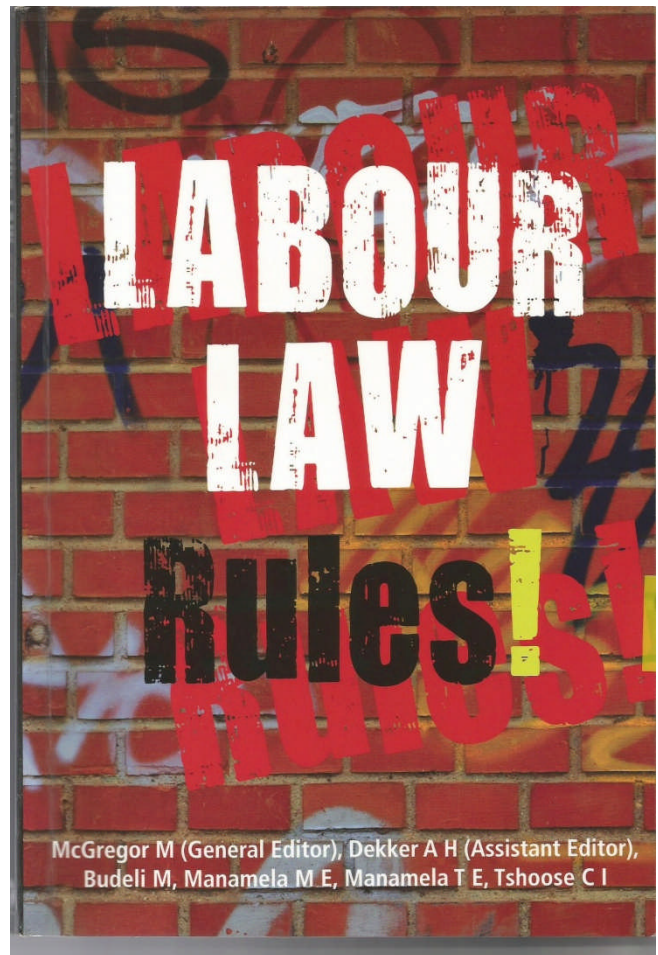


# Individual Labour Law

LLW2601

2014



Extensive notes regarding chapters 1, 2, 3, 4, 5, 6, 8 of the Labour Law prescribed text book, created for LLW2601 semester 2, 2014.

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## Chapter 1: Introduction to Labour Law

### Atypical work:

- different from full-time employment
- includes
  - o part-time work
  - o temporary employees
  - o casual employees
  - o people working from home

### Tripartite making of laws

Role of state as employers of public servants must not be confused with its role as legislator and enforcer of rights.

Interaction between State, organised labour and organised business is crucial to ensure that all role players are involved in shaping policy matters and legislation impacting on the employment relationship.

NEDLAC's work is conducted in four chambers that discuss different aspects of social and economic policy:

- Labour Market Chamber
- Trade and Industry Chamber
- Development Chamber
- Public Finance and Monetary Policy Chamber

NEDLAC Aims:

- Make economic decision making more inclusive
- Promote the goals of economic growth and social equity

### Legislative scope of labour laws

Labour law rules are contained in legislation as well as:

- Constitution
- Common law
- Case law
- ILO conventions

Three main labour acts:

- Labour Relations Act (LRA)
- Basic Conditions of Employment Act (BCEA)
- Employment Equity Act (EEA)

Above acts are supplemented by Codes of Good Practice,

- Do not contain binding rules
- But are used by employers and employees as guidelines in practice
  - o Code of Good Practice: Dismissal
  - o Code of Good Practice on Dismissal Based on Operational Requirements
  - o Code of Good Practice on Picketing
  - o Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace
  - o Code of Good Practice: Key Aspects of HIV/AIDS and Employment
  - o Code of Good Practice: Key Aspects on the Employment of People with Disabilities
  - o Code of Good Practice: Preparation, Implementation and Monitoring Employment Equity Plans
  - o Code of Good Practice: Who is an Employee

### Other Acts that impact on employment relationship:

- Occupational Health and Safety Act (OHSA)
- Mine Health and Safety Act (MHSA)
- Compensation for Occupational Injuries and Diseases Act (COIDA)
- Occupational Diseases in Mines and Works Act (ODIMWA)
- Unemployment Insurance Act (UIA)
- Unemployment Insurance Contribution Act (UICA)
- Skills Development Act (SDA)
- Skills Development Levies Act (SDLA)

### At start of employment relationship:

- Determine if a person qualifies as an employee → To be eligible for protection in terms of labour legislation
- Protection relates to
  - o minimum terms and conditions of employment,
  - o unfair labour practices,
  - o unfair discrimination
  - o unfair dismissals
  - o participation in industrial action

Once an employment contract has been finalised and an employee has commenced work, both employee and employer have to act as agreed in terms of the contract of employment, subject to the BCEA and rights and duties under common law.

### Dispute resolution

- Institutions that specialise:
  - o Commission for Conciliation Mediation and Arbitration (CCMA)
  - o Labour Court
  - o Labour Appeal Court
- Aim:
  - o Ensure accessible and fast dispute resolution

## Study Unit 1 / Chapters 2, 3 Employee

### Chapter 2: Exclusive protection for employees in terms of legislation

#### 1. Who is an employee

- Primary aim of LRA (1)
  - o promote sound relations between employers and employees in workplace
- Workers who are not employees fall outside of scope of LRA and are not entitled to protection against unfair dismissal.

#### Independent contractor:

- Contracted to
  - o perform a specified task or to
  - o produce a specific result

#### Employee:

- Protected by labour law
- Appointed to render personal services in terms of a job description
- LRA 213, BCEA 1, EEA 1, SDA 1:
  - o (a) Any person, excluding independent contractor, who works for another person or of the State and who receives, or is entitled to receive, any remuneration and;
    - Includes employees in private sector and public sector
    - Includes domestic and farm workers
      - BCEA 1: Domestic worker is an employee who performs domestic work in the home of his/her employer and includes (a) gardener (b) person employed by household as driver of a motor vehicle (c) person who takes care of children, the aged, the sick, the frail or the disabled.
      - BCEA 1: Farm worker means an employee who is employed mainly in or in connection with farming activities and includes an employee who wholly or mainly performs domestic work in a home on a farm
    - Incorporates the common-law contract of service (locatio conductio operarum)
    - Excludes the contract work (locatio conductio operis) which relates to an independent contractor
  - o (b) Any other person who in any manner assists in carrying on or conducting the business of an employer
    - Includes any person who in any manner assists in carrying on or conducting the business of an employer.
    - Can include various categories of workers:
      - Permanent employees,
      - Temporary employees
      - Casual workers
      - Contract workers
      - Part-time employees
      - Self-employed people
      - Seasonal workers



## 2. Guidelines to distinguish between employees and independent contactors

- Courts have developed three tests:
  - o Control test
    - Looks at the control over the work the person does,
    - the manner in which the work must be done and
    - when the work must be done
  - o Organisation test
    - Looks at whether the person is part and parcel of the business.
    - Person's work is integrated into the business of the employer and is
    - not just an accessory to the business
  - o Dominant person test
    - Favoured by the courts
    - Considers the employment relationship as a whole, rather than concentrating on only one factor
  
- **Rebuttable presumption** as to who is regarded as an employee:
  - o As soon as one of the factors, in LRA 200A or BCEA 83A, is found to exist in the relationship between the two parties, there is presumed to be an employment relationship.
    - 200A:
      - until the contrary is proved, a person who works for, or renders services to, any other person is presumed to be an employee, if any one or more of the following factors are present:
      - (a) manner in which the person works is subject to the control or direction of another person
      - (b) person's hours of work are subject to the control or direction of another person
      - (c) the case of a person who works for an organisation, the person forms part of that organisation
      - (d) person has worked for that other person for an average of at least 40 hours per month over the last three months
      - (e) person is economically dependent on the other person for whom he/she works or renders services
      - (f) person is provided with tools of trade or work equipment by the other person
      - (g) person only works for or renders services to one person
  
    - 200A and 83A read in conjunction with Code: Who is an Employee?
      - Incorporates the three tests
      - Goes further to provide guidance for possible interpretation and application of these tests in modern contest
        - o Control:
          - Includes right to determine what work the employee will do, in what manner and what working hours will be
          - May be a term of the contract, but even where it is not specified in the contract, it does not necessarily mean there is not a contract of employment
        - o Organisation test:
          - The traditional workplace no longer exists and employee does not need to work from employer's premises to indicate that there is an employment relationship
          - The tools of trade provided by the employer should not be interpreted narrowly and may range from a modem or cell phone package to a set of screw drivers

- Dominant impression test:
  - Code confirms the importance of this test
  - States there is no single decisive factor to determine existence or absence of an employment relationship, thus all factors should be taken into account when determining the type of relationship

- Table as part of the application of the dominant impression test:

Employee	Independent contractor
Object of contract: - Render personal services	Object of contract: - Perform a specified work or - Produce a specified result
Must perform services personally	May usually perform through others
Employer may choose when to make use of services of employee	Independent contractor must perform work within period fixed by contract
Contract terminates on death of employee	Contract does not necessarily terminate on death of independent contractor
Contract terminates on expiry of period of service in contract	Contract terminates on completion of work or production of specified result

- The other party then has the opportunity to show, on a balance of probabilities, that no employment relationship exists.
- Presumptions will not apply to persons earning more than the amount determined by the minister in terms of BCEA 83A(2) and to a work arrangement involving persons who earn amounts equal to or below the amount determined by the minister BCEA 83A(3)

**- New definitions**

- Contract of employment
  - LRAB:
    - Common law contract of employment or any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract of work as an independent contractor
  - Includes any arrangement by which one party (excluding independent contractor) agrees to do work for another
  - Accommodates categories of vulnerable workers.
- Independent contractor
  - LRAB:
    - A person who works for or supplies services to a client or customer as part of the person's business undertaking or professional practice.
  - BCEAB:
    - Specific about the nature of the service that the independent contractor provides and will provide more clarity on the nature of an independent contractor

### 3. Categories of Employees

Category	Description
Permanent employee	- Person employed for an indefinite period
Temporary / contract / fixed-term employee	- Person employed for a specified period or for a specific project
Casual employee	- Person works for same employer on not more than three days per week - Person's employment can either be temporary or permanent
Part-time employee	- Person works for the employer only at certain times of the day, e.g. mornings / night - Person works on certain days of the week, mostly limited to three days per week - Person's employment can either be temporary or permanent

- Terms: Temporary employees, casual works, part-time employees and contract workers often used interchangeably
  - o These workers known as temporary employees / atypical workers.
  - o More than ordinary employees
  - o Work fewer hours compared to permanent employees
  - o Often excluded from additional employment benefits e.g. medical aid & pension funds
- Definition employee does not differentiate between different categories of employees.
- All categories are included in the definition of an employee and protected under labour laws

### 4. Unprotected workers

#### 4.1 Illegal workers

##### Unlawful contract:

- In terms of common law is void (voidable)
- In terms of criminal law is punishable by court of law
- Distinction in protection into Constitution or LRA for illegal workers:
  - o Employment terminated:
    - Employment Contract valid → Worker protected by LRA against unfair dismissal
    - Employment Contract not valid → Worker not protected under LRA, but under Constitution:
      - Section 23: grants 'everyone' the right to fair labour practices
      - Section 10; grants 'everyone' the right to dignity

##### Rights of illegal workers:

- People working illegally, i.e. against the law:
  - o Have a right to fair labour practices as a result of the employment relationship
  - o Not protected against unfair dismissal because there cannot be a valid contract of employment
  - o Claim in terms of section 23 of Constitution
- Illegal foreigner
  - o Immigration Act prohibits employment of an illegal foreigner
    - Aim: deter employers from intentionally hiring workers not authorised to work in terms of the Act
  - o Any employer who knowingly employs an illegal foreigner or a foreigner in contravention of the Act commits an offence

- Employer who employs an illegal foreigner may not refuse to pay that worker on the basis that the worker is an illegal foreigner.
  - I.F. may still be able to enforce his/her contractual rights against the employer.
  - I.F. may still be protected by the Constitution, which guarantees
    - everyone's right to dignity
    - everyone the right to fair labour practices
- Constitution S23(1) provides broader protection than labour laws.
- If a worker is in a work relationship similar to an employment relationship, he can enjoy the protection to the right to fair labour practices
  - One of the purposes of constitutionally entrenched labour rights is to protect vulnerable workers =- illegal foreigners or prostitutes
  - The infringement of a person's labour rights can also constitute an infringement on the right to dignity

#### 4.2 Statutory exclusions of workers

- LRA (2) Excludes members of:
  - National Defence Force
  - National Intelligence Agency
  - South African Secret Service
  - South African National Academy of Intelligence
  - Comsec
- BCEA (3) Excludes:
  - Members listed above, as well as:
    - Unpaid volunteers working for charitable organisations / organisations with public purpose (3(1)(b))
    - People employed on vessels at sea (MSA57/1951)
  - BUT BCEA does apply to persons undergoing vocational training, except to extent that any term / condition of their employment is regulated by provisions of any other law (3(2))

## 5. Who is an employer

- Not defined in SA labour legislation
- But can be defined in relation to definition of 'employee' as:
  - o Any person / body that employs any person in exchange for remuneration
  - o Any person who permits any person to assist him in conducting his business.
- This definition covers
  - o Person who employs the other under employment contract → formal employment
  - o Person who allows another person to assist him conducting his business
    - Include labour brokers → temporary employment services **TES**
      - (labour broker) the employer of a person whose services have been obtained for / provided to, the client for reward. (LRA 198(1), 198(2) & BCEA 82(1))
      - Triangular relationship between employer, employee, client
    - Using TES:
      - Employer limits risks
      - Avoid responsibilities such as providing employees with benefits and avoiding administrative tasks such as deducting unemployment contributions
      - TES responsible for liabilities & duties that go with employer-employee relationship.
      - TES ad client can be jointly and severally liable iro contraventions of collective agreements concluded at bargaining councils, BCEA, arbitration awards. (LRA 198(4); BCEA 82(3))
- Trade unions generally against use of labour brokers because:
  - o It creates difficulties in identifying who the real employer is and
  - o In the process workers may be exploited.
- Other concerns about labour brokers:
  - o Worker gets reduced salary: TES deducts feeds from workers' salaries
  - o Protection against unfair dismissal and unfair labour practices is not shared between TES and Client.

## Chapter 3: Common law and the contract of employment

### 1. Introduction

- Common law relates to basic rights and duties of employers and employees.
- These rights are relevant even if parties do not agree or specifically include it in the contract of employment.

### 2. Duties of employer and employee

- Common-law duties are very broad
- Indirectly covered by legislation, remain valid and important

#### 2.1 Duties of employers

##### 2.1.1 Remuneration

- o Primary duty to pay employee
- o If employee does not work, no pay is due
- o Common-law duty applies
- o BCEA provides for paid leave in certain circumstances
- o If no leave applies → no work no pay.

### 2.1.2 *Provide work*

- Employer generally not required to provide work except in certain special instances e.g.
  - Salary commission-based, dependent on actual work done
  - Success dependent on performance of certain duties on regular basis, e.g. actor

### 2.1.3 *Provide safe working conditions*

- Depending on nature of work / workplace, employer may install safety equipment and exercise proper supervision
- Might include protection against any form of harassment (physical / psychological) i/o EEA by employer / co-employees
- → duty to contribute to Compensation Fund i/o COIDA, to ensure employee injured on duty will be compensated

### 2.1.4 *Deal fairly with employee*

- Constitutional right to fair labour practices section 23
  - **Labour relations**
    - Everyone has the right to fair labour practices.
    - 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. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
    - National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).
- LRA protects employees against unfair treatment during employment against unfair dismissal
- Includes other common-law duties such as
  - Receive employee into service
  - Comply with other statutory obligations

## 2.2 *Duties of employees*

### 2.2.1 *Render services to employer*

- Primary duty
- Employee's labour potential placed at disposal of employer

### 2.2.2 *Work competently and diligently*

- When entered into employment contract
- Employee guarantees he is capable of doing the work
- Work will be performed competently and diligently.

### 2.2.3 *Obey lawful and reasonable instructions*

- Employee under control & authority of employer
- Non-compliance constitutes
  - serious insubordination &
  - breach of contract
  - Except if employee refuses orders outside scope of employment contract

### 2.2.4 *Serve employer's interests and act in good faith –fiduciary duty*

- Employment relationship built on trust & confidence → implicit term of employment contract
- Includes duty
  - not to work against employers interests
  - not to compete with employer
  - devote hours of work to promoting employers business
  - act honestly

## 3. Doctrine of Vicarious Liability

- Employer is liable for the unlawful / delictual acts of an employee performed during the course of business.
- Operation regulated by common law, not by employment legislation.
- Employer must compensate those who suffer injury a result of wrongful conduct of employee.
- Protects third parties.
- Depending on circumstances, employer can discipline employee for misconduct and claim repayment in this regard. (BCEA 34)
- Three requirements must be met for employer to be held liable for employee's wrongful conduct:
  - Must be contract of employment
  - Employee must have acted in course and scope of employment
  - Employee must have committed a delict
    - Delict: negligent / intentional unlawful action / omission by an employee causing a third party to suffer damages or personal injury.
- Problem: Determine if employee acted in course and scope of employment.
- Each case judged on own merits.
- Fact that act of employee expressly forbidden by employer / constituted criminal act, not always absolve employer from being held vicariously liable.

## 4. Impact of contract of employment on employment relationship

### 4.1 Introduction

- Consider contents of contract when determining the impact of contract of employment on employment relationship.
- Contract Terms & conditions of employment can be changed during course of employment.
- Important to know when that would be possible.

## 4.2 General contract principles

- Contract of employment must
  - o Meet all requirements that the law prescribes for the conclusion of a valid contract.
  - o Is regulated by common law.
- In cases where specific labour matter is not covered by LRA / other legislation, common law will apply.
- Valid contract of employment: Parties to contract must have satisfied all the common law requirements for the conclusion of a valid contract
  - o Parties must agree (BCEA 48)
  - o Have capacity to enter into contract
  - o Agreement must be legally possible
  - o Performance under agreement must be physically possible
  - o If any formalities are prescribed for the formation of that contract, the formalities must be satisfied (Attorneys Act 53/1979 S5(3))
- Contract does not have to be in writing
  - o Desired for sake of clarity and certainty
  - o Valid if in writing or orally
  - o Terms can be express or tacit (understood or meant without being stated)
- BCEA (29(1)) requires employer to provide employee with information in writing such as:
  - o Full name & address of employer
  - o Name and occupation of employee
  - o Place of work
  - o Date of employment commencement
  - o Employee's ordinary days & hours of work
  - o Wage
  - o Rate of pay for overtime work
  - o Other cash payments to which employee is entitled
  - o Any payment in kind and value thereof
  - o Frequency of remuneration
  - o Deductions to be made from remuneration
  - o Leave to which employee is entitled
  - o Notice period required to terminate employment
  - o Period of employment with previous employer that counts towards employee's period of employment
  - o List of any other documents that form part of contract of employment.
- Employer must keep these written particulars for 3 years after termination of employment contract (29(4))
- Employer required to display statement of employees' rights in terms of BCEA in official languages in workplace in prescribed form. (30 / 28)



### 4.3 Remedies for breach of contract

- Breach of contract: if parties do not perform ito agreement.
- Innocent party can:
  - o Accept breach and cancel contract
  - o Compel defaulting party to perform (specific performance)
  - o Claim damages
- LRA largely replaced process of breach of contract disputes by contract law.
  - o Breach by employer would amount to
    - unfair labour practice
    - unfair discrimination
    - unfair dismissal
  - o Breach by employee amount to
    - Misconduct
- Employee claim breach of contract:
  - o High Court has jurisdiction
  - o Only common-law remedies are available
  - o Termination deals with lawfulness, not fairness
  - o Employee can still choose to claim common-law damages based on breach of contract rather than claim unfair dismissal ito LRA.

### 4.4 Restraint of trade

- Normally included in employment contracts to protect interests of employer
  - o E.g. against unfair competition from employees during & after employment ended
- Purpose: Protect employer's
  - o trade secrets,
  - o goodwill and
  - o business connections.
- Prevents employee competing with employer within defined area for prescribed period.
- Restraint of trade is enforceable if court can balance the following:
  - o Public interest: parties comply with contractual obligations even if they're unreasonable or unfair.
  - o OR
  - o Right of all persons to be permitted to engage in commerce or professions of their own choice.
- Example p 36: restraint of trade valid and enforceable unless contrary to public policy, which will deem it unreasonable.
  - o Reasonableness determined with reference to interests of employer and employee, public policy & surrounding circumstances.
  - o Questions for consideration:
    - Interest deserving protection at termination of agreement
    - Is that Interest being prejudiced
    - If so, how does that interest weigh up against interests of other party not to work
    - Is another facet of public policy apart form relationship between parties, which requires restraint to be enforced or disallowed
    - Is restraint wider than necessary to protect the protectable interest.

#### 4.5 Changes to contractual terms and conditions of employment

- Employer and employee bound by other statutory provisions and applicable collective agreements.
- Employer may not unilaterally change terms and conditions of employment.
- T&C only be changed in following ways:
  - o Agreement between employer and employees / in line with method prescribed in contract of employment
  - o Collective agreement between employer and trade union
  - o Operation of law, e.g. BCEA
  - o Sectoral determination issued by Minister (BCEA 50)
- Contract of employment provides basis for individual employment relationship.
- Labour Laws may impact on this.

#### 5. Customs and practices in the workplace

- Customs and practices also have important impact on employment relationship.
- These related to
  - o Afternoon off
  - o Social visit to historical site
  - o Christmas party
- Employer does not have to obtain agreement from employees to implement or change these.

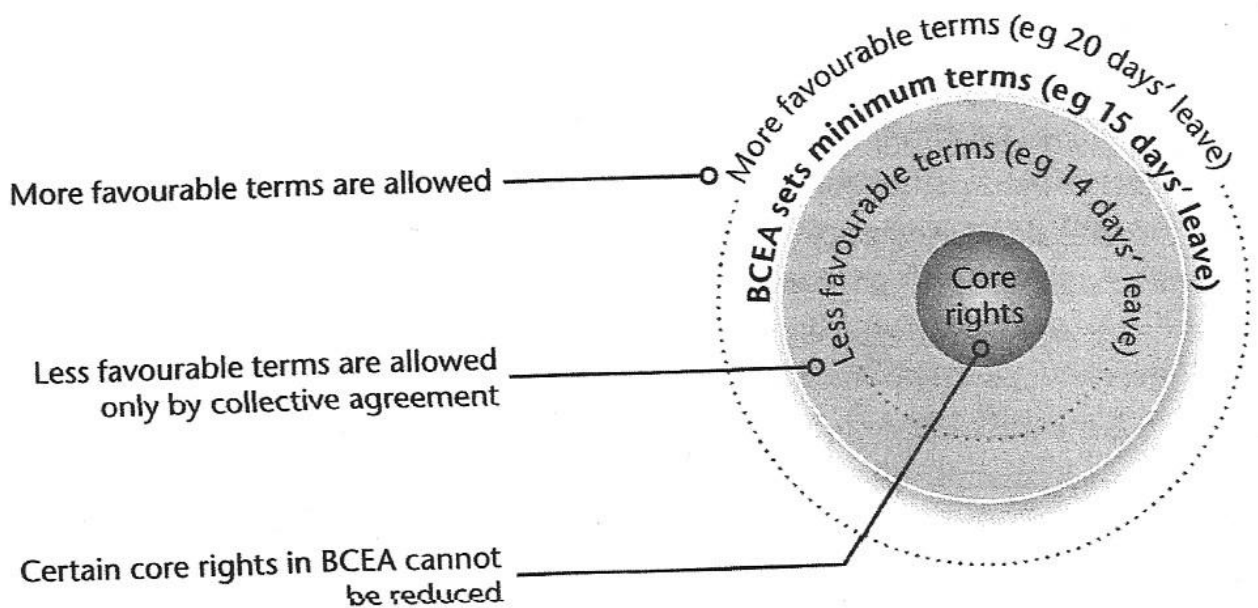
#### Africanisation and Labour Law

- SA is one of major receiving countries of migrants in Southern Africa.
- Migrant workers:
  - o Vulnerable
  - o Often without documentation
  - o Susceptible to exploitation
  - o Often excluded from access to benefits:
    - Unemployment insurance
    - Workmen's compensation
- Not all migrant workers are illegal.
  - o Illegal
  - o Legal with temporary work permits
  - o Permanent residents
  - o Asylum seekers
- Case *Kylie v CCMA & Others [2010]* Labour Appeal court:
  - o Even in cases where employment contract may not be valid,
  - o Vulnerable employee may have right to fair labour practices ito Constitution.
    - Since employment contract with illegal migrant is not valid, worker still has right to fair labour practices.
    - If such worker is unfairly dismissed, worker may have remedy ito the Constitution.

## Study unit 2/ Chapter 4: Basic conditions of employment act

### 1. Introduction

- Acts that impact in the employment relationship:
  - o BCEA: minimum terms and conditions of employment
  - o EEA: prohibits discrimination & promotes affirmative action
  - o LRA: unfair labour practices
  - o Social security legislation: provides employees with entitlements to, e.g. unemployment insurance & involves contributions by employers (BCEA 34A)
  - o SDA & SDLA: Regulate skills and training of employees & involve contributions by employers
- BCEA:
  - o Significant impact on employment contract
  - o Lays down minimum terms and conditions of employment
    - Can be included in sectoral and ministerial determinations and collective agreements that regulate wages e.g.
    - BCEA must be read in conjunction with said determinations and the collective agreement to determine employee's terms and conditions.
- Employers and employees may deviate from minimum terms and conditions to improve them, but not decrease them.
- Basic condition of employment in BCEA constitutes term of any contract of employment, except where
  - o Any other law provides a term more favourable to an employee
  - o The contract provides a more favourable term to the employee (BCEA 4)
  - o The basic condition has been replaced, varied or excluded in terms of the act.



## 2. Scope of application

- BCEA gives effect to & regulates constitutional right to fair labour practices (Constitution 23(1)) by:
  - o Establishes and enforces basic conditions of employment
  - o Regulates variation of such conditions by way of various mechanisms and with a framework of 'regulated flexibility'.
  
- Employees excluded from BCEA:
  - o Members of National Intelligence Agency
  - o South African Secret Service
  - o South African National Academy of Intelligence
  - o Unpaid volunteers working for charitable organisations
  - o Directors and staff of Comsec
  - o People undergoing vocational training except to extent that any term of their employment is regulated by provisions of any other law
  - o People employed on vessels at sea
  - o Independent contractors
  
- Partial exclusions: Certain groups of people are excluded from certain chapters e.g.
  - o Senior managerial employees excluded from chapter 2 (working time)
  - o Employees who work for less than 24 hours a month, excluded from chapter 3 (leave)

## 3. Minimum conditions of employment

### 3.1 Working time

#### BCEA Chapter 2

	Regulation	Additional comments
Exclusion:	<ul style="list-style-type: none"> <li>- Senior managerial employees</li> <li>- Sales staff who travel to premises of customers and who regulate their own hours of work</li> <li>- Employees who work less than 24 hours a month for an employer</li> <li>- Employees who earn more than R172 000 per year (Section 6)</li> </ul>	
Maximum working hours	<ul style="list-style-type: none"> <li>• A maximum of 45 hours a week.</li> <li>• If the employee works 5 days a week or less, he or she may not work more than 9 hours a day.</li> <li>• If the employee works 6 days or more a week, he may not work more than 8 hours a day (these hours include an hour lunch break).</li> </ul>	Employers must endeavour to reduce the maximum ordinary hours to 40 hours a week and eight hours a day, through collective bargaining and sectoral determinations. (9(3) and schedule 1) 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. (9(2))
Lunch	An employee is entitled to a meal interval of at least one hour after five hours of continuous work. (14)	The meal interval can, by agreement, be reduced to 30 minutes, or be done away with if the employee works fewer than six hours per day
Overtime	<ul style="list-style-type: none"> <li>- Maximum of 10 hours per week.</li> <li>- May be increased to a maximum of 15 hours a week by a collective agreement. (10)</li> </ul>	An employee may work overtime only by agreement. <ul style="list-style-type: none"> <li>- An employee who works overtime has to be paid one-and-a-half times normal pay or have time-off.</li> <li>- An agreement to work overtime may not be for more than a total of 12 hours (ordinary hours plus overtime) on any</li> </ul>

		particular day
Sundays & public holidays	<ul style="list-style-type: none"> <li>- The employee has to be paid double the normal rate of pay. (16)</li> <li>- If the employee <i>normally</i> works on Sundays, the employee has to be paid one-and-half times the normal rate.</li> </ul>	The same principle and payment scale apply to work performed on public holidays. (18)
Night work	The employee must be given: an allowance, or a reduction in hours of work, and be provided with transport between the employee's place of residence and the workplace. (17)	<ul style="list-style-type: none"> <li>- Night work is work that is performed after 18h00 and before 6h00 the next day.</li> <li>- It can only be worked in terms of an agreement.</li> </ul>
Rest periods	An employee is entitled to: a <i>daily</i> period of 12 hours between ending and recommencing work, and a <i>weekly rest</i> period of at least 36 consecutive hours, which generally, has to include Sundays. (15)	The BCEA makes provision for daily and weekly rest periods
Compressed work week	Parties may agree that the employee will work up to 12 hours in a day (including a meal interval) without receiving overtime pay, provided that the employee:  does not work more than 45 ordinary hours in any week, more than 10 hours' overtime in any week, or on more than five days in any Ordinary hours and overtime can be averaged over a period of up to four months in terms of a collective agreement. (11 & 12)	The Act allows for averaging of working hours and overtime 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 which will no longer be necessary after harvesting time.

## 3.2 Leave

### BCEA Chapter 3

	Regulation	Additional comments
Exclusion:	- employees who work for less than 24 hours a month for an employer. Such workers will be entitled to the leave agreed upon between the employer and employee	
Vacation leave	A minimum of 21 consecutive (calendar) days paid vacation leave (excluding public holidays) per year for most employees. This amounts to 15 working days. (20)	Employers and employees may agree on additional leave, either paid or unpaid
Maternity leave	An employee is entitled to four consecutive months' maternity leave, which may commence at <ul style="list-style-type: none"> <li>- any time from four weeks before the expected date of birth,</li> <li>- 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 (25)</li> </ul> An employee may not work for six weeks after the birth of her child. If an employee miscarries in the third trimester of her pregnancy or has a still born child, she is entitled to six weeks' leave after the miscarriage or still birth	The employee must notify the employer in writing of the dates of the leave she intends to take.  This is unpaid leave.  BCEA sets the minimum but the parties can agree to more favourable terms, e.g. paid maternity leave.  Employee who is not paid may claim from UIF.
Family responsibility leave	Three days' family responsibility leave every 12 months worked (17). May be taken when: <ul style="list-style-type: none"> <li>- child is born or is sick</li> <li>- death of               <ul style="list-style-type: none"> <li>• spouse / life partner,</li> <li>• parent,</li> <li>• adoptive parent,</li> <li>• grandparent,</li> <li>• child,</li> <li>• adopted child,</li> <li>• grandchild,</li> <li>• sibling</li> </ul> </li> </ul>	Only for employees who have <ul style="list-style-type: none"> <li>- worked for longer than four months,</li> <li>- work at least four days a week.</li> </ul> Interpretation is strict. No provision for death of in-laws.
Sick leave	Six weeks' paid sick leave, every three-year cycle worked (22). If absent from work more than two consecutive days or more than two occasions in an eight-week period, employer may request medical certificate (23). Certificate may be issued by medical doctor or person registered with professional council.	A leave cycle is calculated as number of days an employee would normally work during a six-week cycle. If employee works five days a week, he would work 30 days in six weeks, which would entitle him to 30 days' sick leave in three years.

### 3.3 Other matters

#### 3.3.1 Wages

- No law stipulates minimum wages for employees.
- Collective agreements concluded in bargaining councils and ministerial and sectoral determinations
  - may establish minimum wages &
  - employers & employees will be bound to contract into these minimum standards
  - or more favourably by agreement.
- Paid in SA currency
  - When
    - Daily
    - Weekly
    - Fortnightly
    - Monthly
  - How
    - Cash
    - Cheque
    - Direct deposit (32)
- Employer must provide employee with information in writing regarding
  - Period for which payment is made
  - Amount of pay
  - Amount and reason for deduction
  - Calculation of pay in general (32, 33, 34, 34A, 35)

#### 3.3.2 Notice periods

- Contract of employment for indefinite period may be terminated by
  - Employer or employee
  - By giving notice of intention to terminate contract
  - Notice must adhere to notice periods required into contract of employment.
- If contract does not make provision for notice period, BCEA provides minimum notice period (37)
  - Employer and employee must comply:
  - Contract of employment must be terminated in writing
  - By way of a notice period of not less than:
    - One week: employed six months or less
    - Two weeks: employed more than six months, less than one year
    - Four weeks:
      - employed one year or more
      - farm worker or domestic worker employed for more than six months.
- Notice periods may generally not be shortened, but four week period may be reduced to two weeks by collective agreement.
- BCEA allows employer to pay employee an amount equivalent to salary that employee would have earned during notice period, instead of requiring employee to work such a period (38)

#### 3.3.3 Severance pay

- IF employee is dismissed based on
  - operational requirements of employer in terms of LRA section 189 (study unit 5)
  - employer must pay employee severance pay equal to at least one week's pay for each completed year of continuous service with that employer BCEA section 41 (4)
    - employee who unreasonably refuses to accept an offer of alternative employment with that employer or any other employer, is not entitled to severance pay.

### 3.3.4 Certificate of service

- BCEA Section 42
- Employer must provide employee with certificate of service when employment comes to end.
- Certificate may state:
  - Employee's full name
  - Name & address of employer
  - Description of council/sectoral employment standard by which employer's business is covered
  - Date of commencement and of termination of employment
  - Job title or Job description
  - Remuneration at time of termination
- Reason for termination may be stated only at employee's request.

## 4. Children and forced labour

- BCEA section 43 and Constitution section 28 prohibits employment of children under age of 15 (minimum school leaving age).
  - Contravention → criminal offence
- Children younger than 15, may perform in
  - Advertising
  - Sporting
  - Artistic
  - Cultural activities
    - Only its regulations issued by Minister or ministerial / sectoral determination.
    - BCEA 44, 50(2)(b), 55(6)(b)
- Regulations regarding children under 15 in areas mentioned above:
  - Remuneration paid to parent / guardian of child
  - Maximum hours per day:
    - 4 hours if 10 years and older
    - 3 hours if younger than 10
  - Rest periods must be provided
    - After 2 hours of continuous work – 10 years or older
    - After 1 and half hours continuous work – younger than 10 years
  - Nutritious food and drink must be provided
  - Safe areas provided for rest and play
  - Safe transport between child's home and workplace
- Forced labour is prohibited BCEA section 48; Constitution section 13.



## 5. Enforcement of BCEA

### 5.1 Courts

- Labour court concurrent jurisdiction with civil courts on any matter concerning BCEA (77).
  - o Wide powers to enforce BCEA (77A)
    - Making compliance orders
    - Issuing fines

### 5.2 Inspectors

- Appoint labour inspectors into BCEA 63 who may
  - o Enter workplaces
  - o Require person to disclose relevant information
  - o Question employers and employees
  - o Inspect documents and records
  - o May obtain written undertaking from employer in default that will comply with BCEA provisions
    - If employer refuses / neglects to comply, compliance order may be issued
    - If employer still does not comply, order may be obtained from Labour Court.

## 6. Variation of basic conditions

- BCEA allows for some terms and conditions to be varied.
- Core terms may not be varied at all.



### 6.1 Collective agreement

- Collective agreement between trade unions and employers may change conditions of work
  - o Consistent with purposes of Act (49)
- May replace / exclude a basic condition to extent permitted by Act or sectoral determination.

### 6.2 Ministerial determination

- Section 50
- Primarily replaces / excludes basic minimum conditions iro any category of employees or category of employers, but generally does not set minimum wages.
- Such determination may vary maximum ordinary weekly working hours if:
  - o Determination agreed to in collective agreement
  - o Operational requirements of sector necessitate this
  - o Majority employees are not members of registered trade union.
- May relate to
  - o ordinary hours of work
  - o overtime
  - o meal intervals
  - o daily and weekly rest periods
  - o annual leave
- But must be more favourable to employees than those conditions set out in BCEA.
- Exist for
  - o special public works programme
  - o small businesses
  - o welfare sector
- Typically non-unionised
- Not introduced minimum wages.

### 6.3 Sectoral determination

- Sectoral determination by Minister ito BCEA 51, another way to establish conditions of employment.
- Primarily establishes and regulates minimum wages.
- Can also include other conditions of employment.
- May only be made
  - o after investigation has been done (by DG of DoL)
  - o at initiative of Minister or
  - o as requested y employers' or employees' organisation into particular sector / area
  - o after consideration of representations by public and
  - o preparation of a report.
- Employment Conditions Commission must advise Minister on range of factors that will impact on specific sector and area such as:
  - o Ability of employers to continue to carry on their business successfully
  - o Operation of small, medium, macro, new enterprises
  - o Cost of living
  - o Alleviation of poverty
  - o Inequality in wages
  - o Likely impact of determination on current and future employment
- May relate to
  - o Ordinary working hours
  - o Overtime
  - o Meal intervals
  - o Daily & weekly rest periods
  - o Annual leave
    - Terms on whole must be more favourable o employees than required by BCEA.

- May not reduce protection for night work and maternity leave
- May vary ordinary hours of work only if
  - o Determination agreed to in collective agreement
  - o Operation requirement of sector necessitate this
  - o Majority of employees are not members of registered trade union.
- Minimum wages & conditions set out in sectoral determination will apply to contract of employment between employer and employee
  - o E.g.
    - Farming
    - Private security
    - Contract cleaning
    - Hospitality industry
    - Taxi and domestic workers sector
  - o Said sectors are not well organised, not capable of effective collective bargaining.
  - o Minimum wages generally amended annually to keep abreast of inflation.

### **Africanisation and Labour Law**

- Ubuntu values echoed in BCEA
- BCEA section 43 re employment of children put in place to protect children from exploitation & being exposed to dangerous environments.
- Evidence of care, compassion, fairness.
- Those who contravene with provisions may be found guilty of offence.
- BCEA also applies to domestic workers & farm workers.
  - o Social justice
  - o Fairness
  - o Dignity

## Study Unit 3, Chapter 5: Employment Equity Act

### 1. Introduction

- Discrimination previously implemented by laws:
  - o Industrial Conciliation Act 28 / 1956: excluded black people from collective bargaining
  - o Mines and Works Act 12/1911; 27/1956: Job reservation for whites
  - o Wage Act 27/1925; 44/1937; 5/1957: sanctioned differentiations in wage determination based on race and sex
  - o Public Service Act 54/1957; 111/1984: authorised discrimination based on sex.
- Limited training to black people and females → skills disadvantage
- Disabled people couldn't easily enter the workplace.
- General discrimination based on race, sex, disability → patterns of disadvantage for these groups.
  
- Equality, embraced in 1990s, section 9 of Constitution:
  - o (2)
    - includes full, equal enjoyment of all rights and freedoms
    - promote achievement of equality, legislative & other measures
    - designed to protect / advance persons/categories of persons
    - disadvantaged by unfair discrimination
  - o (3)
    - State may not unfairly discriminate directly / indirectly
      - Against anyone on one / more grounds, incl
        - Race
        - Gender
        - Sex
        - Pregnancy
        - Marital status
        - Ethic / social origin
        - Colour
        - Sexual orientation
        - Age
        - Disability
        - Religion
        - Conscience
        - Belief
        - Culture
        - Language
        - Birth
  - o (4)
    - No person may unfairly discriminate directly / indirectly against anyone on grounds in subsection 3
  
- Constitution
  - o holds country's founding values to be
    - Human dignity
    - Achievement of equality (→ embraced as goal, but only first step in achievement)
    - Advancement of human rights and freedoms
    - Non-racism
    - Non-sexism
  - o Section 9:
    - Prohibition of unfair discrimination
    - Authorises affirmative action
  
- Employment Equity Act gives content to Constitution.

## 2. Basic Terminology

### 2.1 Formal and Substantive equality

- Constitution Equality clause
  - o Formal equality
    - Sections 9(3) and (4)
    - Protecting individuals against {unfair} discrimination → equality in treatment
    - Views individual ability and performance as only factors relevant for achieving success in society
  - o Substantive equality
    - Section 9(2)
    - Opportunities are determined by individual status as member of group
    - Discriminatory acts:
      - Part of patterns of behaviour towards groups
      - Result in disadvantage for such groups
    - Prohibition of unfair discrimination
      - In itself insufficient for true equality
      - Affirmative action measures required to correct imbalances where disadvantage and inequality exist.

### 2.2 Differentiation and Discrimination

- Differentiation
  - o Treating people differently
  - o Acceptable:
    - based on valid grounds,
    - serves a legitimate purpose
  - o Differentiation in pay levels does not in itself constitute discrimination if its based on acceptable considerations such as levels of responsibility, expertise, skills
  
- Discrimination
  - o Differentiation based on unlawful ground
  - o Even if there is not a specific intention to discriminate

### 2.3 Direct and Indirect discrimination

- Direct discrimination
  - o Easiest to determine
  - o Someone is clearly treated differently because of a certain characteristic (race/gender)
  - o E.g.
    - Paid less because female
    - Not promoted because disability
  
- Indirect discrimination
  - o Criteria that appear to be neutral, negatively affects a certain group disproportionately
  - o Disguised, hard to detect
  - o Unless criterion can be justified by requirements of the job, it will amount to indirect discrimination.
  - o E.g.
    - Candidates must have bass voice so more men than women will qualify.

## 2.4 Specified and Unspecified grounds of discrimination

- Specified grounds
  - o EEA prohibits unfair discrimination in any employment policy / practice on 19 grounds (6(1))
    - Race; Gender; Sex; Pregnancy; Marital status; Family responsibility; Ethnic / social origin; Colour; Sexual orientation; Age; Disability; Religion; HIV status; conscience; Belief; Political opinion; Culture; Language; Birth; Any other arbitrary ground.
  - o EEA's list corresponds with Constitutional list, but includes Family Responsibility; HIV status; Political opinion
  - o Lists have in common the potential to demean people.
  - o Grounds relate to individual's personal attributes.
- Unspecified grounds
  - o Court will use dignity as measure to determine if unspecified ground has potential to form basis for discrimination
  - o Fewer discrimination cases on this basis
  - o E.g.
    - Qualifications
    - Tertiary teaching
    - Research experience
    - Professional ethics
    - Mental health/illness
    - Political / cultural affiliation
    - Being a parent

## 3. Purposes of the EEA

- Applies to all employers as far as prohibition of unfair discrimination is concerned.
- Application of affirmative action only applies to designated employers.
- Specifically excludes members of:
  - o National Defence Force
  - o National Intelligence Agency
  - o South African Secret Service
  - o South African National Academy of Intelligence
  - o Directors and Staff of Comsec (4(3))
- Gives effect to equality provisions of Constitution.
- Promotes achievement of equality in workplace.
- Provides foundation for non-discrimination and affirmative action in employment law.
- Other related legislation includes:
  - o Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 (PEPUDA)
    - Purpose: promoting equality and preventing unfair discrimination in all spheres of society
    - Does not apply to persons defined as employees to whom the EEA applies.
    - Workers excluded from EEA (independent contractors) may rely on this act's protection.
  - o Labour Relations Act
    - Regards dismissal on ground of discrimination automatically unfair with severe penalties (187(1)(f))
  - o Broad-Based Black Economic Empowerment Act 53/2003 (BBBEEA)
    - Promote economic transformation and enable meaningful participation of black people in economy.
    - Aim: achieve substantial change in racial composition of ownership and management structures in skilled occupations of existing and new enterprises.

- EEA follows Constitution: it subscribes to both formal and substantive equality

#### **Purpose of EEA:**

- (1) Prohibit unfair discrimination (formal equality) Chapter II
  - o Promote equal opportunities & fair treatment in employment through elimination of unfair discrimination
    - Applicable to all employers and employees
    - Job applicants
  - o Prohibit direct and indirect unfair discrimination on one or more specified or unspecified grounds
    - Applicable to all employers and employees
    - Job applicants
- (2) Provide for affirmative action (substantive equality) Chapter III
  - o Redress disadvantage experienced by designated groups
    - Applicable only to designated employers and employees.

## **4. First purpose; prohibition against unfair discrimination**

### **4.1 Establishing unfair discrimination**

- EEA section 6(1):
  - o no person
    - natural as well as juristic persons
    - Perpetrator may be anyone, employer, co-employee, 3<sup>rd</sup> party
  - o may unfairly discriminate against an employee
    - applicants for employment are also protected against unfair discrimination however difficult it might be for them to substantiate unfair discrimination claims
  - o in any employment policy or practice.
    - An employment policy / practice: include all aspects of employment, e.g. recruitment procedures, advertising, selection criteria, working environment & facilities, training and development.
- **Stage 1 of an unfair discrimination enquiry**
  - o Establish
    - factual foundation for alleged differentiation
    - and the grounds on which the differentiation took place
      - *e.g. Muslim not nominated for training while others have.*
      - *He must establish factual foundation, by producing requests for training and those of other successful applications.*
    - This will lay basis for the claim.
- **Stage 2 of an unfair discrimination enquiry**
  - o Establish a link between differentiation and alleged (specified / unspecified) grounds.
  - o These grounds must be the reason / cause for the differentiation.
    - *E.g. Muslim must show that his religion is the REASON why he is denied training*
    - *E.g. he must establish fact that all other co-employees have been set on training while his application has been declined time and again without good reason.*

- Once such a link has been established, the differentiation becomes discrimination and it is presumed to be unfair.
- Here the complainant must show that specified / unspecified ground is the reason for the differentiation.
  - Showing a link places a difficult burden on a complainant and he is required to establish only a prima facie (based on first impression) case of discrimination.
  - This is more than an allegation or 'bold averment'.
  - Once a prima facie case of discrimination is established on specified or unspecified grounds, presumption of unfairness arises. (EEA section 11)
- **Stage 3 of an unfair discrimination enquiry**
  - Employer gets opportunity of showing that alleged unfair discrimination was indeed fair.
    - *E.g. Muslim not sent on training because there's a minimum requirement of 3 years practical experience.*
    - *All other employees have been working 5 years and longer. Muslim only 2 years.*
    - *Difference in treatment → justifiable*

#### 4.2 Justification grounds for discrimination

- Section 6(2) → two grounds of justification for allegedly unfair discrimination, affirmative action & inherent job requirements.

##### 4.2.1 Affirmative action

- Measures must be applied by designated employers (section 1)
- To ensure that suitably qualified people from designated groups (section 1)
- Have
  - equal employment opportunities and
  - are equitably represented in
    - all occupation categories and
    - levels of the workplaces of those employers. (section 15)

Designated groups	Designated employers
<ul style="list-style-type: none"> <li>- Black people</li> <li>- Women</li> <li>- People with disabilities</li> </ul> <p><i>'black people' includes</i></p> <p><i>Africans</i></p> <p><i>Coloureds</i></p> <p><i>Indians</i></p> <p><i>Chinese</i></p>	<ul style="list-style-type: none"> <li>- Larger enterprises (50 + employees)</li> <li>- Employers with fewer than 50 employees, but have annual turnover specified in Schedule 4 of EEA</li> <li>- Municipalities</li> <li>- Organs of state           <ul style="list-style-type: none"> <li>● Airports Company of SA</li> <li>● Central Energy Fund</li> <li>● Development Bank of SA</li> <li>● Eskom</li> <li>● SABC</li> <li>● SA Post Office</li> <li>● Telkom SA Limited</li> </ul> </li> <li>- Employers designated as such in terms of collective agreement</li> </ul>

- If employer uses affirmative action as defence against unfair discrimination, remember that AA measures must be consistent with purposes of EEA (section 6(2)(a))



#### 4.2.2 *Inherent requirements of the job*

- If job in essence requires a certain attribute, it will not be unfair to exclude people without that attribute.
  - *E.g. Inherent job requirement that sales assistant in lingerie shop is female. Exclusion of males is not unfair discrimination.*
- EEA does not define 'inherent requirements of job',
  - but 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 requirement.
    - *E.g. not inherent that bus driver must be male / fire fighter may not be gay.etc.*

### 4.3 Other specific forms of discrimination prohibited

#### 4.3.1 *Harassment as unfair discrimination*

- Any type of harassment → unfair discrimination in EEA (section 6(3)).
- Most common form → sexual harassment.
  - Serious transgression.
  - Code: Sexual Harassment:
    - attempts to provide guidance to employers on
      - how to deal with this occurrence and
      - how to curtail such conduct in workplace.
    - Defines sexual harassment as:
      - Unwelcome conduct of sexual nature that violates the rights (such as dignity and privacy) of an employee.
      - Conduct that constitutes a barrier to equity in the workplace.
      - Action based on sex and/or gender and/or sexual orientation, whether the conduct was unwelcome or not.
    - Forms of sexual harassment:
      - Victimisation
        - Employee is victimised or intimidated for failing to submit to sexual advances.
      - Quid pro quo harassment
        - Employment circumstances are influenced by employer, manager or co-employee to coerce an employee to surrender to sexual advances.
      - Sexual favouritism
        - Person in position of authority rewards only those who respond to his sexual advances.
  - Sexual harassment includes:
    - Physical conduct
    - Verbal conduct
    - Non-verbal conduct
    - *Example p 62.*

- EEA requires
  - An employee who alleges any contravention of the Act to bring this to the attention of the employer (section 60)
  - Employer must consult all relevant parties and take necessary steps to eliminate such conduct.
  - Employer will be deemed liable for contravention by its employee if the employer
    - Did not follow this procedure
    - Cannot prove that it did all that was reasonably practicable to ensure that an employee would not contravene the EEA.
  - Every employer
    - Must take steps to attempt to eliminate unfair discrimination in any employment policy or practice.
    - Must 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.
  
- To further prevent harassment, The Code: Sexual Harassment makes it compulsory for employers to develop sexual harassment policies that stipulate inter alia:
  - Sexual harassment in a form of unfair discrimination.
  - Sexual harassment in the workplace will not be permitted or condoned.
  - Formal and information procedures may be used to address complaints of Sexual harassment in a sensitive, efficient, effective way.
  - Confidentiality is of the utmost importance in dealing with allegations of Sexual harassment.
  - It is a disciplinary offence to retaliate against an employee who in good faith lodges a complaint of Sexual harassment
  - Disciplinary sanctions may be imposed on a perpetrator, ranging from
    - warnings for minor instances of Sexual harassment to
    - dismissal for continued minor instances after warnings, or
    - for serious instances of Sexual harassment

#### **4.3.2 Testing employees and applicants for employment**

- EEA regulates employee testing in workplace (section 7)
- Testing may be used to
  - evaluate applicants for employment to determine if they are suitable for job
  - evaluate existing employees
  
- Act distinguishes between medical testing in general and HIV/AIDS testing.
- Regulates psychological and other similar assessments (section 8).
  - Testing itself does not constitute discrimination
  - But the manner in which it is carried out may be discriminatory

(a) Medical testing Section 7(1)

- Of Employee or applicant for employment is prohibited
- Unless
  - legislation permits / requires testing
  - justifiable in light of
    - medical facts
    - employment conditions
    - social policy
    - fair distribution of employee benefits
    - inherent requirements of job

(b) Psychological testing

- Prohibited
- Unless it has been scientifically shown that
  - The test is valid and reliable
  - Can be applied fairly to all employees
  - Not biased against any employee or group
  - Certified by Health Professions Council of SA or any other body which may be authorised by law to certify those tests or assessments.

(c) HIV testing section 7(2), 50(4)

- To establish HIV status is prohibited unless considered justifiable by Labour Court.
- EEA does not stipulate grounds on which LC may authorise testing.
- EEA section 50(4) prescribes conditions that the court can impose when it grants an order in which the HIV testing is authorised.
  - Conditions may relate to provision of
    - Counselling,
    - Maintaining confidentiality
    - Period during which authorisation applies
    - Category of jobs or employees in which authorisation applies
- *Joy Mining Machinery, Division of Harnischfeger (SA) (Pty) Ltd v NUMSA & others*: Factors stipulated as circumstances under which HIV testing would be allowed:
  - To prevent unfair discrimination
  - If employer needed HIV testing to determine extent of HIV in workplace to place itself in better position to
    - evaluate training and awareness programmes
    - formulate future plans based on outcome of tests
  - If purpose was that employer needed to know prevalence of HIV in workplace to
    - be pro-active in prevention amongst employees
    - treat symptoms
    - plan for contingencies
      - fair distribution of employee benefits
      - medical aid
      - training of replacement labour
  - Medical facts indicated the need
  - Employment conditions required testing
  - Social policy required testing
  - Inherent requirements of job necessitated it

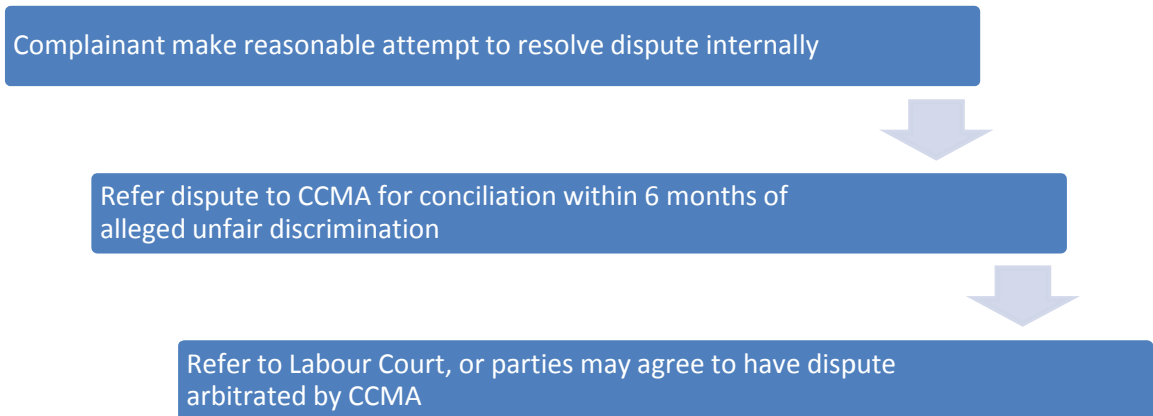
- Particular categories of employees / jobs required such testing.
- Court sanction is not necessary if testing is voluntary and anonymous → no unfair discrimination

#### 4.4 Equal pay for equal work or work of equal value

- EEA does not regulate equal pay for equal work.
- Labour Court: remuneration is an employment policy / practice (section 1, 6(1) of EEA)
- Paying an employee less than another for performing the same or similar work based on a specified or unspecified ground constitutes less favourable treatment → claim of equal pay for work that is same or similar may be brought to EEA.
  - Same applies re equal pay for work of equal value.
- *Mangena & others v Fila South Africa (P\*) Ltd & others* [2009] 12 BLLR 1224 (LC), the issue was addressed. The Labour Court explained that:
  - remuneration is an employment policy or practice in terms of the EEA;
  - that paying an employee less than another for doing the same or similar work because of a ground that is specified in the EEA, or unspecified,
  - constitutes less favourable treatment.
- Therefore, any claim for equal pay for work that is *the same or similar*, falls to be determined in terms of the EEA. The same is true for claims for equal pay for *work of equal value*.
- To claim equal remuneration for work that is the *same or similar*, the claimant must:
  - identify a comparator; and
  - establish that the work done by the comparator is more or less the same or similar than that of the claimant.
- When the claim is one 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 (having regard to the degree of skill, physical and mental effort, responsibility and other relevant factors); and
  - lay a proper factual foundation to enable the court to make an assessment of the value to be attributed to the work in question and the tasks associated with it.
- Once this has been done, the claimant must establish a link between the differentiation (that is, paying one employee less than another for the same work or for work of equal value) and a specified or unspecified ground. Once such a link has been established, section 11 of the EEA requires the employer to show that the discrimination is not unfair.

#### 4.5 Resolution of unfair discrimination disputes

- Dispute must be referred to CCMA for conciliation within 6 months after alleged discrimination occurred (EEA 10).
- Referring party must satisfy CCMA that reasonable attempt was made to resolve dispute prior to referral.
- Such attempt may be interpreted to mean having at least exhausted internal grievance procedures.
- If conciliation unsuccessful, dispute must be referred to Labour Court, unless parties agree to have dispute determined by arbitration.



- IF Labour Court decides there's been unfair discrimination against employee, it may make any appropriate order that is just and equitable, including:
  - o Payment of compensation
  - o Payment of damages
  - o Order directing employer to take steps to prevent same/similar unfair discrimination against other employees in future

## 5. Second purpose of EEA: Affirmative Action

### 5.1 Outline of Affirmative action

- EEA Chapter III
  - o Redress past disadvantage
  - o Achieve employment equity
    - Through Implementation of affirmative action measures
  
- EEA Requires (section 15(1)) AA measures must be:
  - '...designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
  
- Labour court: AA measures must be applied fairly and rationally.
  - o When designated employers reach this goal, appointments and promotions on the basis of AA will be unfairly discriminatory.
  
- Constitutional Court:
  - o AA measures the 'properly fall' within requirements of Constitution are presumed not to be unfair.
  - o For AA measures to be rational it must:
    - Target people or categories of people who had been disadvantaged by unfair discrimination.
    - Be designed to protect or advance such people or categories of people.
    - Promote the achievement of equality.
  - o Only AA measures implemented with reason and designed as required by EEA will be acceptable to courts.
  - o AA measures
    - Do not create a right to be appointed or promoted to a post.
    - Can be used only as defence against a claim for unfair discrimination.

### 5.2 Contents of affirmative action

- EEA Section 15(2)
- Affirmative action measures must be designed to:
  - o Identify and eliminate employment barriers that adversely affect people from designated groups.
  - o Further/encourage diversity in the workplace.
  - o Reasonably accommodate (modify / adjust job / working environment) people from the designated groups to enable them to have access to and advancement in employment.
  - o Ensure equitable representation of suitably qualified people from designated groups.
  - o Retain and develop people from designated groups.
  - o Implement appropriate training measures, including skills development.

- Measures implemented may include
  - o Preferential treatment (targeted recruitment)
  - o Numerical goals
    - but not quotas: require attainment of fixed numbers over a specified time period.
- EEA (section 14(4)) does not require designated employers to implement decisions re employment policies / practise that would establish absolute barriers to prospective / continued employment or advancement of people not part of designated groups → protection for people who belong to a non-designated group.

### 5.3 Designated employers

- Designated employers must apply affirmative action:
  - o Employ more than 50 employees
  - o Employ less than 50 employees but have annual turnover stipulated in schedule 4 of EEA
  - o Municipalities
  - o Organs of state such as SABC, Eskom
  - o Employers designated as designated employers into collective agreement.
- Employers not part of designated employers may voluntarily comply with Chapter III. (section 14).
- Employer who deliberately takes steps to avoid becoming designated employer is guilty of an offence. (section 61 (2)-(3))
- Every designated employer must implement AA measures for people from designated groups to achieve employment equity
  - o Black people
  - o Women
  - o People with disabilities
- Specific duties in designing AA plan:
  - o Consult with representative trade unions and/or their employees or representatives nominated by them.
    - Interests of employees from across all occupational categories, all levels, both designated & non-designated groups, must be represented during consultation.
  - o Disclose relevant information to consulting parties to allow effective consultation.
  - o Collect information on, and analyse all its policies and procedures to identify employment barriers that adversely affect people from designated groups.
    - Profile of workforce in each occupational category & level must reflect degree of under-representation
  - o Prepare and implement an employment equity plan, including:
    - Objectives to be achieved for each year of the plan
    - Numerical goals for under-represented people from designated groups
    - Strategies & timetables
    - Duration of the plan
    - Procedures to monitor and evaluate implementation of the plan
    - Internal procedures to resolve any dispute about the plan
    - People in workforce responsible for monitoring & implementing the plan
  - o Report to DG DoL on progress
    - 150 employees or more: annually
    - Less than 150 Employees: bi-annually

- Other requirements:
  - o Employer must display summary of EEA in workplace
  - o Provide copy of employment equity plan to employees
  - o Submit statement to Employment Conditions Commission on employees' income in each category of workforce
- Failures to comply may lead to
  - o fines for employers and
  - o state contracts being refused or cancelled.

## 5.4 Beneficiaries of affirmative action

### 5.4.1 Designated groups

- o Designated groups
  - Black people
    - Africans
    - Coloured
    - Indians
    - Chinese
  - Women
  - People with disabilities
- o South African citizens only.
- o Personal past disadvantage is not a requirement.
- o Degrees of disadvantage based on:
  - South African History
  - Imbalances of the past
  - Apartheid system was designed to protect white people
  - Black, specifically African, employees suffered brunt of discrimination
  - Purposes and objectives of EEA.
- o Race is favoured over gender and disability
- o African favoured over Coloured and Indian.

### 5.4.2 Meaning of suitably qualified

- o Members form designated groups who are suitable qualified can benefit from AA.
- o Section 20(3) – being suitably qualified depends on
  - Formal qualifications (degrees / diplomas)
  - Prior learning (diplomas not completed)
  - Relevant experience
  - Capacity to acquire within reasonable time, ability to do job (potential of person)
- o To determine if person suitably qualified, employer must
  - Review all factors
  - Determine whether person has ability to do job due to one or combination of factors
    - May not unfairly discriminate solely on ground of lack of experience.
- o People 'not suitably qualified' cannot be considered for affirmative action.



## 5.5 Monitoring and enforcing of affirmative action

- EEA Chapter V: Formal and informal ways of enforcing AA.
  - o Informal
    - Employees and trade union representatives may bring contraventions to attention of
      - Employer
      - Trade union
      - Labour inspector
      - DG DoL
      - Commission of Employment Equity (CEE)
  - o Formal
    - Act is enforced by labour inspectors
      - By obtaining written undertakings from employers that they will comply with act
      - By issuing compliance orders
      - By requesting reviews by DG
      - By DG referring cases of persistent non-compliance to Labour Court.
  - o Labour Court powers include:
    - Orders requiring employer to comply with compliance order issued by inspector
    - Ordering compliance with any provision of the Act
    - Imposing fines for contravention of certain provisions of the Act.
  - o CEE:
    - Watchdog role by annual reporting Minister on progress towards achievement of employment equity in workforces of designated employers.
- When measuring compliance, take into account:
  - o Extent to which suitably qualified people are equitably represented in workplace re
    - Demographic profile of national & regional economically active population
    - Pool of suitably qualified people from designated groups
    - Present & anticipated economic & financial factors relevant to the sector
    - Employer's present and planned vacancies in various categories and levels.
  - o Employer's turnover of labour
  - o Employer's progress in implementing employment equity in comparison with other employers in comparable circumstances and in same sector
  - o Reasonable efforts made by employer to implement its plan
  - o Extent to which employer made progress in eliminating employment barriers that adversely affect people from designated groups.

## Africanisation and Labour Law

- Affirmative action aim to remedy injustices of past b requiring that suitably qualified people from designated groups are given equal employment opportunities and are equitably represented n all levels of workplace to address inequalities in society.
- Development inspired by ubuntu to bring about social justice and restore human dignity to those previously disadvantaged.

## Study Unit 4; Chapter 6: Unfair Labour Practices

### 1. Introduction

- Dispute of right
  - o Dispute re unfair labour practice
  - o Existing rights
- Dispute of interest
  - o Creation of new rights
  - o Resolved by industrial action, not court.

### 2. LRA

- Content to right to fair labour practices guaranteed by Constitution.
- Protects employees against unfair labour practices in employment relationship.

<b>Right to fair labour practices: Constitution</b>	<b>Protection against unfair labour practices: LRA</b>
<ul style="list-style-type: none"> <li>- Wide</li> <li>- Protects everyone</li> <li>* Also workers not employees ito LRA</li> <li>- Infringement of right to fair labour practices determined re surrounding circumstances</li> </ul>	<ul style="list-style-type: none"> <li>- Limited to list of actions included in def of unfair labour practice</li> <li>- Protects employees only against specific actions by employers</li> <li>- Employee cannot commit unfair labour practice towards employer; only employer can commit unfair labour practice towards employee</li> </ul>

- Section 185(b):
  - o Every employee has right not to be subjected to unfair labour practice
- Section 186(2) gives content to concept of unfair labour practice:
  - o 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 the 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) the 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, Act 26 of 2000, on account of the employee having made a protected disclosure defined in that Act.

### 3. Listed unfair labour practices

#### 3.1 Promotion

- Managerial prerogative.
- May promote most suitable candidate after fair process was followed.
- Employee does not have legal entitlement to be promoted.
  - o Circumstances may sometimes show a reasonable expectation re promotion.
  - o Can be due to assurance by employer.
- Employer must act fairly
  - o Procedurally and
  - o Substantively
- Decision not to promote is reviewable if
  - o employer cannot justify its decision or
  - o if decision proves to be seriously flawed.
- Courts will intervene only if employer acted in bad faith.
- For allegation of unfair labour practice re promotion to succeed it must be shown that:
  - o Employer exercised its discretion capriciously (capricious: prone to sudden changes in moods or behaviour)
  - o Reasons provided cannot be substantiated
  - o Decision was taken on wrong principle
  - o Decision was taken in biased manner.

#### 3.2 Demotion

- Demotion means an employee:
  - o Transferred to a lower level
  - o Receives less remuneration
  - o Loses benefits
  - o Experiences loss in status
- Fair demotion:
  - o Consent is required
  - o Operational reasons: restructuring / merging
  - o Fair procedure is required
  - o Fair as disciplinary penalty based on valid reason

### 3.3 Probation

- Purpose: give employer opportunity to evaluate employee's performance before confirming appointment.
- Code: Dismissal
  - o Sets requirements for fair probationary period:
    - Determined in advance
    - Reasonable duration, determined with reference to
      - Nature of job
      - Time it would take to determine employee's suitability for continued employment
  - o Probation should not be used for wrong purposes, e.g.
    - Deprive employees of status of permanent employment
    - Dismiss probationers at conclusion of probationary period and replace them with newly hired employees
  - o At end of probationary period, employer may
    - Extend probationary period to enable employee to improve performance
      - Only if justified, e.g. job requirements requires extended period to determine suitability
    - Dismiss employee
    - Confirm appointment of employee
  - o Before extension or dismissal
    - Employee must be invited to make representations
    - Employee may be represented by union representative or fellow employee.
- *SACTWU v Mediterranean Woollen Mills (Pty) Ltd* – employer who does not want to confirm appointment must show procedure prior to dismissal included:
  - o Giving employee opportunity to improve
  - o Making employee aware that work performance was unacceptable
  - o Counselling employee if he is not able to handle work
  - o Treating employee sympathetically and with patience.
- If employee still fails to perform satisfactorily after requirements have been met, contract can be terminated.

### 3.4 Training

- If employer acts unfairly towards employee as far as provision of training is concerned, it will amount to unfair labour practice.
  - o If employer
    - fails to provide training
    - fails to send employee for training
  - o Employee must show that
    - he had some kind of legitimate expectation to be trained and
    - the employer acted arbitrarily, capriciously or inconsistently in denying the employee training.
- Training is important
  - o for advancement of employee and
  - o if employer has an established practise of training employees.

### 3.5 Provision of benefits

- Dispute about remuneration → interest dispute: right has not yet been created.
- Must be resolved by way of industrial action, not by court.
- This means that in order to claim that an employer acted unfairly with regard to a 'benefit' the employee must show that the benefit affected is something extra, apart from remuneration.
- Some of the distinguishable features of a benefit are that the benefit must:
  - o have some 'monetary value' for the employee;
  - o be an expense (or cost) to the employer; and
  - o be 'something which arises out of a contract of employment.'
- Considering the nature of modern day salary packages, it is difficult to separate benefits from remuneration, and these difficulties will stay with us until such time as the unfair labour practice concept has been reviewed by the legislature

### 3.6 Suspension or any other disciplinary action short of dismissal

#### (a) Precautionary suspension

- Suspension
  - o pending an inquiry
  - o Employee must be paid
- Alleged misconduct investigated to decide if disciplinary action must be taken.
- With pay unless
  - o employee agrees to suspension without pay or
  - o law or collective agreement authorises unpaid suspension.
- Employee should not be suspended unless
  - o Prima facie reason to believe that employee has committed serious misconduct
  - o Some objectively justifiable reason for excluding employee from workplace.
- Suspension
  - o Has detrimental impact on affected employee and may
  - o Prejudice his reputation, advancement, job security and fulfilment.
  - o Must be based on substantively valid reasons
  - o Fair procedures must be followed before suspensions are implemented.
  - o Unless circumstances dictate otherwise, employees must be offered opportunity to be heard before being placed on suspension.

#### (b) Punitive suspension

- Suspension
  - o As sanction for misconduct following disciplinary action
  - o Unpaid
- Fair suspension without pay can be alternative to sanction of dismissal in attempt to correct behaviour or employee.

#### (c) Other Disciplinary action short of dismissal

- These relate to warnings and transfers.
- Could be where the employer transfers the employee to another province without reason or process.

### 3.7 Refusal to reinstate or re-employ an employee in terms of any agreement

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

### 3.8 Employee suffering an occupational detriment on account of protected disclosure (whistle blowing)

#### 3.8.1 Requirements

- o Occupational detriment other than dismissal in contravention of Protected Disclosure Act, because of a protected disclosure → Unfair labour practice
- o PDA:
  - Regulates disclosure by employees of information on suspected criminal and other improper conduct by employers (and co-employees)
  - Provides remedies in this regard over and above unfair labour practice remedies provided for in LRA .
  - Aim: promote a culture of openness and accountability without fear of reprisal.
- o Three requirements must be met for employee to establish unfair labour practise based on occupational detriment:
  - Employee must have made a protected disclosure
  - Employer must have taken some retaliating action against employee which amounts to employee suffering from occupational detriment
  - Detriment suffered must be on account (LRA) or partly on account (PDA) of making of the protected disclosure.
    - Casual link between disclosure ad retaliating action by employer.

#### 3.8.2 Meaning of occupational detriment & protected disclosure

##### (a) Occupational detriment

- Subjection of an employee to any of following as result of 'whistle-blowing' (after making protected disclosure)
  - o Any disciplinary action
  - o Dismissal, suspension, demotion, harassment or intimidation;
  - o Transferred against one's will;
  - o Refusal of a transfer or promotion;
  - o Subjection to a term of employment
  - o Subjection to a term of retirement which is altered or kept altered to the employee's disadvantage;
  - o Refusal of a reference or being provided with an adverse reference;
  - o Denial of appointment to any profession or office;
  - o Threatened with any of these actions; or
  - o Otherwise adversely affected in respect of employment, employment opportunities and work security.

- (b) Protected disclosure
  - General protected disclosure
    - o Covers a wider range of disclosures including disclosures to media.
  - Protected disclosure
    - o Disclosure of information to specific persons or bodies such as
      - Legal advisors; employers; members of Cabinet; Public Protector; Auditor-General
    - o Information must be disclosed
    - o Suspicion, rumours, personal opinion is not information.
    - o Employee must make disclosure:
      - In good faith
      - Reasonably believe
      - That the information disclosed is substantially true.

#### 4. Resolution of unfair labour practice disputes

- Important factors in the process are:
  - o Bargaining councils or the CCMA (if no council has jurisdiction) have jurisdiction to conciliate unfair labour practice disputes.
  - o A referral of an unfair labour practice dispute must be lodged within 90 days from the date on which the unfair labour practice was committed or, within 90 days from the date on which the employee became aware of the unfair labour practice.
  - o If conciliation fails, and the dispute remains unresolved, the employee may request that the dispute be arbitrated by the relevant bargaining council (or the CCMA) EXCEPT where:
    - The unfair labour practice relates to probation, in which case the so-called 'con-arb' process must be followed. This entails a single expedited process in which the matter is arbitrated immediately after a certificate is issued that the dispute remains unresolved; and
    - The unfair labour practice relates to an occupational detriment, in which case the dispute may be referred to any court that has jurisdiction, including the Labour Court, or the matter might be pursued through any other process allowed or prescribed by law.
- The arbitrator may determine the unfair labour practice dispute referred to him or her on terms that he or she deems reasonable, including making an order for reinstatement, re-employment or compensation of not more than the equivalent of 12 months' remuneration.

#### Africanisation and Labour Law

- Fairness → ubuntu & essential constitutional value → LRA protection
- Open communication is essential → unfair labour practice occurs when employers use other tactics

## Study Unit 5, Chapter 8: Termination of the contract of employment

### 1. Dismissal in general

- LRA 185(a): every employee has right to not be unfairly dismissed
- Definition of dismissal indicates what actions performed by the employer brings the employment relationship to an end.
- If allege unfair dismissal, you must prove:
  - o You are an employee
  - o Were dismissed
- Burden of proof shifts to employer to prove dismissal was not unfair by proving:
  - o There was fair reason for dismissal – substantive fairness
  - o Fair procedure was followed – procedural fairness
  
- LRA 186:  
Dismissal means that
  - (a) An employer has terminated a contract of employment with or without notice;
  - (b) An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
  - (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 a contract of employment with or without notice because the employer made continued employment intolerable for the employee
  - (f) An employee terminated a contract of 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 to work that are substantially less favourable to the employee than those provided by the old employer.

### 2. Definition of dismissal

#### 2.1 Termination of contract by employer, with / without notice

*EG M catches N who takes cash from register. After disciplinary hearing N is dismissed with 1 months' notice, paid instead of allowing him to work on premises for another month.*

- Normal
- Most common form
- Notice period:
  - o 1 week: Employed 6months or less
  - o 2 weeks: Employed 6months – 1 year
  - o 4 weeks: Employed 1 year or more.
- Fairness is separate issue ito section 186(1)(a) reference to substantive and procedural fairness.
- Employee Serious breach of contract:
  - o Employer may terminate contract summarily – immediately without notice.
  - o Employee must still get opportunity to be heard.



## 2.2 Refusal / failure by the employer to renew a fixed-term contract

*EG R appointed S as project manager, one-year contract. R renewed contract 3 more consecutive years, gave S performance bonuses. When S contract not renewed for 4<sup>th</sup> time, he claimed he had been unfairly dismissed.*

- If employee reasonably expects employer to renew fixed-term contract on same / similar terms, but employer offers to renew it on less favourable terms, or does not renew it at all, this constitutes a dismissal.
- Main question: if employer's conduct created reasonable expectation that fixed-term contract would be renewed. Such as:
  - o Previous renewals
  - o Assurances of renewal

## 2.3 Refusal to allow an employee to resume work after maternity leave

*EG F returns to work after 4 months unpaid maternity leave. Employer informs her they have become used to working without her, her position no longer exists.*

- Dismissal
- Employee is entitled to 4 consecutive months (unpaid) maternity leave
- In line with ILO convention 183 on maternity protection.
- This dismissal relates to definition of automatically unfair dismissals, due to dismissal relating to pregnancy being automatically unfair.

## 2.4 Selective re-employment

*EG ABC worked for chicken mania. B caught stealing chickens and dismissed. Chicken Mania asked A if he would like to come work again. Selective re-employment of A means that B and C may claim unfair dismissal.*

- Dismissal
- Not necessarily unfair
- If employer retrenched employees and financial position of business improves, employer may re-employ some employees.
- Not unfair selective re-employment as long as employer followed fair procedure and can justify selection for re-employment.

## 2.5 Constructive dismissal

*EG X works for Z as receptionist. Z tried many times to kiss X against her will, Z keeps sending naked pictures via e-mail. X resigns because she feels she can no longer work for Z under these circumstances.*

- If employee resigns because employer made continued employment intolerable, it constitutes dismissal or constructive dismissal.
  - o Employee terminates contract but not voluntarily.
  - o Employer's conduct made it impossible for employee to continue working there.
- Three elements must be present:
  - o Employee must show that he resigned
  - o Employee must show that the reason for resignation was that continued employment became intolerable
  - o Employee must show that it was employer's conduct that created intolerable circumstances.
- Facts of every case must be analysed to determine with conduct by employer was irritation or insult or whether it really made continued employment intolerable.

## 2.6 Employee being provided with less favourable terms after the transfer of a business

*EG K works for L. L sells his business to J. J changes terms and conditions of employees that they work 6 days iso previous 5. Salaries are reduced, retirement age changed from 65 to 60. K finds working conditions unbearable and resigns from J.*

- Form of constructive dismissal.
- Read with sections 197 and 197A of LRA which were designed to protect interests of employees who are transferred between employers.
- If employee resigns because conditions or circumstances are substantially less favourable than under previous employer, such a termination constitutes a dismissal.
- LRA protects job security of employee affected by transfer of business as going concern from one employer to another, in ordinary course of business and circumstances of insolvency.
- Contact of employment must continue on terms and conditions that are on the whole not less favourable than those under previous employer.
- If employee's conditions are substantially less favourable than those provided by previous employer, he can with / without notice, terminate contract of employment and claim constructive dismissal.

## 3. Automatically unfair dismissals

### 3.1 Concept of automatically unfair dismissals

- LRA section 187 → automatically unfair dismissals.
  - o Carries more severe maximum penalty than ordinary unfair dismissal, i.e. 24 months' salary.
- To provide remedy to an employee when basic right of employee was infringed.
- Only reasons that may justify infringement of basic right of employee will be if:
  - o It is an inherent requirement of the job
  - o Employee was dismissed because he had reached normal or agreed retirement age.
- LRA section 187: 9 types of dismissals automatically unfair:  
Dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 [confers protections relating to 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) To compel the employee to accept a demand in respect of any matter of mutual interest between he employer and employee.
  - (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.

### 3.2 Employer acts contrary to an employee's right to freedom of association

- Freedom of association: employee's right to
  - o join a trade union,
  - o belong to a trade union,
  - o participate in activities of a trade union
    - including right to strike.
- Dismissal due to any of these actions → automatically unfair.
- Senior managerial employees' right to freedom of association:
  - o Potential conflict of interests
    - Have access to information that can harm employer if divulged to union.
  - o Can't be dismissed when exercising right to freedom of association.
    - Must act in good faith towards employer

### 3.3 Participation in / supporting a protected strike or protest action

- Dismissal for participating in protected strike / protest action → automatically unfair dismissal.
- May be dismissed during protected strike in cases of
  - o Misconduct and/or
  - o Operational reasons

### 3.4 Refusal to do the work of employees who are on a protected strike

- Further protection against infringement of right to freedom of association.
- Dismissal of employee who refuses to do work normally done by employee taking part in protected strike → automatically unfair dismissal.
- If refusing to do own work while others strike → insubordination.

### 3.5 Compelling an employee to accept a demand made by the employer

- Dismissal because employee would not accept demand made by employer → AUD
- Also known as 'lock-out' dismissal.
- Employer is bullying employee by threatening him with dismissal if employer's demand is not acceded to.
- NB: must be seen against employer's right to change workplace rules and practices.
  - o Ts & Cs of employment can change by way of negotiation.
  - o Prohibition against lock-out dismissal ensures that employer does not exert unfair pressure by threatening employees with dismissal.

### 3.6 Exercising rights against the employer

- Dismissal for exercising rights granted by LRA against employer → AUD
- Protects sanctity of LRA
- Prohibits victimisation of employees who exercise rights to LRA.

### 3.7 Pregnancy, intended pregnancy or any reason related to pregnancy

- Dismissal due to any of these reasons → AUD.

### 3.8 Unfair discrimination

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

### 3.9 Transfer of a business

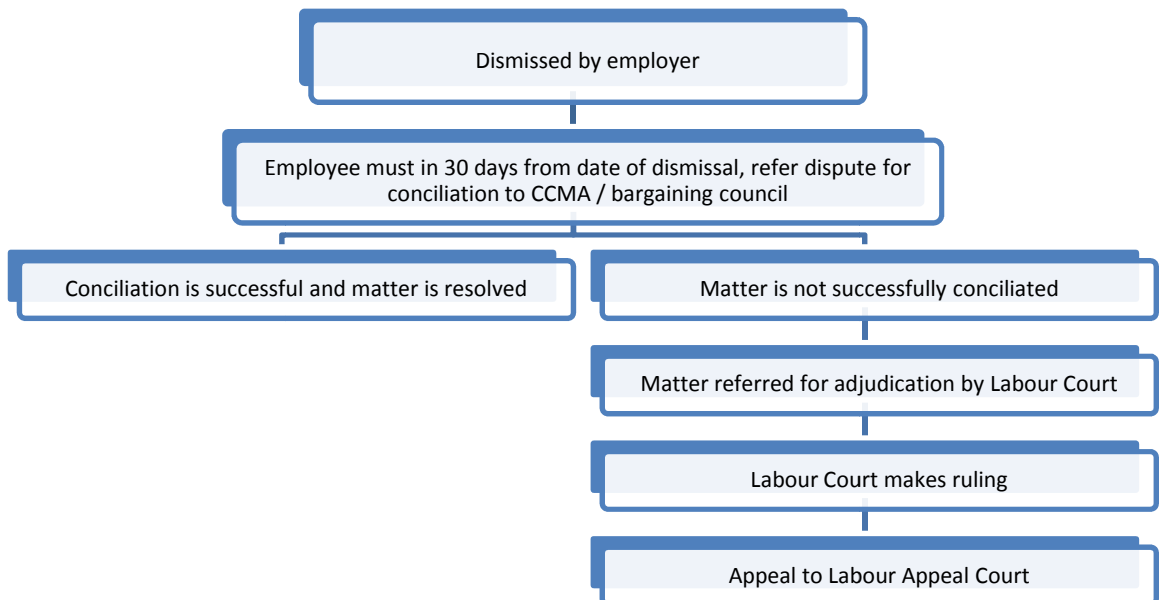
- Dismissal because of transfer of business as going concern → AUD
  - o Circumstances of each case will determine period after transfer for which this protection will last.
    - Employer who buys a business as going concern is entitled to restructure business
    - IF all transferred employees are dismissed as result of restructuring it will probably be automatically unfair.

### 3.10 Protected disclosures

- Dismissal for blowing the whistle into PDA → AUD.

### 3.11 Dispute resolution for an automatically unfair dismissal

- In addition to showing that he was dismissed, employee must also allege that dismissal was for one of the reasons mentioned.
- Employer must show it was not for one of those reasons, else it will be AUD.



## 4. Fair dismissals in terms of the LRA

- Main provisions re dismissal sections 186, 188.
- Fair dismissal:
  - o dismissal for fair reason and
  - o using correct procedure
- LRA ascribe principle of progressive discipline:
  - o Disciplinary action should be used to make employees aware of standards of conduct required of them.
- Dismissal should be reserved for
  - o Cases of serious misconduct
  - o Repeated offences
- Alternative to dismissal, employer should consider inter alia
  - o Counselling
  - o Warnings
  - o Informal correction

### 4.1 Dismissal for misconduct

#### 4.1.1 Substantive fairness

- Dismissal based on misconduct:
  - o employee is at fault
  - o breaking workplace rule(s)
- The Code: Dismissal:
  - o All employers should adopt disciplinary rules to ensure employees know required standard of conduct.
    - Must be communicated in a manner that they understand
    - May vary depending on size & nature of workplace
  - o Some rules are so well known that they apply implicitly, need not be included in contract of employment.
- Misconduct is a recognised reason for dismissal but still needs to be substantively fair.
- The Code: Dismissal sets requirements for substantive fairness:
  - o whether the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace;
  - o if so, whether the rule was valid and reasonable. This is normally determined with reference to the needs of the workplace and business;
  - o whether the employee was aware, or could reasonably be expected to have been aware of the rule. An employee can only be punished if he or she knew that the conduct was unacceptable and that a transgression of this rule could lead to dismissal;
  - o whether the rule was consistently applied by the employer. An employer cannot enforce a rule which was previously ignored. If he or she does so, it is called historical inconsistency, because the employer now acts inconsistently with past conduct. If the employer wants to enforce the rule in future, it would first have to inform the employees. If the employer treats employees who are guilty of the same offence at more or less the same time, differently from one another, it is called contemporaneous inconsistency; and
  - o whether dismissal is the appropriate sanction for contravention of the rule. Dismissal should be seen as a last resort. Normally an employee will not be dismissed for a first offence, unless the misconduct is serious and of such gravity that it renders the employment relationship intolerable. The appropriateness of dismissal as a penalty will depend on the employee's circumstances including:

- length of service;
- previous disciplinary record;
- personal circumstances;
- the nature of the job; and
- the circumstances of the infringement itself.

#### 4.1.2 Application of substantive fairness

- Basic duty breached in all cases of misconduct is common-law duty to act in good faith towards the employer.
- Regarding types of misconduct:
  - o Employers provide guidelines and clarity by way of disciplinary code and procedure
  - o That cannot even cover all possible forms of misconduct.
  - o Best way to determine misconduct: Determine if employee did NOT perform a duty expected of him/her.

#### (a) Unauthorised absence from work, abscondment, desertion, time-related offences

- Primary responsibility of employee: make services available to employer.
- If fails to report for work – breach of contract.
- Circumstance of absence will determine if employee can be disciplined and ultimately dismissed.

Abscondment / AWOL	Desertion
<ul style="list-style-type: none"> <li>- Employee does not want to terminate contract, but stays away without leave.</li> <li>- Warrants dismissal if period of absence is unreasonably long.</li> <li>- If employee returns after few days with letter to show he had reason for absence, dismissal will not be appropriate.</li> </ul>	<ul style="list-style-type: none"> <li>- 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, employer must give him opportunity to be heard.</li> </ul>

#### (b) Attitudes of hostility, abusive language, racism, insubordination

- Employer may expect employees to work together in reasonable harmonious relationship
- Hostility, abusive language, swearing, remarks that instigate racism, religious discrimination, sexism, other discriminatory action → misconduct.

#### (c) Theft, team misconduct, dishonesty, breach of trust relationship

- Theft causes irreparable harm to relationship of trust and confidence between employer and employee → dismissal.
- If one person cannot be deemed guilty, a group of employees may be dismissed → team misconduct.
- Misconduct can be disciplined if it happens after hours or off the employer’s premises.

#### (d) Other forms of misconduct

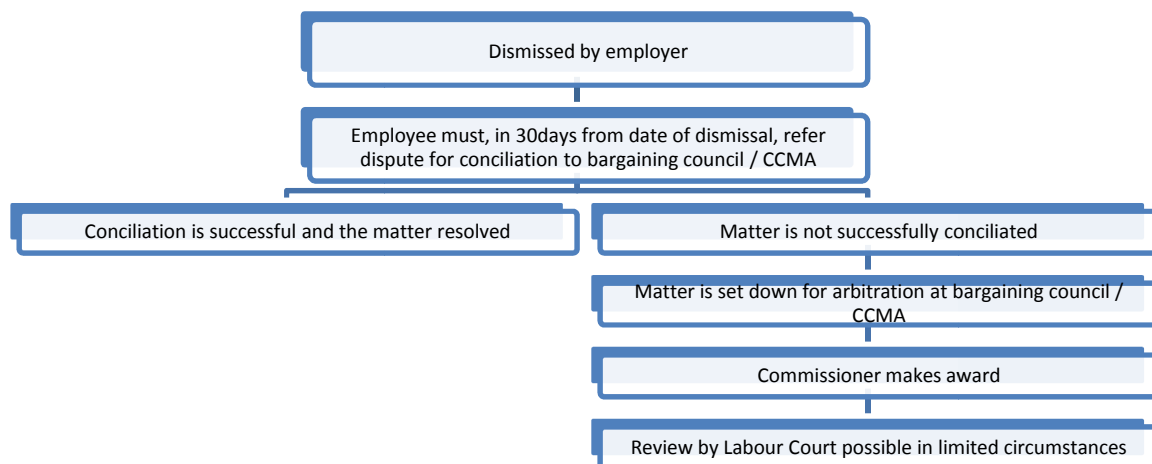
- Examples of common forms:
  - o Assault
  - o Conflict of interest
  - o Damage to property
  - o Intimidation
  - o Sexual harassment
  - o Alcohol and drug abuse.

#### 4.1.3 Procedural fairness

- Main principle: the employer must give employee an opportunity to be heard and to defend himself against allegations
- Procedural fairness is as important as substantive fairness for a dismissal for misconduct (as is the case with all types of dismissal). A fair procedure requires:
  - o that the employer conduct an investigation into the circumstances of the infringement to determine if there are grounds for dismissal
  - o that the employer notify the employee of the allegations (using a form and language that the employee can reasonably understand).
  - o The employee must be given reasonable time to prepare;
  - o that the employee be given the opportunity to state a case in response to the allegations;
  - o that the employee be afforded the assistance of a union representative or co-employee;
  - o that after the enquiry, the employer communicate the decision taken, furnishing the employee with written notification of the decision as well as the reasons for the decision;
  - o that if the employee is dismissed, he or she be given the reason for the dismissal and be reminded of any rights to refer the matter to a bargaining council or the CCMA;
    - Reminder1: disciplinary steps 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.
    - Reminder 2: An employer can only dispense with a pre-dismissal hearing under exceptional circumstances, namely in crisis-zone situations, where there is danger to life or property, and where the employee waives his or her right to a hearing.

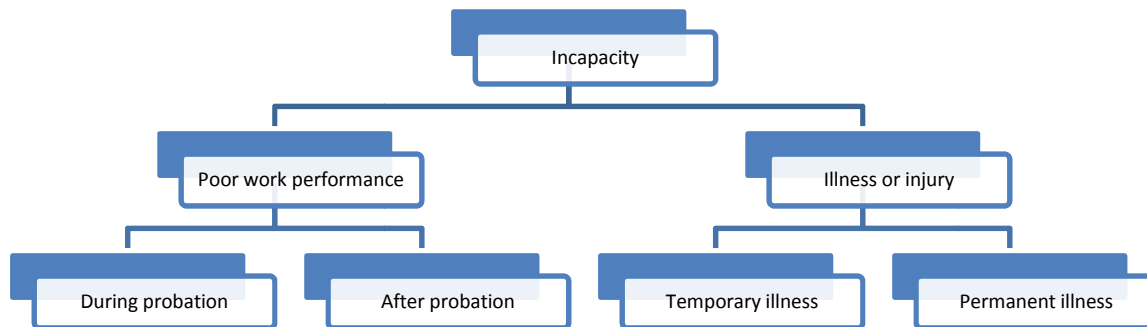
#### 4.1.4 Dispute resolution for a dismissal based on misconduct

- If the fairness of a dismissal is challenged, the dispute can be resolved through conciliation and arbitration, by a bargaining council or the CCMA



## 4.2 Dismissal for incapacity

- Second recognised reason for which an employer can fairly dismiss an employee, is incapacity.
  - o Can manifest as poor work performance (the employee does not have the ability to do the job),
  - o or be due to ill health or injury.
- A dismissal based on incapacity is a 'no fault' dismissal because it involves behaviour or conduct, or inability, which is neither intentional nor negligent



### 4.2.1 Poor work performance during probation

- LRA distinguishes between employees on probation, and employees who have completed their probationary period.
- One purpose of probation: determine if employee can perform job.
- Employer must still act fairly towards probationary employee.
- The Code: Dismissal – compels an employer to give employee on probation assistance before he can be dismissed for poor work performance.
  - o Evaluation, instruction, training, guidance or counseling needed to perform his duties during the probationary period;
  - o The employer must make clear to the employee what the performance standard is, where he or she falls short,
  - o Employer must give the employee assistance and opportunity to improve;
  - o Employer should measure the progress and give feedback to the employee.
- The assistance needed and the period of probation will be determined by the nature of the work; and
- The employee should be given the opportunity to respond to the allegations of unacceptable work performance and he or she may be assisted by a union representative or fellow-employee.
- Employees on probation may not be dismissed with 24 hours' notice.

### 4.2.2 Poor work performance after probation

- After probation, once permanently appointed, employer must be careful when considering dismissal for poor work performance.
- Employer should consider other ways to remedy the matter.
- Before employer can dismiss employee on this basis, employer should:
  - o Investigate to determine the reasons for the unsatisfactory performance;
  - o Give appropriate evaluation, instruction, training, guidance or counseling;
  - o Give the employee a reasonable period of time to improve.
  - o If the employee then continues to perform unsatisfactorily, he can be dismissed for poor work performance.
  - o The employee has the right to be heard and to be assisted by a union representative or colleague.

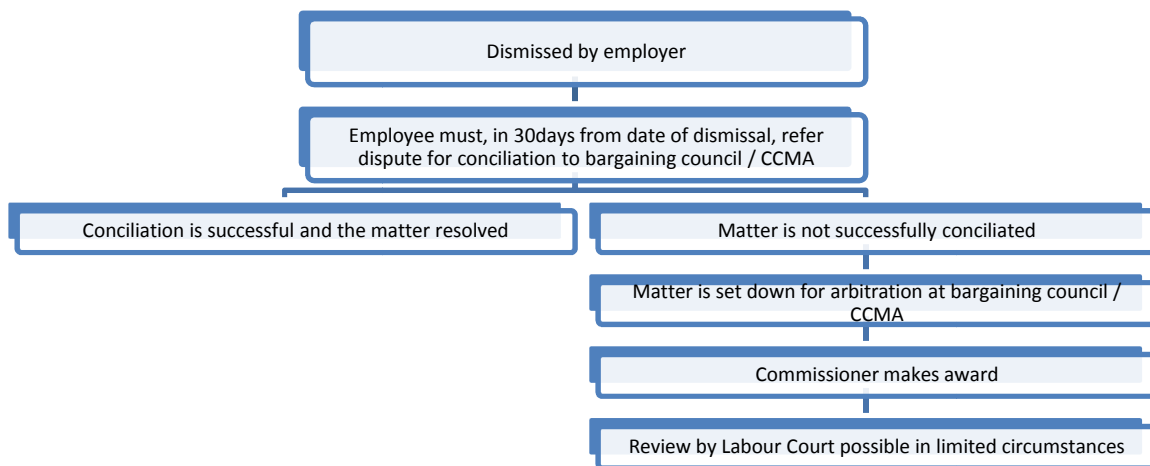


### 4.2.3 Ill health or injury

- The Code: Dismissal distinguishes between temporary / permanent illness / injury.
- LRA
  - o allows dismissal of ill / injured employees
  - o 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 states an employer must attempt to accommodate in workplace an employee injured on duty.
  - o Employers may adopt most cost-effective means consistent with effectively
    - removing barrier to person being unable to perform job
    - Enjoy equal access to benefits and opportunities of employment.
  - o Includes:
    - Adapting existing facilities to
      - make them accessible or
      - reorganise work stations
    - Adjusting working time and leave
- Employer need not accommodate qualified applicant or employee with disability if this will impose unjustifiable hardship on business of employer.
  - o Unjustifiable hardship: action that
    - requires significant / considerable difficulty or expense and
    - would substantially harm the viability of the enterprise.
- The LRA aims to prevent employers from dismissing employees because of injury or illness.
  - o In the case of permanent illness, dismissal is sometimes the only option.
  - o This decision is more problematic in cases of temporary illness, because
    - the possibility exists that the employee can return to his or her previous position.
- Substantive fairness in cases of dismissal for injury / illness entails
  - o Employer must make informed decision
  - o Employer must determine if employee is capable of performing work
  - o 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 employee's duties might be adapted.
- Procedural fairness:
  - o Employee gets opportunity to respond and make suggestions (may be assisted by co-employee or union rep)
  - o Employer must consult with employee
  - o Employer must consider available medical information
  - o Employer must attempt to accommodate employee where reasonably possible.

- Checklist to ensure procedural fairness:
  - o the nature of the job;
  - o the period of absence;
  - o the seriousness of the illness or injury;
  - o the possibility of securing a temporary replacement for the ill or injured employee;
  - o the degree of incapacity;
  - o the cause of the incapacity—if the employee is incapacitated as a result of a work- related illness or injury, the duty on the employer to accommodate the incapacity of the employee is more onerous;
  - o the availability of any suitable alternative work or adapting the duties or work circumstances of the employee to accommodate the employee's disability;

#### 4.2.4 Dispute resolution for a dismissal based on incapacity



### 4.3 Dismissal for operational requirements

#### 4.2.1 Definition operational requirements

- Dismissal for operational reasons is also regarded as 'no-fault' dismissal, because the termination is not the result of the actions or fault of the employee.
- LRA defines operational reasons as reasons relating to
  - o economic needs;
  - o technological needs;
  - o structural needs; or
  - o similar needs.
- Also remember that 'similar needs' may include instances where:
  - o the employee's actions or presence have a negative effect on the business;
  - o the employee's conduct has led to a breakdown of the trust relationship; or
  - o the enterprise's business requirements are such that changes must be made to the employee's terms and conditions of employment.

### 4.3.2 Substantive fairness 189A

- It is very difficult for the court to determine whether an employer had substantially fair reasons to dismiss employees for operational reasons.
- The current approach is that the employer's version will not merely be accepted on 'face-value'.
- The court will determine if the retrenchment has a reasonable basis and commercial rationale.
- Retrenchment should remain a matter of 'last resort'.
- According to section 189A, dismissal for operational reasons will be substantively fair if:
  - o the reason for the dismissal is operational requirements as defined in the LRA (that is, for economical, technological, structural or similar needs);
  - o the reason is the real reason for the dismissal and not a cover-up for another reason, such as misconduct;
  - o the operational reason on which the dismissal is based, actually exists;
  - o the reason is justifiable and based on rational grounds;
  - o an objective test is applied when the rationality of the reason is determined;
  - o there had been proper consideration of alternatives; in other words, the employer had applied its mind and was able to give reasons for not resorting to alternatives, if any;
  - o the employer was able to show that the dismissal was a measure of 'last resort'; and
  - o the selection criteria were fair and objective.
- Definition limits managerial prerogative as far as retrenchments are concerned.
  - o 189A deals with large-scale retrenchments
  - o Similar guidelines can be used to determine substantive fairness
  - o It is still difficult to determine if retrenchments are really necessary.

### 4.3.3 Procedural fairness *ito* section 189

- Process for retrenchment is extensive and important to ensure fairness.
- **Prior consultation**
  - o 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 dismiss, but has merely foreseen the possibility
- **Whom did employer consult with**

It is also important to know with whom the employer must consult:

  - o First, the person or group indicated in a collective agreement;
  - o If there is no collective agreement, consult with a workplace forum, if there is one;
  - o Alternatively, with any registered trade union whose members are likely to be affected by the proposed dismissals. If there is no such union, with the employees likely to be affected by the proposed dismissals, or their nominated representatives;
- **How did parties consult**
  - o In terms of section 189(2) consultation means to 'attempt to reach consensus'
  - o A single meeting is not 'sufficient' consultation with employees.
  - o A single meeting during which the employer informs the employees of his plans is not sufficient to constitute 'consultation'.

- **Did they attempt to reach consensus**

There are six matters about which the parties must try to reach agreement/consensus namely:

- appropriate measures to avoid 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.

- **Did employer disclose relevant information in writing**

This requirement is regulated by sections 189(3) and 16 of the LRA, which compel an employer to disclose relevant information. The right of the employees to demand information is 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 him or her 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.

The CCMA, acting as an arbitrator, may order the disclosure of two of these categories of information under certain circumstances (discussed below)

- **Did employees get 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 employer consider all representations**

- Employer should consider representations in 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 employer use fair, objective selection criteria**

- The Code: Dismissal Operational Requirements acknowledges the criterion of LIFO (last in, first out) which is widely accepted as fair and objective. It can, however, amount to indirect discrimination in some instances where, for example, only affirmative action appointments (the last appointed employees) are affected.
- The criteria FIFO (first in, first out) can also amount to indirect discrimination based on age

- **Did employer pay severance pay**

- The payment of severance pay is regulated by section 41 of the BCEA. The employer must pay the employee a minimum of one week's salary per completed year of continuous service.
- However, 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 that employer or another employer, the employee forfeits his or her entitlement to severance pay.

#### 4.3.4 Procedural fairness *ito* section 189A

- Big employers undertaking large-scale retrenchments
  - o Big employer: more than 50 employees
  - o Large-scale dismissal: determined in relation to number employees dismissed and size of business.
- LRA sliding scale for large-scale dismissals:

Number of employees	Number dismissed
Up to 200	10
More than 200; not more than 300	20
More than 300, not more than 400	30
More than 400, not more than 500	40
More than 500	50

- *Ito* section 189A:
    - o Parties can get help of facilitator to assist with resolution of retrenchment issues
    - o Parties are forced to comply with prescribed timeframes
    - o Parties can choose to refer matter to Labour Court for adjudication or go on strike.
- (a) Who can request facilitator
- o Employer when it gives notice of proposed retrenchments
  - o Representative of majority of employees facing dismissal.
  - o Must be done within 15 days of employer's notice of contemplated dismissal.
  - o If neither party requests facilitator, they ay still agree to request one during consultation process.
- (b) What does facilitator do
- o Must conduct facilitation in line with Facilitation Regulations:
    - Chairs meetings between parties
    - Decides any issue of procedure that arises in course of meetings between parties
    - Arranges further facilitation meetings after consultation with parties
    - Directs parties to engage in consultations without facilitator being present.
  - o Decision is final *iro* matter concerning procedure for conducting facilitation.
- (c) What are time limits
- o If facilitator appointed, employer may not dismiss employees before 60 days have elapsed from date on which appointment was requested.
  - o Employer must give proper notice of retrenchments acc section 37(1) of BCEA.
- (d) What if no facilitator appointed
- o Minimum 30 days must elapse before dispute about contemplated dismissal can be referred for conciliation to CCMA / council.
  - o Dismissal may not be carried out during this period, nor during conciliation period.

#### 4.3.5 *Dispute resolution for a dismissal based on operational requirements*

- If conciliation unsuccessful, matter must be referred for adjudication, except when
  - o Dispute relates to unfair retrenchment of single employee, that employee has choice to refer to CCMA / Labour Court, so not to limit single employee who may not be able to afford legal costs
  - o Employees or union can choose to strike or refer matter to Labour court. If they strike, the matter cannot be referred to court.
- Dispute resolution route:
  - o Dismissed by employer
    - Employee must within 30 days refer dispute for conciliation to bargaining council / CCMA
      - Conciliation is successful and matter resolved
      - Matter is not successfully conciliated
        - o Embark on strike
        - o Refer for adjudication by Labour Court
          - Labour court makes ruling
          - Appeal to Labour Appeals Court

### 5. Other aspects of dispute resolution

- LRA aims to create fast, efficient, simple dispute-resolution mechanism.
- Some aspects aimed at simplifying the process:
  - o Prescription periods are shorter
  - o Manner in which cases may be referred is simple
  - o Involvement of legal representatives is limited.

#### 5.1 Conciliation

- If (after internal processes have been followed and completed) employee wants to challenge fairness of dismissal, reason for dismissal will determine dispute resolution route
- In most cases of alleged unfair dismissal, LRA requires matter first be referred for conciliation
- IF conciliation unsuccessful,
  - o dispute about dismissal based on misconduct or incapacity will go for arbitration
  - o dispute about automatically unfair dismissal must go for adjudication to Labour Court
  - o If dismissal dispute based on operational requirements is not conciliated successfully, it may be referred to Labour Court for adjudication.
    - Union may choose to strike, but then matter can't go to Labour Court.

#### 5.2 Arbitration

- CCMA is separate dispute resolution body with jurisdiction to conduct arbitration.
  - o LRA specifically determines when dispute must go for arbitration and when for adjudication.
- Can take place at bargaining council or to CCMA
- Award by arbitrator is final.

### 5.3 Reviews and appeals

- If a reasonable decision maker would have come to a different decision than the arbitrator, then the matter may be reviewed
- Section 167 of LRA:
  - o Appeal to Labour Appeal Court
    - Supreme Court of Appeal
      - Unless constitutional matter
- Main difference between review and appeal:
  - o Review: manner in which conclusion was reached is under scrutiny
  - o Appeal: conclusion reached is under scrutiny

### 5.4 Remedies

- Primary remedy for unfair dismissal is reinstatement, ordered except in following circumstances, when compensation will be awarded:
  - o Employee does not wish to be reinstated or reemployed
  - o Circumstances surrounding dismissal are such that continued employment relationship would be intolerable
  - o It is not reasonably practicable for employer to reinstate or reemploy the employee
  - o Dismissal is unfair because employer did not follow fair procedure
- LRA caps amount of compensation: Maximum 12 months' salary to employee whose dismissal found to be substantively / procedurally unfair
  - o Calculated at employee's rate of remuneration on date of dismissal
- Compensation for dismissal automatically unfair: not more than 24 months remuneration.

### 5.5 Common-law dispute resolution route

- Breach of contract entitles other party to
  - o Accept other party's repudiation of contract (termination) and claim damages or
  - o Enforce contract (claim specific performance) and claim damages where applicable.

## 6. Other ways of terminating the employment contract

### 6.1 Resignation by the employee

- BCEA recognises employees can terminate employment contracts by giving required notice.
- In writing if required.
- Once accepted by employer it may not be withdrawn without employer's consent
  - o Employer may elect to allow employee work out notice period or
  - o Terminate contract and pay out remuneration for notice period.
- Not necessary for employer to communicate acceptance of resignation to employee.
- Employee contract breach: stop services before end of notice period.
- Contract is terminated at end of notice period, not when notice is given.

### 6.2 Termination on completion of an agreed period or task

- Fixed-term employment contract automatically comes to end
  - o when period agreed upon expires OR
  - o when task is completed.

### **6.3 Termination by mutual agreement**

- Parties to employment contract may agree to terminate.
  - o Irrespective of length of period originally agreed upon.

### **6.4 Termination on grounds of impossibility of performance**

- Impossible for one party to contract to perform its contract terms
  - o Contract comes to end
  - o No performance is required from either parties.
- Employee death during contract term terminates contract → objective impossibility of performance
- Employer's death not necessarily terminates contract, because estate of employer still liable to pay employee, unless services are of personal nature.

### **6.5 Termination as result of insolvency of employer**

- Contract is suspended from date of sequestration for period of 45 days after appointment of trustee.
- Under certain circumstances, contract may be terminated by trustee / liquidator prior to 45 days suspension.
  - o Trustee: appointed where insolvent employer is an individual
  - o Liquidator: appointed where insolvent employer is a company
- Employee need not render services to employer
- Employee is entitled to severance pay and to claim damages suffered as result of such termination.

### **6.6 Termination as result of retirement**

- Parties to employment contract may agree on mandatory retirement age.
  - o Expressly or impliedly agreed upon by employer and employee.
  - o When employee reaches this mandatory retirement age and does not retire, employer may demand retirement.
  - o This will not amount to discrimination based on age.
- If there's a dispute, onus is in employer to prove employee has reached normal / agreed-to retirement age & compelled to retire.