employer was considering retrenchments and a severance package, was not sufficient to constitute consultation. Such an abrupt process fell short of pre-retrenchment requirements as set out in the LRA, particularly if one looks at the aim of such consultation. The employee's consequent dismissal was thus procedurally unfair. In *AMCU & others v Shanda 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 Dhlamini & others* (2013) 34 *ILJ* 108 (LAC) the employer did not consult with the employees but only invited them to come and speak to them. The court held the dismissals to be unfair.	

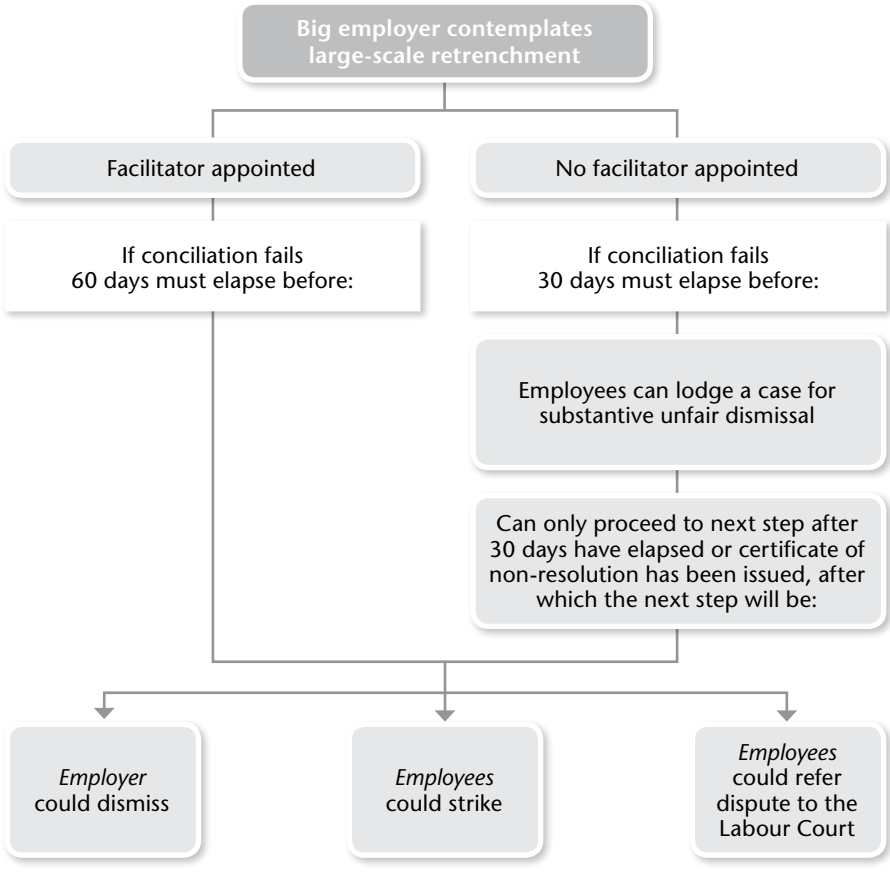
Requirement	✓
Did the employer disclose relevant information in writing? Sections 16 and 189(3) of the LRA compel an employer to disclose only *relevant* information. The other party's right to demand information is however not unrestricted. In terms of section 16(5) four categories of information need *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).	
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 a fair and objective selection criterion? The LRA prescribes that a fair and objective selection criterion must be agreed upon and used. 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 Dhlamini & 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 CEPPWAWU* (2014) 35 *ILJ* 140 (LAC) retrenched employees refused the employer's offer of alternative employment on the same or increased salaries. 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 as it is not unreasonable to refuse.	

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.

This amendment makes provision for the involvement of a facilitator in the process and her/his role is 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. 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 either refer a dispute about the *substantive fairness* of the dismissal to the Labour Court or to strike. 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 in this regard. Once they have elected their appropriate course of action they may not change it later.[61]

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.[62] 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. In *Steenkamp & others v Edcon Ltd*[63] the Constitutional Court had to decide what the effect was where no facilitator was appointed in the case of a large-scale retrenchment and where the employer issued the employees with notices of termination of employment before the expiration of the minimum consultation period set by the LRA. The trade union argued that this non-compliance with the time limits made the dismissals invalid and therefore all the employees should be reinstated with full back pay. The employer argued that the concept of 'invalid termination' came from the common law and could not be used, since the LRA only makes provision for either a fair or unfair dismissal. The court agreed with the employer, namely, that non-compliance with the LRA[64] may impact on the procedural fairness of the dismissals. Instead of relying on the common-law remedies the union should have turned to the remedies of the LRA, for example, embarking on strike action, referring the dispute to the Labour Court seeking, for example, an order compelling the employer to comply with a fair procedure, interdicting the employer from dismissing employees prior to complying with a

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[61] 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 a dispute about organisational rights (see ch 11, para 2.5.3, n 30 below).

[62] 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.

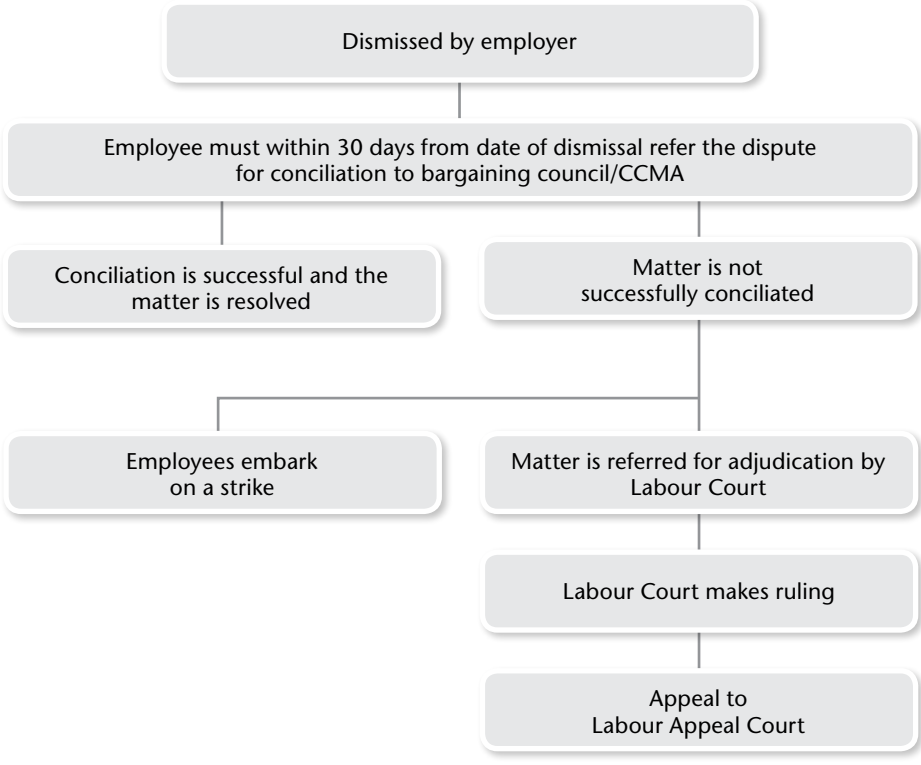
[63] (2016) 37 *ILJ* 564 (CC).

[64] Section 189A(8).

fair procedure, or directing the employer to reinstate employees until it has complied with a fair procedure.

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 only one employee is retrenched. Such an employee has the choice to refer the dispute either to the CCMA or to the Labour Court. This is not to limit a single employee who may be unable to afford the legal costs of Labour Court litigation.

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 existed and a fair procedure had been followed. This is in line with the 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) were 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 the CCMA or bargaining council (and retain proof that it has been sent). The CCMA or bargaining council will then set a date for conciliation and arbitration. In a civil claim where summons is issued, it must be served on the other part by the sheriff of the court and then after pleadings have been exchanged between the parties they will apply for a hearing date.
- The involvement of legal representatives (attorneys and advocates) in the process, especially at the CCMA, is limited. In terms of Rule 25 of the CCMA a party to a dispute may in arbitration proceedings before the CCMA appear in person or be represented by a legal practitioner but this right is restricted if the dispute being arbitrated is about the fairness of a dismissal as a result of the employee's conduct or capacity. This restriction can be relaxed if:
  - the commissioner and all the other parties consent, or
  - if the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering relevant factors, such as:
    - the nature of the questions of law raised by the dispute,
    - the complexity of the dispute,
    - the public interest, and
    - the comparative ability of the opposing parties or their representatives to deal with the dispute.[65]

The dispute resolution routes have already been discussed above for every type of dismissal. It is, however, important to also describe the following processes in more detail.

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[65] In *CCMA v Law Society, Northern Provinces* (005/13) [2013] ZASCA 118 the Supreme Court of Appeal confirmed that Rule 25(1)(c) which limits the right to legal representation at the CCMA, is not unconstitutional and serves a rational purpose.

4.1 Conciliation

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 operational 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 a process 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. The parties can then apply for arbitration of the dispute.

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 such 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 an appeal and a 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.

A review application must be filed within six weeks' from the date of receipt of the arbitration award. Once a party filed for a review application she/he must apply for a court date within six months' of filing of the application.

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.[66]

> In the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[67] the test for review was formulated as follows:[68]
>
> '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)*[69] where the Supreme Court of Appeal warned that this test does not mean that there was, 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, this 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.

Section 145(7) of the LRA provides specifically that the institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court. In the case of an order of reinstatement or re-employment the security furnished should be equivalent to 24 months' remuneration or in the case of an order of compensation it must be equivalent to the amount of compensation awarded. These provisions were added to protect employees where an employer took matters on review just to delay the implementation of arbitration awards.

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[66] Section 145.
[67] [2007] 12 BLLR 1097 (CC).
[68] At para 69.
[69] (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, where compensation will rather be awarded.[70]

- where the employee does not wish to be reinstated or re-employed,
- where the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable,
- where it is not reasonably practicable for the employer to reinstate or re-employ the employee, or
- where the dismissal is unfair only because the employer did not follow a fair procedure.

In *SARS v CCMA*[71] the court concluded that once the arbitrator had concluded that the employee's dismissal was unfair he had to consider whether reinstatement would be appropriate and in doing so he needs to look at the seriousness of the misconduct and its potential impact on the workplace.

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.[72]

It is calculated at the employee's rate of remuneration on the date of dismissal.

Remember that for an automatically unfair dismissal the compensation awarded must be 'just and equitable' in all the circumstances, but not more than the equivalent of 24 months' remuneration.[73]

Within these limits the commissioner and court have a discretion to award compensation. In *Equity Aviation Services (Pty) Ltd v CCMA & others*[74] it was held that this discretion operates at two levels. On the one hand it must decide whether or not to award any compensation pursuant to a finding of unfairness and on the other hand,it must determine what would be 'just and equitable' compensation under the specific circumstances. The main criterion is that compensation must be just and equitable.

4.5 Pre-dismissal inquiry

In some instances the employer may, with consent of the employee, apply for a pre-dismissal inquiry (previously called 'pre-dismissal 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.

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[70] Section 193(2).
[71] (2017) 38 *ILJ* 97.
[72] Section 194(1).
[73] Section 194(3).
[74] 2009 (1) SA 390 (CC).

4.6 Jurisdiction of the courts in labour disputes

The LRA envisaged three specialist labour dispute institutions to resolve matters, namely the CCMA, the Labour Court and the Labour Appeal Court. 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.

The processes at the CCMA were discussed above. The Labour Court has the same status as any division of the High Court and has wide powers as far as adjudication of various disputes is concerned. Review of 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 and the Constitution Seventeenth Amendment Act, 2012,[75] 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 matters which means that the Labour Appeal Court is the highest court of appeal for all labour matters.[76]

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,[77] the possibility of choosing to approach the High Court or Labour Court (forum shopping) also exists.

[75] GN 72, *GG* 36128, dated 1 February 2013.
[76] Superior Courts Act 10 of 2013. Previously, an appeal from the Labour Appeal Court was possible to the Supreme Court of Appeal.
[77] 3 of 2000.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Identify the *incorrect* statement:
   (*a*) There are two categories of incapacity, namely, 'poor work performance' and 'ill health or injury'.
   (*b*) A dismissal for poor work performance normally implies that there must be an objective standard of performance against which the employee can be measured.
   (*c*) Dismissal for poor work performance should always be the last resort and where possible, alternative employment should be offered.
   (*d*) In the case of an employee employed for a probationary period, the employer need not follow a fair procedure where the work of the probationary employee is not satisfactory.
2. Susan is employed by Lebo on a probationary three-month contract of employment. After two weeks on the job, Lebo calls her in and tells her that she does not believe that Susan has what it takes, and that she is dismissed with immediate effect. Susan bursts into tears and runs out of the office.
   (*a*) Name the five guidelines that the Code: Dismissal lays down for a dismissal for poor work performance.
   (*b*) Explain the purpose of probation.
   (*c*) Advise Susan on whether Lebo's behaviour is legally acceptable.
3. Soccer player Goals Galore Mashaba has been bought by Great Gauteng Football All Stars (GGFAS). His performance deteriorates and one day he pitched up for a match clearly drunk. He is charged with misconduct and at the hearing it transpires that he has been addicted to alcohol and drugs. Can GGFAS dismiss him for misconduct?

✓ Feedback

1. Statement (*d*) is *incorrect*. Even an employee on probation must be dismissed in terms of a fair process if her/his work performance is not satisfactory. Statements (*a*), (*b*) and (*c*) are correct.
2. (*a*) Before an employer may dismiss an employee for poor work performance she/he must receive:
   - Evaluation/instruction/training/guidance/counselling to perform her/his duties during this period.
   - The employer must make clear to the employee what the performance standard is, and what the shortfalls are.
   - The employee must be assisted and be given an opportunity to improve.
   - Progress should be measured and feedback must be given.
   - The assistance required and the period of probation will depend on the nature of the job.

(*b*) The purpose of probation is to determine whether an employee can perform the job and whether the employee fits in.

(*c*) Before Lebo can dismiss Susan on this basis, Lebo should:
- investigate to determine the reasons for Susan's unsatisfactory performance,
- give Susan appropriate evaluation/instruction/guidance/counseling,
- give Susan a reasonable period of time to improve,
- if Susan continues to perform unsatisfactorily, she can be dismissed for poor work performance, and
- during this process Susan has the right to be heard and to be assisted by a union representative/co-employee.

3. If an employee is found to be drunk on duty or guilty of substance abuse it will amount to misconduct and warrant dismissal BUT if the employee alleges that she/he is an alcoholic, the employer should rather consider incapacity as the ground for dismissal. This process would entail that GGFAS provides guidance and counselling to Mashaba. GGFAS must give Mashaba assistance and an opportunity to rehabilitate and he should get the opportunity to respond to the allegations. He may also be assisted by a union representative/co-employee. GGFAS should measure the progress and give feedback to Mashaba.

RECOMMENDED READING

1. Le Roux PAK 'Discipline and inconsistent penalties' (2013) 22 *Contemporary Labour Law* 53
2. Le Roux R *Retrenchment law in South Africa* (2016)
3. Manamela TE 'Failure to obey employer's lawful and reasonable instruction—Operational perspective in the case of a dismissal: *Motor Industry Staff Association & another v Silverton Spraypainters & Panelbeaters (Pty) Ltd'* (2013) 25(3) *SA Merc LJ* 418
4. Mischke C 'Social networks, privacy and dismissal: Facebook, twitter *et al*: The employer's reputational risk' (2011) 21 *Contemporary Labour Law* 11
5. Scheepers J 'The deformalization of disciplinary proceedings—Demise of the criminal justice model' (2012) 33 *ILJ* 1555
6. Smit N 'How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct' (2011) 44(1) *De Jure* 49

Part IV

Rules applicable to collective labour law

The power play between employers and employees is best displayed in their engagement through collective labour law. The increasing labour unrest in South Africa in the mining, transport and metal and engineering sectors 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.

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 (or an employer into an employers' organisation although it can act on its own in the collective labour law arena), the power play between employees and employers begins. Agreements between these two sides are concluded by way of collective agreements. 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. A protected strike or lock-out provides protection against the negative consequences that would flow from withholding of services or of remuneration.

Part IV consists of five chapters. **Chapter 11** deals with the development of trade unions, freedom of association, unions' and employers' organisational rights and the foundations of collective labour law. It also looks into union security arrangements, those are, the closed-shop and agency-shop agreements. **Chapter 12** discusses collective bargaining.and particularly whether there is a duty to bargain and what important impact collective agreements have. The relevant bargaining agents and bargaining structures are also discussed.

Chapter 13 gives a discussion of workplace forums which differ from traditional collective bargaining structures. The purpose of these forums is to promote employee participation in decision-making in the workplace. At present very few forums have been established. It has been suggested that the reason for this is that unions (in particular) fear that collective bargaining structures may become weaker/undermined.

Chapter 14 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 15 looks into pickets (in support of protected strike action) and protest action which unions may use to advance their socio-economic rights, for example, requesting a better education system, lower fees at universities or the removal of the e-toll system.

11

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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 freedom of contract, paid employment, fairness or 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.

[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 union 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.

In 1954, the South African Trade Union Council, which later became the Trade Union Council of South Africa (hereafter 'TUCSA'), was formed.[8] Some

[4] 11 of 1924. See also ch 5, para 1 above.
[5] 27 of 1925. See also ch 5, para 1 above.
[6] 36 of 1937.
[7] 44 of 1950.
[8] Black unions were excluded from this federation but their members were encouraged to form parallel unions with which they could liaise.

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 on a non-racial basis. SACTU maintained a link with the political organisation, 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 carying 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 UN Universal Declaration of Human Rights was adopted in 1948, South Africa continued with its policy on racial separation. The UN 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]

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.

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[9] Founded on 1 January 1912.

[10] Due to SACTU's neglect of shop floor issues, it became weak and disintegrated under State repression by 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.

[14] 70 of 1973.

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,
- 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'.[15]

The Commission further called for the establishment of an Industrial Court and the abolition of job reservation.

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 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

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[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.

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 but has soured subsequently.[20] More recently, unions started splitting and smaller unions were formed.

2. FREEDOM OF ASSOCIATION

Freedom of association is one of the basic principles and foundations of collective bargaining. Workers' right to freedom of association is protected by the Constitution, the LRA and ILO Conventions.

> Freedom of association means that people have the right to associate with others in order to defend and protect their common interests. 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.

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.

2.1 Protection under the Constitution

Section 18 of the Constitution grants 'everyone' the right to freedom of association.

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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. These relationships have soured subsequently (see ch 1, para 4.1, n 41 above).

Section 23 of the Constitution protects the freedom of association for employees, trade unions, employers and employers' organisations.

Section 23 guarentees the following:

- Every worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union, and to strike.
- Every employer has the right to form and join an employers' organisation and to participate in the activities and programmes of an employers' organisation.
- Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities, to organise, and to form and join a federation.
- Every trade union, employers' organisation and employer has the right to engage in collective bargaining (but remember that national legislation may be enacted to regulate collective bargaining).

2.2 Protection in terms of International and Regional law

As South Africa is a member of the international community, it is imperative to look at the protection of the right to freedom of association in regional and international labour law.

2.3 Protection in terms of the African Charter on Human and Peoples' Rights (hereafter 'ACHPR')

The ACHPR was adopted by the Organisation of African Unity (hereafter 'OAU'), currently the African Union (hereafter 'AU') in 1981. The ACHPR which is the major regional human rights instrument on the African continent came into effect in 1986.

Article 10 of the Charter provides every individual with the right to freedom of association provided that she/he abides by the law. Article 10 of the ACHPR contains the general right to freedom of association but does not specify the types of associations that individuals may form or join. Thus, associations referred to in article 10 may be of a social, cultural or political nature.

2.4 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.

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[21] Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948. See also ch 1, para 3 above.

[22] Right to Organise and Collective Bargaining Convention No 98 of 1949. See also ch 1, para 3 above.

- 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.[23]
- 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.[24] The Convention also protects unions and employers' organisations against any acts of interference by each other or each other's agents.

2.5 Protection in terms of the Labour Relations Act

2.5.1 *Purpose of enactment of the LRA*

The LRA is the cornerstone of South African labour law and was enacted, amongst other things to:

- 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.

2.5.2 *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[25] 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:
  - not to become a member of a union,
  - to give up membership of a particular union, or

[23] Article 2 of Convention 87 of 1948.
[24] Article 1 of Convention 98 of 1949.
[25] *National Union of Public Service & Allied Workers obo Mani & others v National Lotteries Board* (2014) 35 *ILJ* 1929 (CC) interpreted the term 'lawful activities' as excluding 'illegal activities and activities that constitute contraventions of the law'.

  - 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,[26] and
  - affiliate with and participate in the affairs of international organisations.
- Any dismissal for exercising the right to freedom of association is automatically unfair.

2.5.3 *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 and
- State Security Agency.[27]

This led to the question whether these groups excluded from the LRA are entitled to form and join trade unions since they retain their constitutional protection in this regard.

The constitutionality of section 126B of the Defence Act[28] was decided upon by the Constitutional Court in *SANDU v Minister of Defence*.[29] This section stated that a member of the Permanent Force shall not be or become a member of any union. The court looked for guidance to the ILO Conventions on Freedom of Association and Protection of the Right to Organise as well as sections 18 and 23(2) of the Constitution. It held that uniformed members of the Defence Force have a right to freedom of association but in terms of section 36 of the Constitution this may be limited under certain circumstances. Consequently, uniformed members of the Defence Force may form and belong to trade unions but may not strike and must refer interest disputes

[26] The largest union federations in South Africa are COSATU, the Federation of Unions of South Africa ('FEDUSA'), the National Council of Trade Unions ('NACTU') and a newly formed South African Federation of Trade Unions ('SAFTU') the latter which mostly comprised of split-off unions from COSATU.

[27] 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 but to the various institutions before combination. See ch 5, para 3 above.

[28] 42 of 2002.

[29] *SANDU v Minister of Defence* 1999 (4) SA 469.

to compulsory arbitration in the same way that disputes in essential services would be dealt with.

Another group with limited freedom of association is *senior managerial employees*, who must balance the right to freedom of association with their common-law duty to act in good faith towards their employers. If a manager, who belongs to a trade union, for example, divulges information to the union that she/he acquired by virtue of the managerial position, she/he may be disciplined. In *IMATU & others v Rustenburg Transitional Council*[30] the court held that a senior manager can join a union but must be mindful of her/his fiduciary duty towards the the employer.[31]

(*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,[32] 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,[33] 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.

---

[30] (2000) 21 *ILJ* 377 (LC).

[31] See also chs 9, para 4.1, n 52; 11, para 2.5.3, n 52.

[32] See n 23 above.

[33] This type of council is established where no bargaining council exists (ss 39–43). Very few councils of this type exist in practice.

These two types of union security arrangements can be illustrated by way of the following example:

> **Example:** Kate employs 100 employees. Of these, 60 belong to Popular Workers Union. These members pay a monthly membership fee of R20. Of the other 40 employees, 10 belong to Happy Union and 30 are non-unionised. Every year with wage negotiations, Popular Workers Union negotiates with Kate. The increase agreed on is applied across board. In other words, Popular Workers Union does all the work which *both* union and non-union members benefit from. If Popular Workers Union concludes an agency-shop agreement with Kate, it means that Kate will deduct an agency fee of R20 from the salaries of all of the other 40 employees and pay it over to Popular Workers Union. These 40 employees do not have to become members of Popular Workers Union. However, the members of Happy Union will pay their own membership fee as well as the R20 agency fee.
>
> If Kate and Popular Workers Union conclude a closed-shop agreement, it will mean that all other 40 employees must become members of Popular Workers Union. Happy Union will no longer be allowed to operate in the workplace. All 100 employees will have to pay the R20 membership fee to Popular Workers Union.

3.2 Agency-shop agreement

As can be seen from the above example, an agency shop agreement is less of an infringement on an employee's right to freedom of association than a closed-shop agreement is. Agency-shop agreements are regulated by section 25 as follows:

(*a*) An agency-shop agreement is concluded by a majority union and an employer or an employers' organisation.

(*b*) It is concluded by way of a collective agreement.

(*c*) The employer must deduct the agreed agency fee from the employees identified in the agreement, subject to the following:

- The employer may only deduct from non-members who are eligible for membership.
- Conscientious objectors to the policies of the union (on religious or moral grounds) must pay the fee, which is then paid into a fund administered by the DoL.
- The fee of non-members cannot be higher than the subscription fee payable by members of the majority union.
- Agency fees are paid over to a separate account and can be used only for the benefit of all employees at the workplace.
- Agency fees may not be used for political affiliation purposes other than advancing or protecting the socio-economic interests of employees.
- The employer can deduct agency fees from the wages of employees without their authorisation.

It can further be illustrated as shown on page 243.

3.3 Closed-shop agreement

Closed-shop agreements pose more of an infringement on an employee's right to freedom of association and are regulated by section 26 as follows:

- They are concluded by a majority union and an employer or an employers' organisation.
- They are concluded by way of a collective agreement.
- The employees to be covered by the agreement must have a ballot before a closed-shop agreement is concluded.
- Two-thirds of the employees (that will potentially be covered) who voted, must vote in favour of the agreement.
- Employees who were already employed when the closed-shop agreement came into effect, and conscientious objectors may not be dismissed for refusing to join the union which is a party to a closed-shop agreement.
- The employer must deduct the agreed subscription fees from the employees identified in the agreement.
- Union subscription fees may not be used for political affiliation; they may be used only to advance the socioeconomic interests of the employees.

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:

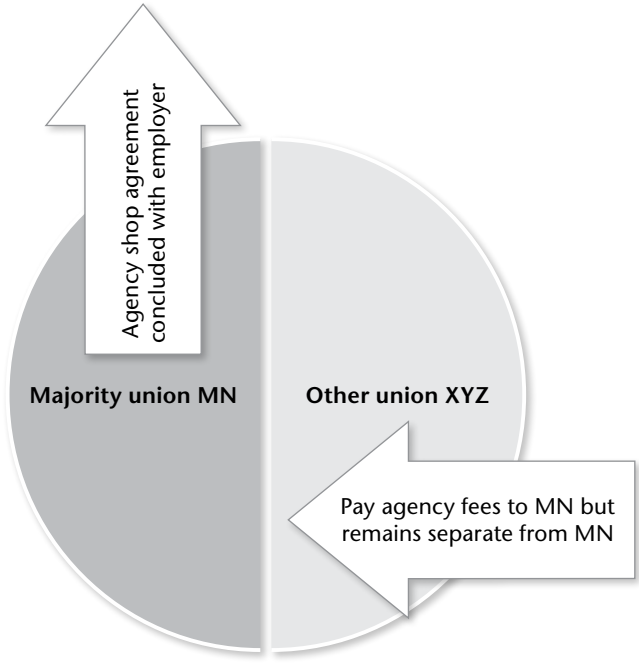
- refuses to join the union which is a party to a closed-shop agreement, or
- is refused union membership, or
- has been expelled from the union which is a party to the agreement, provided that the refusal or expulsion is in accordance with the union's constitution and that the reason for the refusal or expulsion is fair.

However, employees who refuse to join a union party to the agreement on the ground of conscientious objection may not be dismissed.

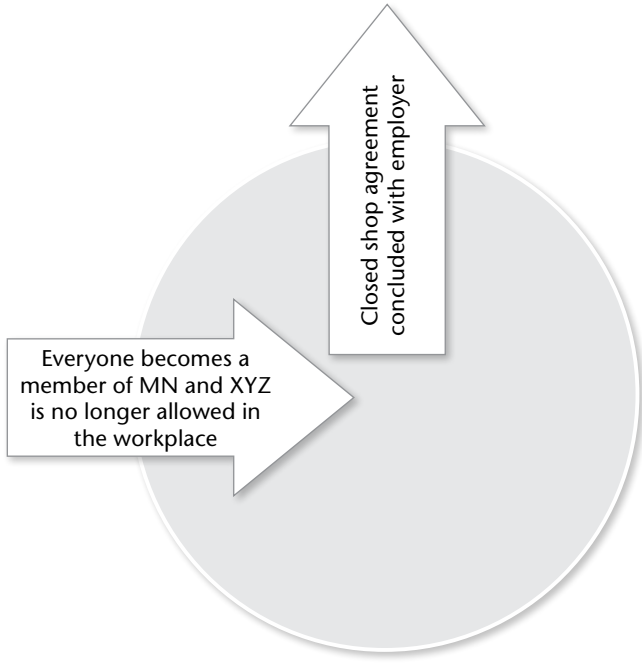
There are two types of closed-shop agreements, namely, *pre-entry* and *post-entry* closed-shop agreements. *A pre-entry* closed-shop is *not* allowed in South Africa. Thus, only *post-entry* closed-shop agreements are recognised by the LRA.

- A *pre*-entry closed-shop agreement is a closed-shop agreement that requires an employee to be a member of a majority trade union *before* employment.
- A *post*-entry closed-shop agreement on the other hand requires an employee to join a majority union during employment or immediately after employment.

A closed-shop agreement can further be illustrated as shown on page 243.



Agency-shop agreement



Closed-shop agreement

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, registration is, however, encouraged by granting most of the organisational rights *only* to registered unions.[34]

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.

[34] The LRA encourages registration of trade unions, by allowing only registered unions.

Organisational right	Content of the right
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).
Election of shop stewards and leave for them to perform their duties (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 and not the union.
Leave for union office bearers (section 15)	• A union office bearer is entitled to paid leave to perform their functions. • Details about such leave and payment are normally arranged between the employer and the union.

The following terminology is important to understand the difference between sections 14 and 15.

- An office bearer of a trade union is someone with a position in the trade union, for example, the General Secretary or Chief Financial Officer of the union.
- A trade union representative/shop steward/shaft steward operates between an employer and employees in the workplace. A trade union representative has the right to perform the following functions:
  - at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings,
  - to monitor the employer's compliance and to report non-compliance with the workplace-related provisions of the LRA or any law regulating terms and conditions of employment and any collective agreement binding on the employer, and
  - to perform any other function agreed to between the representative trade union and the employer.

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.

It is important to note that section 21 of the LRA holds that the commissioner, in determining the representativeness of a trade union, must also have regard to the composition of the workforce, including:

- a temporary employment service (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 (before the Amendment Act), the above categories of employees were excluded when organisational rights were awarded and often exploited due to their vulnerable status.

4.4 Different levels of representation by unions for different rights

Union with majority representation

- Union represents 50% + 1 or more of all employees in the workplace and have the following organisational rights:
  - access to the workplace
  - membership fees deducted from wages
  - can elect shop stewards
  - shop stewards get leave for union activities
  - disclosure of information

Union with sufficient representation

- Term not defined in the LRA but is a union that represents less than the majority of employees in the workplace but which has more than minority representation and they have access to the following organisational rights:
  - access to the workplace
  - membership fees deducted from wages
  - union representatives may get leave for trade union activities

Union with minority representation

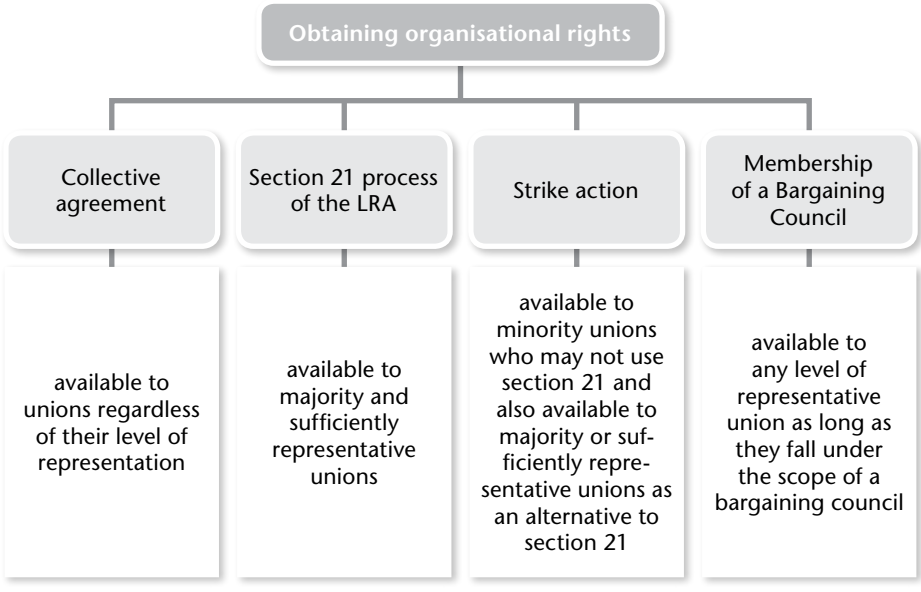
- Union may enforce rights through collective bargaining and industrial action (two or more trade unions may act jointly to acquire rights)

Union that is part of a bargaining council

- Automatically has the rights of:
  - access to the workplace and
  - deduction of membership fees from wages

4.5 Acquisition of organisational rights

Trade unions may acquire organisational rights in one of the following ways, depending on their level of representation:



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 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.[35] A majority or sufficiently representative union which chooses not to follow section 21 (discussed below) may also elect to rather endeavour to obtain organisational rights through strike action. Once they have elected this option they may not revert back to use the section 21 process.

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 and 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.

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

The commissioner has a discretion to determine what sufficient representivity means. It will depend on the specific circumstances.[36]

---

[35] See *NUMSA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC).

[36] For example, in *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA) a union representing seven out of 31 workers was recognised as sufficient since it was the only union represented at the workplace. In *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)*

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(s) 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:
    - access to the workplace,
    - membership fees deducted from wages, and
    - leave for union activities.

  This amendment gives smaller unions more opportunities to access organisational rights.

(2000) 21 *ILJ* 425 (CCMA) the commissioner refused to recognise a union as sufficiently representative even though it had 42.3% membership in the workplace. In *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA) only 17% representation of the total workplace was recognised as sufficient because it covered almost two thirds of the specific factory. In *Organisation of Labour Affairs (OLA) v Old Mutual Life Assurance Company* (SA) [2003] 9 BALR 1052 (CCMA) a union with 2% representation of the total workforce was regarded as sufficiently representative because the employer had previously granted organisational rights to trade unions with fewer members.

- 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.

> **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.

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:

- 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.

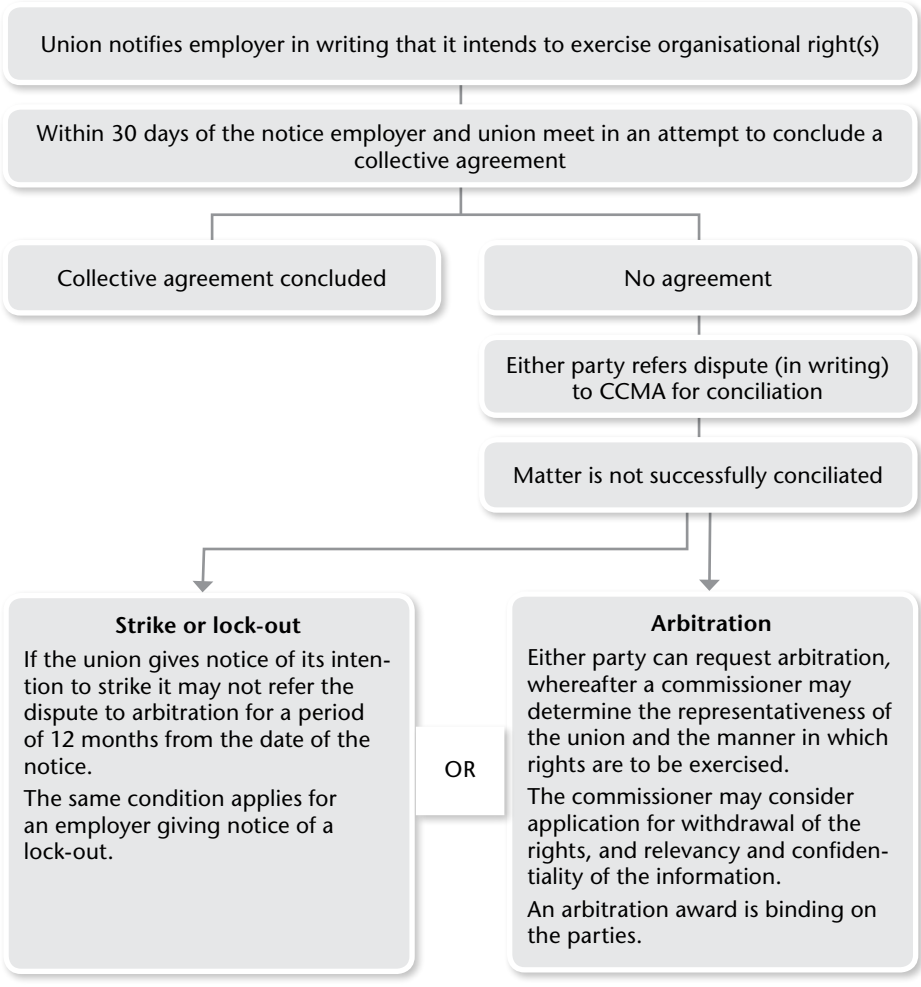
A union that exercises organisational rights in respect of employees of a TES may do so at the workplace of the TES or of the client of the TES.

The section 21 procedure is further illustrated in the flow chart on page 251.

4.6 Dispute resolution for organisational rights

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 a 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/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 wide discretion to make a suitable award to achieve this.

5. RELATIONSHIP BETWEEN UNIONS AND THEIR MEMBERS

The relationship between a union and its members is regulated by the 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.[37] In *FAWU v Ngcobo & another*[38] 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 & another.*[39]

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. 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.

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.

---

[37] See *NUMSA & others v COSATU & others* (32567/13) [2014] ZAGPJHC 59.
[38] (2013) 34 *ILJ* 1383 (SCA).
[39] (2013) 34 *ILJ* 3061 (CC).

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. With regard to agency shop agreements, which *one* of the following statements is *incorrect*?
   (*a*) Only non-union members and members of a minority trade union, are obliged to pay the agency fee.
   (*b*) Agency fees paid to the trade union may be used for any purpose, such as a financial contribution to a political party.
   (*c*) A trade union which enters into an agency-shop agreement, must be registered in terms of the LRA.
   (*d*) A trade union or two or more trade unions acting together, wishing to enter into an agency shop agreement, must represent the majority of all employees in the workplace.
2. One of the most important organisational rights relate to disclosure of information. Explain what level of representation is required for this right and what it entails.
3. ABC Union represents 60% of all employees employed by BB Leather (Pty) Ltd. However, ABC union is not registered. You have just completed your degree in law and have been approached by ABC Union's Secretary for advice regarding the importance of registering a trade union. Advise him accordingly.

✓ Feedback

1. Statement (*b*) is *incorrect*. In terms of section 25 of the LRA, agency fees may not be paid to a political party.

   Statement (*a*) is correct because only non-union members and members of minority trade union are required to pay agency fees.

   Statement (*c*) is correct because only registered trade union(s) can enter into agency shop agreements.

   Statement (*d*) is correct because only majority trade union(s) can conclude agency shop agreements.
2. Only a majority trade union has access the right of disclosure of information. It means that all relevant information must be disclosed, that is, information that will allow shop stewards to perform their 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).
3. This question deals with the importance of registering a trade union. In order for ABC Union to qualify as a trade union, registration is not a requirement. As long as it can prove that it is an association of employees whose principal purpose is to regulate the relations between themselves

and BB Leather (Pty) Ltd. However, to exercise some of the statutory rights provided by the LRA, ABC Union should be registered. For instance, only a registered trade union may acquire organisational rights, conclude a binding collective agreement such as closed- and agency-shop agreements, be a member of a bargaining or statutory council, be able to authorise a picket and represent employees at the CCMA. In the given scenario, if ABC Union was to register it could acquire all rights that registered majority trade unions are entitled to and exercise them at BB Leather (Pty) Ltd.

RECOMMENDED READING

1. Esitang TG & Van Eck BPS 'Minority trade unions and the amendments to the LRA: Reflections on thresholds, democracy and ILO Conventions' (2016) 37 *ILJ* 763
2. Fergus E 'Revolution in the ranks? The development of military unionism in South Africa' (2008) 29 *ILJ* 2386
3. Hirschsohn P 'The "hollowing-out" of trade union democracy in COSATU? Members, shop stewards and the South African Communist Party' (2011) 15 *Law, Democracy & Development* 279
4. Kruger J & Tshoose CI 'The impact of the Labour Relations Act on minority trade unions: A South African perspective' (2013) *PELJ* 285
5. Theron J, Godfrey S & Fergus E 'Organisational and collective bargaining rights through the lens of Marikana' (2015) 36 *ILJ* 849

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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, which is one of the most important aims 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 position where possible in order to find common ground.

The term 'collective' is used because employees act as one entity through their trade union. Employees join together in trade unions to increase their bargaining power with employers (or employers' organisations) over wages,

working conditions and any other matters of mutual interest. Only unions can engage in collective bargaining. A single *employer* can engage in collective bargaining but a single *employee* cannot do so.

> If successful, collective bargaining leads to the conclusion of a collective agreement. If 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[1] does *not* create a *duty* for either of the parties to bargain with the other.[2] Neither does the LRA 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's conduct amount to a refusal to bargain, the LRA allows for strike action by employees in accordance with the requirements set in section 64 of the LRA, in an endeavour to convince the employer to bargain. The following conduct from the employer would constitute 'a refusal to bargain:'[3]

- 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.

Disputes regarding a refusal to bargain must first be referred to the CCMA for an advisory award before the notice in terms of section 64(1)(b) or (c) is given. An advisory award provides guidance only; it is *not* binding on the parties.[4]

3. BARGAINING AGENTS

Collective bargaining is performed by bargaining agents, namely, unions and an employer or employers' organisation.

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[1] Section 23(5).
[2] *SANDU v Minister of Defence* (2007) 28 *ILJ* 1909 (CC). The position under the 1956 LRA was different where a duty to bargain in good faith existed.
[3] Section 64(2).
[4] 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.

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 does not make provision for recognition agreements but does contain provisions about organisational rights. If an employer recognises a trade union it will grant certain organisational rights to that trade union. The LRA obliges the employer to grant organisational rights (or so-called 'recognition') only to registered unions which are 'representative' at the workplace.[5]

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. LEVELS OF BARGAINING

Collective bargaining can take place at plant level,[6] sector level[7] or industry level.[8]

The distinction between these different levels are also referred to as centralised and decentralised bargaining.

- *Centralised* bargaining takes place in a defined geographical area (for example, Gauteng) across a whole sector (for example, the metal industry) and amounts to sector or industry level bargaining. Bargaining councils are created for this purpose. 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

[5] See ch 11, paras 4.3–4.4 above where the level of representivity and organisational rights are discussed.

[6] 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.

[7] Sectoral bargaining refers to bargaining that takes place in a specific sector of the economy and linked to a specific geographical area.

[8] Industry-wide bargaining refers to bargaining for a whole industry, eg, mining or motor manufacturers, and is normally on national level.

employer. The LRA also makes provision for statutory councils and both structures are discussed in more detail below.

- *Decentralised* bargaining takes place between an individual employer and one/more unions with reference only to employees in the employer's workplace(s) and constitutes basically plant level bargaining.

5. STATUTORY BARGAINING STRUCTURES

The LRA provides for bargaining councils and statutory councils.

5.1 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.[9] 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 council is established and registered, it has jurisdiction within such sector and geographical area.

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[10] and a trade union may embark on strike action to force the employer to agree to the establishment of a bargaining council.

5.1.1 *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 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.

5.1.2 *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 of Labour Relations for the registration of a bargaining council. The parties do this by submitting to the Registrar:

[9] Section 29.
[10] Section 64(2)(ii).

- 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. A copy of such notice must also be sent to NEDLAC.[11]

An objection may be made if the applicant has not complied with the provisions of the LRA or for any reason relating to the sector and area of the proposed council. The applicants for the bargaining council will be allowed to respond to the objection NEDLAC will also be involved in the process of application, demarcation and objections.[12]

If the Registrar is satisfied that the applicant complied with the requirements for registration, the council must be registered.

5.1.3 *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:[13]

- to conclude collective agreements,
- to enforce such collective agreements,
- to prevent and resolve labour disputes,
- 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,
- to provide industrial support services within the sector, and
- to extend its services to workers in the informal sector and home workers.

5.1.4 *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

[11] Section 29(3)(*c*).
[12] Section 29(8).
[13] The functions of a statutory council are narrower than those of a bargaining council.

Type of dispute	Bargaining council jurisdiction
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 the Labour Court will adjudicate it
Disputes that may lead to a strike or lock-out	A bargaining council can only 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	A bargaining council only 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

5.2 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.[14] The procedure for registering a statutory council is similar to that of a bargaining council.

A statutory council may include in its functions some of the functions of a bargaining 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/funds or any similar schemes for the benefit of its members, and
- to conclude collective agreements to give effect to its functions.[15]

6. 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

[14] For example, the Statutory Council of the Printing, Newspapers and Packaging Industry of South Africa was established in June 1999.

[15] Section 43.

and duties of parties as well as the terms and conditions of employment of workers.

A collective agreement varies any contract of employment between an employee and an employer if they are both bound by the collective agreement.[16]

The most *common* collective agreements are the closed-shop and agency-shop agreements discussed in chapter 11 above.

> 'Collective agreement' is defined 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,
- 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, and
- 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.

Section 23 permits the parties to a collective agreement to extend the agreements to non-parties (outside a bargaining council) if certain requirements are met, namely, where:

- 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.

Section 32 also permits the MoL to extend a collective agreement concluded in a bargaining council to non-parties in the industry under certain circumstances. It can be illustrated as follows:

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[16] See ch 4, para 5 above.

In *Chamber of Mines v AMCU & others*[17] AMCU challenged the principle of majoritarianism that is applied when a collective agreement is extended to non-signatories. AMCU was unhappy about a collective agreement concluded between the Chamber of Mines and the NUM which was extended to AMCU members in terms of section 23 of the LRA. The court found that the principle of majoritarianism was not unconstitutional and is both rational and reasonable as it ensures labour peace at the workplace.

6.1 Bargaining council 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 as well as their members,
- parties to the council who are not parties to the agreement 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. 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, and
- parties who are not members of the council and not parties to the agreement but fall within the sector and area of jurisdiction of such council may be bound by the council's collective agreements through extension.

The requirements and procedures for the extension of bargaining councils' agreements to non-parties are as follows:

- The extension must be authorised by the MoL if one/more registered union(s) 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 the 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.

[17] (2014) 35 *ILJ* 3111 (LC).

6.2 Disputes about collective agreements

Section 24(1) 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. 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 as it must be resolved through arbitration.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. In terms of section 64(2) of the LRA, a refusal to bargain includes:
   (*a*) the employer's refusal to recognise an employee as a bargaining agent.
   (*b*) the employer's refusal to recognise a trade union as a bargaining agent.
   (*c*) the employer's refusal to recognise a workplace forum as a bargaining agent.
   (*d*) the employer's refusal to recognise a bargaining council as a bargaining agent.
2. Discuss who would be bound by a collective agreement.
3. A dispute exists between trade union UU and employer ZZ regarding ZZ's refusal to bargain with UU. Trade union UU argues that Employer ZZ has a constitutional duty to bargain with it over all matters of mutual interest. Is UU's argument correct? Briefly advise ZZ.

✓ Feedback

1. Statement (*b*) is *correct*. Refusal to bargain includes the employer's refusal to recognise a trade union as a bargaining agent.

   Statement (*a*) is incorrect because an employee is not a bargaining agent.

   Statement (*c*) is incorrect because a workplace forum is not a bargaining agent.

   Statement (*d*) is incorrect because a bargaining council is not a bargaining agent. Only trade union(s), an employer, or employers' organisations are bargaining agents.
2. 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.

3. Trade union UU's argument is not correct. The inclusion of the right to engage in collective bargaining in the Constitution does not create a duty for either of the parties to bargain with the other. Neither does the LRA compel parties to bargain with each other. It, however, encourages collective bargaining through the granting or organisational rights; the right to establish bargaining institutions; and conclusion of closed-shop and agency-shop shop agreements.

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. Du Toit D 'The extension of bargaining council agreements: Do the amendments address the constitutional challenge?' (2014) 35 *ILJ* 2637
3. Godfrey S *et al* 'Regulating the labour market: the role of bargaining councils' (2006) 27 *ILJ* 731
4. Grogan J 'No duty to bargain: Military union back in line' (2007) 23(2) *Employment Law* 3
5. Maree J 'Trends in the South African collective bargaining system in comparative perspective' (2011) 35(1) *SAJLR* 7

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Workplace forums

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1. INTRODUCTION

Collective bargaining is by its nature an adversarial process. One of the main objectives of the LRA is to promote employees' participation in decision-making in the workplace and for this purpose it makes provision for workplace forums.[1]

A forum is an in-house institution intending 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 with the differences as follows:

Trade union	Forum
• A union is a juristic body • A union deals with both wage and non-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 only • A forum cannot embark on industrial action

[1] See sections 78–81.

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 with more than 100 employees.
Who would qualify as employees for a forum?	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.'
In what manner may 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 between those parties, or at least, between the applicant and the employer. • If a collective agreement is concluded to establish a forum, the provisions of the LRA will not apply.
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).

3. MEETINGS OF A FORUM

The LRA requires a forum to meet regularly to ensure its effective functioning.[2] 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. At those meetings, the employer must:

- present a report on its financial and employment situation, its performance since the last report and its anticipated performance in the short and long term, and
- consult the workplace forum on any matter arising from the report that may affect employees in the workplace.

The LRA also requires meetings between members of the forum and the employees employed in the workplace at regular and appropriate intervals. At those meetings, the forum must report to employees on:

- its activities generally,
- matters in respect of which it has been consulted by the employer, and
- matters in respect of which it has participated in joint decision-making with the employer.

The LRA further requires the forum at one of the meetings with employees to present an annual report of its financial and employment situation, its performance generally and its future prospects and plans.

All meetings of a forum must be held during working hours at a time and place agreed upon by the 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 decisions 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. If the employer disagrees with them it must state the reasons for disagreeing.[3]

[2] Section 83.
[3] Section 84.

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 a workplace that falls within the registered scope of that bargaining council. Moreover, 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. The joint decision-making power of a forum may be regulated by a collective agreement.[4]

[4] Section 86.

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 people 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.

7. DISCLOSURE OF INFORMATION

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.[5] The employer is not obliged to disclose information that:

- is legally privileged,
- the employer may not disclose without contravening a law or court order,
- is confidential and, if disclosed, may cause substantial harm to the employee or the employer, and
- is 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.

8. 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,

[5] Section 89.

- 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 the 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.

9. DISPUTE RESOLUTION

Unless there is a collective agreement regulating the resolution of disputes, 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. Which *one* of the following statements regarding workplace forums is *correct*?
   (*a*) A workplace forum is a juristic body.
   (*b*) A workplace forum deals with wage-related issues.
   (*c*) A workplace forum can call strike action for its members
   (*d*) Managerial employees cannot be members of a workplace forum.
2. Define a 'senior employee' for purposes of a workplace forum.
3. A dispute arose between the workplace forum and Employer Crocs regarding information that the employer should disclose to the forum in fulfilling its consultation and joint-decision making duties. The forum argues that the employer is required to disclose all information. Crocs argues that it is not obliged to disclose any information to the forum. Advise both forum and Employer Crocs on the validity of their arguments

✓ Feedback

1. Statement (*d*) is *correct*. Managerial employees are excluded from workplace forum membership.

   Statement (*a*) is incorrect because unlike a trade union which is a juristic body, a workplace forum is not a juristic body.

   Statement (*b*) is incorrect because workplace forums do not deal with wage related issues but with issues not related to wage issues.

   Statement (*c*) is incorrect because since a forum is not a juristic body; it cannot call strike action for its members.
2. It is an employee whose contract of employment or status confers the authority to do 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.

3. The LRA requires the employer to disclose all relevant information to the forum in order for meaningful consultation and joint-decision making to take place. If information is legally privileged it need not be disclosed. Crocs may not disclose information which will contravene a law/court order. If information is confidential and will cause serious harm if it is disclosed Crocs may refuse to provide such information. Finally, private personal information relating to an employee may not be given unless the employee has consented to this.

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1. Du Toit D 'Collective bargaining and worker participation' (2000) 21 *ILJ* 1544
2. Du Toit D 'The extension of bargaining council agreements: Do the amendments address the constitutional challenge?' (2014) 35 *ILJ* 2637
3. Steadman F 'Workplace forums in South Africa: A critical analysis' (2004) 25 *ILJ* 1170
4. Summers C 'Workplace forums from a comparative perspective' (1995) 16 *ILJ* 806
5. Van der Walt R 'Have workplace forums contributed to worker participation? Some management perceptions' (2008) *South African Journal of Business Management* 45

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1. INTRODUCTION

Successful collective bargaining will culminate in a collective agreement. If no agreement can be concluded 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 and picketing while employers may resort to lock-outs.

In this chapter the focus will be only on strikes and lock-outs but it is important to know that there are in fact different types of industrial action and it is important to know what type of action to take for which purpose, as illustrated below.

Type of industrial action undertaken by employees	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 to oppose any lock-out*
Protest action	to promote or defend the socio-economic interests of workers
Lock-out	to compel employees to accept a demand in respect of any matter of mutual interest between employer and employees

Type of industrial action undertaken by employers	Purpose
Lock-out	to compel employees to accept a demand in respect of any matter of mutual interest between employer and employees

* Pickets and protest action will be discussed in chapter 15 below.

Both strikes and lock-outs are essential elements of collective bargaining. However, such actions 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.'[2]

[1] According to the 2016 Annual Industrial Action Report of the DoL more than 61% of work stoppages lasted between 1–5 days in 2013 and 2015; and between 16–20 days in 2014. Over the past decade, from 2005 to 2015, 5.2 million working days were lost due to strike action. Over the 2015 period, the number of working days lost were 903 921 (Department of Labour *Annual Report* available at http://www.labour.gov.za)(accessed on 22 May 2017).

[2] Section 23(2)(c).

The Constitution does not give employers the *right* to lock out employees.[3] The lock-out is implied in the Constitution's express protection of the right to bargain collectively.

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. The effect of this is that employees have stronger protection in their right to strike than employers have but it has been held that it is acceptable as this is part of the measures used by the law to balance the power imbalance between employers and employees.[4]

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 employees cannot be dismissed for that reason.[5] 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.

South Africa has endured a number of lengthy and violent strikes in the past few years. One of the suggestions to curb this was the introduction of a secret strike ballot prior to embarking on a strike. It has also been mooted that when a strike gets violent, it should lose its protected status. These suggestions were not included in the Amendment Act. Instead, section 150(1)(*b*) makes provision for the director of the CCMA to appoint one/more commissioners to resolve disputes through conciliation if it is believed to be in the public interest.

3. PROTECTED INDUSTRIAL ACTION

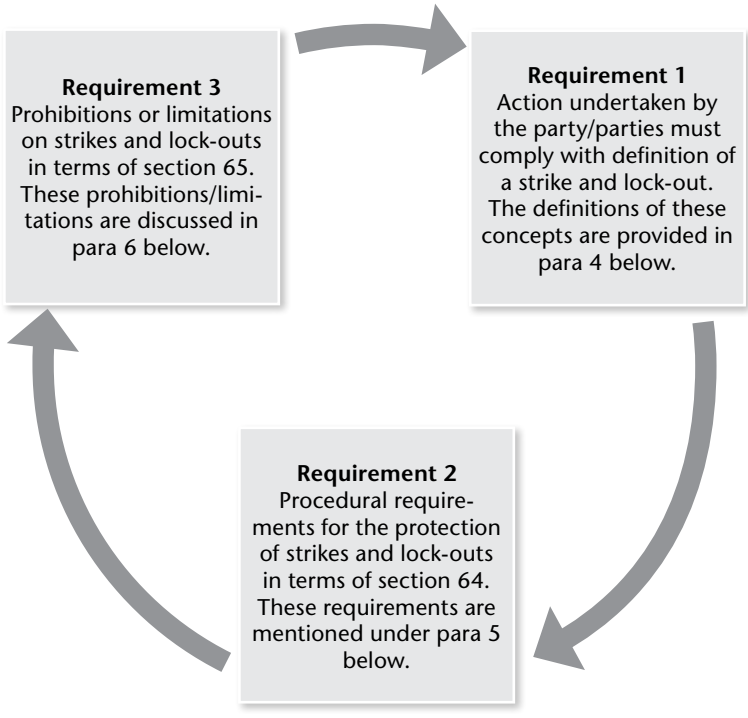
The way in which parties acquire and exercise the right to strike and recourse to lock-out should comply with the law in order to be protected. Certain requirements must be met to ensure that the action is protected, namely:

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[3] Section 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. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* [1996] (4) SA 744 (CC) it was held that the effect of including the right to strike does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers.

[4] Neither the right to strike nor a lock-out is directly protected in terms of an ILO Convention, but the protection for the two actions is indirectly given through ILO Convention 87 and ILO Convention 98, which were both ratified by South Africa.

[5] An exception exists in cases of misconduct committed during strike action and if, as a result of prolonged industrial action, the employer suffers economically and needs to dismiss employees based on the operational requirements of the business.



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 as defined by section 213 of the LRA. 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?

> A strike is the partial or complete concerted refusal to work, or the retardation or obstruction of work, by people who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory

The above definition contains three important components:

4.2.1 There must be a refusal to work.

4.2.2 The work stoppage must be a concerted action by people employed by the same or different employers.

4.2.3 The purpose of the stoppage must be to remedy a grievance or resolve a dispute in respect of a matter of mutual interest between the employer and employees.

These are discussed in more detail below.

It is important that the action taken by the employees comply with *all* three elements of the definition, because any intentional refusal to work will amount to misconduct unless it can be regarded as strike action (or protest action).

4.2.1 *Refusal to work*

Two issues are important here:

What is a refusal?	What is work?
The refusal may be partial (employees perform only some of their duties),* or	The refusal to work must be: • in relation to work which employees are contractually obliged to perform, and • in relation to work which is 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. However, if the employees have no obligation to work overtime and they refuse, it will not be a refusal to work because it was not work which they were contractually required to perform.
complete (employees do not perform any of their duties), or	
involve the retardation of work (employees work, but at a reduced pace),† or	
an obstruction of work (employees disturb production through their actions).	

* An example of a partial strike is a 'work-to-rule' (doing only the essential aspects of the work).

† An example of retardation of work is a 'go-slow' (working extremely slowly).

Two issues are important here, namely, what a 'refusal to work' entails and what 'work' entails based on the definition of a strike.

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. Based on the definition of strike, the action must be:

- 'concerted' (jointly carried out),
- 'by persons', and
- constitute collective action.

A single employee cannot engage in a strike; more than one person must be involved in order for the action to constitute a strike.[6] The action must be carried out by people *acting together,* who are or have been employed by the same employer or by different employers.

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[6] It was held in *Schoeman & another v Samsung Electronics (Pty) Ltd* [1997] 10 BLLR 1364 (LC) that an individual employee cannot strike and although a single employer can lock-out employees, a lock-out can also not be effected against a single employee.

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*

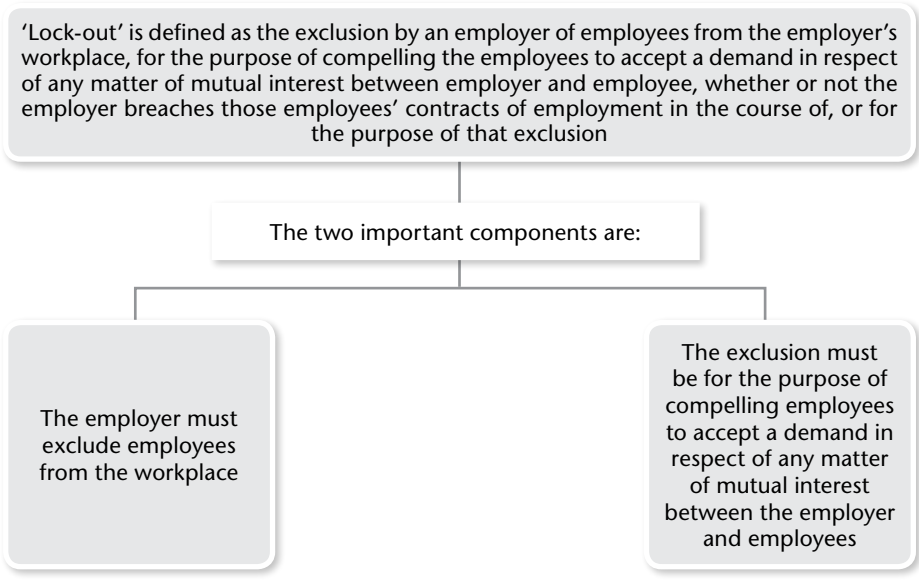
The refusal to work must be for a purpose contained in the definition of a strike in order for the action to constitute a strike. Two issues are, again, important here, namely, what this 'purpose' entails and 'against whom the refusal to work must be directed'.

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 as matters of mutual interest, unless the State is the employer and the demands relate to the State's role as employer.	

A grievance or a dispute must exist and the strikers must intend their action to remedy or resolve that grievance or dispute which relates to matters of mutual interest between the employer and employees. It must be noted that employees may not strike in demand of the employer performing an act or omission which is unlawful, for example, an unlawful dismissal of an employee.

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.



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 section 67(3) of the LRA, which states that the employer is not obliged to remunerate an employee for services not rendered during a protected strike or a protected lock-out. Put differently, the principle of 'no work, no pay' applies to both protected and unprotected strikes and lock-outs. 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' 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 OF THE LRA

5.1 What does this requirement entail?

Compliance with section 64(1) means that:

- the issue in dispute must be referred for conciliation,[7]
- 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.

5.2 What is an 'issue in dispute'?

The issue in dispute must fall within the definition of a strike or lock-out. 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. There will be no issue in dispute until deadlock is reached regarding the matter. Put differently, the employer must have been in a position to know about the issue raised by the employees or their trade union and rejected it.

The LRA requires that parties must endeavour to resolve the issue in dispute. 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 to either a bargaining council or the CCMA, 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

[7] Section 64(1)(*a*).

member of an employers' organisation, notice must be given to the employers' organisation. If the issue relates to a collective agreement to be concluded in a council, notice must be given to that council.

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. In *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others*[8] the Labour Appeal Court held that the primary aim of a strike notice is to give the employer advance warning of the proposed strike so that it may prepare for the imminent action. The notice must set out the issue in dispute with reasonable clarity.

A pre-strike ballot is not a requirement for protection of a strike in terms of the LRA, however, some trade unions prescribe it in their constitutions.

The following are exceptions to the above procedure:

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 was dealt with in terms of the procedure set by that council's constitution,
- 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 institutes a lock-out in response to an unprotected strike,
- if the employees strike in response to an unprotected lock-out, and
- 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.

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

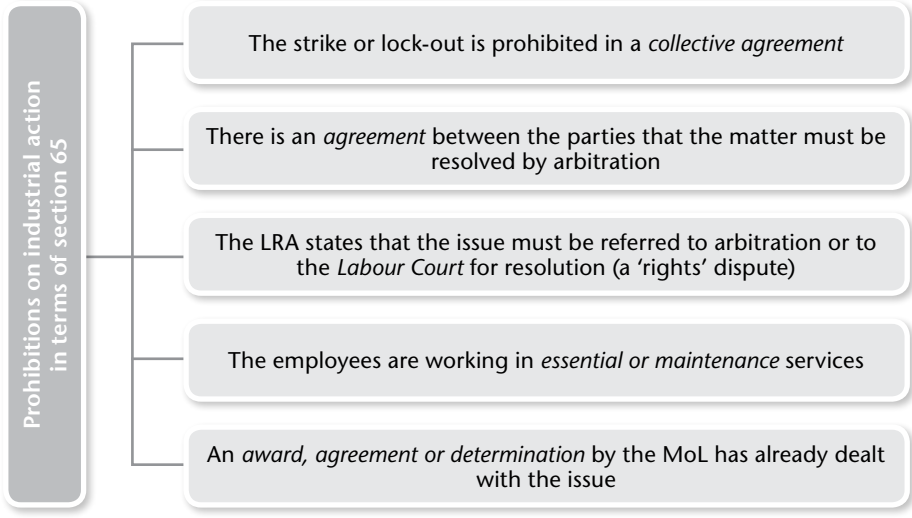
6.1 What does this requirement entail?

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 prohibits strikes and lock-outs.

[8] [1997] BLLR 697 (LAC).

If a strike or lock-out is prohibited 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 when employees may not strike and employers not institute lock-outs.



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. This will bind the parties only for the duration of the collective agreement. Employees may, however, strike over an issue covered by a current agreement in support of demands relating to a future agreement.[9]

6.3 Where an agreement prescribes arbitration

Section 65(b) 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*.

[9] *South African National Security Employers' Association v TGWU* [1998] 4 BLLR 364 (LAC).

6.4 Where parties have a right to refer a dispute to arbitration or the Labour Court

If a party has a right to refer the issue in dispute (a 'rights' dispute) for arbitration or adjudication, a party may not resort to a strike or lock-out in order to resolve the dispute.

Despite this rule, there are 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 the union 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, 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.

In terms of section 74 where there is a collective bargaining dispute in an essential service or maintenance service, it must first be referred for conciliation to either a bargaining council or the CCMA and, if it remains unresolved it must be referred for arbitration to either a council or the CCMA. The arbitrator is tasked to achieve a rational outcome of the dispute.

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[10] See chs 10, para 3.6; 11, para 4.6 above.

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 or a maintenance service is determined by the Essential Services Committee (hereafter 'ESC') established in terms of section 70. The SAPS and Parliamentary Services are specifically included in the definition of 'essential service' as per the above definition.

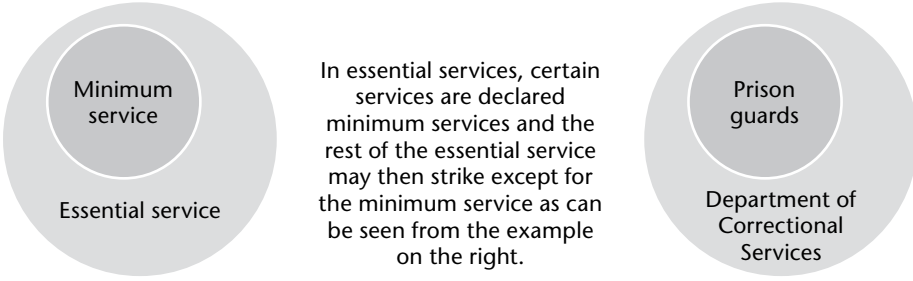
Other examples of services that have been designated as essential services are:

- 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.

Although employees engaged in essential services are prohibited from striking, the LRA makes provision for an exception, namely, where there is a collective agreement which provides for the provision of *minimum* services.

Employers and unions involved in essential services can conclude collective agreements providing for the maintenance of certain 'minimum services' in a service which has been designated as an essential service. If such a collective agreement is approved and ratified by the ESC, employees who provide the minimum service will not be able to strike as they will now be regarded as an essential service in respect of the employer, while the rest of the 'essential services' may strike. The terms and conditions of employment of employees who provide minimum services will not be subject to arbitration in terms of section 74 but will be determined by the outcome of the strike by other employees who are not engaged in the minimum service.

Example: In the Department of 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 may strike, such as the kitchen, the switchboard or the store.



An employer employing essential and non-essential service employees may face a protected strike by employees who do not perform essential service functions. In *SAPS v POPCRU*,[11] the SAPS which was designated as an essential service by the LRA and sought an interdict against POPCRU after the union called its members to join a strike. The SAPS argued that its employees are prohibited from striking because they are engaged in an essential service. POPCRU argued that the SAPS employs two categories of employees, that is, those employed under the South African Police Service Act and those employed under the Public Service Act. The court held that SAPS' argument that all its employees fall under essential services is neither justifiable nor reasonable and it would unjustifiably restrict the fundamental right to strike provided in the Constitution. The court, therefore, found that employees employed by the SAPS who are not performing police functions do not fall under essential services and may engage in a strike.

6.6.2 *Maintenance services*

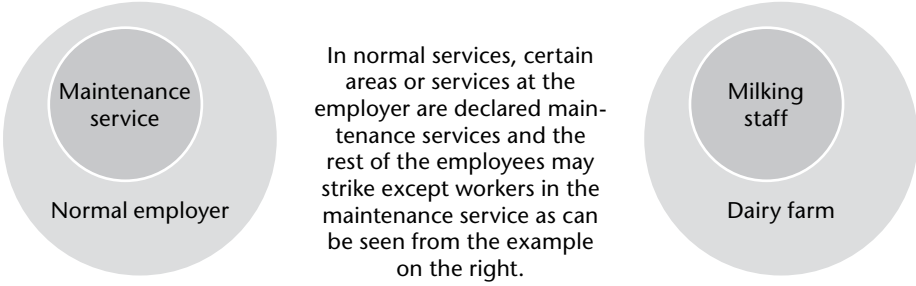
The LRA also recognises that certain areas of the workplace (even if the employer is not performing an essential service) must be maintained during a strike in order to prevent large-scale damage to a workplace or the machinery in a workplace. The washing machinery and its operators in the brewery is 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.

A maintenance service may be designated through an agreement between the employer and union. If no such agreement exists, the ESC may designate a service as a maintenance service (for example, milking the cows). Once

[11] (2010) 31 *ILJ* 2844 (LAC).

designated as a maintenance service, employees involved in such a service are prohibited from striking if the agreement provides so or if directed by the ESC. However, in terms of section 75(6) the ESC may not direct that disputes relating to the maintenance service be referred to arbitration, for example, if their terms and conditions of employment are determined by collective bargaining or the number of employees engaged in the maintenance service exceeds the number of employees who are entitled to strike.

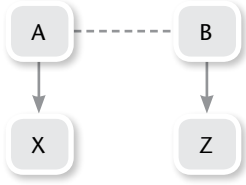
Moreover, once the whole or a *part* of the business has been designated as a maintenance service, the employer will not be allowed during the strike to use replacement labour in *that part* of the business.



Maintenance services are not the same as minimum services. A minimum service is part of an essential service, designated as such by a collective agreement. It is possible to conclude a minimum service agreement in an essential or maintenance service in order to reduce the number of employees in these services that may not strike. 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. Company A is in dispute about wages with trade union X at the workplace. Factory B fells, cuts and supplies raw wood to Company A. Trade union Z is the only union in the workplace of Factory B. If the members of trade union Z strike in support of the wage demand by members of trade union X, that will amount to a secondary strike. The strike by members of trade union Z will impact on Factory B, but also put

pressure on Company A, because Factory B will not be able to provide Company A with raw wood, which may bring Company A's operation to a halt.

In order to understand how secondary strikes work, the following facts should be clarified with reference to the above example:

- Company A is the primary employer and Factory B is the secondary employer.
- The wage dispute between Company A and trade union X will constitute the primary dispute, and the strike by members of union X will constitute the primary strike action.
- The strike by members of trade union Z at the workplace of Factory B is a secondary strike.

The secondary strike, therefore, takes place when the members of union Z at Factory B (not the primary employer Company A) strike in support of demands by members of trade union X against their employer Company A. The purpose of the strike by members of union Z at Factory B is in support of the strike by members of union X at Company A. Factory B's inability to supply the raw wood will influence Company A's operation (which may have financial consequences for Company A) and thereby exert pressure on Company A to accede to the demands of trade union X.

In order for a secondary strike to be protected, the LRA sets the following requirements:

- the *primary strike itself must be protected,*
- secondary 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 box below.

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.

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 instituting 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 employees' 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. This is the case because the reason for the dismissal was participation in a protected strike.

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.

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 as discussed in chapter 10. The Supreme Court of Appeal held that the in terms of the Regulation of Gatherings Act[12] the trade unions and organisers may be liable for damage caused by union members during a strike.[13]

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 prescribed procedures 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.

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[12] 205 of 1993.

[13] *SATAWU v Garvas & others* [2011] 12 BLLR 1151 (SCA). The finding was upheld by the Constitutional Court (see ch 15, n 2 below).

8.4 Protection against claims for compensation by employers

Employers of employees who are 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 the 'no work, no pay' principle 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 employees (making their 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 even 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.

Employers cannot use replacement labour if they embark on an offensive lock-out, that is, a lock-out initiated before a union decides to strike. 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 discussed above, the action will be unprotected and will have certain consequences.

9.1 Consequence 1: Interdict

If a strike or lock-out does not comply with the definition provided by the LRA and/or provisions of sections 64 and 65, it will be unprotected. The Labour

Court has jurisdiction to grant an interdict to stop the unprotected strike or lock-out. 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 anyone who suffered a loss as a result of an unprotected strike or lock-out.

Compensation will not be granted unless it can be proved that the loss was as a result of the strike or lock-out. In deciding whether to grant the order for payment of compensation, the court must have regard to:

- attempts made to comply with the provisions of the Act,
- 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.

The 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. Take note that the requirements for both substantive and procedural fairness in this case are different from those for purposes of an ordinary act of misconduct.

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 its 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.



(*c*) Compliance with ultimatum

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.



(*d*) No ultimatum

In circumstances where it cannot reasonably be expected from the employer to issue an ultimatum, the employer may summarily dismiss the strikers.

Take note that the common-law rule of 'no work, no pay' also applies to unprotected strikes and lock-outs.

? SELF-ASSESSMENT QUESTIONS AND FEEDBACK

1. Which *one* of the following statements regarding strikes is *correct*?
   (*a*) An issue in dispute must be referred to the Labour Court for adjudication.
   (*b*) An individual employee may engage in a strike action.
   (*c*) At least 48 hours' notice must be given to the employer before the commencement of a strike.
   (*d*) The right to strike is protected by the Constitution and therefore it cannot be limited.
2. Discuss whether employees who participate in a protected strike can be dismissed.
3. Employer ABC and Union EE fail to reach agreement regarding a wage increase. Both the employer and the union are members of a council and the dispute is referred to such council where it is dealt with in accordance with the council's constitution. While the matter is being dealt with by the council, members of the union grow impatient and without following the procedure set by the LRA for a protected strike, they decide to engage in a strike. Advise Employer ABC on whether strike by members of Union EE will be protected.

✓ Feedback

1. Statement (*c*) is *correct*. At least 48 hours' notice must be given to the employer before the commencement of a strike.

   Statements (*a*), (*b*) *and* (*d*) are incorrect. An issue in dispute must be referred to a bargaining council or the CCMA for conciliation. Although the right to strike is granted to every worker, an individual employee cannot engage in a strike. The definition of a strike requires that the action must be concerted. Although the right to strike is protected by the Constitution, it can be limited in terms of law of general application such as the LRA.
2. Employees who participate in a protected strike may not be dismissed for their participation in such a strike. If employees are dismissed based on their participation in a protected strike, the dismissal will be automatically unfair. However employees may still be dismissed for acts of misconduct committed during a protected strike or for operational reasons, on condition that all the substantive and procedural fairness requirements are met.
3. Although the LRA prescribes a procedure which should be followed in order for a strike to be protected, the LRA also provides for exceptions under which a strike will be protected even if the set procedure was not followed. An example of such an exception is where parties to a dispute are members of a bargaining council and the matter is dealt with in accordance with its constitution. Union EE followed the process prescribed in the constitution of the council and their strike is therefore protected. Employer ABC will not be able to act against EE.

RECOMMENDED READING

1. Manamela ME & Budeli M 'Employees' right to strike and violence in South Africa' (2013) XLVI *CILSA* 308
2. Gericke SB 'Revisiting the liability of trade unions and/or their members during strikes: Lessons to be learnt from case law' (2012) 75 *THRHR* 566
3. Fergus E 'Reflections on the (dys)functionality of strikes to collective bargaining: Recent developments' (2016) 37 *ILJ* 1537
4. Le Roux PAK 'Giving notice of strike action' (2012) 22(5) *Contemporary Labour Law* 41
5. Norton D 'When is a secondary strike reasonable? The connections between separate employers' (2008) 18(3) *Contemporary Labour Law* 21
6. Van Eck S 'In the name of "workplace and majoritarianism:" Thou shalt not strike—*Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 *ILJ* 831 (CC) and *National Union of Mineworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 305 (CC)' (2017) 38 *ILJ* 1496

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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. The right to engage in these actions is protected in terms of section 17 of the Constitution which provides that everyone has the right peacefully and unarmed, to assemble, to demonstrate, to picket and to

present petitions. 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 oppose a protected or unprotected 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 endeavour to convince customers and suppliers of the employer not to deal with their employer. A picket is generally used by employees to gain publicity 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 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.'

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] issued under the LRA.

[1] See ch 1, para 6.1.

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 on them.

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,[2] and
- in support of *any protected* strike or in opposition to a *protected or unprotected* 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.
- 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 protection. 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.

[2] It was held in *SATAWU v Garvas & others* [2012] 10 BLLR 959 (CC) that although s 17 of the Constitution affords everyone the right to picket, present petitions, demonstrate and assemble peacefully and unarmed, s 11 of the Regulation of Gatherings Act 205 of 1993 limits the right to assemble by holding the organisers of a gathering liable for riot damage when the act or omission was 'reasonably foreseeable' but the organisers did not take all the reasonable steps to prevent the damage.

In support of any protected strike or in opposition to a protected or unprotected lock-out

A picket must be:
- in support of a protected strike, or
- in opposition to a protected or unprotected lock-out.

Pickets in support of unprotected strikes will not fall under section 69 of the LRA. 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 section 17 of the Constitution which, amongst other things, provides that everyone has the right to picket.

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.

In *Growthpoint Properties Ltd v SACCAWU & others*[3] the union picketed in the underground parking of the shopping mall which increased noise levels and scared shoppers. The court held that SACCAWU and its members can exercise their rights reasonably without interfering with Growthpoint, its tenants and the public. The union was, however, ordered to cease being a nuisance at the premises of the Growthpoint-owned shopping mall by shouting, chanting loudly, ululating or using any kind of instrument or object with which to make any loud noise in the vicinity of any of the entrances to the mall.

Provision is made for a person other than the employer in terms of which rules established by the CCMA, may provide for picketing by employees in a place which is owned or controlled by another, if that person has had an opportunity to make representations to the Commission before the rules are established.

[3] (2010) 31 *ILJ* 2539.

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
- an 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 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 union.
- The convenor must always have at hand copies of section 69, 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, 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 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 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 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.[4]

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.[5]

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 breached 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.

3.1 Definition of protest action

'Protest action' is defined as '… the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of

[4] Section 68(1).
[5] See ch 10, para 1.2.4 above.

promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike.'[6]

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 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.[7]

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 the 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 covered by the LRA.

3.2 Procedural requirements for the protection of protest action

Since protest action has a serious impact on the economy of the country, it is important that it be regulated. Section 77 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, stating the nature and reasons for the protest action,
- the matter giving rise to the protest action must have been considered by NEDLAC, and
- NEDLAC must have been given at least 14 days' notice of the intention to proceed with the action.

[6] Section 213.

[7] 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.

3.2.1 *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 federation of trade unions may call 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 must have considered the matter giving rise to the intended protest action in order to resolve 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

Protest action will be protected if it complies with the prescribed requirements which are similar to those for strikes and lock-outs. Protection affords immunity against civil claims and against the dismissal of those who took part in protest action. The protection against dismissal will be forfeited if employees took part in unprotected protest action. As with strikes and pickets, unions and their members may be held liable in case there is violence and property is damaged during the protest action. Furthermore, in terms of section 77(4) there will be no protection if:

- employees participate in a protest action in breach of an order of the court, and
- employees act in contempt of an order of court.

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*?
   (*a*) A picket may only be used to oppose an unprotected lock-out.
   (*b*) An unregistered trade union may authorise a picket.
   (*c*) Picketers may chant slogans and dance.
   (*d*) A picket may only be held on the employer's premises.
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 a day in order to march to the Union Buildings and submit a memorandum against the proposed new tax system. 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. Statement (*c*) is *correct*. Picketers may chant slogans and dance as long as their action is peaceful.

   Statements (*a*), (*b*) and (*d*) are incorrect. A picket can also be used in support of a protected strike or to oppose a protected or unprotected lock-out. A picket can only be authorised by a registered trade union. A picket can be held in any place to which the public has access, but outside the premises of the employer or with the permission of the employer, inside the employer's premises.
2. The purpose of a 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 constitutes 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) 20(3) *Contemporary Labour Law* 27
3. Le Roux PAK & Mischke C 'Picketing and the dismissal of strikers: Three new Labour Court decisions' (2006) 16(5) *Contemporary Labour Law* 51
4. Myburgh A 'The failure to obey interdicts prohibiting strikes and violence: The implications for labour law and the rule of law' (2013) 23(1) *Contemporary Labour Law* 1
5. Wallis M 'Now you foresee it, now you don't: *SATAWU v Garvas & others*' (2012) 33 *ILJ* 2257

Part V

Annexures

Part V is a new addition to the book and consists of three Annexures. These documents are included because of their importance as well as their practical value. The Codes to the Acts as well as relevant forms are available on the websites of the various government departments, most notably the Department of Labour (www.labour.gov.za).

- **Annexure A** is Form EEA1 which is used by employees to indicate their nationality and designated status.
- **Annexure B** is LRA Form 7.11 which is used to refer a dispute to the CCMA. The form provides clear instructions to the referring party and she/he must indicate the nature of the dispute and the relief sought. In paragraph 3 the various disputes that can be referred are listed, for example, disputes about unfair dismissal, unfair labour practice, refusal to bargain, organisational rights, unfair discrimination, unilateral changes to terms and conditions of employment, disclosure of information, etcetera.
- **Annexure C** is Schedule 8 to the LRA: Code of Good Practice: Dismissal which provides guidelines on procedural and substantive issues of dismissals. The provisions of the LRA should be read together with this Code. It is suggested that you look at this Code while studying Chapters 9 and 10. Other forms for referral of disputes to the CCMA can be obtained from their website at www.ccma.org.za.

ANNEXURE A

Form EEA1

labour
Department:
Labour
REPUBLIC OF SOUTH AFRICA

PAGE 1 OF 1 **EEA1**

DECLARATION BY EMPLOYEE
(*Confidential)*

PLEASE READ THIS FIRST

PURPOSE OF THIS FORM

This form is used to obtain information from employees for the purpose of assisting employers in conducting an analysis on the workforce profile. Employers should use this form to ascertain which employees are from designated groups in terms of the Employment Equity Act, 55 of 1998, as amended.

WHO COMPLETES THIS FORM?

Employees should fill in this form.

INSTRUCTIONS

All employers must ensure that the contents of this form remain confidential, and that it is only used to comply with the Employment Equity Act, 55 of 1998, as amended.

PLEASE NOTE:

'Designated groups', mean black people, women and people with disabilities who-

a) Are citizens of the Republic of South Africa by birth or descent; or
b) Became citizens of the Republic of South Africa by naturalization –
   (i) before 27 April 1994; or
   (ii) after 26 April 1994 and would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by Apartheid policies

'People with disabilities' are defined in the Act as people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment.

*Please note that people with disabilities have the right not to disclose their disability, unless it is in line with the inherent requirements of the job.

1. Name of employee:----------

2. Employee workplace No: ----------
(This is the number that an employer/company/organisation uses to identify an employee in the workplace.)

3. Please indicate to which categories you belong with an '**X**' below:

Male	Female

African	Coloured	Indian	White

Foreign Nationals	

If you are not a citizen by birth, please indicate the date you acquired your citizenship: ----------

Person with a disability*	

If yes, specify nature of disability:

---

4. I verify that the above information is true and correct.

Signed: ----------
Employee

Date: ----------

ANNEXURE B

LRA Form 7.11

LRA Form 7.11
Labour Relations Act, 1995
Sections 9, 16, 21, 22, 24, 26, 45, 61, 63, 64, 72, 74, 86, 89, 94, 134, 191(1), 198 and 198A-C
Employment Equity Act, 1998
Sections 10
Basic Conditions of Employment Act, 1997
Sections 41 and 80
Skills Development Act, 1998
Section 19

REFERRING A DISPUTE TO THE CCMA FOR CONCILIATION (INCLUDING CON-ARB)

CCMA

READ THIS FIRST

WHAT IS THE PURPOSE OF THIS FORM?

This form enables a person or organisation to refer a dispute to the CCMA for conciliation and con-arb.

WHO FILLS IN THIS FORM?

Employer, employee, trade union or employers' organisation.

OTHER PARTIES

If there is more than one employee to the dispute and the referring party is not a trade union, then each employee must supply his/her personal details and signature on a separate page, which must be attached to this form.

WHERE DOES THIS FORM GO?

The Registrar, Regional Office of the CCMA in the region where the dispute arose.

OTHER INSTITUTIONS

Please note that if you are covered by a bargaining council, a statutory council or an accredited agency you have to refer the dispute to the relevant council or agency.

You may also need to deal with the dispute in terms of a private procedure if one applies.
If in doubt contact the CCMA for assistance.

WHAT WILL HAPPEN WHEN THIS FORM IS SUBMITTED?

When you refer the dispute to the CCMA, it will appoint a commissioner who must attempt to resolve the dispute within 30 days.

1. DETAILS OF PARTY REFERRING DISPUTE

☐ An employee ☐ A trade union

☐ An employer ☐ An employers' organisation

(a) Name of the party if the referring party is an employee

Name:……

Surname:……

Length of service:…… ID Number:……

Salary Gross:…… Salary Net:……

Gender (M/F):……Age:…… Nationality……

Postal Address:……

……Code:……

Tel:……Cell:……

Fax:…… …… Email: ……

Alternative contact details of employee (representative/relative or friend):

Name:…… ……

Surname:……

Postal Address:……

……Code:……

Tel:……Cell:……

Fax:…… Email: ……

(b) Name of the referring party if the referring party is an employer, employer's organisation or trade union, or if the employer's organisation or the trade union is assisting a member to the dispute

Name:……

Surname (if applicable):……

Designation:……

Postal Address:……

……Code:……

Tel:……Cell:……

Fax:…… Email: ……

Contact person:……

CCMA Case Number……

Please turn over ⟶

FURTHER INSTRUCTIONS

A copy of this form must be served on the other party.

Proof that a copy of this form has been served on the other party must be supplied by attaching any of the following:

- A copy of a registered slip from the Post Office; or
- A copy of a signed receipt if hand delivered; or
- A signed statement confirming service by the person delivering the form; or
- A copy of a fax confirmation slip; or
- A copy of an email confirmation slip; or
- Any other satisfactory proof of service.

Attach relevant documents such as collective agreements, etc.

The CCMA may be requested to assist with service.

UNFAIR LABOUR PRACTICE

If the dispute(s) concerns an unfair labour practice the dispute must be referred (i.e. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has lapsed you are required to apply for condonation.

2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)

The other party is:

☐ An employer ☐ An employer's organisation

☐ An employee ☐ A trade union

Name:……

(If company or close corporation, the name of the company or close corporation)

Surname (if applicable):……

Postal Address:……

……Code:……

Physical Address:……

……Code:……

Tel:……Cell:……

Fax:……Email:……

Company or close corporation registration number:……

If it is an organisational rights dispute, the name of the owner of and/or the person who controls access to the premises where the employees work.

……

If a Temporary Employment Service (TES) is involved, the name of the TES:

……

Number of employees employed by the employer:……

3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

❒ Refusal to Bargain ❒ Mutual Interest
❒ Severance Pay ❒ Organisational Rights
❒ Unfair Labour Practice ❒ Disclosure of Information
❒ Freedom of Association ❒ S80 BCEA
❒ Unfair Discrimination - S10 EEA ❒ S19 SDA
❒ Interpretation/Application of Collective Agreement
❒ Unilateral Changes to Terms and Conditions of Employment
❒ Dismissal ❒ S198 LRA
❒ S198A LRA (Labour Broker) ❒ S198B (Fixed Term Contract)
❒ S198C (Part-time Employment)
❒ Other ……

Please turn over →

If it is an unfair labour practice, state whether it relates to probation.

If it is an unfair dismissal dispute, tick the relevant box

☐ Misconduct ☐ Incapacity
☐ Unknown Reasons ☐ Constructive Dismissal
☐ Poor Work Performance ☐ Dismissal relates to Probation
☐ Operational Requirements (Retrenchments)
☐ where I was the only employee dismissed
☐ where the employer employs less than ten (10) employees
☐ Other ……

4. SUMMARISE THE FACTS OF THE DISPUTE (Use additional paper if necessary)

……

……

5. DATE AND WHERE DISPUTE AROSE:

The dispute arose on: ……
(give the date, day, month and year)

The dispute arose where: ……
(give the city/town in which the dispute arose)

6. DATE OF DISMISSAL (if applicable) _____

This section must be completed!

If necessary write the details on a separate page and attach to this form.

7. FAIRNESS/UNFAIRNESS OF DISMISSAL (if applicable)

(a) Procedural Issues
Was the dismissal procedurally unfair? Yes ☐ No ☐
If yes, why?

……

……

(b) Substantive Issues
Was the reason for the dismissal unfair? Yes ☐ No ☐
If yes, why

……

……

8. RESULT REQUIRED

……

9. SECTOR

Indicate the sector or service in which the dispute arose.

❒ Retail ❒ Safety/Security (Private)
❒ Mining ❒ Domestic
❒ Building & Construction ❒ Food & Beverage
❒ Business/Professional Services ❒ Transport (Private)
❒ Agriculture/Farming
❒ Other ……

Please turn over →

Parties may, at their own cost, bring interpreters for languages other than the official South African languages. Please indicate this under 'other'.

10. INTERPRETER SERVICES

Is an interpreter required? **Yes/No**

☐ Afrikaans	☐ IsiNdebele	☐ IsiZulu
☐ IsiXosa	☐ Sepedi	☐ SeSotho
☐ Setswana	☐ IsiSwati	☐ Xitsonga
☐ Sign Language	☐ Tshivenda	

☐ Other ……

The con-arb process involves arbitration being held immediately after the conciliation if the dispute remains unresolved.

If the employer objects to the arbitration commencing immediately after the conciliation the employer must submit a written notice in terms of CCMA Rule 17(2) at least 7 days prior to the scheduled date of the conciliation. The employer must attend the conciliation regardless of whether it makes this objection.

11. DISCRIMINATION MATTER

If it is a discrimination dispute, have you attempted to resolve the disputed?

Yes		No	

(If written confirmation is available, please attach)

12. OBJECTION TO CON-ARB PROCESS (Only complete this part if you object to the arbitration commencing immediately after conciliation).

I/we object to the arbitration commencing immediately after the conciliation in terms of Section 191(5A)(c).

_____
Signature of person objecting to con-arb

The parties must attend the conciliation regardless of whether there is an objection.

13. CONFIRMATION OF ABOVE DETAILS

Form submitted by:

……
(please print name)

Signature: .....

Position: .....

Date: .....

Place.....

ANNEXURE C

Code of Good Practice: Dismissal

1. Introduction

(1) This code of good practice deals with some of the key aspects of dismissals for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach.

(2) This Act emphasises the primacy of collective agreements. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a workplace forum.

(3) The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.

2. Fair reasons for dismissal

(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.

(3) This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187. The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.

(4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.

3. Disciplinary measures short of dismissal

Disciplinary procedures prior to dismissal

(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline.

This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the

past, and consistently as between two or more employees who participate in the misconduct under consideration.

4. Fair procedure

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(3) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5. Disciplinary records

Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

6. Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—

(*a*) the seriousness of the contravention of this Act;

(*b*) attempts made to comply with this Act; and

(*c*) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will

be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

7. Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider—

(*a*) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(*b*) if a rule or standard was contravened, whether or not—

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

8. Incapacity: Poor work performance

(1) Probation

(*a*) An employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed.

(*b*) The purpose of the probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment.

(*c*) Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(*d*) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.

(*e*) During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service.

(*f*) If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet

the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with subitems (g) or (h), as the case may be.

(*g*) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(*h*) An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee.

(*i*) If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.

(*j*) Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reason for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has—

(*a*) given the employee appropriate evaluation, instruction, training, guidance or counselling; and

(*b*) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

9. Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider—

(*a*) whether or not the employee failed to meet a performance standard; and

(*b*) if the employee did not meet a required performance standard whether or not—

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.

10. Incapacity: Ill health or injury

(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2) In the process of the investigation referred to in subsection (1) the employee I should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider—

(*a*) whether or not the employee is capable of performing the work; and

(*b*) if the employee is not capable—

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

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LABOUR LAW RULES!

THIRD EDITION

ARBEIDSREG *Beslis!*
UMTHETHO WASASEBENZI *Uyabusa!*
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This now well established labour law text has been updated to reflect the law as of September 2017. *LABOUR LAW Rules!* has provided a highly accessible text on labour, equity, social security and skills development laws over many years. 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, and 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 for the first time during their studies. Labour law is a compulsory subject for LLB students, and increasingly so for BCom students at South African universities. In addition, IR and HR practitioners, line managers, supervisors and union officials will all find the book useful.

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