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Study unit 2 LLW2062

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## LLW2062 Study unit2-2014

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**KEY CONCEPTS TO LOOK OUT FOR IN THE UNIT**

*• Collective bargaining; • bargaining agent; • bargaining level; • collective agreement; • workplace forum; • consultation; and • joint decision making.*

**2.4.1 Collective bargaining**

Collective bargaining assumes willingness by both parties not only to listen to and consider representations by the other party but also to abandon fixed positions where possible in order for the parties to find common ground. Through collective bargaining, parties (trade unions and employers/employers' organisations) with different views and desires are able to reach agreement on a variety of issues. It is called collective bargaining because employees, collectively represented by a trade union and not as individuals, negotiate with the employer.

**Collective bargaining:**

- ✚ Neither constitution or LRA defines collective bargaining
- ✚ Process of collective bargaining is a process of collective bargaining between two parties – union and employer/employer org
- ✚ Willing ness by each party to listen and abandon its own fixed positions to find common ground
- ✚ COLLECTIVE Means – employees join together in trade union to increase power in bargaining with employer over wages
- ✚ Only trade unions can engage in collective bargaining

### 2.4.1.1 Duty to bargain

Although the Constitution provides for the right to engage in collective bargaining, this does not create a duty for employers to bargain with trade unions, or vice versa. The LRA encourages collective bargaining by granting organisational rights and sanctioning union security arrangements (discussed in Study Unit 1). A refusal to bargain can result in industrial action (discussed in Study Units 3-5) by employees in order to force the employer to bargain. In terms of section 64 (2) of the LRA, the refusal to bargain includes the following: • the refusal to recognise a trade union as a bargaining agent; • the refusal to establish a bargaining council; • the withdrawal of the recognition of a collective bargaining agent; • the resignation of a party from a bargaining council; and • a dispute concerning the appropriate bargaining units, levels and topics.

#### 1. Duty to bargain:

- ✚ The right to engage does NOT create the DUTY for either parties to bargain
- ✚ LRA encourage collective bargaining through closed-shop or agency-shop
- ✚ Should employer refuse to bargain ACT allows strike action by employees to convince employer to bargain
- ✚ Refusal to bargain includes:
  - ☆ Emp refusal to recognise trade union as bargaining agent
  - ☆ Emp refuse to establish bargain council
  - ☆ Emp withdrawal of recognition of collective bargaining agent
  - ☆ Emp registrations a party to a bargaining council
  - ☆ Emp dispute appropriate bargaining levels and topics
- Disputes regarding bargaining levels should first be ref to CCMA for advisory award – PROVIDES GUIDANCE ONLY NOT BINDING PARTIES

### 2.4.1.2 Bargaining agents

Employees organise themselves in trade unions which represent them during bargaining. See paragraph 3.3 on page 171 of the prescribed book for the definition of a trade union. Trade unions are regulated by the LRA, which also prescribes the process for their registration.

The following are the benefits of registration for trade unions:

- they can conclude collective agreements enforceable in terms of the LRA;
- they can acquire organisational rights;
- they can become members of bargaining and statutory councils;
- they can establish workplace forums; and
- they can conclude closed shop and agency shop agreements

. A single employer can engage in collective bargaining with a trade union, or employers may form an employers' organisation which will serve as a bargaining agent. An employers' organisation is defined as "any number of employers associated together for the purpose, whether by itself or other purposes, of regulating

relations between employers and employees or trade unions”. Trade unions and employers’ organisations may establish bargaining councils together.

2. **Bargaining agent:**

- + Collective bargaining performed by bargaining agent – trade unions and emp org
- + LRA sets requirements
- + Trade union is defined as as an association of employees whose purpose is to regulate relations between emp and emp-org and employees.
- + Only employees may be part of trade union
- + Qualify as Trade union:
  - ⊗ Association of employees must be registered
  - AND HAS THE RIGHT TO:
    - ✓ Conclude a collective agreement enforceable under the LRA
    - ✓ Acquire org rights
    - ✓ Member of bargaining council, statutory council and work place forum
    - ✓ Conclude closed shop and agency shop agreement
- + Power of function of LRA are outlined in section 28 of LRA
- + Bargaining council has **3 Main functions:**
  - ☆ **Conclude collective agreement**
  - ☆ **Enforce collective agreement**
  - ☆ **Prevent and resolve labour disputes**

2.4.1.3 Levels of bargaining

Bargaining can take place at the following levels:

Bargaining can take place at the following levels:

Bargaining Level	
Plant level	It takes place between the employees and the employer at a specific plant or factory.
Sector level	It takes place in a specific sector of the economy in a specific geographical area.
Industry level	This is bargaining for the industry as a whole, e.g. mining.

3. **Levels of bargaining:**

- + Collective bargaining can take place at **plant level**, **sector level** or industrial level

- ☆ **Plant level:** Bargaining that takes place between employees represented by a union, and employer at a specific plant or factory.
- ☆ **Sector level:** Bargaining that takes place in a specific sector of economy and linked to specific geographical area.

- ✚ LRA encourage bargaining at sector or industry level
- ✚ Bargaining councils can be established in the private as well as the public sector
- ✚ The PRIVATE sector is the economic sector where state is not the employer
- ✚ The PUBLIC sector state is the employer
- ✚ **SEE TABLE ON PG 172 – 3.5**

#### 2.4.1.4 Collective agreements

A collective agreement is the product of successful collective bargaining between the employer and trade unions. It regulates the terms and conditions of employment agreed upon by the parties. See paragraph 3.6 for the definition of a collective agreement and its important elements, and for the legal and binding effect of such an agreement. It is important to note that a collective agreement changes any contract of employment between an employee and an employer if they are both bound by the agreement.

#### 4. Collective agreement:

- ✚ Main goal is to reach consensus and formalise relationship by means of collective agreement
- ✚ Collective agreement regulates the right of duties , T&C of employment
- ✚ **Collective agreement defined in LRA:**
  - Written agreement concerning t&c of employment or any other matter of mutual agreement concluded between emp or registered trade union and one more employer or registered employer.
- ✚ **3 element distinguish a collective agreement:**
  - Must be in writing
  - Only registered trade union can be party to a collective agreement
  - Collective agreement must regulate t&c of emp or any other matter of interest between trade union and the emp or emp org.
- ✚ **Collective agreement binds:**
  - Parties to agreement
  - Each party to arrangement and members of any other party of agreement in so far as provisions are applicable
  - Member of registered trade unions and emp who are members of reg emp org that are party to collective agreement if it regulates:
    - ⊗ T&C of emp
    - ⊗ Conduct emp in relation to their employees or conduct of employees in relation to emp
  - Employee who are not members of reg trade unions party to agreement are bound to agreement if:
    - ⊗ Employees are identified in agreement
    - ⊗ Agreement expressly binds employees
    - ⊗ Trade unions represent majority of all employees employed in the work place
- ✚ Collective agreement varies any contract of employment between employee and employer if they are both bound to the agreement.

### 2.4.2 Workplace forums

Workplace forums are in-house institutions established by registered trade unions to promote worker participation in decision making within the workplace. Unlike trade unions, workplace forums do not deal with wage related issues and cannot embark on industrial action. All employees, except senior managerial employees, can be members of a workplace forum. A workplace forum must be consulted on certain matters and has joint decision making powers in other matters. Study these matters in paragraphs 4.3 and 4.4 of the prescribed book.

A summary is provided below:

<p><b>Consultation</b></p>	<p>The forum makes representations and advances alternative proposals about a matter to the employer. The employer must consider and respond to the proposals and if he or she finds them unacceptable, he or she must provide reasons.</p> <p>Matters for consultation:</p> <ul style="list-style-type: none"> <li>• the restructuring of the workplace;</li> <li>• changes in how the work is organised;</li> <li>• the total or partial closure of the plant;</li> <li>• mergers and transfers of ownership, if it will affect employees;</li> <li>• the retrenchment of employees;</li> <li>• exemption from a collective agreement;</li> <li>• job grading;</li> <li>• criteria for merit increases or the payment of discretionary bonuses;</li> <li>• education and training;</li> <li>• product development plans; and</li> <li>• the promotion of exports.</li> </ul>
<p><b>Joint decision making</b></p>	<p>The employer must consult and reach consensus with the workplace forum.</p> <p>Matters for joint decision making:</p> <ul style="list-style-type: none"> <li>• disciplinary codes and procedures;</li> <li>• the proper regulation of the workplace;</li> <li>• measures designed to protect and advance persons disadvantaged by unfair discrimination; and</li> <li>• changes by employer-representatives on boards of employer-controlled schemes with regard to social benefits.</li> </ul>

### Workplace forum:

- ✚ To encourage workers
- ✚ Introduced by LRA
- ✚ FORUM:
  - ❖ In-house institution promoting workers participation in decision-making in the work place.
  - ❖ Deals with non-wages related issues like – restructuring, new tech, new work methods

**DO NOT CONFUDE WORKPLACE FORUMS WITH TRADE UNIONS!!!**

<b>Trade union</b>	<b>Workplace forum</b>
<ul style="list-style-type: none"><li>• Union is a juristic body</li><li>• Union deals with wage related issues</li><li>• Union can embark on industrial council</li></ul>	<ul style="list-style-type: none"><li>• Forum is not juristic body</li><li>• Forum deals with non-wage-related issues</li><li>• Forum cannot embark on industrial action</li></ul>

- ✚ All employees can be part of forum
- ✚ Senior manager may not be part of forum
- ✚ Only registered trade unions representing majority of **all** employees employed in the workplace , may apply for establishment of a forum
- ✚ Forum must have 100 or more employees through collective agreement or intervention of the CCMA
- ✚ Must meet regularities
- ✚ Function of a forum is to consult on certain matters and to have joint decision making on other matters.

### Consultation:

- ✚ Entails the employer:
  - ❖ Allow forum to make representation and to advance alternative proposals
  - ❖ Consider and respond to these and if employer disagrees with them that must state reason for disagreement
- ✚ Consultation must take place before emp implements any proposal

*Joint decision making:*

- ✚ Requires emp to consult and reach agreement with forum

*Matter of consultation:*

- ✚ Proposal relating to : / unless regulated by collective agreement/
  - ☆ Restructuring the workplace
  - ☆ Changes in org of work
  - ☆ Total or partial plant closure
  - ☆ Transfer of ownership in so far as they have an impact on employees
  - ☆ Retrenchment of employees
  - ☆ Exemption for any collective agreement by law
  - ☆ Job grading
  - ☆ Criteria for merit increases or the payment of discretionary bonuses
  - ☆ Education and training
  - ☆ Product dev
  - ☆ Export promotions
- ✚ Bargaining counsel may conclude collective agreement granting a forum the right to be consulted about additional matters that falls within the councils scope.

*Matters for joint decision making:*

- ✚ Cannot be regulated by collective agreement
- ✚ Matters for joint decision making relate to:
  - ⊗ Disciplinary codes and procedures
  - ⊗ Proper regulation of workplace
  - ⊗ Measures designed to protect and advance persons disadvantages by unfair discrimination
  - ⊗ Changes by employer-representative on board of employer-controlled schemes with regards to social benefits
- ✚ Representative union and employer may also enter collective agreement conferring on the forum joint decision making in respect of additional matters, in fulfilling its duties to consult and to have joint decision making , an employer is required to disclose all relevant info that will allow forum to participate effectively
- ✚ Employer is not obligated to disclose info on:
  - ⊗ That is legally privileged
  - ⊗ May not disclose contravening a law or court order
  - ⊗ Confidential and if disclosed may not cause substantial harm to the employee or employer
  - ⊗ Private personal info relating to an employee
- ✚ Disputes must be referred to the CCMA
- ✚ If parties fail to resolve may dispute through conciliation , any party to the dispute may request arbitration

## 2.5 PRACTICAL QUESTIONS

### Question 1

Is the statement below true or false? Provide reasons for your answer. A workplace forum enters into an agreement which regulates terms and conditions of employment with company A. This agreement has the status of a collective agreement and is binding on all employees of company A.

Did you remember the following in your answer? False A workplace forum is not a legal person and cannot conclude a collective agreement as defined in the LRA. Only a registered trade union can conclude a valid collective agreement.

### Question 2

List 3 possible bargaining levels in the workplace.

Did you remember the following in your answer? Plant, sector and industry bargaining levels.

Question 3 Discuss the binding effect of a collective agreement.

Did you remember the following in your answer? Such an agreement binds (1) the parties to the agreement, (2) 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, (3) members of a registered union and employees who are members of a registered employers' organization that are party to the collective agreement if it regulates (i) terms and conditions of employment or (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to the employer, (4) employees who are not members of the union/s which is party to the agreement and (i) the employees are identified in the agreement, (ii) the agreement expressly binds the employees, (iii) the union/s represent the majority of all the employees employed in the workplace.

### Question 4

Discuss the difference between consultation and joint-decision making.

Did you remember the following in your answer? With consultation the employer considers and respond to representations by the employees. If the employer does not agree with them, he must provide reasons. With joint-decision-making, the employer must consult and reach consensus with the employees.

### Question 5

Which of the following matters can be decided by way of consensus in a workplace forum?

- Job grading
- Criteria for merit increases or payment of discretionary bonuses
- Education and training
- Disciplinary codes and procedures
- The proper regulation of the workplace
- Measures designed to protect and advance persons disadvantaged by unfair discrimination

Did you remember the following in your answer?

- Criteria for merit increases or payment of discretionary bonuses



- Disciplinary codes and procedures
- The proper regulation of the workplace
- Measures designed to protect and advance persons disadvantaged by unfair discrimination

## **2.6 AFRICANISATION AND LABOUR LAW !**

Both labour law and Africanisation aim to ensure that people in a particular context (for example the workplace, in the case of labour law, the community or family in the case of traditional African societies) have sound relationships tailored on accommodating opposing views and conciliating competing interests. Both collective labour law and ubuntu favour the inclusive approach of joint decision making in matters that affect the group or organisation as a whole. This allows for a more horizontal approach where not all decisions are made from the top. Collective bargaining is based on freedom of association. Freedom of association is fundamental to ubuntu, with its inherent belief that one is never alone, as expressed in the African idiom “Motho ke motho ka batho” (I am because you are).

Collective bargaining creates a platform for parties to discuss and convince each other of their opinions, with the view of finding common ground or reaching a decision that will benefit all, leading to the conclusion of a collective agreement. To stand together is part of African tradition. This is evident from the African idioms “*Tau tsa hloka seboka disitwa ke nare e tlhotsa*” (When soldiers do not work together, they fail); “*bobedi bo bolaya noga*” (directly translated it means that two people can kill a snake, in other words, it means that if two people work together, they can defeat the enemy); and “*kopano ke maatla*” (unity is power).

Because there is no duty to bargain in South African labour law, and there is no penalty for not bargaining, the choice whether to bargain or not is with the parties. Because there is no obligation on the parties to engage in it, collective bargaining is a humane way of solving problems. It humanises the law. The humaneness of collective labour law is also evidenced by the fact that even minority unions are allowed to acquire and exercise certain organisational rights. The mere fact that even the minority has a voice, is humane.

In workplace forums the parties have to share ideas, respectfully consider representations and try and reach consensus, which reflects the African saying “*kutlwano ke matla*” (unity is strength). These requirements humanise the law because decisions are based on consensus.