

1) Contract of Employment

a) Elements

- agreement between two parties
- one works for the other
- in exchange for remuneration
- reciprocal contract
- control or subordination

- voluntary agreement on contents
- control
- labour potential
- benefits
- delay

must have right but
- does not have to enforce

b) Definition of employee

- LRA: "any person, excluding independent contractor, who works for another person or State & who receives or is entitled to receive remuneration, as person who in any manner assists in carrying on or conducting the business of an employer"
- include State employees, farm workers, domestic workers
- tests developed by courts

1) Control test

2) Organisation test - part & parcel

3) Multiple or dominant impression test

- look at various factors to determine answer

- supervision

- dependency for work

- allowed to work for others

- must they perform work personally

- how paid

- if supply own tools

- right to discipline

4) New presumption in LRA 2002

- if on list present presumed employee

- rebuttable presumption

- see list is:

- ~~control~~^{control} of work subject to control

- persons hours subject to control

- forms part of organization

- works average 40 hrs. per month for 3 months

- economically dependent

- provides tools person requires to work

- only renders work to one person

- certain exclusions

- some excess of amount determined

7) - put back corporate veil to reveal true nature of
independent contractor

categories of workers:

- permanent

- temporary (fixed term contracts)

- part time & full-time employees

- probationary employees

- services, skills & abilities assessed

- must be of a reasonable length

- dismissal related to capacity & ability

- performance must be assessed

- given reasonable evaluation, instruction,

training, guidance & counselling

- expedite of personnel position

- senior managerial employees

- dismissal is slightly different

- should know that work does not reach

required performance standards

- atypical forms of employment

d) Identity of Employer

- difficulty if labour brokers used
- I/A corporate veil
- ? normally arises during dismissal
- Stat are employer not each dept

d) Concluding employment contracts

- requirements
- contents lawful
- must be consensus & intention
- performance must be possible
- necessary capacity to contract → no
 - illegal foreigners now covered: Discovey case

g) - negotiation & formalities

- balance of power normally for employer
- does not have to be in writing ^{merchant seaman} - learnership agreements

e) Contractual duties

- Occupation Health & Safety Act

- BCCA

- LRA

- employee duties

- tender service, does not mean actually work

- work competently & diligently

- obey lawful & reasonable instructions of employer

- control factor

- serve employer's interest & act in good faith

- trust & confidence cornerstone

- fiduciary duty

- can take away general skills & knowledge

- avoid conflict of interest

- employer's duties

- remunerate

- if cannot calculate no contract

- duty to provide work

- only for commission work

- safe working conditions

- duty of fair dealing with employee

if) other terms & conditions of employment

- freedom to contract & basic conditions of employment

- common law sees as a pure contract

- BCCET steps in

- terms & conditions must be stated

- cannot change unilaterally

- collective agreements

- restraint of trade

- protect from competition

- stays in effect no matter who ended contract

1) - prevent employee from working within certain distance

for certain time

- conditions may be harsh

- contracts contrary to public policy unenforceable

- can restrict unreasonably

- right to work

- balance interest between parties

- take into account nature, extent, duration

- employee bears onus of proof

- Court can enforce, reject or partly do so

- limitation clause of C

- Vicarious liability
- employer held liable for employees delict
- course of business
- sexual harassment

g) Breach of contract

- common law
- HC for purely contractual breach
- CCMA → Labour Court
- breach of material terms is breach of contract
- Contractual breach:
 - summary ^{terminated} if breach serious
 - specific performance
 - Claim for damages
 - can accept repudiation of contract

h) Termination of contract

- Ferris

- resignation
- Completion of contract
- Constructive dismissal
- Termination by agreement
- Termination on insolvency, not automatic
- Breach of contract
- Termination on notice (elderly rule)
- Summary ^{dismissal} if far

2) Basic Conditions of Employment

a) Application

- BCEA

- only workers not independent contractors

- excludes: SA National Defence Force

National Intelligence Agency

SA Secret Service

unpaid volunteers

Merchant sailors

b) Regulating working time

- excludes: senior managers

sales staff who travel

employees work < 24hrs a month

• 45hrs per week

• 9hrs per day

• meals at 1hr after 5hrs worked

• Overtime no more than 10hrs a week - 1 1/2 hrs

• Sunday's, public holidays 3 night work

• double salary for Sunday's

• double salary for public holidays

• night work 6pm to 6am → trans portation

c) leave

- annual - 21 days for every 12 months (includes weekend)

- accumulated leave paid out

- must be paid

- sick - 36 months cycle 6 weeks leave

- has to pay unless sick 2 days 8 week cycle

if asked for medical certificate

- maternity ? Family responsibility
- 4 consecutive months
- not paid
- cannot perform work hamilt.
- 3 days fr leave in a year
- birth, illness, death - child, spouse, parent, immediate family

d) Termination

- Notice periods
- 0-6 months 1 week
- 6m - 1 year 2 weeks
- 1 year > 1 month
- in writing
- Payment in lieu of notice
- can pay
- Severance pay
- operational reasons
- 1 week for every year worked
- Certificate of service
- no re-employment

e) Contracts, BCCA ? collective agreements

- ^{employment} contract can be governed by all three
- first step see if BCCA excluded
- if benefit higher than condition applies
- cannot contract out of BCCA
- if collective agreement cannot contract out
- second step is three collective agreement
- collective agreements take precedence
- terms can be more favorable than BCCA

f) Enforcement of BCEA

- labour inspectors
- promote, monitor & enforce compliance
- issue compliance orders
- Labour Court exclusive jurisdiction for BCEA

3) Dismissal

a) Statutory definition & s. 185

- employee must prove dismissal
- employer prove fairness of dismissal
- S186 dismissal means:

- terminate contract with or without notice
- reasonable expected fixed term contract to be renewed on similar terms
- refused employee to resume work after:
 - probationary leave
- dismissed number of workers & then employ only same
- constructive dismissal
- S197 & S197A - transfer

b) General Principles

- termination before commencement of employment
 - when does employment start?
 - 2 decision at contract, 1 decision when start
- abandonment by employee
 - ? who terminates
- when employer accepts decision dismissal
- if cannot trace breach of contract

- acceptance of resignation

- can withdraw hasty resignation

- termination by operation of law

- automatic termination

- failure to renew fixed term contracts

- expires automatically under common law

- reasonable expectation

- employee must prove

- reasonable person test

- employer must create impression

- fixed term contract has no expectation of permanent post

- each case assessed

- automatic termination or dismissal allowed if

- reasonable expectation to renew

- HC & EC jurisdiction

- Dismissal relating to pregnancy

- 4 months

- automatic unfair dismissal

- Constructive dismissal

- resignation/termination not voluntary

- continued employment intolerable

- employer must be at fault not perception

- value judgment can be omission

- 2 steps: employee prove not voluntary

court look at employers conduct as a whole

- must be last step ie internal avenue first

- must prove that constructive dismissal was unfair

- must prove / test

employee terminated contract

continued employment intolerable

intolerability was employers making

resigned as a result of behavior

objective test: reasonable employee

- sexual harassment - vicarious liability

- S197 transfers

- transfer of business

- terms & conditions substantially less favorable

4) Automatically unfair dismissals

a) In terms of LRA

- perhapsed or supported or indicated intention in a
strike or protest

- refused to do work of person on strike

- compel employer to accept demand in respect of
mutual interest

- employee took action

- exercising right

- perhapsing

- pregnancy

- discriminate based on arbitrary grounds but include
sex, race, gender, ethnic & social origin, color,
sexual orientation, age, disability, ethnicity, conscience,
belief, political opinion, culture, language, marital
status, family responsibility

- S197

- Protected Disclosure Act

- might be fair if based on inherent requirement of job

- based on normal retirement age

b) Infringement of Freedom of Association

- automatically unfair

- fundamental right C protects

- can join & participate in TU

- senior managers enjoy but may be conflicted

c) Participation in a protected strike

- protected if participate or support

- caply Chapter IV

- automatically unfair

- criminal activity not covered

d) Lock out and dismissal

- employer may use threat of dismissal

- unfair if concerns mutual interests

- lock out dismissal vs operational dismissal
valid reason

e) Exercise of rights

- protect if take legal action against employer

f) Pregnancy

- has to prove employee is dismissed for pregnancy

g) Discrimination

- employer must prove no discrimination

h) Protected disclosure

- Protected disclosures Act

- protect employees who blow whistle or report activities or criminal offences

- disclosure to legal advisors, employer, member of Cabinet, Public Protector, Auditor General

- disclosure made in good faith

- not unconditional

8) Discipline in workplace? Dismissal for misconduct

a) Requirements for dismissal for misconduct

- progressive discipline concept

- last measure in series

- fair if:

1) related to employee conduct or capacity

2) based on operational requirements

b) Substantive fairness

- S188 Fair reasons

- misconduct Fair reasons

- test:

1) - contravened rule or standard

2) - if rule or standard was

a) - valid or reasonable

b) - employee aware, could be aware of same

c) - consistently applied

d) - dismissal appropriate sanction

1) - must first decide if rule existed then if contravened

- disciplinary rule formation responsibility of employer
- written code best
- could be in contract of employment, policy, manual, notice
- common law rules: theft, assault, good faith
- "relevance to workplace" may include behaviour after hours
- rules from legislation OHS Act
- if contravened based on facts of matter
- balance of probabilities

2a)

- must look at validity of rule
- valid & reasonable?
- must justify rule can look at:
 - workplace/business itself
 - inclusion in collective agreement
 - if enforced in past

b)

many ways to inform employees of rules

c)

there must be consistency in application
can start process by warning staff that will be guilty
also if only discipline one person

d)

if appropriate sanction factual
gravity of misconduct is mitigating situations
& factors; gravity of misconduct ^{- must}
circumstances of infringement
nature of employees job
employee circumstances ^{- length}
whether other employees dismissed ^{- previous record}
^{- warning & merits}

c) Procedural fairness

- audi alteram partem rule
- prc dismissal procedure

- elements:

1) investigation

2) nature of charge is the investigation

- use language understood

- in writing

- know what accused of

3) reasonable time to prepare a response

4) employee entitled to state a case in response

5) employee entitled to assistance

- trade union or fellow employee

- presentation of procedure

6) Decision - charma S

7) Communicating decision

8) Informed of reasons for dismissal

9) Appeal

10) Dispensing with prc - dismissal procedure

- crisis time dismissal

- employee waves right to reply

6) Dismissal for incapacity

a) Grounds

- internationally recognised S 188

- 2 type: poor work performance

ill health or injury

- no fault dismissal

- employee not capable

7 Code of Good Practice: Dismissal

b) Poor work performance

- objective standard of performance
- employee must have been aware of standard, given fair opportunity to meet same & dismissal had to be appropriate sanction
- employees on probation
 - time to assess
 - not used as fixed term
 - reasonable duties decided in advance
 - performance assessed given advice, instruction, training, guidance, counselling
 - should advise employee if below standard
 - can extend probation
- after probation
 - must give appropriate advice, training, etc
 - investigate reasons why not performing
 - right to hearing
 - employer has right to set standard
 - senior managers different bar as should assess own performance
 - must be given opportunity to improve
 - if standards set by regulatory body
 - consultation process
 - dismissal last resort
 - employees incompatible with other staff must be handled carefully → no other alternatives

c) Ill health or injury

- decide if capable if not look at reasons

- can look at: extent to which can perform
 extent work adapted to accommodate
 availability of suitable alternate work

a) substantive & procedural fairness

- must investigate situation & other alternatives
- work related injury, new reasons
- alternate work must be looked at
- consultation NB

7) Dismissal for operational requirements

a) Concept

- retrenchment
- based on economic ^{economic well-being}
 - new technology
 - restructuring
- 4 categories:
 - technology
 - structural
 - similar needs of employer
- changes to employee terms & conditions
- unreasonableness test
- incompatibility
- breakdown in trust relationship
- balance of probabilities

b) Substantive fairness

- i) real reasons & increase in profits
 - factual test for operational requirements
 - reason, that it existed, connection

- ii) large scale dismissal

- 5189 small employer & size of dismissal
- small employee < 50

- 5189 defines size of dismissal

- 10 employees if 50 - 200

- 20 employees if 200 - 300

- 30 employees if 300 - 400

- 40 employees if 400 - 500

- 50 employees if > 500

- 12 month ^{rolling} cycle if less than prescribed number

(i) iii) Sisa fair reason if

- based on economic, technological, structural, similar

- operationally justifiable on rational grounds

- proper consideration of alternatives

- selection criteria fair & objective

iv) changing view of cart

- carts now look at reasons and business decisions

d) Procedural fairness

- no clear line between substantive & procedural fairness

i) consultation process

- heart of matter

- must consult with employee, TU, all stated

- in collective agreement, workplace forum

- consultation when contemplating dismissal

- i.e. at start before decision reached

- give chance to employees to influence see

- process not laid out

ii) consultation topics

- appropriate measures to -
 - avoid dismissal
 - must apply mind
 - minimise number of dismissals
 - measures to change timing of dismissals
 - measures to mitigate the adverse effects
 - help seek for work
 - reemployment if possible
 - selection criteria
 - severance pay

iii) written disclosure of information

- 3rd requirement
- must disclose
 - reasons for proposed dismissals
 - alternatives considered
 - number & job categories affected
 - proposed selection method
 - timing of dismissals
 - severance package
 - assistance to be offered
 - possibility of reemployment
 - number of employees employed
 - number dismissed in 12 months
- must disclose so can engage effectively in consultations
- can refer dispute for arbitration to LC ^{arbitrator} _{for} ^{arbitrator}
- don't have to disclose
 - legally privileged
 - confidential info that may cause harm

- info protected by cart order
- private info of employees

iv) representations

- employee must be allowed to make representations
- representations must be considered

v) Selection criteria

- agreed to or fair & objective
- ↓
 - not arbitrary

- seniority

- conduct

- efficiency, ability, skills, capacity, experience

- attitude

- bumping

- early retirement

- volunteers

- FIFO list

vi) Severance pay

- 1 week for every calendar year
- not entitled if unreasonable reject alternate employment
- entitled to normal pay

vii) Large scale

- either party can ask CCMA to facilitate
- places 60 day moratorium on dismissal
- ask for some with 15 days of notice of completion
- 30 days moratorium if no facilities

a) Unfair labor practice

a) Relevance of ULP

- requirement of Fairness
- Chapter VIII
- employment relationship 3 stages

- 1) applicant
- 2) employee
- 3) terminated

(1) - deals with acts not dismissal

b) Definition of ULP

- unfair act or omission involving
 - unfair contract oblig to promotion, demotion, probation, training, benefits
 - unfair suspension, unfair disciplinary action
 - failure to reinstate or reemploy
- PDA Act

- who does it protect → employee

- list above closed

- if not in list not ULP

- dispute of right

- must be arbitrated on first

- must be existing right not to gain new right

- legitimate expectation

- if const. rely on list S.186(b) can look to C or contractor administrative law

- Constitutional avoidance if possible

c) Unfair conduct: probation

- employer must be fair in decision
- must set realistic standards & give feedback

d) Unfair conduct: the provision of benefits

what is benefits?

- as salary benefit should arbitrate & would not be allowed to strike → problematic
- issue is dispute over right v dispute over what

e) Unfair suspension

- preventative suspension - suspended during disciplinary enquiry
- punitive suspension - disciplinary measure short of dismissal
- UHP covers both
- must be fair suspension - ^{substantive} procedural
- for preventative must believe serious conduct, intimidation, for work to run smoothly
- good idea to allow employee to have say in suspension
- told in writing of suspension, reasons therefor
- 3 conditions of suspension
- must pay during suspension
- punitive suspension normally without pay

f) Disciplinary action short of dismissal

- when disciplinary action is taken before employee found guilty
- substantive & procedural fairness of sanction

g) Failure or refusal to reinstate

- in terms of an agreement

- normally comes from retrenchment agreements

h) Protected disclosure

- any occupational detriment is whp this includes:

- disciplinary action

- dismissal, suspended, demoted, harassed

- transferred

- being refused transfer or promotion

- being refused release

- being denied appointment

- being threatened with obit

- must link detriment to protected disclosure and show cause linkage

- protected disclosure is any info regarding conduct that shows:

- criminal offence

- failure to comply to legal obligations

- miscarriage of justice

- health's safety issues

- environmental damage

- unfair discrimination

- disclosure must be made in certain way to be protected: legal adviser

employee

Cabinet or MEC

PP

AG

- Good Faith

9) Equality in Employment

a) Employment Equality & Constitutional Context

- affirmative action
- Employment Equity Act
- Equality relies on 2 basis
 - formal equality: equality in treatment
 - substantive equality: equality in outcome
- eliminate unfair discrimination & implement affirmative action

b) Prohibition of unfair discrimination

- S6 of EEA

- reasons: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political, culture, language & birth

- not unfair discrimination to

- take affirmative action consistent with Act

- distinguish, exclude or prefer based on inherent requirements of a job

- employees protected even applicants

- employee can be guilty of discrimination

- Discrimination means differentiation

- only discrimination if based on unacceptable reason

- presumption of unfairness once discrimination proved

- Direct & indirect discrimination

appears neutral

- bona fides or good faith by employer is not a defence

- does not have to have fault element

- inherent job requirements will have to be proved
- look at normal operation of business
 - qualifications that affect ability
- fairness can be based on public policy
- AA is also defence 3 issues
 - AA is admitting differentiation
 - does not have to comply with procedural requirements as long as acted rationally in pursuing action
 - must be referred to HC unless parties consent to CCMA

c) Harassment as discrimination

- 4 types: sexual harassment
 - racial harassment
 - sexual orientation harassment
 - religious harassment
- sexual harassment most prevalent
- def: unwelcome conduct of a sexual nature
 - physical, verbal, non verbal conduct
 - 4 types usually identified
 - quid pro quo - fear of losing benefits per se
 - sexual favouritism
 - hostile working environment - often blown employees
- sexual conduct not always harassment → unacceptable conduct
 - what test should apply
 - objective - molestation
 - subjective - over sensitive
 - reasonable victim test
 - experience of victim but also surrounding circumstances is fault
 - test: whether harassment is prohibited
 - whether sexual conduct was unwelcome
 - nature & extent of sexual conduct
 - "poet" on employee

- employer liability for sexual harassment

- 7 requirements: must be an employee

566

unfair discrimination

take place at work

brought to attention of employer

employer aware of conduct

failure as part of employer's duties

employer show done anything reasonable possible

- vicarious liability

- must adopt policies

- by 3rd party? resolve or disciplinary enquiry

- can end up being constructive dismissal

d) Medical & psychological testing

- SI prohibits

- H2U - automatic unfair

- LC can order if justifiable

- informed consent testing

e) Dispute about discrimination

- referred to CCMA for conciliation within 6 months

- reasonable attempt to resolve first

- LC afterwards unless CCMA arbitrates

- onus of proof

f) Affirmative action

- to advance people in certain categories

- 3 requirements must be met → targeted PDI

→ designed to protect or advance

→ must promote achievement of equality

- beneficiaries : suitably qualified persons from designated groups
- designated groups : black people, women, people with disabilities
- suitably qualified : qualifications
- Designated employers
 - employer with > 50 employees
 - < 50 but annual turnover exceeds certain levels
 - municipalities
 - agencies of State
 - employer appointed in collective agreement
- obligation to implement AA if DE
- on a step bands the UWP
- look at each workplace to get need
- link between AA's goal
- employment equity plan
 - consultation
 - analysis
 - employment equity plan
 - reporting
 - income differentials
- Enforcement
 - self regulation
 - administrative procedure
 - contracts
 - state contracts

Collective Labor Law

- 10) a) Freedom of Association & Collective Bargaining
- LRA perfects CB as far as to bargain to change rights
 - S23 of C both employees & employers

b) Protection of FOA

- right to form & join TU
- TU determines its own constitution
- TU cannot discriminate unfairly
- Right to participate in lawful activities
- to participate in elections
- stand for elections as other base
- stand for elections as TU representative
- cannot discriminate if participate s.s.(i)
- cannot require employee not to be member of TU
- yellow-dog contract
- may not offer inducement not to be member
- can be conflict with senior managers & fiduciary duty → which side of fence
- employer cannot stop senior managers
- still has contractual duty to firm - confidentiality

c) FOA for employees & employers' organizations

d) Right of TU & Employers' organizations

- determine own C & rules
- hold elections
- plan & organize own adm & lawful activities
- join federations
- protects autonomy

Freedom of Disassociation

11) Organisational Rights

a) OR in lens of LRA

- 5 rights

- 1) trade union access to workplace
- 2) deduction of TU subscription from salaries
- 3) recognition of TU representatives
- 4) granting leave to TU representatives
- 5) procedure for gaining access to certain info

1) access to workplace

- need access to talk to members & prospective members
- sufficiently representative
- can hold meetings at workplace outside working hours
- allowed to vote by ballot at workplace
- right is not unlimited, subject to conditions
- time
- notice period
- number of access

2) deduction of subscriptions

- sufficiently representative
- give authorisation deduct pay across 15th
- give list
- can give authorisation to stop

3) TU representatives

- shop stewards are employees but represent TU
- majority representation

| | | | |
|-------|--------|----------|---------|
| 0-10 | 1 rep | 10007 | 12 reps |
| 10-50 | 2 reps | 7500 | 1 rep |
| | | max 2000 | |

- role: to assist & represent employees
- monitor compliance
- report alleged contractual breaches
- perform functions agreed to

4.) leave for office-bearers for union activities

- trade union officials or employees of TU
- TU reps are employees of employer
- can be both

- () - allowed reasonable leave to perform functions
- sufficiently representative

5) Disclosure of information

- need info to perform functions properly
- collective bargaining equal footing
- only registered TU represents majority
- all relevant info necessary to perform effectively
- info \leftrightarrow ^{needs} functions

- don't disclose legally privileged
- confidential
- court order prevent

- disputes related to contract \rightarrow consultation
- if fails arbitration

b) Acquisition of OR

- 3 ways: i) collective agreement
- ii) bargaining council or statutory council
- iii) S21 procedure

i) Collective agreement

- TU approaches employer & asks for rights
- degree of
- no representation required

ii) Bargaining Council

- if recognised by BC get
- right of access
- deduction of membership

(i) iii) S21 procedure

- if cannot reach agreement with employer
- refer to CCMA to mediate then arbitrate
- conditions:

- a) registration & representativeness of union
 - majority vs sufficiently
 - no set number for sufficiently
 - roughly 30%

- b) workplace

- public service v private sector
- problem when conducts two operations
- geographic separation not factor

- c) Procedure

- notify employer in writing
- notice must set out all details
- meet within 30 days to try conclude agreement
- if fail CCMA

c) Organised rights & strikes

- LRA allows right to strike instead of S21 procedure
- if fail may not use S21 for a period of a year

12) Collective bargaining & the law

a) A duty to bargain

- LRA supports bargaining but not enforced in ways encouraged

- 1) can join TU
- 2) TU obtain agreement voluntarily
- 3) can strike to force negotiation
- 4) legal status of collective agreements
- 5) extend collective bargaining to sectors not previously covered

b) What is collective bargaining

- when one or more TU engage in negotiations with one or more employers or employers organisations with purpose of regulating terms & conditions of employment or matters of mutual interest

- various outcome to CB

- agreement

- strike

- law prescribe process

d) Def of collective agreements

- written agreement concerning terms & conditions of employment or matter of mutual interest
- does not have to be signed to be valid
- only registered TU can be party
- will fall outside LRA if unregistered

d) Agency shop & closed shop agreements

i) nature

- type of collective agreements

- agency shop deduct fees from non member

employees who are eligible for membership of TU

- closed shop all ^{employees} members must be member of TU

- used as non members denied benefit

ii) FOA

- looks like infringe
- recognised by C
- enhances collective bargaining

iii) requirements for validity

- Agency shop

- employer not obliged to enter into
- employee must qualify for membership
- TU must be registered
- majority representation
- if lose majority give 90 days notice to
regain then 30 day termination
- agency fee paid to special separate account
3 only used to advance or protect socio-
economic interests of employees
- not used for political purpose
- conscientious objector can ask for fee to
be paid to Dept of Labour ^{- moral}
- religious
- political

- Closed shop

- majority representation
- ballot must be held $\frac{2}{3}$ in favour
- post-employment closed shop
- no union membership to be used for
political purposes
- ? what happens if refused rebashy
& loose membership
- present employees cannot be dismissed
for refusing to join but pay agency
fee

13) Strikes & Lock-outs

a) Statutory definition

1) - strike means partial or complete concerted refusal to work, retardation or obstruction of work

- 3 elements

i) refusal to work

ii) concerted or collective action

iii) for specific purpose

i) nature of strike

- work must be total

- includes overtime

- 4 types

- complete refusal to work

- partial refusal to work

- retardation of work

- obstruction of work

ii) concerted or collective action

- some employee cannot strike

- must be for common purpose

iii) purpose of the strike

- must have specific purpose

- if no common purpose, it is not a strike so
have to take disciplinary action

- matters of mutual interest

- if not a matter of mutual interest not a strike

- cannot strike or something beyond employees action

- interest must also be lawful

2) Lock out: exclusion of employees from employer's workplace to compel them to accept demand of mutual interest

i) action taken

- locked out of premises
- accompanied by refusal to pay
- cannot lock out 1 employee

ii) purpose of action

- mutual interest

b) Prohibits on strike's lock outs

- barred by collective agreement that prohibits

- barred by agreement to arbitrate

- has right to refer to LC

- unfair dismissal

- unfair labor practice

- physical destruction

employee's lives

Part 101

- is engaged in essential services/maintenance services

SAPS

- can strike on organizational rights

- an award or collective agreement regulates issue in dispute

- issue in dispute is regulated by determination

- existence of a dispute

c) Procedural requirements

- must comply with two procedural requirements

i) dispute referred to coalition

ii) required notice of intended strike given

i) referral to conciliation

- either to bargaining or statutory council
- if none CCMA
- 30 days
- give certificate to effect of non-agree

ii) Prior notice

- 48 hrs written notice
- 7 days if State
- must be given to relevant party
- notice must say when strike will start
- universal

- once notice given all union members of employer may strike
- if delay in strike starting still protected if reasonable
- if workers go back dat. have to give notice again

d) Refusal to bargain - disputes

- occurs refusal to recognize TU
- refusal to establish bargaining council
- resignation from bargaining council
- must first conciliate then mediate

e) Strikes & operational requirements dismissal

- dismissal not appropriate for strike
- refer to arbitration or LC
- charged for operational requirements dismissed
- must employ > 50 ; strike challenging substantive fairness
- procedure difficult

- employer notifies union to use facilitation

- 60 days must lapse

- employer give notice of termination

- 48 hrs notice

- if no facilitation 30 days then can refer

- after another 30 days give notice to knout

- 48 hrs notice

f) S 64 procedure not applied with

- union members of a council 3 procedure followed

- if collective agreement in procedure

- if unprotected lock out can strike

- if unprotected strike can lock out

- if strike after unilateral change

g) Secondary Strikes

+ Def: strike or conduct in contemplation or furtherance of a strike, that supports strike by other employees

not sympathy strike if member already refused to bargain with council that they are members of

- requirements: primary strike protected

give 7 days notice

give 14 days notice if deal operational details

limit can be less

must see an effect which is reasonable

no solution to be possible effect

material effect on primary employees

h) Payment of remuneration

- common law principle no work - no pay
- remuneration wider than just wages
- could stop payment of accommodation, food & amenities of life

14) Protest Action

a) Right to protest

- LRA allows protest action to promote or defend social-economic interests of workers

b) Nature of protest action

- same as strike but relates to factor outside work
- social-economic interest is large

c) Procedural requirements

- s.77: not engaged in essential or maintenance must be called for by recognised TU
- same nature as NEDLAC: reason/nature issues must be considered by NEDLAC
- give it a legal nature
- LC can restrain

15) Dispute resolution

a) Introductory matters

- distinction between disputes of interest & disputes of rights
- creation of new rights
- collective bargaining best place
- wages
- interpretation or application of right that exists
- discussion

b) resolution of rights disputes

- different sources of rights

- LRA, BCEA, CEA, C, contract of employment, administrative law, PAJA

- CCMA, conciliation, arbitration, LC, HC

- constitutional avoidance

- employees have right to choose LC or HC

c) resolution of rights dispute in terms of labour legislation

- simplified procedures

- did not happen

d) Conciliation

- first step in process

- neutral third party tries to reach settlement

- consensus agreement

- voluntary in nature not in taking part

e) Arbitration

- capillary process

- neutral party hears case & decides dispute

- CCMA has wide powers

- forms: advisory arbitration

not binding

em-arb

pre-dismissal arbitration

f) Court adjudication

- LC proceedings similar to other HC

- appeal to Labour Appeal Court

g) Resolution of unfair dismissal & unfair labor practice disputes

- s 191 of LRA
- first step refer for conciliation - begins with CCMA
- within 30 days of dismissal
- commit to try resolve within 30 days
- can refer to LC within 90 days of certificate

h) Resolution of misconduct & incapacity dismissals

- CCMA compulsory conciliation
- 30 days dismissal, 90 days unfair practice
- can sub if agreed
- 90 days arbitration
- parties can agree that CCMA hold hearing

i) Constructive dismissal see as above

j) Dismissal after transfer of employee contract
- automatically unfair

k) Dismissal for operational requirements

- small scale first conc or CCMA conciliate
- LC afterwards

if large scale - procedural fairness 30 days to LC
substantive fairness - LC for relief
must choose or right to strike
ce

Orders - reinstatement
- compensation

EMPLOYEE v INDEPENDENT CONTRACTOR

THE IMPORTANCE OF AN EMPLOYMENT CONTRACT

The employment contract serves as the foundation for the relationship between an employee and that employee's employer. It is also the starting point for the entire system of labour law rules. All rules of labour law depend, at least initially, on there being a contract of employment which links the individual employee to the employer. It is only when one looks at the contract that one can determine whether there is a relationship between two parties. One factor may also be to determine what the nature of that contractually based relationship is.

By carefully evaluating a given set of contractual terms, one may be able to ascertain whether or not a certain contractual relationship is based on a contract of employment or, for example, a contract of partnership or even of agency. The essential elements of the employment contract can be summarised as being:

- A voluntary agreement;
- Between two parties (employer and employee);
- In terms of which the employee places labour potential at the disposal of and under the control of the employer, and
- In exchange for some form of remuneration by the employer.

CATEGORIES OF EMPLOYEES

Not all employees are the same. An employment relationship may be on a casual, temporary or permanent basis.

A **casual employee** is someone who is employed to do a once-off job – once the work has been completed and the employee has been paid, the employment relationship ends.

A **temporary employee** is someone who is employed for a fixed time period or for a specific task only – once that task is completed, the employment relationship ends.

A **permanent employee** is someone who is employed with the intention of there being an ongoing employment relationship, or in other words, for an indefinite period. This permanent, ongoing relationship may be full time or part time. There are also non-standards forms of employment such as dependent contractors, piece-workers and employees of contractors. It is these

three groups of employees that are vulnerable and have been abused the most. The next section addresses their concerns.

PROTECTION OF VULNERABLE WORKERS

Attempts by employers to evade the provisions of the Labour Relations Act, 1995 and the Basic Conditions of Employment by trying to structure the relationship between themselves and the people who do work for them as something other than an employment relationship, has led to the expansion of the definition of an employee in both pieces of legislation (LRA and BCEA).

The definition itself has not been amended, but a new section, s200A, has been introduced which establishes a series of criteria that would form the basis for a rebuttable presumption as to whether or not an employment relationship exists. They are as follows:

- The manner in which the person works is subject to the control or direction of another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person has worked for that other person for an average of at least 40 hours per month over the last three months;
- The person is economically dependent on the other person for whom he or she renders services;
- The person is provided with tools of trade or work equipment by the other person; or
- The person only works for or renders services to one person.

The effect of the abovementioned criteria is to provide that, where a particular factor exists, the worker is presumed to be an employee unless the contrary is proved.

HOWEVER - The above provisions do not apply to a person who earns in excess of the amount referred to in s6(3) of the BCEA (R89499)(Where the Minister can make a determination that excludes the application of that chapter or any provision of it to any category of employees earning in excess of an amount in that determination). If such a person earns below the amount referred to in the above section, any of the parties to the relationship may approach the CCMA for an advisory award on whether or not there is an employment relationship in

existence. NEDLAC must also prepare and issue a code of good practice that sets out guidelines for determining whether persons are employees or not.

THE EMPLOYEE AND CONTRACTOR DEBATE

The contract of the independent contractor on the other hand, is characterised by the fact that one person hires another person to do a specific job or a specific piece of work. The following can be said about the independent contractor:

The person letting out the work is seen as the *principal* and the person doing the work is seen as the *agent*. The contractual relationship is totally different – it is not a contract of employment, but a contract relating to the performance of a certain piece of work.

Another feature of the contract of an independent contractor is that there is *far less control* by the principal over the agent (contractor) than an employer has over the worker.

As such, the Labour Relations Act and the Basic Conditions of Employment do not cover independent contractors.

RELEVANT LEGISLATION

Labour Relations Act, 1995, as amended, s213 & 200A
Basic Conditions of Employment, 1997, as amended, ss1, 6 and 83A

ACKNOWLEDGMENTS

Basson, A et al. 1999. **Essential Labour Law. Volume 1. Individual Labour Law.** Labour Law Publications, Groenkloof.
Employment contract – Definition, identification and formation
The meaning of employee – The first basic concept

RETRENCHMENT IN TERMS OF SECTION 189A

INTRODUCTION

This section applies to employers employing more than 50 employees if the employer intends retrenching:

- 10 or more employees, if the employer employs 50 – 200 employees;
- 20 or more employees, if the employer employs 201 – 300 employees;
- 30 or more employees, if the employer employs 301 – 400 employees;
- 40 or more employees, if the employer employs 401 – 500 employees; and
- 50 or more employees, if the employer employs 501 or more employees.

Or if the employer intends to dismiss the above number of employees either on one occasion or cumulatively over a 12-month period.

IDENTITY OF EMPLOYER

For the purposes of calculating the ratio of proposed retrenchees and previous retrenchees in the past 12 months as against the total number of employees employed, the legal entity of the employer must be identified. Large national chain stores or banks with numerous branches all form part of one corporate structure or juristic person.

The total workforce across all stores or branches must be calculated together to assess all whether the ratio will trigger s189A. Conversely, where a national chain store consists of numerous independent franchises across the country, each franchise will be a separate corporate entity or employer. Equally, if a holding company contemplates a retrenchment exercise, the employees employed by subsidiaries of the holding company are not included in the calculation of the ratio of retrenchees to the total workforce and vice versa.

PROCEDURES: FACILITATION

Both parties need to agree on the process of facilitation and notify the CCMA in writing by completing the LRA 7.20 form within fifteen (15) days.

The CCMA then needs to inform the parties in writing within seven (7) days of receiving the form of the following:

- The name of the facilitator; and
- The date of the first facilitation meeting.

CONDUCT OF THE FIRST FACILITATION MEETING

The facilitator must, at the first meeting seek to facilitate a agreement between the parties on the following:

- The procedure to be followed during the facilitation;
- The date and time of additional facilitation meetings; and
- The information the employer is required to disclose.

A facilitator may conduct up to four (4) facilitation meetings with the parties; however, the director of the CCMA may give permission for additional meetings to be held.

POWERS AND DUTIES OF THE FACILITATOR

- To chair the meeting between the parties; and
- To decide on any issue of procedure that arises in the course of meetings between the parties.

The facilitator's decisions regarding the procedure for conducting facilitation, including the date and time, is binding on the parties.

If there is a dispute about the disclosure of information, the facilitator may make an order directing an employer to make such disclosure.

STATUS OF THE FACILITATOR

Facilitation is done on a with prejudice basis, but parties can agree in writing that parts be done on a without prejudice basis. The latter cannot be disclosed in any court proceedings, nor can the facilitator be called to give evidence of the facilitation proceeding.

Note: If a facilitator is appointed, the employer is not allowed to retrench for a period of sixty (60) days. After the 60 days has lapsed, the employer may give notice of retrenchment to employees affected or the union can give notice to strike or the union may decide to refer a dispute concerning the substantive fairness of the retrenchment to the Labour Court.

STRIKES

If the employees or representative trade union decide to strike on the issue, the union or employees will need to follow the strike procedures in terms of s64.

NB: Once the matter has been referred to the Labour Court, the right to strike on the issue will be lost. The same will apply once the union or employees give notice to strike, in that the right to refer the matter to the Labour Court will be lost.

CONCILIATION

If no facilitator is appointed, the dispute may not be referred to the conciliator until thirty (30) days have lapsed. If the matter fails at conciliation or the 30 days expires and the matter still remains unresolved, the union can:

- Give notice to strike; Refer a substantive fairness dispute to the Labour Court. And the employer can give notice to dismiss in terms of the Basic Conditions of Employment Act.

GENERAL POINTS

- The parties can agree on different time periods for consultation/facilitation;
- The parties can agree to appoint a facilitator at any time, despite the procedure set out in point 1 above (facilitation); and
- At any stage, a consulting party can apply to the Labour Court to:
 1. Interdict the employer from dismissing employees prior to complying with a fair procedure;
 2. Direct the employer to reinstate the employees until there is compliance with a fair procedure; and
 3. Make an award of compensation.

RELEVANT LEGISLATION

Labour Relations Act, as amended, s189A
 Regulations for the conduct of facilitation in terms of s189A