

**CHAPTER 2  
EXCLUSIVE PROTECTION FOR EMPLOYEES IN TERMS OF LEGISLATION**

**WHO IS AN EMPLOYEE:**

1. Person , excluding independent contractor, who works for person/state & receives, entitled to remuneration
  - a. Incorporates: common-law contract service – locatio conduction operarum
  - b. Excludes the contract of work – location conduction operis – relates to independent contractors
2. Any other person who in any manner assists in carrying on or conducting business of an employer

Protected by Labour law

Aim LRA = promote sound relations between employers & employees

Independent contractor = contracted to perform specific task

Employee = render personal service in terms of job description

**GUIDELINES TO DISTINGUISH BETWEEN EMPLOYEES & INDEPENDENT CONTRACTORS**

3 tests:

- Control Test
- Organisation Test
- Dominant Impression Test

Control Test	Organisation Test	Dominant Impression Test
Looks at control over work person does, manner in which & when work must be done	Whether person part & parcel of business Person’s work integrated into business of employer and not just accessory	Favoured by courts & considers employment relationship as whole

Section 200A

“Until contrary is proved, a person who works for, or renders service to, any other person is presumed to be an employee, if any 1 or more of following factors are present”:

- a. Manner in which person works = control/direction of another person
- b. Person’s hours = subject to control/direction of another person
- c. Person forms part of organisation
- d. Works average of 40 hours per month over last 3 months
- e. Economically dependent on person for whom he/she works/ renders service
- f. Provided with tools of trade/equipment
- g. Only works renders services to 1 person

Part of application of dominant impression test:

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

**Contract of employment:**

“Means common law contract of employment, or any other agreement or arrangement under which a person agrees to work for an employer nut excluding contract of work as an independent contractor”

- Above accommodates categories of vulnerable workers – part time, temp

**Independent contract:**

“IC = person who works for or supplies services to client/customer as part of person’s business undertaking/professional practice”

**CATEGORIES OF EMPLOYEES**

Categories of employee	Description
Permanent employee	<ul style="list-style-type: none"> <li>• Person employed for indefinite period</li> </ul>
Temp/Contract/Fixed term employee (atypical)	<ul style="list-style-type: none"> <li>• Person employed for specified period or for specific project</li> </ul>
Casual Employee (atypical)	<ul style="list-style-type: none"> <li>• Person works for same employer – not more than 3 days p/week</li> <li>• Employment: temp or permanent</li> </ul>
Part-time employee (atypical)	<ul style="list-style-type: none"> <li>• Works only at certain times of day</li> <li>• Certain days of week – limited 3 days p/week</li> <li>• Temp/Permanent</li> </ul>

**New definition of employee**

“any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit & works under direction of supervision of any employer”

## **UNPROTECTED WORKERS**

### **ILLEGAL WORKERS**

Constitution/terms of protection against unfair dismissal in terms of LRA

Immigration Act

Aim:

- Deter employers from intentionally hiring workers not authorized to work in terms of act
- NB employer who employs illegal foreigner may not refuse to pay worker on this basis

Employment Services Bill

- Attempt to regulate employment of foreign workers
- Prohibits dismissal of SA citizen as result of having employed foreign worker

### **STATUTORY EXCLUSIONS OF WORKERS**

Following categories of employee are specifically excluded from scope of definition of employee in LRA

- Members of National defence force
- National intelligence agency
- SA Secret service
- SA national Academy of intelligence
- Members of Comsec

BCEA

Excludes following people from its protection

- Unpaid volunteers – Non-profit orgs
- People employed on vessels at sea

### **WHO IS AN “EMPLOYER”**

- Any person/body which employs any person in exchange for remuneration
- Any person who permits any person to assist him/her in conducting his/her business

TES = responsible for liabilities & duties that go with employer-employee relationship

Concerns regarding labour brokers:

- Reduced salaries
- Protection against unfair dismissal & unfair labour practices not shared between TES & client

Labour Relations Amendment Bill proposes:

- Employment service bill – provides legal framework for operation of TES & wants to set up free public employment service – will register & attempt to place work seekers – government regulated
- Labour brokers will be required to register as private employment agencies regulated by DoL

Labour Relations Amendment Bill proposed definition:

“Employer” means any person, institution, org, organ of state who employs, provides work to an employee or any other person & directly supervises, remunerates, tacitly/expressly undertakes to remunerate/reward such employee for services rendered”

## **CHAPTER 3**

### **IMPACT OF COMMON LAW ON CONTRACT OF EMPLOYMENT**

Impact of common law relates to basic rights & duties of employers & employees

#### **DUTIES OF THE EMPLOYER & EMPLOYEE**

##### **DUTIES OF EMPLOYERS**

1. Remunerate employee
  - a. Pay employee
  - b. No work, no pay
2. Provide employee with work
  - a. Except on commission salary. Eg actor
3. Safe working conditions
  - a. Protective devices, install safety equipment & exercise proper supervision
  - b. Compensation fund
4. Deal fairly with employee
  - a. Right labour practices

##### **DUTIES OF EMPLOYEE**

1. Render services
  - a. Placed at disposal of employer
2. Work competently & diligently
  - a. Guarantees he/she capable of doing work
3. Obey lawful & reasonable instructions
  - a. Non-compliance = insubordination & breach of contract
4. Serve employers interests & act in good faith (also called fiduciary duty)
  - a. Built on trust & confidence

##### **DOCTRINE OF VICARIOUS LIABILITY**

- Employer = liable for unlawful/delictual acts of an employee performed during course of business
- Regulated by common law & not employment legislation
- Based on principle that employer has to compensate those who suffer injury as result if wrongful conduct if employee
- Protects third parties
- Employer can discipline employee for misconduct & even claim repayment
  - Required in order to hold employee liable:
    - Contract if employment
    - Employee must have acted in course& scope of employment
    - Employee must have committed a delict (= negligent/intentional unlawful action against 3<sup>rd</sup> party)

## **IMPACT OF CONTRACT OF EMPLOYMENT ON THE EMPLOYMENT RELATIONSHIP**

### **GENERAL CONTRACT PRINCIPLES**

- Agreement between parties
- Parties to contract must have capacity to act
- Agreement must be legally possible
- Performance under agreement must be physically possible
- Formalities are prescribed for formation of particular type of contract - these formalities must be satisfied

Employer obliged to provide to employee in writing in terms of BCEA

- Full name & address of employer
- Name & occupation of employee
- Date employment commenced
- Working days & hours
- Wage
- Rate of pay – overtime
- Cash payments
- Deductions
- Period of notice required
- Period of employment with previous employer

### **REMEDIES FOR BREACH OF CONTRACT**

In event of breach of contract – innocent party has choice either to accept breach & cancel contract or compel defaulting party to perform – innocent party can claim damages

### **RESTRAINT OF TRADE**

Example

“Employee herewith agrees that, for period of 3 months after termination of employment with company, he will not accept employment with any competitor of employer within 20km radius of premises of employer”

Purpose:

Protect employers trade secrets, goodwill & business connections

In determining whether restraint of trade is enforceable, court will balance following:

Public interest, which requires parties to comply with contractual obligations even if these are unreasonable or unfair

VS

Right of all persons to be permitted as far as possible to engage in commerce or the professions of their own choice

Reasonableness will be determined with reference to interests of both parties, public policy & surrounding circumstances

- Is there an interest deserving of protection at the termination of agreement?
- Is that interest being prejudiced?
- If so, how does that interest weigh up against interests of other party not to work?
- Another facet of public policy apart from relationship between parties, which requires restraint should either be enforced or disallowed?
- Is restraint wider than necessary to protect protectable interest?

### **CHANGES TO CONTRACTUAL TERMS & CONDITIONS OF EMPLOYMENT**

An employer may not unilaterally change t&c of employment

Can only be changed in following ways:

- Agreement between 2 parties – in line with method prescribed in contract of employment
- By means of collective agreement between employer & trade union
- By operation of law
- Through sectoral determination issued by minister

### **CUSTOMS & PRACTICES IN WORKPLACE**

Customs & practices in workplace also have NB impact on employment relationship

Relate to an afternoon off per month, social visit to historical site & Christmas party

**CHAPTER 4**  
**BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)**

BCEA employment constitutes a term of any contract of employment, except where:

- Any other law provides a term more favourable to an employee
- Contract provides more favourable term to employee
- Basic condition has been replaced, varied or excluded in terms of act

**SCOPE OF APPLICATION**

BCEA gives effect to & regulates constitutional right to fair labour practices. To do this:

- Establishes & enforces basic conditions of employment
- Regulates variation of such conditions by way of various mechanisms, and within framework of ‘regulated flexibility’

Certain employees are excluded:

- Members of National defence force
- National intelligence agency
- SA Secret service
- SA national Academy of intelligence
- Members of Comsec
- Unpaid volunteers
- People employed on vessel
- Independent contractors

**MINIMUM CONDITIONS OF EMPLOYMENT**  
**WORKING TIME:**

Does not apply to:

- Senior managerial employees
- Sales staff who travel
- Who work less than 24hrs p/m
- Earn more than R172000 p/y

	REGULATIONS	ADDITIONAL COMMENTS
Max working hours	<ul style="list-style-type: none"> <li>• Max 45 hrs p/w</li> <li>• 5 d/w, not more than 9h p/d</li> <li>• 6 d/w not more than 8h p/d</li> <li>• (include 1 hour lunch break)</li> </ul>	



Lunch	<ul style="list-style-type: none"> <li>• 1 meal interval – 1hr after 5hours continuous work</li> </ul>	Can be reduced to 30mins Done away with if work fewer than 6 h/d
Overtime	<ul style="list-style-type: none"> <li>• Max 10 h/w</li> <li>• May increase to max 15 h/w by collective agreement</li> </ul>	<ul style="list-style-type: none"> <li>• Pay 1.5 x normal pay or time off</li> <li>• May not be more than total 12 h/d</li> </ul>
Sundays & public holidays	<ul style="list-style-type: none"> <li>• Pay double normal rate</li> <li>• If normally works on Sunday = 1.5 x normal pay</li> </ul>	
Night work	Employee must be given: <ul style="list-style-type: none"> <li>• Allowance</li> <li>• Reduction in hours of work</li> <li>• Provided with transport from home</li> </ul>	<ul style="list-style-type: none"> <li>• Night work performed after 18h00 – before 06h00 next day</li> <li>• Only be worked in terms of agreement</li> </ul>
Rest Periods	<ul style="list-style-type: none"> <li>• Daily rest period of 12 hour between ending &amp; recommencing</li> <li>• Weekly rest period of at least 36 consecutive hours include Sunday</li> </ul>	BCEA makes provision for daily & weekly rest periods
Compressed work week	Work 12 h/d without receiving overtime pay; provided that: <ul style="list-style-type: none"> <li>• Not more than 45 ordinary hs/w</li> <li>• More than 10 hs overtime in any week</li> <li>• More than 5 days in any week</li> </ul>	Averaging working hours & overtime calculated over period

## LEAVE

Does not apply to employees who work less than 24hr p/m

	Regulation	Additional Comments
Vacation leave	<ul style="list-style-type: none"> <li>• Min 21 consecutive paid vacation leave</li> <li>• Amount to 15 working days</li> </ul>	
Maternity leave	Entitled to 4 consecutive months which may commence at: <ul style="list-style-type: none"> <li>• Any time from 4 weeks before birth</li> <li>• On date medical practitioner certifies necessary</li> <li>• May not work 6 weeks after birth of child</li> <li>• Miscarries in 3<sup>rd</sup> trimester, entitled to 6 weeks leave</li> </ul>	Unpaid leave: can claim from UIF
Family responsibility leave	3 days family leave for every 12 months worked <ul style="list-style-type: none"> <li>• Child sick</li> </ul>	No provision for death of in-laws

	<ul style="list-style-type: none"> <li>• Death of spouse, life partner, adoptive parent, grandparent, child, adopted child, grandchild or sibling</li> </ul>	
Sick Leave	6 weeks paid sick leave every 3 year cycle worked	

## **OTHER MATTERS**

### **WAGES**

No min wage stipulated

Paid: monthly, daily, cheque, cash & direct deposit

### **NOTICE PERIODS**

- 1 week – employed for 6 months or less
- 2 weeks – more than 6 months – less than 1 year
- 4 weeks – employed for 2 year or more

### **SEVERANCE PAY**

Pay = to at least 1 weeks pay for each completed year of continuous service

### **CERTIFICATE OF SERVICE**

State: date of commencement, job description, remuneration at time of termination, reason for termination of employment may be stated only at employees request

### **CHILDREN & FORCED LABOUR**

Under age of 15 prohibited

Permits must be obtained from DoL to employ children:

- Remuneration paid to parents
- Max 4 hours child = 10 or old
- Max 3 hours child = 10 younger
- Rest period: over 10 years = 2 hours of continuous work, under 10 1.5 hours continuous work
- Nutritious food & drink
- Safe areas – rest & play
- Safe transport

### **ENFORCEMENT OF BCEA**

#### 1. COURTS

#### 2. INSPECTORS

- a. Monitor & enforce compliance with BCEA
- b. Inspectors may: enter workplaces, require person to disclose relevant info, question employers & employees & inspect docs & records

## VARIATION OF BASIC CONDITIONS

### 1. VARIATION BY WAY OF COLLECTIVE AGREEMENT

- a. Trade unions & employers
- b. It may replace/exclude basic condition of employment only to extent permitted by Act or sectoral determination

### 2. VARIATION BY WAY OF MINISTERIAL DETERMINATION

- a. Replaces/excludes basic min conditions of employment in respect of any category of employees or category of employment
- b. Determination may vary max ordinary weekly working hours if:
  - i. Collective agreement
  - ii. Operational requirements of sector necessary
  - iii. Majority of employees not members of trade union
- c. May relate to:
  - i. Working hours
  - ii. Overtime
  - iii. Meal intervals
  - iv. Daily & weekly rest periods
  - v. Annual leave

### 3. VARIATION BY WAY OF SECTORAL DETERMINATION

- a. Regulates min wage
- b. Conditions of employment
- c. Employment Conditions Commission (ECC) advise minister on range of factors which impact on specific sector & areas, such as:
  - i. Ability of employers to continue on business successfully
  - ii. Operation of small, med, macro & new enterprises
  - iii. Cost of living
  - iv. Alleviation of poverty
  - v. Inequality in wages
  - vi. Likely impact of determination on current & future employment
- d. May relate to (terms must be more favourable to employees than required by BCEA):
  - i. Working hours
  - ii. Overtime
  - iii. Meal intervals
  - iv. Daily & weekly rest periods
  - v. Annual leave

- e. May not reduce protection for night work & maternity leave
- f. May vary working hours only if:
  - i. Collective agreement
  - ii. Operational requirements of sector necessary
  - iii. Majority of employees not members of trade union

Examples:

- Farming
- Private security
- Contract cleaning
- Hospitality
- Taxi
- Domestic workers

Min wage adjusted to keep abreast of inflation

## CHAPTER 5: EMPLOYMENT EQUITY ACT

### BASIC TERMINOLOGY

#### FORMAL & SUBSTANTIVE EQUALITY

##### Formal

- Focus on protecting individuals against discrimination
- Views individuals ability & performance as only factors relevant for achieving success in society

##### Substantive Equality

- Recognises opportunities are determined by individual's status as member of group
- Discriminatory acts = part of pattern behaviour towards groups – result is disadvantage for such groups
- Prohibition of unfair discrimination – insufficient to achieve true equality
- Affirmative action – required to correct imbalances where disadvantage & inequality exist

#### DIFFERENTIATION & DISCRIMINATION

##### Differentiation

- Treating people differently
- Occurs frequently in workplace
- E.g: salary levels

##### Discrimination

- Form of differentiation based on unlawful grounds

#### **Direct & indirect discrimination**

##### Direct

- Easiest form of discrimination to determine
- Occurs if someone clearly treated differently – i.e due to race, gender
- Being paid less because she is female

##### Indirect

- Occurs when criteria appear to be neutral, negatively affects certain group disproportionately
- Often disguised – hard to detect
- i.e candidate must have deep voice

#### **Specified & unspecified grounds of discrimination**

##### EEA prohibits unfair discrimination

- list of prohibited grounds identical to constitutional list
- EEA 3 additional grounds: family responsibility, HIV status, political opinion

## PURPOSE OF EEA

Excludes following categories of employees

- Members of national defence force
- Members of national intelligence agency
- Members of SA secret service
- Members of SA national academy of intelligence
- Directors & staff of Comsec

Promotes achievement of equality in workplace

Provides foundation for non-discrimination & affirmative action

**1<sup>ST</sup> PURPOSE OF EEA: PROHIBITION AGAINST UNFAIR DISCRIMINATION  
ESTABLISHING UNFAIR DISCRIMINATION**

1. Stage 1: of an unfair discrimination enquiry
  - a. Establishing factual foundation for alleged differentiation
2. Stage 2: an unfair discrimination enquiry
  - a. Link must be established between differentiation & alleged
  - b. Alleged must = reason/cause for differentiation
3. Stage 3: of an unfair discrimination enquiry
  - a. Employer gets opportunity of showing that alleged unfair discrimination was indeed fair

**JUSTIFICATION GROUNDS FOR DISCRIMINATION**

1. Affirmative Action
  - a. Measures have to be applied by designated employers – ensure suitably qualified people from designated groups have equal employment opportunities
  - b. Represented in all occupational categories & levels

Designated Groups	Designated employers
<ul style="list-style-type: none"> <li>• Black people</li> <li>• Women</li> <li>• Disabled people</li> </ul> Black: Africans Coloured Chinese (SA Citizenship)	<ul style="list-style-type: none"> <li>• Larger enterprises with more than 50 + employees – annual turnover schedule 4 of EEA</li> <li>• Municipalities</li> <li>• Organs of state</li> <li>• Employers – designated as such in terms of collective agreement</li> </ul>

2. Inherent requirements of job
  - I.e sales assistant in lingerie shop – must = female

**OTHER SPECIFIC FORMS OF DISCRIMINATION PROHIBITED**

1. Harassment as unfair discrimination
  - a. Any type
  - b. Most common – sexual = serious transgression
  - c. Includes: physical, verbal, non-verbal
  - d. In terms of code: sexual harrassement is:
    - i. Unwelcome conduct of sexual nature – violates rights of an employee
    - ii. Conduct constitutes barrier to equity
    - iii. Action based on sex and/or gender and/or sexual orientation, welcome or not

- e. Forms of sexual harassment:
  - i. **Victimisation**
    - 1. victimised/intimidated for failing to submit to sexual advances
  - ii. **Quid pro quo harassment**
    - 1. i.e promotion/ increase
    - 2. influenced by employer coerce employee to surrender to sexual harassment
  - iii. **Sexual Favouritism**
    - 1. Person in position of authority in workplace rewards only those who respond to his/her sexual advances
- f. Claims for sexual harassment can be based on 3 possible legal bases
  - i. Vicarious liability
  - ii. EEA
  - iii. LRA

In order to prevent harassment in workplace, code: sexual harassment makes it compulsory for employers to develop sexual harassment policies stipulating following

- Is form of unfair discrimination
- In workplace will not be permitted/condoned
- Formal/informal procedures – used to address complaint
- Confidentiality utmost NB
- Disciplinary offence – to retaliate against employee who in good faith lodges complaint of sexual harassment
- Disciplinary sanctions may be imposed on perpetrator

## **TESTING EMPLOYEES & APPLICANTS FOR EMPLOYMENT**

- EEA regulated
- May use evaluate applicants for employment to determine whether they are suitable for job
  - I.e medical testing, HIV/AIDS
- a. **Medical Testing**
  - Prohibited unless legislation permits/requires testing or justifiable in light of medical facts
- b. **Psychological testing**
  - Prohibited unless been scientifically shown test used is valid & reliable
  - Applied fairly to employees – not biased against employee or group
- c. **HIV Testing**
  - Prohibited unless testing considered justifiable by Labour court
  - Following factors stipulated as circumstances under which HIV testing would be allowed:
    - i. Prevent unfair discrimination
    - ii. In order to better position itself for awareness and training
    - iii. Pro-active in prevention amongst employees
    - iv. Medical factors indicated need
    - v. Employment conditions required testing
    - vi. If inherent requirements of job necessitated it



vii. Particular categories of employees/job required such testing

## **EQUAL PAY FOR EQUAL WORK/WORK OF EQUAL VALUE**

EEA does not regulate equal pay for equal work

EEA Amendment Bill: wants to introduce section on equal terms & conditions for all employees of same employer doing same work or work of equal value:

'Difference in t&c's of employment between employees of same employer performing same/substantially same work/work equal of value is form of unfair discrimination & is prohibited on anyone, or more grounds of unfair discrimination listed in subsection (1)'

### **RESOLUTION OF UNFAIR DISCRIMINATION DISPUTES**

- Must be referred to CCMA for conciliation within 6 months
- Referring party must satisfy CCMA that reasonable attempt was made to resolve dispute prior to referral

Steps to resolve dispute about unfair discrimination

1. Complainant must make reasonable attempt to resolve dispute internally
2. Refer dispute to CCMA for conciliation within 6 months
3. Refer to Labour court, or parties may agree to have dispute arbitrated by CCMA

Labour court has wide discretion to determine dispute

### **SECOND PURPOSE OF THE EEA: AFFIRMATIVE ACTION OUTLINE OF AFFIRMATIVE ACTION**

Redress the past disadvantage & achieve employment equity

'Designed to ensure suitably qualified people from designated groups have equal employment opportunities & are equitably represented in all occupational categories & levels in workforce of designated employer'

Tool to be used temporarily to achieve 'equitable representation' in workplace

Court said that for AA measures to be rational it must

- Target people/categories of people who had been disadvantaged by unfair discrimination
- Designed to protect/advance such people/categories of people
- Promote achievement of equality

AA actions measures do not create right to be appointed / promoted to post

### **CONTENTS OF AA**

AA measures must be designed to:

- Identify/eliminate employment barriers that adversely affect people from designated groups
- Further diversity in workplace

- Reasonably accommodate people from designated groups to enable them to have access to and advancement in employment
- Ensure equitable representation of suitably qualified people from designated groups
- Retain & develop people
- Implement appropriate training measures, including skills development

### **DESIGNATED EMPLOYERS**

Every designated employer must implement AA measures for people from designated groups to achieve employment equity

Employer has specific duties in designing an AA action plan

- Consult – trade unions, employees
- Disclose relevant info to consulting parties
- Collect information – identify employment barriers
- Analyse
- Plan
  - Objectives to be achieved for each year of plan
  - Numerical goals for under-represented people
  - Strategies & timetables
  - Duration of plan
  - Procedures to monitor/evaluate
  - Internal procedures to resolve dispute
  - Workforce responsible for monitoring & implementing plan
- Report to DG – Director General

### **BENEFICIARIES OF AFFIRMATIVE ACTION**

Designated Groups:

- Include black, coloured, women, disabled

Court held in deciding on degrees of disadvantage, cognisance taken of:

- SA History
- Imbalance of past
- Fact apartheid system was designed to protect white people
- Fact that black, particularly African, employees suffered brunt of discrimination
- Purpose & objectives of EEA

‘a redress strategy with class objectives at its core would in substance have effect of mediating historical racial disparities...without reinforcing racial identities & aggravating racism’

### **MEANING OF ‘SUITABLY QUALIFIED’**

- Formal qualification
- Prior learning
- Relevant experience

- Capacity to acquire ability to do job

Determine whether person has ability to do job due to any one of, or any combo of these factors

## **MONITORING & ENFORCEMENT OF AFFIRMATIVE ACTION**

When ensuring compliance of employers with provisions of EEA, number of flexible factors have to be taken into account:

- Extent to which suitably qualified people are equitably represented in workplace with regards to:
  - Demographic profile – national & regional economically active population
  - Pool of suitably qualified – employer may reasonably be expected to promote/appoint
  - Present & anticipated economic & financial factors relevant to sector
  - Employers present & planned vacancies
- Employers turnover of labour
- Progress in implementing EEA
- Reasonable effort made by employer to implement plan
- Extent to which employer has made progress in eliminating employment barriers that adversely affect people from designated groups

## CHAPTER 6

### PROTECTION AGAINST UNFAIR LABOUR PRACTICES UNDER THE LABOUR RELATIONS ACT (LRA)

#### LRA

- Gives content to right to fair labour practices guaranteed in constitution
- Protect employees against unfair labour practices by employers within employment relationship

Right to fair labour practices: Constitution	Protection against unfair labour practices: LRA
Right to fair labour practices in terms of constitution: <ul style="list-style-type: none"><li>• Is wide</li><li>• Protects 'everyone'</li><li>• An infringement of right to fair labour practices will be determined with regard to surrounding circumstances</li></ul>	Protection against fair labour practices in terms of LRA: <ul style="list-style-type: none"><li>• Limited to list of actions included in definition of a unfair labour practice</li><li>• Protects employees only against specific actions by employer</li><li>• Employee cannot commit an unfair labour practice towards employers; only vice versa</li></ul>

'Unfair labour practice' means any unfair act/omission that arises between an employer and an employee involving:

- a) Unfair conduct by employer relating to:
  - Promotion
  - Demotion
  - Probation
  - Training
- b) Unfair suspension
- c) Failure /refusal by employer to reinstate/re-employ former employee in terms of any agreement
- d) Occupational detriment, in contravention of Protection Disclosures Act

#### LISTED UNFAIR LABOUR PRACTICES

##### a) UNFAIR CONDUCT OF EMPLOYER RELATING TO PROMOTION

- a) Promote suitable candidate
- b) Decision not to promote employee is reviewable if employee cannot justify decision/ or proven flawed
- c) NB court will intervene in disputes about promotion only if employer acted in bad faith
- d) For allegation of unfair labour practice regarding promotion to succeed, it must show:
  - i. Employer exercised its discretion capriciously
  - ii. Reasons provided cannot be substantiated
  - iii. Decision was taken on wrong principle
  - iv. Decision was taken in biased manner

##### b) UNFAIR CONDUCT OF EMPLOYER RELATING TO DEMOTION

- a) Demotion means employee:
  - i. is transferred to lower level
  - ii. receives less remuneration
  - iii. loses benefits
  - iv. experiences loss in status
- b) can take place in restructuring/merging organisations
- c) could be fair as a disciplinary penalty

**c) UNFAIR CONDUCT OF EMPLOYER RELATING TO PROBATION**

- a) Purpose: afford employer opportunity to evaluate employee's performance before confirming appointment
- b) Code set requirements for fair probationary period as follows:
  - i. Period should be determined in advance
  - ii. Period should be of a reasonable duration
    - 1. Nature of job
    - 2. Time it would take to determine employee's suitability for continued employment
- c) Code: dismissal the employer is allowed, at end of probationary period, to:
  - i. Extend probationary period to enable employee to improve performance
  - ii. Dismiss employee
  - iii. Confirm appointment of employee
- d) Probation may be extended – before extension – he/she must be invited to make representations (Union)
- e) Employer who does not want to confirm probationary employee's appointment must show that procedure prior to dismissal included:
  - i. Giving employee opportunity to improve
  - ii. Making employee aware that work performance was unacceptable
  - iii. Counseling employee if he/she was not able to handle work
  - iv. Treating employee sympathetically & with patience

**d) UNFAIR CONDUCT OF EMPLOYER RELATING TO TRAINING**

- a) Employee can allege a legitimate expectation to training, but only if employer acted arbitrarily, capriciously or inconsistently in denying employee training

**e) UNFAIR CONDUCT OF EMPLOYER RELATING TO PROVISION OF BENEFITS**

- a) LRA does not provide definition of 'benefits'
- b) Dispute about remuneration regarded as interest disputes
- c) Interest disputes must be resolved by way of industrial action
- d) Modern-day salary packages – difficult to separate benefits from remuneration

**f) UNFAIR CONDUCT OF EMPLOYER RELATING TO SUSPENSION OR ANY OTHER DISCIPLINARY ACTION SHORT OF DISMISSAL**

a) Precautionary suspension

- Could be implemented to allow an employer to investigate alleged misconduct of employee
- With pay – unless otherwise negotiated
- Employee should not be suspended unless:
  - Prima facie reason to believe employee committed serious misconduct
  - Is some objectively justifiable reason for excluding employee from workplace

b) Punitive Suspension

- Fair suspension without pay

c) Any other disciplinary action short of dismissal

**g) UNFAIR CONDUCT OF EMPLOYER RELATING TO REFUSAL TO REINSTATE OR RE-EMPLOY AN EMPLOYEE IN TERMS OF ANY AGREEMENT**

**h) UNFAIR CONDUCT OF EMPLOYER RELATING TO EMPLOYEE SUFFERING AN OCCUPATIONAL DETRIMENT ON ACCOUNT OF A PROTECTED DISCLOSURE (WHISTLE BLOWING)**

i) Requirements

- a) PDA aims to promote culture of openness & accountability without fear of reprisal
- b) 3 requirements have to be met for employee to establish unfair labour practice based on occupational detriment:
  - i. Employee must have made protected disclosure
  - ii. Employee must have taken some retaliating action against employee which amounts to employee suffering from occupational detriment
  - iii. Detriment suffered must be on account of/partly on account of making protected disclosure

j) Meaning of 'occupational detriment' and 'protected disclosure'

a) Occupational detriment

- i. Subjection of employee to any of following as result of 'whistle blowing'
  1. Disciplinary action
  2. Dismissal, suspension, demotion, harassment or intimidation
  3. Being transferred against employee's will
  4. Refusal of transfer/promotion
  5. Subjection to term of employment
  6. Subjection to term of retirement
  7. Refusal of reference
  8. Denial of appointment
  9. Being threatened with any of these actions
  10. Being otherwise adversely affected in respect of employment, employment opportunities & work security

b) Protected Disclosure

- i. Is disclosure of info to specific persons/bodies such as legal advisors, employers, members of cabinet, public protector or auditor general
- ii. Employee must make following disclosure
  1. in good faith
  2. reasonably believe
  3. that info disclosed is substantially true

## **RESOLUTION OF UNFAIR LABOUR PRACTICE DISPUTES**

### **LRA Amendment Bill proposes:**

- exclusion of persons earning more than certain threshold from referring unfair labour practice disputes to CCMA  
to ensure vulnerable not prejudiced by delay due to large numbers of complaints  
Runs counter to purpose LRA: to provide specialized dispute resolution system where forum-shopping is limited

## **CHAPTER 8 DISMISSAL & OTHER WAYS OF TERMINATING CONTRACT OF EMPLOYMENT**

### **DISMISSAL IN GENERAL**

LRA – every employee has right to not be unfairly dismissed

If employee alleges that termination amounts to unfair dismissal, he/she must prove that he/she:

- is employee
- was dismissed

Burden of proof then shifts to employer, who must prove that dismissal was not unfair

- fair reason for dismissal
- fair procedure was followed

Dismissal means that:

- Employer terminated contract
- Employee reasonably expected employer to renew fixed term contract of employment on same or similar terms but employer offered to renew on less favourable terms, or did not renew it
- Employer refused to allow employee to resume work after
  - Took maternity leave
- Employer who dismissed no. of employees for same reason has offered to re-employ 1 + of them, but refused to employ another
- Employee terminated contract of employment with/without notice – because employer made continued employment intolerable
- Employee terminated contract of employment with/without notice because new employer, after transfer in terms of section 197 or section 197A, provided employee with conditions/circumstances at work are substantially less favourable to employee than those provided by old employer

### **DEFINITION OF 'DISMISSAL'**

#### **1. TERMINATION OF CONTRACT BY EMPLOYER, WITH/WITHOUT NOTICE**

- a) Serious breach of contract – employee may terminate contract summarily – immediately
- b) Normal – notice periods referred to in section refer to min requirements for such periods in terms of BCEA

#### **2. REFUSAL /FAILURE BY EMPLOYER TO RENEW FIXED-TERM CONTRACT**

- a. Employee reasonably expected employer to renew fixed term contract of employment on same or similar terms but employer offered to renew on less favourable terms, or did not renew it, constitutes dismissal



**3. REFUSAL TO ALLOW EMPLOYEE TO RESUME WORK AFTER MATERNITY LEAVE**

- a. Employer refuses to allow employee to resume work after having taken maternity leave, refusal will qualify as dismissal
- b. Entitled to 4 consecutive months maternity leave

**4. SELECTIVE RE-EMPLOYMENT**

- a. Employer who dismissed no. of employees for same reason has offered to re-employ 1 + of them, but refused to employ another constitutes 'dismissal'
- b. Not necessarily unfair
- c. i.e employee dismissed then financial position of business improves – employer may re-employ some of employees

**5. CONSTRUCTIVE DISMISSAL**

- a. Employee terminated contract of employment with/without notice – because employer made continued employment intolerable – constitutes dismissal – better known as constructive dismissal
- b. Although employee terminates contract – not done voluntarily
- c. Court made clear following 3 elements must be present to succeed with claims for constructive dismissal
  - i. Employee must show he/she has resigned
  - ii. Show that reason for resignation was continued employment became intolerable
  - iii. Show that it was employer's conduct that created intolerable circumstances

**6. EMPLOYEE BEING PROVIDED WITH LESS FAVOURABLE TERMS AFTER TRANSFER OF BUSINE**

- a. Also forms part of constructive dismissal
- b. Conditions at work under new employee substantially less favourable than under previous employer, such termination will constitute 'dismissal'

**AUTOMATICALLY UNFAIR DISMISSALS**

**1. CONCEPT OF AUTOMATICALLY UNFAIR DISMISSALS**

- a. Provide remedy to employee when basic right of employee has been infringed
- b. Only reason that may justify infringement of basic right of the employee will be if:
  - i. It is an interent requirements of the, or
  - ii. An employee was dismissed because he/she had reached normal/agreed retirement age

**2. EMPLOYER ACTS CONTRARY TO EMPLOYEE'S RIGHTS TO FREEDON OF ASSOCIATION**

- a. Employees right to join trade union, belong to trade union & participate in activities of trade union
- b. If dismissed for any of above – unfair dismissal

**3. PARTICIPATION IN/OR SUPPORTING PROTECTED STRIKE/PROTEST ACTION**

- a. Employee dismissed for participating in protected strike/protest action – will constitute automatically unfair dismissal
- b. 2 exceptions to rule:
  - i. Employee may be dismissed during protected strike in cases of:
    - 1. Misconduct
    - 2. For operational reasons

**4. REFUSAL TO DO WORK OF EMPLOYEES WHO ARE ON PROTECTED STRIKE**

- a. Employer dismisses employee for refusing to do work, which is normally done by an employee who takes part in protected strike, will constitute unfair dismissal
- b. Employee refuses to do his/her own work while others on strike – it will amount to insubordination

**5. COMPELLING EMPLOYEE TO ACCEPT DEMAND MADE BY EMPLOYER**

- a. Dismissed employee because employee would not accept demand made by employer, this will constitute automatically unfair dismissal
- b. Also known as 'lock out'
- c. Bullying of employee

**6. EXERCISING RIGHTS AGAINST EMPLOYER**

- a. Dismisses employee for exercising rights granted by LRA against employer, will constitute automatically unfair dismissal

**7. PREGNANCY, INTENDED PREGNANCY OR ANY REASON RELATED TO PREGNANCY**

- a. Dismisses employee because of pregnancy, intended pregnancy or any of reason related to pregnancy, constitute automatically unfair dismissal

**8. UNFAIR DISCRIMINATION**

- a. Dismissal based on unfair discrimination against employee, directly/indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic, social origin, colour, sexual orientation, age disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility
- b. Some measures of discrimination is allowed as to fairness of dismissal if reason for discrimination is based on:
  - i. Inherent requirements of particular job, or
  - ii. Age, if employee has reached normal or agreed-to retirement age for persons employed in capacity

**9. TRANSFER OF BUSINESS**

- a. Dismissal because of transfer of business as a going concern will be automatically unfair

**10. PROTECTED DISCLOSURE**

- a. Dismissal for making protected disclosure (blowing whistle) in terms of PDA will be automatically unfair

## 11. DISPUTE RESOLUTION FOR AN AUTOMATICALLY UNFAIR DISMISSAL

Dismissed by Employer

Employee, must, within 30 days from date of dismissal, refer dispute for conciliation to CCMA/bargaining council

Conciliation is successful & matter

Matter not successfully conciliated

Matter referred for adjudication by Labour Court

Labour Court makes ruling

Appeal to Labour Appeal Court

### FAIR DISMISSAL IN TERMS OF THE LRA

- LRA makes provision for fair dismissal, that is, dismissal for fair reason & using correct procedure
- Dismissal should be reserved for cases of serious misconduct/repeated offences.
- Alternative to dismissal – employer should consider, inter alia:
  - Counseling
  - Warnings
  - Informal correction

### DISMISSAL FOR MISCONDUCT

#### SUBSTANTIVE FAIRNESS

- Dismissal based on misconduct, employee at fault, by breaking workplace rule
- In terms of code: dismissal, all employers should adopt disciplinary rules to ensure employees know required standard of conduct
- The Code: Dismissal sets following requirements for substantive fairness:
  - Did employee contravene rule/standard regulating conduct in, or of relevance to workplace
  - If so, was rule valid & reasonable – normally determined with reference to needs of workplace & business
  - Was employee aware of rule
  - Was rule consistently applied by employer

- Is dismissal an appropriate action for contravention of rule?  
Appropriateness of dismissal as penalty will depend on employee's circumstances, including
  - Length of service
  - Previous disciplinary record
  - Personal circumstances
  - Nature of job
  - Circumstances of infringement itself

**APPLICATION FOR SUBSTANTIVE FAIRNESS**

- Case law provides examples of various forms of misconduct for which employees have been dismissed
- Duty/principle is stated, & then application in a less straight-forward situation

**a. Unauthorised absence from work, abscondment, desertion & time-related offences**

- Primary responsibility of employee – to make his/her services available to employer
- Fails to report for work, he/she is in breach of employment contract
- Circumstances of employee's absence will determine whether employee can be disciplined or ultimately dismissed

<b>AWOL</b>	<b>DESERTION</b>
<ul style="list-style-type: none"> <li>• If employee does not want to terminate employment contract, but stays away from work without leave.</li> <li>• Warrant dismissal if period of absence is unreasonably long</li> <li>• If employee returns after few days with letter to show he/she had reason for absence</li> </ul>	<ul style="list-style-type: none"> <li>• If employee, without resigning, stays away from work with intention of terminating contract of employment</li> <li>• employer must terminate contract of employment by holding disciplinary hearing in absence of employee</li> <li>• Even if employee returns after dismissal, the employer must give him/her an opportunity to be heard</li> </ul>

**b. ATTITUDES OF HOSTILITY, ABUSIVE LANGUAGE, RACISM & INSUBORDINATION**

- Employer may expect of employees to work together in reasonable harmonious relationship
- If employee acts with hostility towards employer/co-employee, he/she can be dismissed
- Abusive language, religious discrimination, sexism – employee guilty if misconduct

**c. THEFT (INCLUDING PETTY THEFT, STOCK LOSSES,) TEAM MISCONDUCT, DISHONESTY AND BREACH OF TRUST RELATIONSHIP**

- Theft by employee causes irreparable harm to relationship of trust & confidence – would be fair to dismiss such a thieving employee

- Court will have to balance duty of employee to act in good faith with LRA's approach that employers must follow process of progressive discipline & use dismissal as matter of last resort

**d. OTHER FORMS OF MISCONDUCT**

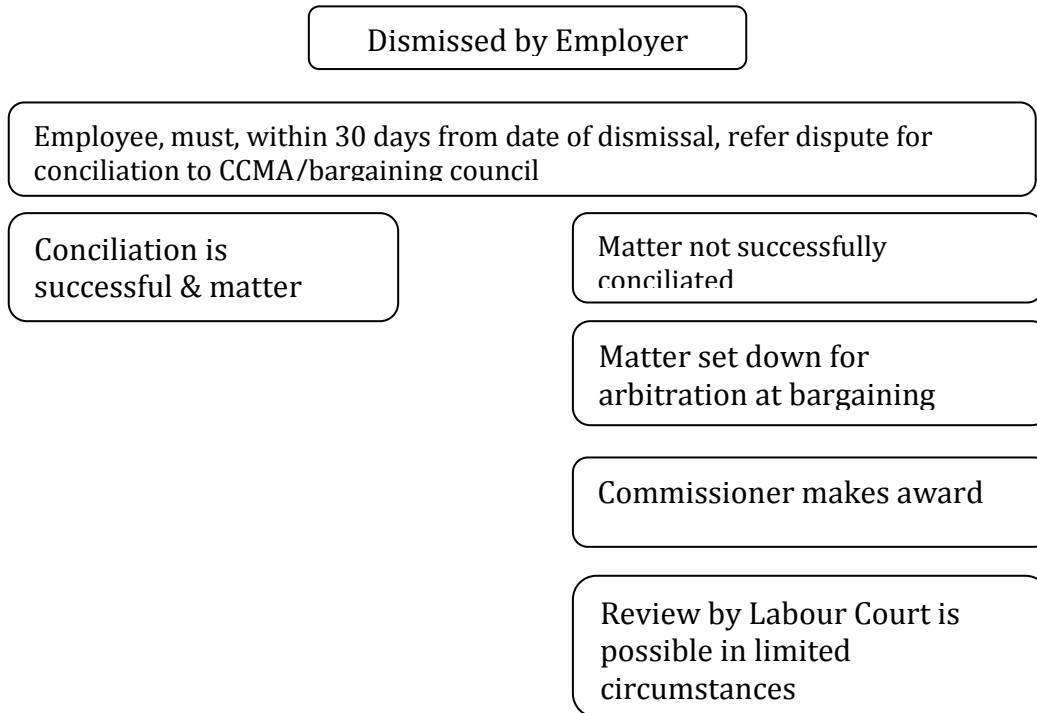
- Assault
- Conflict of interest
- Damage to property
- Intimidation
- Sexual harassment
- Alcohol & drug abuse

**e. PROCEDURAL FAIRNESS**

- NB as substantive fairness for dismissal based on misconduct
- Main principle is that employers must give employee opportunity to be heard & defend himself against allegations

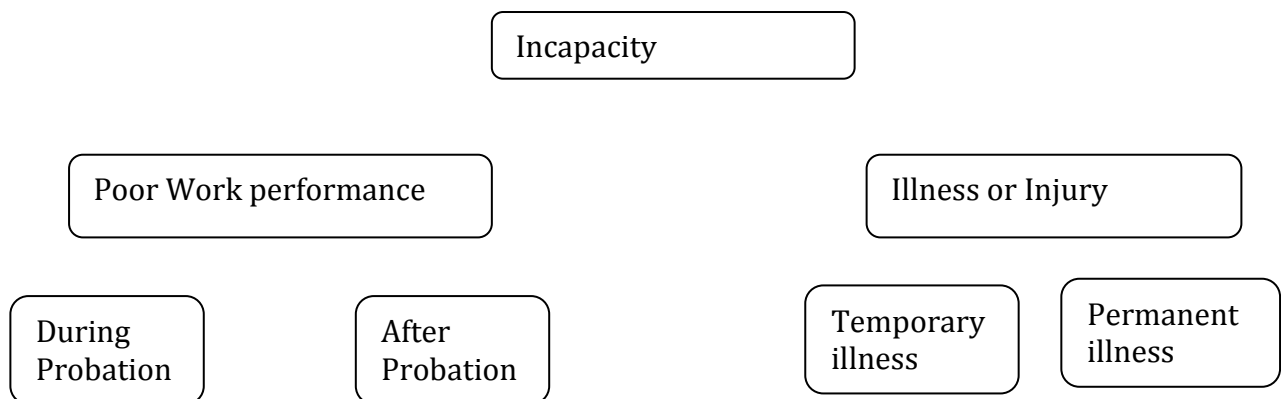
Step	Action	Yes/No
1	Did employer conduct investigation to determine whether there are grounds for dismissal?	
2	Did employer notify employee of allegations?	
3	Did employee get reasonable time to prepare?	
4	Was employee allowed to state a case in response to allegations?	
5	Was employee allowed the assistance of union representative/co-employee?	
6	Did employer, after enquiry, communicate decision taken, & furnish employee with written notification of decision as well as reasons for decisions?	
7	If employee is dismissed, did employer remind him of any rights to refer matter to bargaining council /CCMA?	
	<p><b>Special reminder 1:</b> Discipline against union representative/employee who is an office bearer/official of union, should not be instituted without first informing &amp; consulting with union</p> <p><b>Special reminder 2:</b> Employer can dispense with predissmissal hearing only under exceptional circumstances, namely in crisis-zone situations and if employee waives his right to hearing.</p>	

## DISPUTE RESOLUTION FOR A DISMISSAL BASED ON MISCONDUCT



## DIMISSAL FOR INCAPACITY

- Second recognised reason for employer to fairly dismiss employee is incapacity
- Defined as consisting of poor work performance & ill health/injury
- Involves some form of behaviour, conduct/ inability which is neither intentional nor negligent
- LRA recognises 2 types of incapacity as set out below



## POOR WORK PERFORMANCE DURING PROBATION

- Purpose s of poor work performance – LRA distinguishes between employees on probation & employees who have completed probationary period
- The Code: dismissal, however compels an employer to give employee on probation following assistance before he/she can be dismissed for poor work performance
  - Evaluation, instruction, training, guidance or counseling needed to perform his duties during this period

- Employer must make clear to employee what performance standard is, where he falls short
- Employer must give employee assistance & opportunity to improve
- Employer should measure progress & give feedback

### **POOR WORK PERFORMANCE AFTER PROBATION**

- After probation, once employee has been permanently appointed, an employer should be careful when considering dismissal of employee for poor work performance.
- Employer should consider other ways, short of dismissal, to remedy matter
- Before employer can dismiss employee on basis, employer should:
  - Investigate to determine reasons for unsatisfactory performance
  - Give appropriate evaluation, instruction, training, guidance or counseling
  - If employee then continues to perform unsatisfactory, he can be dismissed for poor work performance
  - During process employee has right to be heard & to be assisted by union representative or co-employee

### **ILL HEALTH OR INJURY**

The Code: dismissal distinguishes between temporary/permanent illness/injury

LRA allows for dismissal of ill/or injured employees

By way of provisions discussed below, aims to provide job security in that an employer is compelled to:

- Consider alternatives before dismissal
- Get input from employee on alternatives before employee is dismissed

The Code; dismissal specifically states that employer should attempt to accommodate in workplace an employee injured on duty

Substantive fairness in cases of dismissal for injury/illness would therefore entail following:

- Employer must make informed decision
- Employer must determine whether/not the employee is capable of performing work
- If employee is not capable – employer must:
  - Determine extent to which employee is able to perform work
  - Extent to which employee's work circumstances might be adapted to accommodate disability
  - Where this is not possible extent to which employees duties might be adapted
- Procedural fairness would entail:
  - Employee gets opportunity to respond & make suggestions
  - Employer must consult employee
  - Employer must consider available medical information
  - Employer must attempt to accommodate employee where reasonably possible

- Checklist can be used to ensure procedural fairness in cases of temporary as well as permanent illness/injury

Did employer take following into account		Yes/No	Finding & Reason
1	Nature of job		Employer will have to be able to substantiate answer, if yes, or give reason why not, if no
2	Period of absence		
3	Seriousness of illness/injury		
4	Possibility of securing temporary replacement or ill/injury employee		
5	Degree of incapacity		
6	Cause of incapacity: if employee is incapacitated - as result of work-related illness or injury. Obligation on employer to accommodate incapacity of employee is more onerous		
7	Availability of any suitable alternative work/adaption of duties/work circumstances to accommodate employees disability		