

STUDY UNIT 1- INTRODUCTION

- Labour law comprises:
    1. Individual labour law – deals with the formation, content and termination of the employment relationship. Employment relationship exists between two single entities eg. one single employer and one single worker
    2. Collective labour law- focuses on relationships on a collective level. Ie. a number of people acting together (collectively) to influence this relationship. looks at groups. Eg. May act collectively by way of trade unions and employer's organisations
  - Labour law deals with relationships:

Between employer and worker is called employment relationship. Basis of relationship is contract of employment

Between an employer and trade union called a collective bargaining relationship (collective bargaining can also exist betw employers organisation and trade union)

Between trade unions and workers called a membership relationship. Worker becomes a member of the trade union ito the union's constitution. Also a membership relationship between a single employer and an employer's organisation

State has relationships with all its citizens
  - Sources of labour law: Constitution, international labour standards set by the ILO (The International Labour Organisation), labour legislation, (for example the Labour Relations Act, the Basic Conditions of Employment Act, and the Employment Equity Act), collective agreements, the common law and the contract of employment.
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STUDY UNIT 2- CONTRACT OF EMPLOYMENT

- What is a contract of employment? is a **voluntary agreement** between **two parties**, in terms of which one party (the employee) places his or her **labour potential** at the **disposal and under the control** of the other party (the employer) in exchange for some form of **remuneration**
- definition of an employee is important because most protective labour legislation (such as LRA & BCEA) apply only to employees (as opposed to independent contractors). An independent contractor is someone who works for his own account for example a dentist with his own practice. If the dentist works at a hospital and earns a salary from the hospital he will qualify as an employee.
- Definition of an employee 'any person excluding an independent contractor who works for another person or the State and receive or is entitled to receive remuneration & any other person who in any manner assists in the carrying on or conducting the business of an employer'
- Know difference between an employee and an independent contractor. Courts have developed certain tests to help to clarify the concept of 'employee'
  - the control test,
  - the organisation test,
  - the dominant impression test
- Element of control has been reduced to the right of the employer to control the employee. Is one of the elements which the court will use to decide whether the contract is, in fact, a contract of employment

Activity:

1. What is the purpose of the statutory presumption of section 200A of the Labour Relations Act, 1995?  
*to protect vulnerable workers*
  2. List seven factors that will lead to the presumption that a worker is an employee.
    - *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 works or 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.*
  3. Must all these factors be present before a worker will be presumed to be an employee?  
*No, only one or more of the factors must be present for the presumption to apply to the employment relationship.*
- What are the differences between an employee and an independent contractor?

Employee: Object of contract is to render personal services

IC: Object of contract is to perform a specified work or produce specified result

Employee: Must perform services personally

IC: Can perform through others

Employer: may choose when to make use of services of employee  
IC: Must perform work within a fixed period by contract

Employee: Contract terminates on death of employee  
IC: Contract does not necessarily terminate on death

Employee: Contract also terminates on expiry of period of service in contract  
IC: Contract terminates upon completion of work or production of a specified result

### Who is an employer?

No statutory def for the word.

Generally accepted definition 'person or body which employs any person in exchange for remuneration and any person who permits a person to assist in the conducting of business'

Definition includes labour brokers or temp employment services.

A labour broker is the employer of a person whose services have been obtained or provided to a client for a reward. Eg . recruitment agency

Difficulty in using a labour broker: difficult to identify who the employer is, employees salary is reduced because labour broker deducts their fees

### Categories of employees which qualify for protection under labour law:

Permanent employee- employed for indefinite period

Temporary/contract/fixed term employee- employed for specified period or specified project

Casual- person works for same employer on not more than 3 days a week. The employment can temp or perm.

Part-time- works for employer at certain times of the day. Works on certain days, mostly limited to 3 days per week. Can be temp or perm

### Unprotected workers

Illegal workers- common law dictates that an unlawful contract is void or voidable. Under criminal law, an unlawful contract is punishable by a court of law.

If for eg an illegal worker is not protected by the labour law, they may still be protected by the Constitution

Activ- African Importers CC appointed Andre as an independent agent to sell the products imported by the corporation. African Importers trained Andre, but they were not entitled to instruct him about the way in which he sold the product, or to whom he sold the product. Andre could engage other people to assist him in marketing African Importers' products and, if he wished, he could sell other products as well. Andre could take vacation leave without the consent of African Importers CC, and had no obligation to submit medical certificates if he was ill. Do you think Andre was an employee or an independent contractor?  
*In terms of the dominant impression test, Andre was not an employee, but an independent agent who was his own master, because he did not perform the services required of him under the control and supervision of African Importers. However, in terms of the definition of employee, Andre did assist African Importers in the carrying on of their business. That assistance arose out of his obligation as an agent in terms of an agency agreement, not out of a contract of employment. Andre is therefore not an employee, but an independent contractor.*

Activ- P hires K, a builder, to build a flat for P's parents on P's property. K uses his own building equipment and has a team of workers in his employment who will do the actual work. P will pay K when the flat is completed. K is also involved in other building projects, so he uses S, his foreman, to supervise the work on P's flat. Do you think that K is an employee of P? Will S be an employee of K?

*K is an independent contractor. Using the control test as a criterion, S is an employee of K.*

Susan is an accountant. She is employed at two businesses for which she audits their books. Every Friday she works at Trustworthy Trustees and on Mondays she works at the Special Care Pharmacy. Susan is a member of an independent pension fund, but makes use of a motor vehicle provided by Trustworthy Trustees for tax benefits. Susan has her own office at the back of the Special Care Pharmacy, and she makes her own decisions about her working hours. Trustworthy Trustees has provided a computer for Susan, but usually Susan uses her own personal computer. Do you think Susan is an employee or an independent contractor?

*If we use the organisation test as our criterion, it may seem in light of the facts that Trustworthy Trustees has provided Susan with a computer and a motor, that she is therefore an employee. The control test, however, will probably indicate that neither Trustworthy Trustees nor Special Care Pharmacy has control over Susan's working hours nor does either company control the way in which she does her work. The dominant impression is that Susan is an independent contractor, even though it seems that she works for these two companies every week. We will probably need more information before we can make a final decision. This is*

*an example of a borderline case, and this example should help you to appreciate how difficult it is sometimes for the court to gain a “dominant impression”.*

Activ- Tambo, a builder by trade, does work for Entrepreneur CC. Entrepreneur CC has realised that education is crucial to the development of the new democratic South Africa, and is establishing various educational enterprises at both secondary and tertiary level. Tambo lives on the premises of the first educational venture, is paid monthly, and has pension and medical-aid contributions deducted from his salary. Tambo is consulted about building plans, and even designs some of the buildings himself. He is usually consulted about the hiring of builder's assistants, some of whom are part-time and others are full-time. From time to time, Tambo meets with one of the managers of Entrepreneur CC to discuss the current building projects, the financing of building materials, the payment of the builder's assistants, labour-related problems and, when necessary, future plans. Which of the following statements is the correct?

(1) A builder is an independent contractor, and therefore the contractual relationship between Tambo and Entrepreneur CC is that of an independent contractor.

(2) Tambo is an independent contractor because he, and not Entrepreneur CC, hires builder's assistants and orders building material.

(3) In terms of the multiple test, the dominant impression is that Entrepreneur CC is the employer and Tambo is the employee.

(4) Because Entrepreneur CC can tell Tambo what to do, where to do it and how to do it, Entrepreneur CC as the employer has control over all that Tambo does.

*(3) is the correct answer. Although builders are usually independent contractors, in the case of Tambo the dominant impression is that he is an employee of Entrepreneur CC. (1), (2) and (4) are incorrect.*

### **Concluding employment contracts**

- Requirements for the completion of the contract is that there must be consensus between the parties to the contract about the terms and conditions of the contract. A term to be agreed upon is the period of employment (can be fixed term or indefinite)
- LRA does not define diff types of employees but these types can be distinguished:
  - Permanent and temporary employees
  - Temporary and probationary employees
  - Temporary, casual and part-time employees
  - Full-time and part-time employees
  - Managerial and non-managerial employees
- Requirements for a valid contract of employment:
  1. Must be agreement
  2. conclusion of the contract has to be lawful
  3. parties must have the necessary capacity to enter into the contract
  4. performance by the parties
  5. obligations must be possible and the required formalities have to be complied with

Activ- Which of the following would be valid contracts of employment?

1. Peter, aged 14, approaches RatRace CC. RatRace had advertised a post in the local newspaper for a delivery boy. Peter agrees to the terms and conditions proposed by RatRace.
2. David is employed by Paint CC in order to paint a house. Unknown to either David or Paint CC, the house had burnt to the ground six months before the contract was concluded.
3. Steven and Michael enter into a contract. Steven is under the impression that he has contracted to build Michael a house, while Michael believes that Steven has offered him full-time employment as manager of a building site.
4. John concludes an employment contract with Mark and, in terms of the contract, Mark is expected to murder Mrs G.
5. Billy, aged 18, concludes an employment contract with RatRace. At the time the contract is concluded, Billy's father is overseas on a business trip, and the father is totally unaware of what Billy is doing.
6. Joyce concludes an employment contract with Mrs C. Because Joyce can barely read, they conclude an oral employment contract.
7. Larry is employed as a merchant seaman. Because Larry can barely read, he and his employer enter into an oral employment contract.

*Only 6 and 7 constitute valid contracts of employment. An employment contract does not have to be in writing, it can be concluded orally. Peter is too young to conclude a valid contract of employment. David cannot conclude a valid contract to paint a house, because the house had burnt down, and the obligations in terms of the contract will therefore be impossible. Steven and Michael clearly do not have consensus about the obligations in terms of the contract. John cannot conclude an employment contract to murder Mrs G because such an action is clearly unlawful. Billy is under the age of 21 and therefore can only conclude a valid contract of employment with the assistance of his father.*

Activ- Jenny is appointed for one month to make sure that all the marks in the examination papers were correctly added up. Jenny will be paid at the end of the month. However, after two weeks on the job, Jenny has not received a single examination paper to check. Is Jenny entitled to be given examination papers to check? Would your answer be different if Jenny was paid for each examination paper that she checked?  
Anna is doing her apprenticeship at a large auditing firm. The firm has employed too many clerks and, as a result, Anna often plays computer games on the computer to pass the time. Is Anna entitled to complain to management about the lack of work?  
*Did you mention in your answers that there is, in general, no duty on an employer to provide an employee with work, except where the employee's wage depends on the work provided by the employer or if the employee requires work in order to maintain or develop skills?*

Activ- The leading case in regard to restraint of trade is *Magna Alloys & Research*  
Consider the following rules dealing with restraint of trade: Which of the above rules were formulated by the court?  
A) A restraint of trade clause which is contrary to public policy will be unenforceable.  
B) If an employer seeks to enforce a restraint of trade clause, the employee bears the onus of proving that the clause is contrary to public policy.  
C) In deciding whether or not the restraint of trade clause is contrary to public policy, the court will consider the circumstances prevailing when the contract was concluded.  
D) The court may decide that part of the restraint of trade clause is enforceable and part of it is unenforceable  
**Statement 1 is correct. A, B & D were rules formulated by the court. C is not correct. In deciding whether the restraint if the restraint of trade clause is contrary to public policy, the court will consider the circumstances that prevail when the enforcement of the clause is sought and not when the contract was concluded. All the other statements are self-explanatory.**

Activ- Carl works as a bartender at the Hotel Las Vegas in Gauteng. In terms of his contract of employment, Carl works fourhour shifts on Monday, Wednesday and Saturday evenings and is paid R250 per shift. One Saturday night a fight starts in the bar. Carl tells the people involved to leave the bar. As they leave, one of the people involved in the fight – Barney - turns round and swears at Carl. Carl ignores the insult, but a few minutes later, when he (Carl) fetches something in his car, he runs into Barney in the parking lot just outside the premises of the hotel. They get into a fight and as a result, Barney gets injured and has to spend a week in hospital and his medical expenses are R25 000.  
Which **one** of the following statements is the **most correct** one?  
1. Carl is not an employee of the Hotel Las Vegas and therefore Barney cannot sue the Hotel Las Vegas on the basis of vicarious liability.  
2. Because Carl did not act negligently, Barney will be unsuccessful in his efforts to sue the Hotel Las Vegas on the basis of vicarious liability.  
3. Barney can sue the Hotel Las Vegas on the basis of vicarious liability, but the success of his claim will primarily depend on whether it is found that Carl acted in the course and scope of his employment.  
4. Because Carl reacted to the verbal abuse by Barney, neither he (Carl) nor the Hotel can be held liable for Barney's damages.  
5. Because Carl acted unlawfully by assaulting Barney, it is neither fair nor legally possible to hold the Hotel Las Vegas vicariously liable.  
**Statement 3 is correct as it contains the most correct statement. Statement 1 is incorrect. The facts clearly state that Carl is an employee of Hotel Las Vegas and also mentions his contract of employment. Statement 2 is incorrect. The act must have been culpable, in other words either wilful or negligent. It is not clear from the facts whether Carl acted at all or showed some culpable behaviour. Statement 4 & 5 are incorrect. This will not constitute defences for a claim based on vicarious liability. If the requirements for vicarious liability are met the employer can be held liable. These requirements are: (a) there must be a contract of service between the employer and employee, (b) the conduct of the employee must have constituted a delict, namely (c) there must have been an act or omission, (d) which is unlawful (e) and culpable. (f) A third party must have suffered prejudice and (g) the act must have caused the patrimonial damage to a third party.**

Activ- F is employed by P. In terms of the written contract of employment between F and P, one month's notice of termination must be given. F and P disagree about the results of a soccer match, and the disagreement is of such a nature that P gives F one month's notice of termination of employment.  
*It is clear that in this case, the period of notice agreed to by the parties in the contract of employment has been given. In other words, the termination is lawful. However, it should be clear that something is wrong -an employer should not be in a position to terminate the employment of an employee because of a disagreement about the results of a soccer match.*

### Statutory exclusions of workers

The flg are excluded from def of employee in LRA & BCEA: members of

- National defence force
- National intelligence agency
- South African secret service
- SA national academy of intelligence
- Comsec members

BCEA also excludes the flg people from its protection:

- Unpaid volunteers working fir charitable orgs or orgs with a public purpose
- People employed on vessels at sea
- Persons undergoing vocational training except to extent that a term/condition of their employment is regulated by another law

### TB activ- True or False

- Every worker who falls under the statutory definition of employee is protected by labour legislation. **T**
  - Domestic and farm workers are excluded from the statutory def of employee. **F**
  - The courts in SA are in favour of a restrictive interpretation of the def of employee. **F** (in favour of purposive & expansive interpretation)
  - Illegal foreigners are not employees for purposes of teh LRA, their contracts are unlawful and unenforceable and they will have any contractual remedies if their employers refuse to pay them for their service. **F** (illegal workers are not employees for purposes of IRA as not valid contract exists but employer cannot refuse to pay because they are illegal foreigners. Employee can enforce his contractual rights through civil court)
1. What is the main reason why a distinction has to be drawn betw an employee & someone who is not?  
*Only those who qualify as employees are protected by labour legislation*
  2. List & describe factors the court will consider when determining whether a person is an employee or not.  
*Courts have used the flg 3 tests, control test (if an employee is subject to the control of his employer), organisation test (is the person part and parcel of the business), dominant impression test (looks at the employment relationship as a whole, factors considered in this test are:*
    - *right to control or supervision*
    - *extent to which the person depends on the employer in the performance of his duties*
    - *if the person is required to devote specific time to his work*
    - *if the person is obliged to perform his duties personally*
    - *if the person is paid according to a fixed rate or commission*
    - *if the person provides his own tools & equipment*

In an effort to determine who qualifies as an employee, the LRA and BCEA have brought in a rebuttable presumption that a persons who works for or renders a service to any person is presumed to be an employee regardless of the form of the contract until the contrary is proved or one or more of the factors stated in the presumption are present.

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## **STUDY UNIT 3: THE BASIC CONDITIONS OF EMPLOYMENT ACT (BCEA)**

**Employee protection-** purpose of BCEA to establish minimum terms and conditions of employment to almost all employees regarding, for example, hours of work, overtime, meal intervals, rest periods, work on Sundays and public holidays, night work, all the various types of leave, particulars of employment and remuneration and termination of employment.

- BCEA applies to almost all employees. General exclusions are:
  - Members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence;
  - Unpaid volunteers working for an organisation serving a charitable purpose;
  - Persons undergoing vocational training of which any term or condition of their employment is regulated by the provisions of any other law;
  - Persons employed on vessels at sea in respect of which the Merchant Shipping Act applies except to the extent provided for in a sectoral determination; and
  - Independent contractors.
- Apart from these general exclusions there are also partial exclusions which means that in certain chapters of the act, certain groups of people are excluded from the act. For example senior managerial employees are not protected as far as working time is concerned or for example only people who have

worked for more than 4 months for at least 4 days a week are entitled to family responsibility leave.

**Regulation of working time-** know the ordinary hours of work, the regulation of meal intervals, rest periods, overtime, and arrangements for Sundays, public holidays and night work.

**Leave-** Know the number of days allowed for annual leave, sick leave, maternity and family responsibility leave.

- maternity leave does not need to be paid.

- only employees working for at least 4 days a week and who worked for longer than 4 months are entitled to family responsibility leave.

Will an employee be entitled to take family responsibility leave when her husband is ill? No, only sickness of a child will entitle a person to family responsibility leave.

### **Termination of employment**

Know notice periods and severance pay and how severance pay is calculated

Activ- Which **one** of the following statements regarding termination of a contract of employment is **incorrect**?

1. A contract of employment for an indefinite period may be terminated by one party giving the other notice of intention to terminate the contract.
2. The Basic Conditions of Employment Act, 1997 lays down minimum standards relating to the length of the notice period.
3. The Basic Conditions of Employment Act, 1997 stipulates that notice of termination of an employment contract is invalid unless it is given in writing.
4. An employer may give an employee his/her salary in lieu of notice.
5. A fixed-term contract can be terminated by one party giving the other notice of intention to terminate the contract.

**Statement 1** is correct because it contains the incorrect statement. A fixed-term contract cannot be terminated during its duration unless the agreement contains a written agreement to that effect. All the other statements are correct (and self-explanatory).

TB- **The common law rights and duties of employer & employee**

#### **Duties of employer:**

1. To remunerate employee- this is the primary duty. No work means no pay but paid leave is allowed in certain circumstances. If employee has no leave then no work, no pay applies eg strikes.
2. To provide employee with work to do
3. To provide safe working conditions- provide protective devices where applicable, install safety equipment, exercise proper supervision, protect against harassment by employer or co-workers, contribute to Compensation Fund & ensure that employee is compensated if IOD
4. To deal fairly with employee- also captured by constitutional right to fair labour practices. LRA protects against unfair treatment during employment & unfair dismissal

#### **Duties of employee:**

1. To render services to employer- this is the primary duty.
2. To work competently & diligently- when entering employment contract, employee is guaranteeing that she is capable of doing the work & that it will be performed competently & diligently
3. To obey lawful & reasonable instructions- is under control & authority of employer. Non compliance is insubordination & breach of contract unless employee refuses to follow orders outside the scope of the contract
4. To serve employers interest & act in good faith (aka fiduciary duty)- relationship is built on trust & confidence, includes duty not to work against employers interests, not to compete with employer, to devote hours of work to promote employers business & to act honestly.

**Vicarious liability-** means that the employer is held legally liable for the wrongful acts (delictual & unlawful) of its employees occurring during course of business. This is regulated by common law and not employment legislation. Doctrine based on principle that employer must compensate those who suffer injury caused by its employee. It protects 3<sup>rd</sup> parties. Employer can still have recourse against employee (discipline for misconduct or claim repayment)

The wrongful acts must however arise out of and in the course of the employee's duties. The three requirements for vicarious liability therefore are:

- There must be a contract of employment
- employee must have acted in the course & scope of employment
- Employee must have committed a delict (negligent or intentional unlawful action or omission) causing a 3<sup>rd</sup> party damage or personal injury

Note that the fact that an employee commits a forbidden or criminal act will not always absolve employer from vicarious liability.

- Case- **Bezuidenhout v Eskom**- employee used company truck for work. Was prohibited by company from giving lifts to anyone without permission. Driver gave a hiker a lift and met with accident. Hiker was hurt with severe head injuries. Court held that instruction not to carry passengers placed a limitation on the scope of employment. Employer was not held vicariously liable as driver knew of the prohibition and giving the hiker a lift added nothing of interest to the employer.

### **Impact of the contract of employment on the employment relationship**

- The terms and conditions in the contract can be changed during the course of employment.
- The contract must meet the requirements that the law prescribes for the conclusion of a valid contract, these are:
  - Must be agreement betw parties (forced to work is slavery)
  - Parties must have capacity to act (eg visually impaired or under 18 cannot conclude valid contract)
  - Agreement must be legally possible (eg, illegal to appoint an assassin for your business)
  - Performance must be physically possible (eg nurse employed to care for someone then person dies so performance will not be possible any longer)
  - If any formalities are prescribed for the formation of that particular type of contract then these formalities must be satisfied (eg employment contract of attorney must be in writing & registered with Law Society within 2 months of conclusion)
- no formal requirement exists that a contract of employment must be writing (can be oral and terms can be express or tacit)
- In terms of BCEA, certain information must be given to employee in writing:
  - Full name and address of employer
  - Name and occupation of employee
  - Place of work
  - Date which employment began
  - Ordinary days & hours of work
  - Wage amount
  - Rate of pay for overtime
  - Any other cash payments if entitled
  - Any payment in kind and the value
  - Frequency of remuneration
  - Any deductions to be made
  - Leave entitled to
  - Notice period required to terminate employment
  - Any period of employment with a previous employer that counts towards the employees period of employment
  - List of any documents forming part of employment
- Employer must keep these written particulars for 3 years after termination of employment contract.
- Employer must display employees rights at work place in terms of BCEA in official languages spoken

### **Remedies for breach of contract**

- breach occurs when parties do not perform ito agreement. Innocent party can then choose to accept the breach and cancel contract or compel defaulting party to perform (called specific performance). Can also claim damages.
- LRA has replaced the process provided by contract law for breach of contract. In terms of LRA, a breach by employer amounts to unfair labour practice, unfair discrimination or unfair dismissal. A breach by employee amounts to misconduct.

### **Restraint of trade**

- Normally included to protect employers interests against unfair competition from employees during and after employment has ended
- Purpose is to protect employers trade secrets, goodwill & business connections
- Prevents employee from competing with employer in a defined area & for a prescribed period.
- To determine if a restraint of trade is enforceable, court will look at
  1. Public interest which requires parties to comply with contractual obligations even if unreasonable/unfair
  2. Right of all persons to b permitted to engage in commerce or the professions of their own choice
- Case- **Magna Alloys & Research v Ellis**- court had to balance competing interests of employer & employee. Held that a restraint of trade agreement is valid & enforceable unless it is contrary to public policy which wit will be if it is unreasonable. Reasonableness will b determined with ref to the interests of both parties, public policy & surrounding circumstances. Questions to consider in determining reasonableness are:
  - Is there an interest deserving protection at the termination of the agreement
  - Is that interest being prejudiced
  - If so how does that interest weigh up against the interest of the other party not to work

- Is there another facet of public policy apart from the relationship between the parties, which requires that the restraint should be enforced or disallowed
- Is the restraint wider than is necessary to protect the protectable interest.  
(an employer who unlawfully terminates a contract of employment should not be allowed to benefit from the restraint)

### **Changes to contractual terms & conditions of employment**

- Employer cannot unilaterally change terms & conditions. It can only be changed in the following ways:
  - By agreement between both parties or in line with the method prescribed in contract of employment
  - By means of a collective agreement between employer & trade union
  - By operation of law e.g. BCEA
  - Through a sectoral determination issued by the Minister

### **Customs & practices in the workplace**

- This relates to an afternoon off per month, a social visit to a historical site, Christmas party etc. Employer does not have to obtain agreement from employees to implement or change these

TB Activ- 1. An employer can be held liable for the delictual acts performed by its employees in the course of their duties. In order for an employer to incur vicarious liability, certain requirements must be met. Which one of the following is least accurate?

- Employee must have been on the business of the employer when the delict was committed
- Employment relationship must exist between employer & employee when employee commits the delict
- Conduct of employee must comply with all requirements of a delict
- Conduct of employee must be negligent

*Answer is a. Employee should have acted within the course & scope of his employment. Employee need not be on the business of employer but his actions should be closely linked with his position or work*

2. Company A imports & distributes car paints & other associated products to SA. It has its principal place of business in Jhb & its branches in all other 8 provinces. George is a sales rep for Company A. When he was employed, he had to enter a restraint of trade preventing him from directly or indirectly canvassing business regarding the supply of car paints etc from company A customers after he has left the company. Further prohibited from selling such products or rendering any service to any of their customers in any capacity within RSA for 2 years. George now wants to join company B to occupy the same position he had at his previous employer and needs advice. Discuss implications of the restraint clause & factors court must consider.

*The restraint of trade prevents George for a period of 2 years after leaving Company A from doing anywhere in SA the activities mentioned in his contract of employment. This is basically to protect Company A's interests. In order to determine whether the restraint agreement is reasonable, a court will consider the factors mentioned above. The restraint appears to be wide and restricts George severely in terms of duration & geographical scope. This will deprive George of working & earning an income in SA. The restraint will probably be found unreasonable and invalid.*

3. Discuss whether the following agreements are valid contracts of employment.

a) Grace concludes an employment contract with Big Joe into which she will perform duties as a prostitute.  
*Not a valid contract. A contract is void if it does not meet the requirements for a valid contract. One requirement is that it must be legally possible. A contract to work as a prostitute is contrary to good morals.*

b) Bruce a 16 year old boy is employed by Hot & fresh bakery as a cashier.  
*Not a valid contract. He must be 18 years or older to conclude a valid contract. Would be valid if he was assisted by parent or guardian*

c) Pitso is employed by Quick Retailers as branch manager of its Pretoria store. Quick retailers does not want to conclude the employment contract in writing.  
*This is a valid contract. It does not have to be in writing to be valid. It can be oral. BCEA however requires some information to be given in writing*

d) Barry is employed by JJ Manufacturers. Barry is expected to work only 3 days a week  
*valid contract. A person can be employed to work only certain days of the week. He is a part-time employee.*

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## STUDY UNIT 4- THE MEANING OF DISMISSAL

- Activ- Issues that need to be identified the definition of dismissal
1. Firstly it is the employer who has terminated the contract
  2. Secondly there must have been a contract of employment
  3. Thirdly the termination can be either with or without notice

Activ- When does a contract of employment commence, in light of the def of employee in the LRA?  
*Confusion arose because LRA defines employee as someone who works for another for remuneration. The interpretation of 'works for' provided some challenges, namely if that only means that a contract of employment has been signed or whether a person must start his first day (render his services) before work really commences. Should also discuss how the court interpreted this issue in the flg cases*

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|---|
| Whitehead – only employee once actually start working- not enough to have signed a contract |
| Wyeth- employee   |
| Jack- contract binding if agreement was reached on all essential terms & cond of employment |

Activ- When a worker absconds, who terminates the contract of employment

|   |   |
|---|---|
| South African Broadcasting Corp v CCMA & others | - A desertion constitutes a breach of contract but the contract is only terminated when the employer accepts the employees repudiation of the contract  |
| SACWU v Dyasi                                   | - If the employee cannot be traced, the employer may have no other option but to accept the employees breach of contract. Then the employee terminates the contract-not the employer. But if the employer has a choice, to accept the breach or not & the employer chooses to terminate then the employer terminates the contract |

### **Selective re-employment**

When the employment relationship continues even after the employment contract had been terminated because it is necessary to keep the employment relationship alive .

- Activ- List the req that should be met before selective re-employment qualifies as a dismissal
- A number of employees must have been dismissed
  - Employees must have been dismissed for the same or similar reasons
  - Employer must have offered to re-employ one or more of these employees
  - Employer must have refused to re-employ the employee who is alleging that there has been a dismissal

Activ- Which of the flg eg constitutes a dismissal and what type is it if it is a dismissal?

- a) Abi has worked as a labourer for a construction company in Jhb for the past 10 years. He is an active member of his trade union & as a result is popular with management. The company has just opened a branch in Nelspruit & insists that he be transferred. Abi cannot move now because he has family problems & decides to resign.  
*Abi was probably constructively dismissed. He could even claim that it was an automatic unfair constructive dismissal if he could show that the reason why the employer made his working conditions intolerable was because of his trade union membership. Remember that there must be a resignation before a dismissal can be regarded as constructive*
- b) Maria has been working for a publishing company for a number of years. The company has consistently refused to negotiate for paid maternity leave, wither with individual employees or with the trade union. Maria is pregnant & decides to take off 4 weeks prior to the birth of her baby & 8 weeks after the birth. When she returns her employer refuses to take her back on grounds that she has breached her contract. Maria claims this is unfair dismissal but employer raises the defence that it cannot be unfair because there was no dismissal.  
*Maria could claim that she was dismissed as a result of her pregnancy. The definition of dismissal includes the refusal to take an employee who went on maternity leave back into service. If the reason for the refusal is because of her pregnancy (which is the case) then the dismissal will also be automatically unfair. If for eg the employer discovered (while Maria was on maternity leave) that she was stealing money from the company and then refuses to allow her back- it will still amount to a dismissal but will not be automatically unfair and will be based on misconduct.*
- c) Johan sells insurance on commission. Much of his work is generated by Financial Consultants CC, a firm of brokers. He has had an extra marital affair with the wife of one of the brokers and subsequently he is given

no further business from them. Johan claims he has been unfairly treated as his affair had nothing to do with the selling of insurance.

*Johan will probably not qualify as an employee but rather be regarded as an independent contractor. Note that when deciding whether or not there has been a dismissal, it is important to establish right from the outset that there was in fact an employment relationship. If there is no employment relationship, there can be no dismissal.*

- d) Brutus has worked for Tertiary Education Pty Ltd for the past 5 years. His contract has always been for a one year period but in the past the company renewed his contract annually. This year they decided not to renew it telling him that cuts in the budget have meant they can no longer employ lecturers to teach Latin. He claims unfair dismissal but the company says his contract was only for 1 year and it has come to an end.  
*Brutus would be able to claim that he has been dismissed because of the non renewal of a fixed term contract where there was a reasonable expectation to do so.*
- e) Nandi is a marketing consultant with Flash products. As part of her contract of service, she agrees to travel and if necessary to move to set up a branch in another part of the country. However the date on when she is asked to do this coincides with the date of her forthcoming marriage and she decides to resign.  
*Nandis resignation was not a measure of last resort and will therefore not amount to a constructive dismissal*
- f) Judy has been employed at Supreme Stockbrokers in Pretoria for the past 5 years. The company has been sold to Competitive Consulting in Jhb and Judy must now travel to Jhb daily. Even worse, the only position available to her in the new company is in the derivative section which means a reduced income. Judy has always dealt in fine metal stocks and she resigns.

**TB- BCEA**

- The different Acts that impact the employment relationship:
  - BCEA regulates min terms & cond of employment
  - EEA prohibits discrimination & promotes affirmative action
  - LRA deals with unfair labour practices
  - Social security legislation provides employees with entitlements to for eg UIF & involves contributions by employers
  - SDA & SDLA regulate skills & training of employees & involve contributions by employers
- BCEA must be read in conjunction with collective agreements and sectoral & ministerial determinations to determine an employees terms & conditions of employment
- Employers may deviate with these rules only for the benefit of the employee not to decrease them
- BCEA condition of employment constitutes a term of any contract of employment except where:
  - Any other law provides a term more favourable to the employee
  - The contract provides a more favourable term to the employee
  - The basic condition has been replaced, varied or excluded ito the Act
- Employer smay not contract out of the bCEA
- Only in limited circumstances can employers agree on terms & cond less favourable than those prescribed in BCEA

|  |   |  |
|--|---|--|
| More favourable terms are allowed                          | → | eg 20 days leave                         |
| Less favourable terms allowed only by Collective agreement | → | BCEA sets minimum terms eg 15 days leave |
| Certain core right in BCEA cannot Be reduced               | → | Core rights                              |

**Scope of application**

- BCEA gives effect & regulates the constitutional right to fair labour practices. To do this the Act:
  - Establishes & enforces basic conditions of employment
  - Regulates the variation of such conditions by way of vicarious mechanisms & within a framework of regulated flexibility
- BCEA applies to almost all employees. The fig employees are excluded from the Act
  - Members of National Intelligence Agency
  - National defence force
  - South African secret service
  - SA national academy of intelligence
  - Directors and staff of Comsec
  - Unpaid volunteers working for charitable orgs or orgs with a public purpose
  - People employed on vessels at sea

- Persons undergoing vocational training except to extent that a term/condition of their employment is regulated by another law
  - Independent contractors
- In addition to these, there are also partial exclusions: certain groups of people excluded eg senior managerial employees are excluded from chapter 2 of BCEA which regulates working time or employees who work for less than 24 hours a month are excluded from chapter 3 which regulates leave.

### Minimum conditions of employment

Exclusion- chapter 2 of BCEA which does not apply to senior management employees and sales staff who travel to the premises of customers and who regulate their own hours of work, employees who work less than 24 hours a month and those who earn more than R172,000 per year.

|                           | Regulation  | Additional comments   |
|---------------------------|---|---|
| Minimum working hours     | <ul style="list-style-type: none"> <li>• Maximum of 45 hours a week.</li> <li>• If an employee works 5 days a week or less, he/she may not work more than 9 hours a day.</li> <li>• If an employee works 6 days or more a week, he/she may not work not more than 8 hours a day (these hours include an hour lunch break).</li> </ul>   | <p>Employers are required to endeavour to reduce the maximum ordinary hours to 40 hours a week and eight hours a day, through collective bargaining and sectoral determinations (section 9(3) and Schedule 1 of the BCEA).</p> <p>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 (section 9(2)).</p> |
| Meals                     | <p>An employee is entitled to a meal interval of at least one hour after five hours of continuous work (section 14).</p>  | <p>The meal interval can, by agreement, be reduced to 30 minutes, or be done away with if the employee works fewer than six hours on a day.</p>   |
| Overtime                  | <ul style="list-style-type: none"> <li>• Maximum of 10 hours per week.</li> <li>• These may be increased to maximum of 15 hours a week by a collective agreement (section 10).</li> </ul>   | <p>An employee may work overtime only by agreement.</p> <ul style="list-style-type: none"> <li>• An employee working 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 particular day.</li> </ul>   |
| Sundays & public holidays | <ul style="list-style-type: none"> <li>• The employee has to be paid double the normal rate of pay (section 16).</li> <li>• If the employee <i>normally</i> works on Sundays, the employee has to be paid one-and-a-half times the normal rate.</li> </ul>  | <p>The same principle and payment scale apply to work performed on a public holiday (section 18).</p>   |
| Night work                | <p>Employee must be given:</p> <ul style="list-style-type: none"> <li>• an allowance, or</li> <li>• a reduction in hours of work, and</li> <li>• be provided with transport between the employee's place of residence and the workplace (section 17).</li> </ul>  | <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              | <p>An employee is entitled to:</p> <ul style="list-style-type: none"> <li>• a <i>daily</i> rest period of 12 hours between ending and recommencing work, and</li> <li>• a <i>weekly</i> rest period of at least 36 consecutive hours, which generally, has to include Sundays (section 15).</li> </ul>  | <p>The BCEA makes provision for daily and weekly rest periods.</p>  |
| Compressed work week      | <p>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:</p> <ul style="list-style-type: none"> <li>• the employee does not work more than 45 ordinary hours in any week,</li> <li>• more than 10 hours' overtime in any week, or</li> <li>• on more than five days in any week.</li> </ul> <p>Ordinary hours and overtime can be averaged over a period of up to four months in terms of a collective agreement (sections 11 and 12).</p> | <p>Averaging of working hours and overtime is allowed where hours are calculated over a period of time.</p> <p>This is to cater for peak periods in certain sectors, for example agriculture, where during harvest time employees may agree to extended hours of overtime to a maximum of 15 hours per week, but after harvesting time this will no longer be necessary.</p>                          |

## Leave

Exclusion: chapter 3 of BCEA which deals with leave does not apply to employees who work for less than 24 hours a month (section 19). Such workers will be entitled to the leave agreed upon between the employee and employer

|                             | Regulation   | Additional comments  |
|-----------------------------|--|--|
| Vacation leave              | A minimum of 21 consecutive (calendar) days' paid vacation leave (excluding public holidays) per year for most employees. This would amount to 15 working days (section 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, or</li> <li>on a date that a medical practitioner or midwife certifies that it is necessary either for the employee's health or her unborn child (section 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. It is unpaid leave. Remember that the BCEA sets the minimum, but the parties can also agree to more favourable terms, for example, paid maternity leave. If an employee is not paid, she may claim from the UIF. |
| Family responsibility leave | An employee is entitled to three days' family responsibility leave for every 12 months worked (section 17). Family responsibility leave may be taken when an employee's: <ul style="list-style-type: none"> <li>child is born or is sick, or</li> <li>in the event of the death of the employee's spouse or life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.</li> </ul>  | Only for employees who have worked for longer than four months and who work at least four days a week. The interpretation is strict. For example, no provision is made for leave to be taken in the event of the death of in-laws.   |
| Sick leave                  | Six weeks' paid sick leave in every three-year cycle worked (section 22). If an employee has been absent from work for more than two consecutive days or on more than two occasions in an eight-week period, the employer may request the employee to submit a medical certificate (section 23). Such a certificate may be issued by a medical doctor or a person registered with a professional council.  | A leave cycle is calculated as the number of days that an employee would normally work during a six-week cycle. If an employee works five days a week, he/she would work 30 days in six weeks and that would entitle him/her to 30 days' sick leave in three years.  |

## Wages

- No law stipulates minimum wage for employees however collective agreements in bargaining councils and ministerial and sectoral determinations may establish min wages. This will bind parties or they can agree on more favourable terms
- Employees must be paid in South African currency daily, weekly, fortnightly or monthly in cash or direct deposit into account
- Employer must provide in writing info regarding period for which the payment is made, the amount of pay, amount and reason for any deductions made and the calculation of the pay in general

## Notice periods

- A contract of employment for an indefinite period may be terminated by either party by giving notice of intention to terminate the contract  
Notice must adhere to the required notice periods in the contract  
If contract does not make provision for notice period, BCEA provides min periods which parties must comply with  
BCEA provides that contract must be terminated in writing and by way of a notice period of not less than:
  - 1 week if employed for six months or less
  - 2 weeks if employed for more than six months but not more than a year
  - 4 weeks if employed for one year or more or is a farm or domestic worker who has been employed for more than six months

Notice periods may not be shortened but the period of 4 weeks may be reduced by collective agreement  
BCEA allows employer to pay employee an amount equal to the salary the employee would have earned during the notice period instead of requiring employee to work such period.

## Severance pay

- When an employee is dismissed based on operational req of employer in terms of LRA, employee must be paid severance pay equal to at least 1 week's pay for each completed year of continuous service.  
Eg. 6 years of work = 6 weeks of pay

If an employee unreasonably refuses to accept an offer of alternative employment, he will then not be entitled to severance pay

### Certificate of service

- Employer must provide certificate of service when employment comes to an end  
Certificate may state date of commencement, job description, remuneration at time of termination  
Reason for termination may be stated only at employees request

### CHILDREN AND FORCED LABOUR

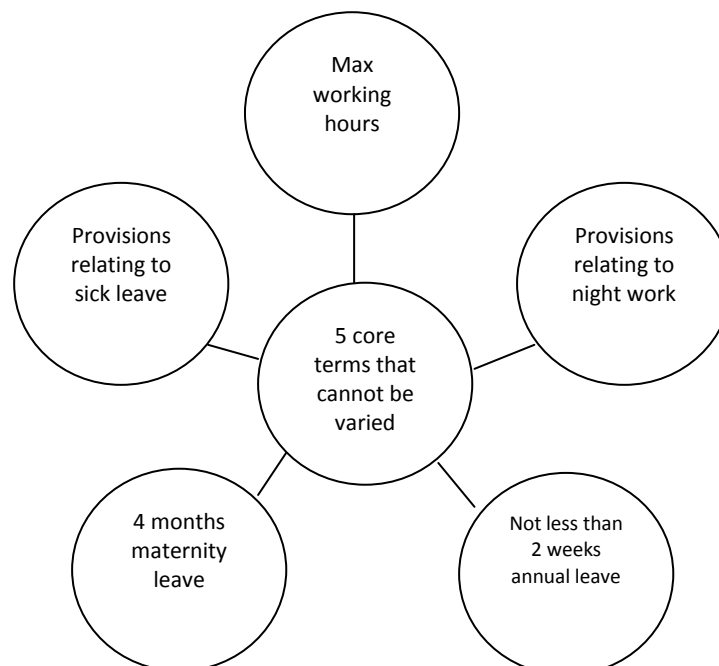
- BCEA prohibits employment of children under 15 (min school leaving age). Contravention constitutes a criminal offence  
Children under 15 can perform in advertising, sporting, artistic, cultural activities only in regulations by minister or ministerial or sectoral determination. These regulations place restrictions on such employment  
Eg. Sectoral determination 10: Children in the Performance of Advertising, Artistic and Cultural activities provides that a permit must be obtained from the DoL to employ children in the circumstances. Further:
  - Remuneration must be paid to parent or guardian of child
  - Max hours of 4 hours work per day for child aged over 10 years. Max 3 hours a day for children under 10 years
  - Rest periods must be provided after 2 hours continuous work for children over 10 years or after 1.5 hours work for under 10 years
  - Nutritious food and drink must be provided
  - Safe areas must be provided for them to rest and play
  - Safe transport must be provided between child's home and workplace
- Forced labour is prohibited in BCEA. Contravention is a criminal offence

### Enforcement of the BCEA

**Courts** –Labour Court has concurrent jurisdiction with civil courts to hear and decide any matter concerning BCEA such as making compliance orders and issuing fines

**Inspectors**- BCEA provides for appointment of labour inspectors to monitor and enforce compliance with BCEA and other employment laws. Inspectors may also enter workplace, require person to disclose relevant information, question employers & employees and inspect documents and records  
They may obtain written undertaking from employer in default that they will comply with provisions of BCEA. If employer refuses or neglects to comply with such undertaking, a compliance order may be issued. If employer still does not comply an order may be obtained from the Labour Court.

**Variation of basic conditions**- BCEA allows for some terms & conditions of employment to be varied. Core terms cannot be varied at all.



Except for these core terms, the BCEA allows for changing, replacing or excluding other rights by way of the following:

- Variation by way of collective agreement  
A collective agreement betw trade unions and employers may change conditions of work provided that such collective agreement is consistent with the purposes of the Act. It may replace or exclude a basic condition of employment only to the extent permitted by the Act or a sectoral determination
- Variation by way of ministerial determination  
A ministerial determination primarily replaces or excludes basic min conditions of employment in respect of any category of employees or category of employers but does not set min wages. Such determinations may vary max ordinary weekly working hours if:
  - \* the determination has been agreed to in a collective agreement
  - \* the operational req of the sector necessitate this
  - \* the majority of employees are not members of a registered trade unionThe determination may be relate to ordinary hours of work, overtime, meal intervals, daily & weekly rest periods and annual leave bust must on the whole be more favourable to employees than those conditions set out in the BCEA.  
The determination exists for the special public works programme, small businesses and the welfare sector which are typically non unionised. These determinations have not introduced min wages
- Variation by way of a sectoral determination  
Is another way of establishing conditions of employment by the Minister ito BCEA. It primarily establishes & regulates min wages, but could also include other conditions of employment. Can only be made after an investigation has been done by Director-General of the DoL at initiative of Minister or as requested by an employer or employees organisation into a particular sector or area and after consideration of representatives by the public & preparation of a report. The Employment Conditions Commission (ECC) must advise Minister on a range of factors which will impact on the specific sector and area such as:
  - \* the ability of employers to continue to carry on their businesses successfully
  - \* the operation of small, medium, macro and new enterprises
  - \* the cost of living
  - \* the alleviation of poverty
  - \* inequality in wages
  - \* the likely impact of the determination on current and future employmentIt may relate to ordinary hours of work, overtime, meal intervals, daily & weekly rest periods, annual leave, but terms must be more favourable to employees than req by BCEA  
It may not reduce protection for night work & maternity leave  
It may vary ordinary hours of work only if:
  - \* the determination has been agreed to in a collective agreement
  - \* the operational req of the sector necessitate this
  - \* the majority of employees are not members of a registered trade unionMin wages & cond set out in it will apply to the contract of employment bet parties.  
Eg of sectoral determinations are found in farming, private security, contract cleaning, hospitality industry, taxi & domestic worker sectors (some have diff min wages for urban & rural area & on a sliding scale). These are sectors that are not well organises & not capable of effective collective bargaining. Min wages in these determinations are generally amended annually to keep abreast of inflation.

TB Activ- 1. Themba is employed by Jacks Stationery CC. Ito his written contract of employment he is entitled to 24 consec days leave per year. The company notifies him in writing that he will only be entitled to 21 days leave in future as per the BCEA. Which is most correct?

- a) Themba is indeed only entitled to 21 days leave as per BCEA
- b) Themba and the company will have to renegotiate the employment contract
- c) Themba will be entitled to 24 days leave as provided by his written contract of employment
- d) The BCEA does not apply to Themba

*a is inaccurate. BCEA provides that a basic condition of employment constitutes a term of any contract of employment unless the contract contains a term that is more favourable to the employee. Ito his contract he is entitled to 24 days leave which is more favourable than the prescribed 21 days in the BCEA. He is therefore entitled to 24 days.*

*b is inaccurate. Terms & cond can only be changed if the employee agrees*

*c is most accurate*

*d is inaccurate. BCEA applies to all employees & employers (see notes for exceptions)*

2. Will a female employee be entitled to take family responsibility leave when her husband is ill?

*No, only in the event of sickness of a child can an employee be entitled to fam respon leave*

3. Catherine works as a clerk for Ezekiel's Cell Shop. She works from 8am till 4pm Mon- Fri. Her contract makes no provision for overtime. No trade union is active in the workplace. Her manager requests her to work overtime next Mon, Tues & Wed for 5 hours each day at no extra pay. She does not agree and wants to be paid a special rate for the overtime. What are her rates of pay and other terms & cond for overtime. *Since her contract does not provide for overtime, the terms & cond of BCEA will apply which are that overtime may be worked only by agreement between parties and not more than 10 hours per week (though collective agreement may increase it to 15 hours per week but only for 2 months in any 12 month period) and must be remunerated at one and a half times the normal rate of pay*  
*If she agrees to work the overtime it will amount to 15 hours for that week which is in excess of the BCEA allowance. No collective agreement applies as there is no trade union involved & therefore no possibility that hours might have been extended in this manner. Although her manager may request her to work overtime, an employee may only work for a max of 10 hours per day and hours per week & only if she agrees to it. In the circumstances if she wants to work she could work for two additional hours on Mon, Tues & Wed at the rate of 1.5 times her normal rate.*

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## **STUDY UNIT 5- AUTOMATIC UNFAIR DISMISSALS**

Activ- Look at the following examples and decide whether there has, in fact, been an automatically unfair dismissal:

1. Righteous, employed by Cheap Houses CC, is an active member of the Building Workers Union (BWU) and is often very vocal at union meetings. Righteous and Lucky both arrived late for work on two occasions: Righteous has been attending trade union meetings; Lucky was late due to family commitments. Righteous is dismissed, whereas Lucky is given a warning. Was the dismissal of Righteous automatically unfair?

*The dismissal would probably be automatically unfair.*

2. Desperate has been looking for work for several months. She is eventually granted an interview with Comfortable Clothing (Pty) Ltd, a small business enterprise, run by overseas investors, which manufactures clothing for the masses. The clothing industry has suffered financially in recent years because of deregulation of the industry. A manager of Comfortable Clothing offers Desperate a job, on condition that she does not join a trade union, and that she accepts a salary which may not be in line with industry specifications. Desperate agrees to these conditions in order to get the job. Three months later, however, under pressure from the union, she joins the Clothing Workers Union (CWU). Comfortable Clothing finds out and dismisses Desperate. Would Desperate's dismissal be automatically unfair?

*Desperate's dismissal is a contravention of section 5 and would therefore be automatically unfair.*

3. Junior started off his working career in the Personnel Department of a big corporation. He was a member of the Staff Association and then became a member of the newly established workplace forum. Shortly after the new workplace forum was established, Junior was promoted to an assistant manager in the Personnel Department. His new job entitled him to hire and fire employees, and to attend and participate in policy meetings. He was asked to resign from the workplace forum. Several months later, Junior was involved in foreign exchange fraud, and was dismissed for misconduct. Junior pleaded that his dismissal was automatically unfair because it was related to his previous membership of the workplace forum. Was this an automatically unfair dismissal?

*Junior's dismissal would not fall within the category of automatically unfair dismissals because he is not an employee in terms of section 78. He was dismissed because of misconduct. Junior's dismissal may be fair or unfair depending on all the circumstances of the case.*

Activ- Mashudu is employed as a sales assistant by Carmen Clothing Company. Her contract provides that she will be on probation for a period of ten months. Mashudu did not disclose the fact that she was pregnant when she commenced with her employment. Six months after her employment commenced Mashudu gave birth to a baby boy. Mashudu called her employer and advised him that she would not return to work instantly as she will be on maternity leave. Her employer advised her that as she was still on probation, her contract had been terminated.

Was Mashudu dismissed by her employer? If yes, was her dismissal fair under these circumstances? *Mashudu will allege that she was dismissed because of her pregnancy, which amounts to an automatic unfair dismissal. From the facts it can be assumed that it will be impossible to prove that the dismissal was for a different reason.*

*Remember to also refer to the findings of the court in Mashava v Cuzen & Woods Attorneys which had similar facts. The employee did not disclose her pregnancy during her probationary period and the employer dismissed her when she discovered the employee's pregnancy. The employer alleged that it was not because of the pregnancy but because the employee was deceitful in concealing her pregnancy and*

*that was the real reason for her dismissal. The Labour Court stated that the employee must prove that the employer knew of her pregnancy and that the dismissal was possibly for this reason. It would be sufficient if the employee produced evidence to raise the issue of her dismissal being related to her pregnancy. The Court further held that the employee was not obliged to disclose her pregnancy during her probationary period and that the true and principal reason for the employee's dismissal was the fact of her pregnancy.*

- Activ- In which **one** of the following cases will a court **most likely** accept the employer's argument that its discrimination was fair because of the "inherent requirements of the job"?
1. A nursing agency who provides live-in frailcare at the homes of elderly patients, refuses to place a male nurse on their books at the home of a female patient.
  2. An employer has a policy that no pregnant women may work in its battery manufacturing business to protect their unborn children from harmful chemicals.
  3. An airline company employs only female flight attendants, because most of its customers are male and the customers like to be served by women.
  4. A company that sells swimming pool cleaner requires their marketing agent to have a university degree (any degree).
  5. A company who wants to appoint someone on contract for two years refuses to appoint a pregnant woman as a Human Resources Manager, because she will be absent from work, and the job needs continued presence at work.

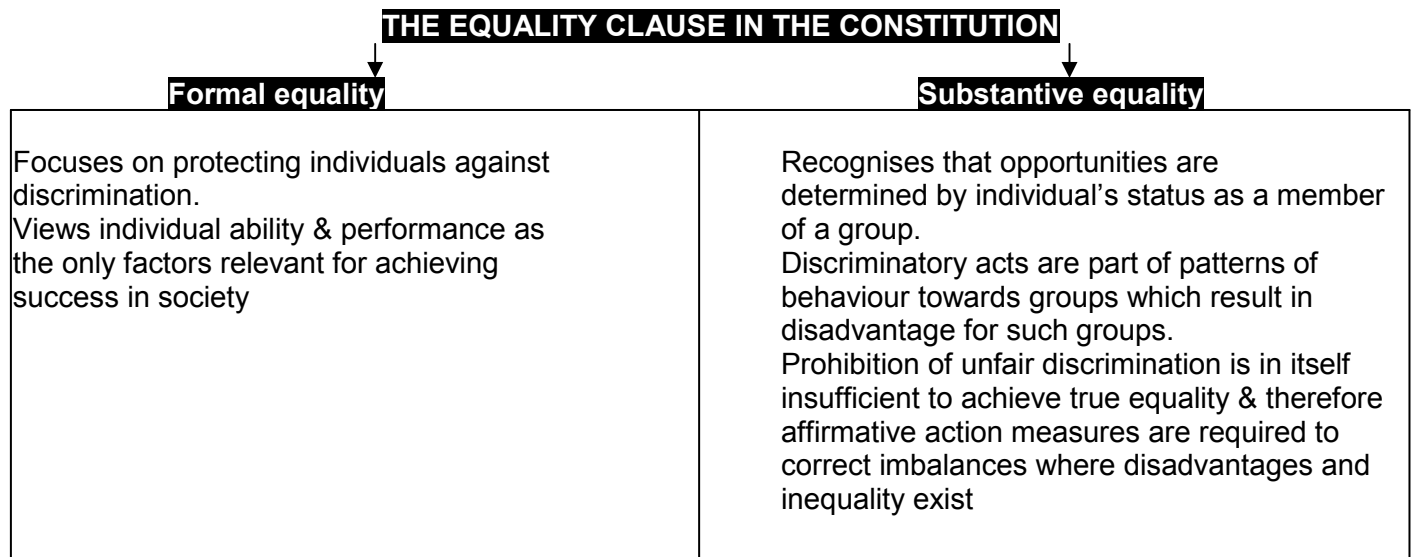
*Statement 1 is the correct answer. Statement 2 is incorrect. Safety concerns may provide an acceptable excuse in certain circumstances. The prohibition contained in statement 2 is however too wide. The employer provides that no pregnant women may work in its battery manufacturing business. He could have narrowed it down to for example the factory. Pregnant women may still then be working in the office or cafeteria etc. Statement 3 is incorrect. The preferences of clients or customers are not regarded as a valid inherent job requirement. (Diaz v Pan American World Airways Inc (311 F. Supp 559). Statement 4 is incorrect. The university degree criteria will amount to indirect discrimination. It is an excessively high qualification required for the particular job and is not reasonably necessary for normal operation of the business. Statement 5 is incorrect. In the Labour Court decision of Whitehead v Woolworths it was decided that the fairness or unfairness of discrimination cannot be measured against the profitability or efficiency of the business enterprise.*

#### TB- **EMPLOYMENT EQUITY ACT (EEA)**

- There is economic and social inequality in the workplace resulting from past discriminatory laws, policies & practices. Discrimination was implemented by laws like:  
Industrial Conciliation Act which excluded black people from collective bargaining  
Mine & Works Act which reserved jobs for Whites only  
Wage Act which sanctioned diff wages based on race & sex  
Public Service Act which authorised discrimination based on sex
- Limited training was offered to black people & females which placed them at a skills disadvantage. Disable people could not easily enter the workplace
- Discrimination has led to the disadvantage for these groups.
- Equality was embraced in the 1990's under the new constitutional order in Section 9:  
(2) Equality includes the full & equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative & other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.  
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language & birth  
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds ito subsection (3).
- Constitution acknowledges SA's discriminatory past & holds the country's founding values to be human dignity, the achievement of equality, advancement of human rights & freedoms & non-racism & non-sexism. Wording of the Constitution that equality still has to be achieved indicates that is has been embraced as a goal.
- Section 9 prohibits unfair discrimination and authorises affirmative action.



## Formal & substantive equality



### Differentiation & discrimination

- There is a significant distinction betw differentiation and discrimination.  
Differentiation in the sense of treating people differently occurs frequently in the workplace eg when people apply for posts & when employees apply for promotion. This form is acceptable as is based on valid grounds and serves a legitimate purpose. Similarly differentiation in pay levels does not constitute discrimination if based on acceptable considerations like responsibility, expertise & skills.  
Discrimination is a particular form of differentiation based on unlawful grounds even if there isn't an intention to discriminate

### Direct & indirect discrimination

- Direct discrimination is easier to determine. It occurs is someone is clearly treated differently because of certain characteristics eg race or gender. Eg of this type are an employee being paid less because she is female or not being promoted because of a disability, different religion or being divorced.
- Indirect discrimination occurs when criteria that appear to be neutral negatively affects a certain group disproportionately eg women or Hindu people.  
This type is harder to detect and is more easily disguised. Eg. A requirement that a candidate must have a deep base voice. In this case men will qualify more than women. Unless this criterion can be justified by the job requirements it will amount to indirect discrimination

### Specified & unspecified grounds of discrimination

- EEA prohibits unfair discrimination in any employment policy or practice on a non-exhaustive list of 19 grounds. This means it is possible that other grounds for discrimination not contained in the list can exist. The list of prohibited grounds in the EEA is identical to the constitutional list but EEA lists 3 additional grounds: family responsibility, HIV status, political opinion. What the specified grounds in the lists have in common is the potential to demean people these grounds often relate to an individuals personal attributes like biological characteristics (race, age, sex) or their associational, intellectual or religious beliefs.
- Discrimination cases are most often based on one or more of the specified grounds like race, conscience, sex/gender, pregnancy, age, birth, political opinion, family responsibility, sexual orientation, religion, language, HIV.
- If an employee alleges discrimination on an unspecified ground, the court will use dignity to determine if the unspecified ground has the potential to form the basis for discrimination eg. Citizenship is not specified as a ground on which discrimination may be found but it has been shown to be an unspecified ground for discrimination.
- There are less discrimination cases based on an unspecified ground. Some eg are: qualifications, tertiary teaching & research experience, professional ethics, mental health/illness, political or cultural affiliation & being a parent

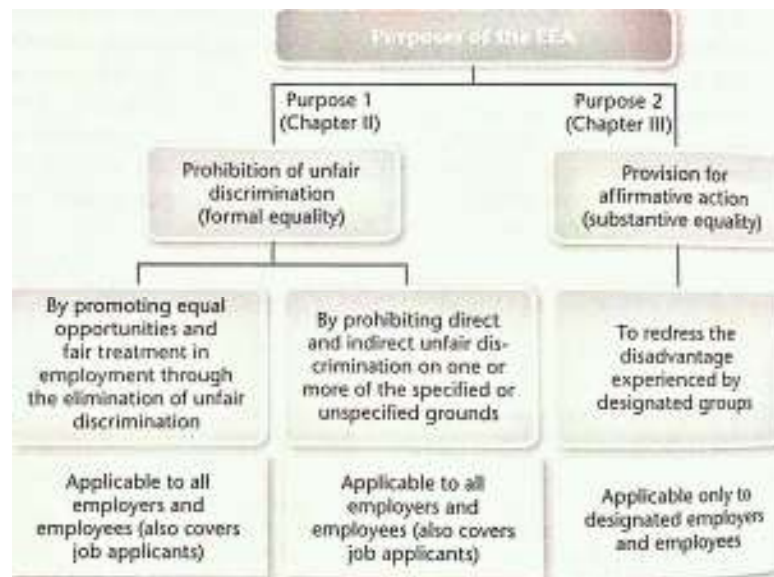
### Purposes of the EEA

- EEA applies to all employers as far as prohibition of unfair discrimination is concerned but as far as the application of affirmative action is concerned it applies only to designated employers.  
It specifically excludes flg categories of employees:
  - Members of the National Intelligence Agency
  - Members of National Defence Force
  - Members of SA Secret Service
  - Members of SA National Academy of Intelligence

➤ Directors & staff of Comsec

- It gives effect to the equality provisions of Constitution & promotes achievement of equality in workplace
- It provides foundation for non discrimination & affirmative action in employment law
- Is not the only equality legislation impacting employment relationship. Others are Promotion of Equality & Prevention of Unfair Discrimination Act (PEPUDA), LRA & Broad Based Black Economic Empowerment Act (BBEE). These also deal with equality eg:

PEPUDA goes further than EEA & has its purpose promoting equality & preventing unfair discrimination in all spheres of society. It does not apply to persons defined as employees to whom the EEA applies. Workers excluded from EEA like independent contractors can rely on PEPUDA.



- LRA regards dismissal on ground of discrimination as automatically unfair with severe penalties
- BBEEA to promote economic transformation & enable meaningful participation of black people in economy Aimed at achieving substantial change in racial composition of ownership & management structures in skilled occupations of existing and new enterprises
- EEA follows constitution in that it subscribes to both formal & substantive equality. It has a 2-fold purpose as shown in above diagram.

### First purpose of EEA- Prohibition against unfair discrimination

#### - Establishing unfair discrimination

Sec 6(1) of EEA provides that no person may unfairly discriminate against an employee in any employment policy or practice. If an employee wishes to pursue a claim for unfair discrimination then the enquiry before the court will consist of the flg:

Stage 1 of an unfair discrimination enquiry- concerned with establishing a factual foundation for alleged differentiation & grounds on which it occurred. Eg A Muslim employee is not nominated for training while others have been. He must establish a factual foundation for eg by producing his requests for training & those of other successful applicants. This will lay the basis for the claim.

Stage 2 of an unfair discrimination enquiry- a link must be established betw the differentiation & the alleged (specified or unspecified grounds). The latter must be the reason/cause for the differentiation. Eg. the Muslim employee must now show that his religion is the reason he is denied training. Eg, he must establish the fact that all other co-employees have been sent on training while his application was declined repeatedly without good reason. Once such a link is established the differentiation becomes discrimination & is presumed to be unfair.

Complainant must show that the specified or unspecified grounds is the reason for the differentiation.

Showing such link places a difficult burden on complainant & complainant must then establish a prima facie of discrimination. This is more than a bold averment or allegation.

Stage 3 of an unfair discrimination enquiry- employer will get opportunity to show the alleged unfair discrimination was indeed fair. Eg, employer can show that Muslim employee was not sent on training because there is a minimum req of 3 years practical experience for it which all other employees have met. The difference in treatment wrt the training will be justified.

#### - Justification grounds for discrimination

Sec 6(2) provides 2 grounds of justification for allegedly unfair discrimination: affirmative action & inherent job requirements

Affirmative action- measures have to be applied by designated employers to ensure suitably qualified people from designated groups have equal employment opportunities & are equitably represented in all occupational categories & levels in their workplace.

| Designated groups   | Designated employers   |
|---|--|
| <ul style="list-style-type: none"> <li>• Black people</li> <li>• Women</li> <li>• People with disabilities</li> </ul> <p>The generic term 'black people' is defined to include Africans, Coloureds and Indians, and the group also includes South African citizens of Chinese descent.<sup>44</sup></p> | <ul style="list-style-type: none"> <li>• Larger enterprises, with 50 or more employees</li> <li>• Employers who employ fewer than 50 employees, but have an annual turnover specified in Schedule 4 of the EEA</li> <li>• Municipalities</li> <li>• Organs of state such as the Airports Company of South Africa (ACSA), the Central Energy Fund, the Development Bank of South Africa, Eskom, the SABC, the SA Post Office Limited and Telkom SA Limited</li> <li>• Employers that are designated as such in terms of a collective agreement</li> </ul> |

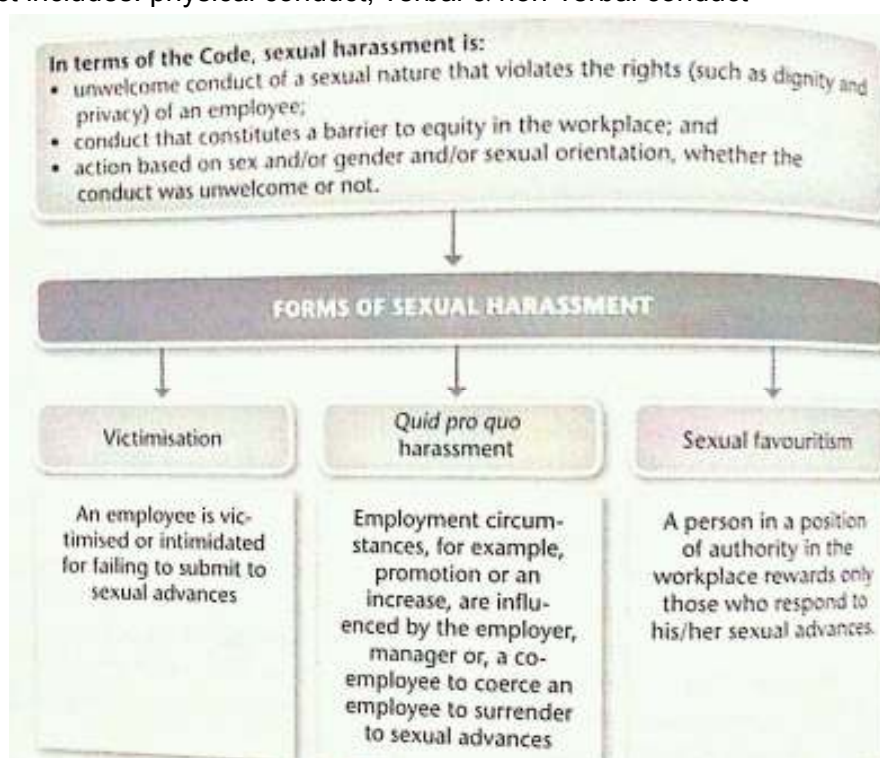
If employer uses affirmative action as a defence against unfair discrimination it must be remembered that affirmative measures must be consistent with purposes of EEA.

Inherent requirement of job- if the job in essence requires a certain attribute it will not be unfair to exclude people that attribute. Eg. It is an inherent req that a sales assistant at a lingerie shop is female. The exclusion of males for this job will therefore not amount to unfair discrimination.

EEA does not define inherent requirement of the job, court have interpreted the concept in a narrow manner in that only req that cannot be removed from the job description (without changing the nature of the job) will be regarded as an inherent req. Eg. It is not an inherent req that a bus driver must be male or a firefighter may not be gay or that a primary school teacher must be young and female.

#### Other specific forms of discrimination prohibited

Harassment as unfair discrimination- any type of harassment is unfair discrimination in the EEA but the term itself is not defined. Most common form in workplace is sexual harassment and is a serious transgression. Such conduct includes: physical conduct, verbal & non-verbal conduct



✚ An example of sexual harassment is found in case **UASA obo Zulu & Transnet Pipelines**- court came out strongly against sexual harassment as having no place in a civilised society. A male employee repeatedly sexually harassed a co-employee for over a year. He verbally abused her by calling her his wife & made repeated demands on her to have sex with him. She repeatedly made it clear to him that his conduct was unwanted and unwelcome. After an assault during which he lifted her dress & attempted to have sex with her (witnessed by a co-employee) the harassed worker reported him. After a disciplinary enquiry the employee was dismissed. He did not deny sexual harassment & showed no remorse. He maintained that such conduct was his culture. Arbitrator held that certain forms of misconduct were so serious that rules relating to them did not have to be spelt out to employees. Also held that it was not part of that particular culture for a man to

demand sexual favours from colleagues. Even if it were found to be part of their culture, such conduct had no place in a civilised society. Dismissal was upheld.

✚ A claim for sexual harassment can be based on 3 possible legal bases as in **Media 24 Ltd & another v Grobler**. Grobler was harassed by her manager. Her complaints were ignored & she then resigned. Court found she was able to claim on these 3 separate causes of action:

- Vicarious liability
- The EEA
- The LRA (she was automatically unfairly dismissed)

EEA requires employee who alleges any contravention of the Act to report it to the employer. Who must then consult all relevant parties & take necessary steps to eliminate such conduct. Employee will be deemed liable if employer:

- Did not follow this procedure
- Cannot prove that it did all reasonably practicable to ensure the employee would not contravene EEA

✚ Eg in **Ntsabo v Real Security** – employees supervisor sexually harassed her by suggesting they have an intimate relationship, touching her private parts, making unwanted sexual proposals & threatening her with a report about bad work performance if she did not oblige him. This was reported to her manager who failed to deal with it. She then resigned as situation became intolerable. Labour Court after a finding of sexual harassment awarded employee compensation for unfair dismissal ito LRA & damages ito EEA for future medical costs & general damages. Award was made on basis that employees supervisor had contravened EEA & their failure to deal with allegations constituted unfair discrimination under the Act. Employer had failed to do all that was reasonable practicable to ensure that supervisor would not contravene the Act & was therefore liable.

- EEA also states every employer must take steps to eliminate unfair discrimination in any employment policy or practice. Employer should know business policies/practices. & must do what is necessary to eliminate existing unfair discrimination to promote equal opportunity.

To prevent further harassment, the Code: Sexual Harassment makes it compulsory for employers to develop sexual harassment policies including the flg:

- Sexual harassment is a form of unfair discrimination
- Sexual harassment in the workplace will not be permitted or condoned
- Formal & informal procedures may be used to address a complaint in a sensitive, efficient & effective way
- Confidentiality is of the utmost importance in dealing with these allegations
- It is disciplinary offence to retaliate against an employee who in good faith lodges such a complaint
- Disciplinary sanctions may be imposed on a perpetrator including warnings for minor instances or dismissal for continued minor instances after warnings or for serious instances

#### Testing employees and applicants for employment-

EEA regulates testing. May be used to evaluate applicants to determine if they are suitable for the job or to evaluate existing employees. Act distinguishes betw medical testing & testing in general & HIV/Aids testing specifically. Also regulates psychological & other similar assessments. Such testing does not in itself constitute discrimination but the manner in which it is carried out may be discriminatory.

- Medical testing: is prohibited unless legislation permits / requires it or it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or inherent req of a job
- Psychological testing: is prohibited unless scientifically shown that test used is valid & reliable, can be applied fairly to all employees & is not biased against employee or group
- HIV testing: testing to determine employees HIV status is prohibited unless testing is justifiable by Labour Court. Act does not stipulate grounds upon which Labour Court may authorise the testing. Act only prescribes conditions court can impose when granting an order ito which the HIV testing of an employee is authorised. In **Joy Mining Machinery v NUMSA** the flg factors were stipulate as circumstances under which HIV testing would be allowed:
  - To prevent unfair discrimination
  - If employer need HIV testing to determine extent of HIV in the workplace to place itself in a better position to evaluate its training & awareness programmes & to formulate future plans based on the outcome of the tests
  - If employer needed to know prevalence of HIV in the workplace to be pro-active in its prevention amongst employees & to treat symptoms & plan contingencies including fair distribution of employee benefits, medical aid & training of replacement labour
  - If medical facts indicated the need
  - If employment conditions req testing

- If social policy req testing
- If the inherent req of the job necessitated it
- If particular categories of employees/jobs req such testing

EEA is unclear if employee must approach Labour Court for authorisation to test if testing is done voluntarily & anonymously but in **Irvin & Johnson v Trawler Fishing**- courts sanction was held unnecessary if testing was voluntary & anonymous as there could be no unfair discrimination under these circumstances.

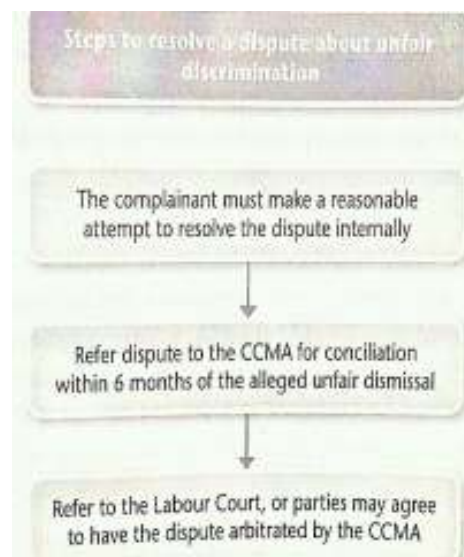
### **Equal pay for equal work or work of equal value**

EEA does not expressly regulate equal pay for equal work.

Labour Court has held that remuneration is an employment policy or practice. Paying an employee less than another for performing the same/similar work based on a specified or unspecified ground constitutes less favourable treatment. Therefore any claim of equal pay for work that is same/similar may be brought to EEA. Same principle applies to equal pay for work of equal value.

In **Mangena & others v Fila SA** – Shabalala a black male employee alleged he was paid less than McMullin a white female for doing the same work based on race. Court considered ILO Convention 100 on equal pay betw sexes & extended to include other specified or unspecified grounds such as race. However no factual foundation was laid in relation to the similarities of the work done by Shabalala & McMullin. Shabalala's allegations were found to be speculative. He was an admin clerk providing price stickers while McMullin did a sale on consignment job involving large clients. Her job req judging & taking decision while his was an elementary mechanical job. Shabalala failed to establish a prima facie case.

**Resolution of unfair discrimination disputes-** the dispute must be referred to CCMA for conciliation with 6 months after alleged discrimination occurred. Referring party must satisfy CCMA that a reasonable attempt was made to resolve the dispute prior to referral. Such reasonable attempt may be interpreted to mean having at least exhausted the internal grievance procedures. If conciliation is unsuccessful dispute must be ref to Labour Court (LC) unless parties agree to have dispute determined by arbitration.



LC has wide discretion to determine dispute eg, it may grant compensation or issue interdict prohibiting employer from continuing with its discriminating action.

### **Second purpose of the EEA: Affirmative Action**

#### **Outline of affirmative action**

Chapter 3 of EEA addresses second purpose of Act, to redress past disadvantage and achieve employment equity by implementing affirmative action measures. It req aa measures must be: 'designed to ensure suitably qualified people from designated groups have equal employment opportunities & are equitably represented in all occupational categories & levels in workforce of a designated employer'

These measures are part of broader strategy to promote achievement of equality as per Constitution.

These measures must be designed to attain employment equity. LC confirmed aa measures must be applied fairly & rationally implying that when designated employers reach this goal, appointments & promotions on the basis of aa will be unfairly discriminatory.

AA is a tool to use temporarily to achieve equitable representation in workplace. In **Minister of Finance v Van Heerden & another**, the CCourt held aa measures that properly fall within req of Constitution are presumed not to be unfair. Held that for aa measures to be rational it must:

- Target people or categories of people who had been disadvantaged by unfair discrimination
- To be designed to protect or advance such people or categories of people
- Promote the achievement of equality

Only aa measures that are implemented with reason & designed as req by EEA will be acceptable to the courts. AA measures do not create a right to be appointed or promoted to a post. They can only be used as a defence against a claim for unfair discrimination.

### - **The contents of affirmative action**

AA measures must be designed to:

- Identify & eliminate employment barriers that adversely affect people from designated groups
- Further diversity in workplace
- Reasonable accommodate (ie. modify or adjust a job or working environment) people from the designated groups to enable them to have access to and advancement in employment.
- Ensure equitable representation of suitably qualified people from designated groups
- Retain & develop people from designated groups
- Implement appropriate training measures incl skills development

The measures implemented by employers may include preferential treatment (such as targeted recruitment) & numerical goals but not quotas (which req attainment of fixed numbers over specified period).

EEA does not req designated employers to implement decisions concerning employment policies or practices that would establish absolute barriers to prospective or continued employment or advancement of people who are not from the designated groups. This implies some measure of protection for people who belong to a non designated group.

### - **Designated employers**

Only designated employers need to apply aa measures. Those who don't fall within the category of designated employer may voluntarily comply with chapter 3 of EEA which regulates aa. An employer who deliberately takes steps to avoid becoming a designated employer is guilty of an offence.

Every designated employer must implement aa measures for people from designated groups to achieve employment equity. Employer has specific duties in designing an aa plan:

- Consult with representative trade unions & their employees or representatives nominated by them. The interests of the employees from across all occupational categories & levels at workplace from both designated & non-designated groups must be represented when consultation takes place
- Disclose relevant information to consulting parties to allow for effective consultation (provision of section 16 of LRA dealing with disclosure of information apply)
- Collect information & analyse all its policies & procedures to identify employment barriers that adversely affect people from designated groups. A profile of workforce in each occupational category & level must reflect the degree of under-representation.
- Prepare & implement an employment equity plan incl the:
  - 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 & evaluate the implementation of the plan
  - Internal procedures to resolve any dispute about the plan
  - People in the workforce responsible for monitoring & implementing the plan

Reports to be made to Director-General of the DoL on progress made (annually in case of employers with more than 150 employees & bi-annually by employers with less than 150 employees)

Other req with which designated employers must comply include:

- Employer must display summary of EEA in workplace
- Provide copy of employment equity plan to employees
- Submit statement to ECC on its employees income in each category of workforce with a view to reduce disproportionate income differentials

This is to enable ECC to make recommendations on income differentials to the Minister. Failure to comply with above duties may lead to fines and state contracts refused or cancelled.

### - **Beneficiaries of affirmative action**

Designated groups- include black people, women, people with disabilities. Generic term 'black people' includes Africans, Coloureds, Indians, SA citizens of Chinese descent

EEA silent on whether SA citizenship is req of members of designated groups to benefit from aa, amendments to regulations ito Act have refined definition of designated groups to apply to SA citizens only. Foreigners cannot benefit from aa. Lack of skills amongst SA poses problems to fill jobs with members of designated groups.

Issue of whether a beneficiary of aa measures must be personally disadvantaged or membership of a designated group is sufficient was resolved in **Minister of Finance v Van Heerden**. Held that personal past disadvantage was not req because apartheid categorised people in groups & consequences resulted from

group membership without any reference to circumstances of individuals. The system meted out disadvantages & afforded advantages according to a person's membership of a group.

Further regulations to EEA give guidance regarding classification of employees to determine the group a person belongs to. Provides for self classification by employees (voluntary action) by completing Form EEA1. Courts established notion of degrees of disadvantage.

In **Fourie v Provincial Commissioner of SA Police Service**, - LCourt found there were diff degrees of disadvantage betw black people and white women in workplace. The applicant (highly qualified white woman) complained she was unfairly discriminated against by being refused promotion. Court accepted that white women had been discriminated against under apartheid. Held that degree of discrimination was lower than suffered by African people who bore the brunt of Apartheid. Held that in deciding on degrees of disadvantage, must consider:

- SA history
- Imbalances of the past
- Fact that apartheid system was designed to protect white people
- Fact that Black, particularly African employees suffered brunt of discrimination
- Purposes & objectives of EEA

The fact that applicant was not promoted found to be rational & fair in the circumstances as there were no black officers at the police station in question & the numbers for white women had already been exceeded, therefore fair that it was a black person who was promoted instead of the complainant.

Since 1999 when aa was implemented, race has been favoured over gender & disability & African over Coloured & Indian.

Argued that racial basis fir redress strategy of aa be re-evaluated since SA has been left with a class structure largely racially defined.

May also be strategic advantage to use class or socio-economic factors rather than race as basis of aa. There is a degree of willingness by white SA to redress inequalities, framing it exclusively in racial terms in not the best way of securing such redress. Redress will be least likely to face resistance if measures to redress racial inequities can be phrased as anti-poverty measures rather than as measures for reversing racial power & privilege even if this is ultimately the goal.

Meaning of suitably qualified- only members of designated groups who are suitably qualified can benefit from aa. EEA rejects tokenism. Ito Act, whether a person is suitably qualified depends on their:

- Formal qualifications (degrees & diplomas)
- Prior learning (diplomas not completed)
- Relevant experience
- Capacity to acquire within reasonable time the ability to do the job (potential of the person)

When determining if a person is suitably qualified for a job, the employer must review all these factors & determine if person has ability to do job due to any of these factors.

In determining if one is suitably qualified, employer may not unfairly discriminate against someone solely on ground of that person's lack of experience.

Though definition of suitably qualified appears wide & flexible, people not suitably qualified cannot be considered for aa.

### - **Monitoring and enforcement of affirmative action**

Chapter V of EEA provides for informal & formal ways of enforcing aa provisions of Act. Employees, trade union reps may bring contraventions to attention of employer, trade union labour inspector, Director-General of DoL or Commission for Employment Equity (CEE) established by EEA.

Act is enforced by labour inspectors by obtaining written undertakings from employers that they will comply; by issuing compliance orders; requesting reviews by Director-General or by DG referring cases of persistent non compliance to LC.

LC has wide powers incl orders req compliance with compliance order issued; ordering compliance with any provision of Act; imposing fine for contraventions.

CEE fulfils broader watchdog role by reporting annually to Minister on progress towards achievement of EE in workforces.

When measuring compliance of employers with provisions of EEA, factors to consider are:

- Extent to which suitably qualified people are equitably represented in a workplace with regard to:
  - Demographic profile of national & regional economically active population
  - Pool of suitably qualified people from designated groups from which employer may be reasonably expected to promote or appoint
  - Present & anticipated economic & financial factors relevant to sector
  - Employers present & planned vacancies in various categories & levels
- Employers turnover of labour
- Employees progress in implementing EE in comparison with other employers in comparable circumstances & in the same sector

- Reasonable efforts made by employer to implement its plan
- Extent to which employer has made progress in eliminating employment barriers that adversely affect people from designated groups

TB Activ- 1. Unfair discrimination is prohibited in the workplace. Which one of the flg statements regarding unfair discrimination is incorrect?

- a) If an employer differentiates betw employees, the employer is discriminating against certain employees
- b) discrimination may be justified by affirmative action
- c) discrimination may be justified by the inherent req of a job
- d) discrimination may be based on more than one ground
- e) discrimination may be direct or indirect

*a is correct answer as the statement is incorrect. If an employer differentiates betw employees, the employer is not necessarily discriminating against certain employees. Only differentiation by the employer for an unacceptable reason, namely on one of the grounds specified in section 6(1) of EEA or a similar reason will amount to discrimination.*

2. The Department of Education's housing policy does not grant its female employees housing subsidies unless their spouses are permanently & medically unfit for employment. No such restriction applies to male employees. Does this constitute unfair discrimination?

*Yes, this constitutes direct unfair discrimination on basis of sex as a specified ground in EEA. Case with similar facts is **Association of Professional Teachers v Minister of Education***

3. Tuba Enterprises wants its employees to be tested for HIV/AIDS on a voluntary & anonymous basis. The employer argues that it req information on the prevalence of HIV in its workforce in order to assess the impact of HIV & to implement effective proactive measures to prevent employees from becoming infected with it. Does Tuba Enterprises need to apply to the LC for an order that such testing is authorised before it can proceed with testing?

*These facts are the same as those in **Irvin & Johnson Ltd v Trawler & Line Fishing Union & Others**. The LC held that if employees are tested in such a manner that the employer could not identify which employees are suffering from HIV, the risk of discrimination based on a medical condition is absent. This would therefore not be in conflict with the broad purpose of EEA. Anonymous & voluntary testing of employees therefore does not fall within the ambit of section 7(2) of EEA & so LC does not have to authorise such testing. Tuba Enterprises can therefore proceed with the testing of its employees without applying to LC for an order that the testing is justifiable.*

## **STUDY UNIT 6- DISCIPLINE & DISMISSAL FOR MISCONDUCT**

Activ- Explain how in the workplace the common law can be a source of rules of good conduct

*The employer can act against the employee if the latter is guilty of misconduct in the workplace & during working hours. However item 7(a) provides that the employer can also act against the employee for misconduct which took place outside the workplace & or after working hours.*

Activ- If the employee is accused of being in unauthorised possession of two bottles of cool drink manufactured by the employer, the employer must prove that the employee contravened a certain rule. If employee alleges that the cool drink was bought during lunchtime and can show the cash slip, a dismissal on grounds of unauthorised possession of company property would be unfair because employee did not contravene the rule regarding unauthorised possession of employer property.

*Once it has been determined that the rule which the employee is alleged to have contravened actually exists, we come to the second step involving a decision as to whether or not the employee actually contravened the rule. This is a matter which must be determined on the facts. Facts must indicate that employee contravened the rule. If employer wants to dismiss employee for unauthorised possession of company property it must be proved that the employee was in possession of the property without necessary authority.*

*Employer only needs to prove the contravention of the rule on a balance of probabilities. This may have interesting repercussions, for eg, the employee is accused of theft of company property. The employer also lays a charge of theft against the employee with the police. The trade union & employer agree that the employer will not hold the disciplinary enquiry until the criminal matter is finalised. During the criminal matter, the employee is acquitted, because the State is unable to prove its case beyond reasonable doubt. The trade union insists that the employer should not proceed with the disciplinary enquiry because of the employee's acquittal. However, the employer can refuse to do this on the grounds that the standard of proof required in a disciplinary enquiry is less onerous. It is therefore possible that the disciplinary enquiry may find the employee guilty.*



Activ-

1. What is the first guideline for a substantively fair dismissal for misconduct?  
*Whether the employee contravened a rule*
2. Who must prove that the rule which the employee is alleged to have contravened, existed?  
*The employer*
3. Who must prove that the employee contravened the rule?  
*The employer*
4. By what standard must it be proved that the employee contravened the rule?  
*On a balance of probabilities*
5. On what facts may the employer rely to prove the contravention of the rule?  
*All the evidence available at the time of the court proceedings. In other words, the employer could rely on evidence available at the time of the disciplinary enquiry or at a subsequent internal appeal, as well as on evidence which became available after the enquiry or appeal.*

Activ-

- What is the rationale for this requirement?
  - John is working for Cadbury's and is caught eating chocolates in the Warehouse. He says he was not aware that it was wrong. Assume the employer's disciplinary code says nothing about stealing, can he still discipline John?
- *The rationale for this guideline is that the employee should only be penalised for actions or omissions which the employee knew (at the time) were unacceptable. Also implied in this requirement is that the employee must have known that a transgression of this rule may lead to dismissal.*
- *Certain forms of misconduct may be so well known in the workplace that notification is unnecessary. The most important examples of such misconduct are those that have their origin in the common law for example theft.*

Activ- Make your own list of guidelines (based on Item 4 of the Code) for a procedurally fair dismissal.

- *The employer should conduct an investigation into the allegations.*
- *The employer must notify the employee of the allegations (using a form and language that the employee can reasonably understand).*
- *The employee should get an opportunity to respond to the allegations (usually at a disciplinary hearing).*
- *The employee gets a reasonable time to prepare the response.*
- *The employee may be assisted by a trade union representative or fellow employee.*
- *After the enquiry, the employer should communicate the decision (and preferably furnish the employee with written notification of that decision).*
- *If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer the matter to Bargaining Council or the CCMA.*

TB- **Protection against unfair labour practices under LRA**

- **Introduction**

A dispute regarding unfair labour practice must amount to a dispute of right. These entail disputes about existing rights. In contrast disputes of interest concern the creation of new rights. The latter must be resolved by way of industrial action and not by a court. An employee may be unhappy about something in the workplace but not sufficiently to resign. Eg. An employee is not promoted or employer discontinues cellphone allowance. Even though termination of the contract is not yet on the table, section 186 of LRA may provide protection for employees based on unfair labour practices committed by employers.

- **LRA**

Gives content to the right to fair labour practices guaranteed in Constitution. It protects employees against unfair labour practices by employers within employment relationship. Const guarantees everyone a right to fair labour practices. One might want to infer that an infringement of this right will amount to an unfair labour practice. This is not necessarily so.

The differences betw these 2 concepts are illustrated below:

| Right to fair labour practices<br>Constitution   | Protection against unfair labour practices<br>LRA   |
|--|---|
| <p>The right to fair labour practices in terms of the Constitution:</p> <ul style="list-style-type: none"> <li>• is wide</li> <li>• protects 'everyone', in other words also workers who are not employees in terms of the LRA</li> <li>• an infringement of the right to fair labour practices will be determined with regard to surrounding circumstances</li> </ul> | <p>The protection against unfair labour practices in terms of the LRA:</p> <ul style="list-style-type: none"> <li>• is limited to the list of actions included in the definition of a unfair labour practice</li> <li>• protects employees only against specific actions by employers</li> <li>• an employee cannot commit an unfair labour practice towards an employer; only an employer, can commit an unfair labour practice towards an employee</li> </ul> |

Section 185(b) provides: every employee has the right not to be subjected to an unfair labour practice  
Section 186(2) gives content to concept of unfair labour practice by describing a number of practices as follows: 'unfair labour practice means any unfair act or omission that arises betw an employer & employee involving:

- unfair conduct by employer relating to the promotion, demotion, probation (excl disputes about dismissals for a reason relating to probation or training of an employee or relating to the provision of benefits to an employee
- the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee
- a failure or refusal by an employer to reinstate or re-employ a former employee ito any agreement
- an occupational detriment other than dismissal in contravention of the Protected Disclosures Act on account of the employee having made a protected disclosure defined in that Act.

The right not be subjected to unfair labour practice has impacted development of labour law in SA. It has led to changes in employer practices & policies and has effectively curbed managerial prerogative in various respects like promotion, suspension & probation.

Def on unfair labour practice in LRA refers to employers & employees only meaning that an unfair labour practice can only be committed within an employment relationship.

### Listed Unfair Labour Practices

Unfair conduct of the employer relating to promotion- promotion falls within the managerial prerogative. Employer can promote most suitable candidate after a fair process has been followed. Employee does not have legal entitlement to be promoted although circumstances may show that an employee had reasonable expectation regarding promotion. The expectation could be due to assurance by employer to employee.

Employer must act fairly both procedurally & substantially in a decision whether or not to promote the employee. A decision not to promote is reviewable if employer cannot justify its decision or if decision is seriously flawed.

Courts will intervene in disputes about promotion only if employer acted in bad faith. For an allegation of an unfair labour practice regarding promotion to succeed it must be shown that:

- Employer exercised its discretion capriciously
- Reasons provided cannot be substantiated
- Decision was taken on wrong principle
- Decision was taken in a biased manner

### The unfair conduct of the employer relating to demotion-

Demotion means that an employee:

- Is transferred to a lower level
- Receives less remuneration
- Loses benefits
- Experiences a loss in status

Eg. In **SA Police Service v Salukazana & others**, the transfer of an employee to another area which then changed his conditions of service & lowered his status was held to be a demotion & an unfair labour practice. In **Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & others**, the court found the transfer of an employee in contravention of employers transfer policy resulted in diminishing employees status & responsibilities & was a demotion. Since employee did not consent to the demotion it was unlawful & unfair. So called transfer was held to be invalid & of no legal effect.

Demotion can also take place in context of restructuring or merging of organisations. This would be based on operational reasons (or incapacity). This is allowed as long as such action is taken in accordance with a fair procedure. Employer must consider best possible option to avoid dismissing employees therefore demotion can be an option avoiding dismissal.

Demotion could be fair as a disciplinary penalty if based on valid reason eg an alternative to the dismissal of an employee found guilty of misconduct & if done in accordance with fair procedure eg disciplinary hearing was held.

#### The unfair conduct of the employer relating to probation

Purpose of probation is to afford employer opportunity to evaluate employees performance before confirming appointment. From the provision of the Code: Dismissal dealing with probation one can infer that the failure by employer to adhere thereto will amount to unfair conduct with regard to probation. Codes sets out req for a fair probationary period as follows:

- Period should be determined in advance
- Period should be of reasonable duration determined with ref to
  - Nature of job
  - Time it would take to determine employees suitability for continued employment

To prevent misuse of probationary period by employer, the Code: Dismissal provides that probation should not be used wrong purposes eg to deprive employees of the status of permanent employment or to dismiss probationers at conclusion of probationary period & replace them with newly hired employees.

It to Code: Dismissal, employer is allowed at end of probationary period to:

- Extend probationary period to enable employee to improve his performance
- Dismiss employee
- Confirm appointment of employee

Probationary period may only be extended if it is justified.eg. where job req are such that an extended probationary period is req to determine whether the employee is suitable for the job.

Before extension of probationary period or dismissal of probationary period employee, he must be invited to make representations which employer must consider. During this process employee may be represented by union rep or fellow employee.

In **SACTWU v Mediterranean Woollen Mills** it was held that an employer who does not want to confirm a probationary employees appointment must show that the procedure prior to the dismissal included:

- Giving the employee an opportunity to improve
- Making employee aware that the work performance was unacceptable
- Counselling employee if he was not able to handle the work
- Treating employee sympathetically & with patience

If the employee still fails to perform satisfactorily after these req have been met the contract can be terminated

#### The unfair conduct of the employer relating to training

If employer acts unfairly toward employee as far as provision of training is concerned, it will amount to an unfair labour practice. Training is important if necessary for advancement of employee & if employer has an established practice of training employees.

In the former case an eg is found **in Mdluli & SA Police Service**- employer removed employee (an inspector) from a training course which would have enabled him to be promoted to the rank of captain. This was done based on allegation of misconduct relating to misuse of an official vehicle. Allegation was later withdrawn. Arbitrator ordered employer to re-nominate employee for the next training course.

In the latter case, employee can allege a legitimate expectation to training but only if employer acted arbitrarily, capriciously or inconsistently in denying the employee training.

#### The unfair conduct of the employer relating to provision of benefits

Common type of unfair labour practice relates to provision of benefits & meaning of benefits. LRA does not provide def of benefits & interpretation given by courts & arbitrators is narrow. A dispute regarding unfair labour practice must amount to a dispute of right in order to qualify as an unfair labour practice. Disputes about remuneration are regarded as interest disputes in other words a right has not yet been created. Interest disputes must be resolved by way of industrial action & cannot be resolved but the court.

Eg. **Schoeman v Samsung Electronics** the employer changed employees commission structure & she claimed that it was an unfair labour practice. Court held that commission was not a benefit but part of remuneration.

Debate has ensued about correct interpretation of benefit. Eg. In some instances transport allowances & provident funds have been regarded as benefits & at other times not.

Considering nature of modern day salary packages it is hard to separate benefits from remuneration & these difficulties will continue until unfair labour practice concept has been reviewed by the legislature.

#### Unfair conduct of the employer relating to suspension or any other disciplinary action short of dismissal

Two types of suspension are found in practice: suspension pending an enquiry known as precautionary suspension. Second type is imposed as a sanction for misconduct flg disciplinary action known as punitive suspension.

##### a) *Precautionary suspension*

Could be implemented to allow employer to investigate alleged misconduct of employee. Suspension as a rule is with pay unless employee agrees to suspension without pay or a law or collective agreement authorises unpaid suspension.

Decision whether or not to implement a precautionary suspension will depend largely on circumstances of alleged misconduct. Employee should not be suspended unless:

- \* there is a prima facie reason to believe that the employee has committed serious misconduct
- \* there is some objectively justifiable reason for excluding employee from workplace

Suspension has a detrimental impact on affected employee & may prejudice his reputation, advancement, job security and fulfilment. Suspensions must be based on substantively valid reasons & fair procedures must b followed before such suspensions are implemented. Unless circumstances dictate otherwise employees must be offered the opportunity to be heard before being placed on suspension.

In **Mogothle v Premier of the North West Province**- was held that the suspension of an employee pending an enquiry into alleged misconduct is equivalent to an arrest & should be used only when there is reasonable apprehension that the employee will interfere with investigations or pose some other threat.

In **Tungwana/Robben Island Museum**- applicant was suspended pending disciplinary enquiry that he failed to disclose outside interests & acted negligently. Applicant referred his suspension to CCMA. Commissioner found charges against applicant were unfounded. Was no prima facie reason to believe that applicant had committed serious misconduct & employer had no reason to exclude employee from workplace. Employee was awarded 6 months' salary as compensation for unfair suspension.

##### b) *Punitive suspension*

Fair suspension without pay could b an alternative to a sanction of dismissal in an attempt to correct behaviour of employee. In **County Fair v CCMA & SA Breweries v Woolfrey**- was held that suspension without pay was a permissible disciplinary penalty where appropriate.

##### c) *Any other disciplinary action short of dismissal*

Any unfair disciplinary action short of dismissal by employer could amount to unfair labour practice. Warnings & transfers are eg of disciplinary action short of dismissal. Unfair conduct by employer in this regard would for eg be where employer transfers employee to another province without reason or process.

-The unfair conduct of the employer relating to a refusal to reinstate or re-employ an employee ito any agreement

Former employees are protected against refusal by employer to reinstate or re-employ them ito any agreement. Eg. where employer refuses to re-employ a retrenched ex-employee when a vacancy arises & it was agreed for eg in a collective agreement or settlement to recall & consider the former employee for such position.

#### The unfair conduct of the employer relating to an employee suffering an occupational detriment on account of a protected disclosure (whistle blowing)

Requirements- If an employee suffers an occupational detriment other than dismissal in contravention of PDA because he made a protected disclosure ito that Act, such occupational detriment will amount to an unfair labour practice.

This Act regulates the disclosure by employees of information on suspected criminal & other improper conduct by employers & co-employees & provides remedies in this regard. PDA aims to promote culture of openness & accountability without fear of reprisal.

Three req must be met for employee to establish an unfair labour practice based on an occupational detriment:

- \* employee must have made a protected disclosure

- \* employer must have taken some retaliating action against the employee which amounts to employee suffering from an occupational detriment
- \* the detriment suffered must be on account of (ito LRA) or partly on account of (ito PDA) the making of the protected disclosure. This implies a causal link betw disclosure & the retaliating action by the employer.

### Meaning of occupational detriment and protected disclosure

Two key concepts regarding whistle blowing and unfair labour practices are:

1. Meaning of occupational detriment
2. Meaning of protected disclosure

a) *Occupational detriment*- is the subjection of an employee to any of the flg as a result of whistle blowing ie.if employee after making protected disclosure faces any of the flg:

- \* disciplinary action
- \* dismissal, suspension, demotion, harassment, intimidation
- \* being transferred against employees will
- \* refusal of a transfer or promotion
- \* subjection to a term of employment
- \* subjection to a term of retirement which is altered or kept altered to the employees disadvantage
- \* refusal of a reference or being provided with an adverse reference
- \* denial of appointment to any position or office
- \* being threatened with any of these actions
- \* being otherwise adversely affected iro employment, employment opportunities & work security.

b) *Protected disclosure* - PDA distinguishes betw a protected disclosure & a general disclosure. Latter covers wider range of disclosures incl those to media. General principles of the two concepts overlap somewhat. A protected disclosure is disclosure of information to specific persons or bodies such as legal advisors, employers, members of Cabinet, Public Protector or Auditor General. Its important that information must be disclosed: suspicion, rumours, personal opinion do not constitute information.

Employee must make disclosure:

- \* in good faith
- \* and reasonably believe
- \* that the info disclosed is substantially true.

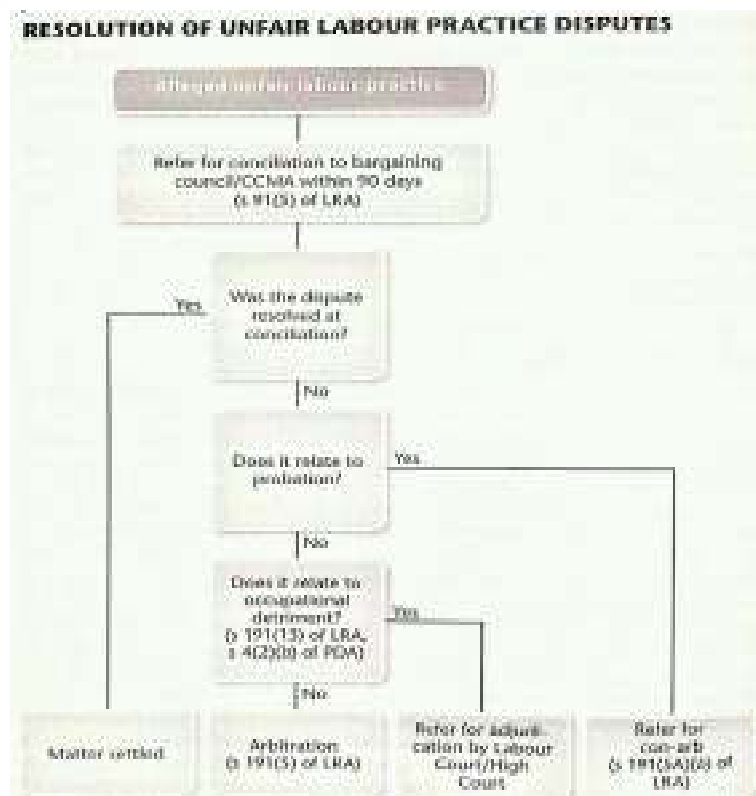
### Examples from case law

Flg are eg of protected disclosures which resulted in employees suffering an occupational detriment.

**Theron v Minister of Correctional Services**- disclosure on poor health care of prisoners made by a prison doctor to the Inspecting Justice of Prisons & relevant Parliamentary Committee was held to be a protected disclosure.

**Engineering Council of SA v City of Tshwane**- Weyers was employed by the municipality as managing engineer and informed employer orally & in writing & copied the Engineering Council and DoL that employer wanted to appoint unskilled & inexperienced people who were unable to perform duties in electrical control section. Court found that copying the letter to the Council & DOL constituted protected disclosure & municipality could not discipline hin or impose any sanction. Municipality was interdicted from taking disciplinary action against him.

**Young v Coega Development Corporation**- court indicated that employees have choice to approach Labour Court or High Court regarding matters relating PDA. Courts have protected employees by interdicting employers from taking disciplinary action against whistle blowers.



The con-arb process is a single expedited process where the matter is arbitrated immediately after certificate of non-resolution is issued.

Arbitrator may determine the unfair labour practice dispute referred to him on terms he deems reasonable incl an order for reinstatement, re-employment or compensation of not more than the equivalent of 12 months remuneration.

Arbitrators & commissioners have wide powers to grant relief to employees. These include declaratory orders, protective promotions, remitting the matter back to the employer for reconsideration & reinstatement to the previous position (in case of demotion).

LRA does not expressly place onus of proof in unfair labour practice disputes on any part but employee who alleges unfair labour practice must prove all the allegations after which employer will be given opportunity to show that the conduct was not unfair.

TB Activ- 1. Can an employee commit an unfair labour practitioner against an employer ito LRA. Justify answer.

*No. The definition of an unfair labour practice in the LRA refers only to unfair conduct by employer toward employee. Distinguish this position from the wider constitutional right to fair labour practices under which it might be possible to argue that an employee committed an unfair labour practice against another employee.*

2. Is the list of unfair labour practices in s186(2) exhaustive.

*Yes. This means that an employee will not be able to complain of any other form of unfair conduct not listed in s 186(2).*

3. Mr Lehabe is an assistant head of salaries at Petrol inc. He has been employed in this post for two years. When the paymaster falls ill he is requested by management to take over the responsibilities until he returns. After 3 weeks the paymaster resigns for health reasons. Mr Lehabe his duties & is told by management they are satisfied with his work performance. The paymaster position is advertised and he then applies for the post but is not appointed for it. He feels the company acted unfairly. Do you agree?

*Acting in a position does not entitle employee to be appointed to that position. In Mr Lehabes case one could argue that the employer had created an expectation that he would be permanently appointed to the position he was acting in. He could argue that because of the positive feedback he received from them he was confident he would be promoted. Although one is tempted to support Mr Lehabe, it can be argued that there is at most a duty on the employer to give the employee an opportunity to be heard prior to making the final decision.*

4. Super Inc has for the past two years been paying employees specific amount of R200 per month as a transport allowance but has not increased the amount since then. The union threatens to declare a dispute regarding the fact that the amount has not been increased. Will thus be a dispute of right or a dispute of interest?

*It is a dispute of interest. A dispute of interest relates to proposals for the creation of new rights & is not*

merely about remuneration. Such disputes relate to the new or better terms and conditions of employment & remuneration.

In the case of a dispute of right, the bargaining council or CCMA will consider whether the dispute concerns application or interpretation of existing right & whether the dispute is about enforcement of a right in a contract of employment, the BCEA, a collective agreement, a sectoral determination or a wage determination.

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## **STUDY UNIT 7- DISMISSAL FOR INCAPACITY**

### **- INCAPACITY AS A GROUND FOR DISMISSAL**

Section 188 of the LRA recognises that incapacity can be a valid reason for dismissal provided that the employer can show that the dismissal was for a fair reason and that a fair pre-dismissal procedure was followed. Section 188 of the LRA refers to 'incapacity' but it does not distinguish between poor work performance and ill health or injury. This distinction is drawn in the Code of Good Practice: Dismissal. The Code sets out two sets of guidelines: one for poor work performance and one for ill health or injury.

Activ- Answer true or false to the following questions:

- Incompetence is distinguished from misconduct by some form of culpability on the part of the employee. *TRUE*
- Incompetence due to a physical disability is best classified as incapacity, while incompetence due to laziness is better considered a matter of misconduct. *TRUE*
- The employee should not be entitled to rebut evidence of his or her alleged incapability. *FALSE*
- The dismissal of a financial manager was found to be unfair, because he was assured less than a month before his dismissal that the company was satisfied with his performance. *TRUE*
- A pilot who made a faulty landing and caused considerable damage to the aircraft was dismissed. In this case, it was held that a single calamitous performance could be sufficient to warrant dismissal for poor work performance. *TRUE*
- The employer is not generally required to warn the employee that the employee's performance is not meeting the required standard. *FALSE*
- Senior managers should be capable of judging for themselves whether or not they were meeting the standard set. *TRUE*
- There is a greater duty to accommodate an employee incapacitated as a result of a work-related injury or illness. *TRUE*
- A trumpeter in an orchestra was placed on extended probation: in such circumstances, employment may be terminated without proper evaluation. *FALSE*
- An employer is not obliged to retain an employee who is not productive, but the alternatives to dismissal have to be exhausted before dismissal will be fair. *TRUE*

Activ-

- Which persons will be regarded as "disabled" people?  
*The only statutory definition of disability is found in the Employment Equity Act. It defines "people with disabilities" as people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.*
  - What is "reasonable accommodation" of a disabled employee?  
*Again this definition is found on the EEA. Reasonable accommodation means any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment. Remember that only reasonable accommodation is expected.*
  - Which labour law legislation protects disabled employees in the workplace?  
*The EEA and the Code of Good Practice: Key Aspects of HIV/AIDS and Employment. Also the LRA which regulates the dismissal of employees with disabilities.*
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## **STUDY UNIT 8 – DISMISSAL FOR OPERATIONAL REQUIREMENTS**

Activ- Before proceeding to the next category of “similar reasons”, make sure that you can explain this “similar reasons” in your own words. What are your views on this similar reason” for dismissal? Do you think that the Labour Court will be prepared to endorse this as grounds for dismissal?

*See the discussion on the employer’s “similar needs” in your prescribed book and the discussion above. As we indicated above, the fourth category of “similar reasons” for dismissal that has been identified is where the enterprise’s business requirements are such that changes must be made to the employee’s terms and conditions of employment. An example of this “similar reason” is where the business is restructured to function more effectively or, alternatively, after an amalgamation or merger which necessitates changes to the employee’s terms and conditions of employment. For example, a company decides to close one of its factories (which is running at a loss). It offers new positions in its other factories to all of the employees who have been working in that factory. If these employees refuse to be transferred, they may be dismissed for operational reasons. They have become redundant, not as a result of the original restructuring of the company, but as a result of their refusal to accept the new positions offered to them. This category of reason must be distinguished from dismissal for “structural needs” listed in the definition of operational requirements. Dismissal based on the “structural needs” entails that there has been a restructuring of the business and that the employee has become redundant because of the restructuring. Note, however, that changes to the terms and conditions of the employee are not always necessitated by changes in the enterprise. Changes may also become necessary as a result of a change in the employee’s circumstances or attitude towards the employer which may have serious economic repercussions for the enterprise.*

Activ- Why do you think these concepts have been included in the LRA?

*Trade unions were critical of the manner in which employers conducted retrenchment consultations under the old s 189 of the LRA. They argued that meetings were often only formalities because the decision to retrench had already been taken. Furthermore, they stated, the proceedings often became highly adversarial and parties failed to explore genuine options to avoid or reduce the size of the retrenchment. Many disputes about the disclosure of information were encountered rather than seeking options to avoid or minimise retrenchment. This had particularly severe consequences in large-scale retrenchments where thousands of employees lost their jobs. Government then came with proposals to inter alia enhance the effectiveness of consultations in large-scale dismissals for operational requirements and the appointment of a facilitator to assist the parties in an endeavour to reach consensus. Lengthy consultations on these proposals took place between labour, business and government until the end of 2001. The issues were also debated at NEDLAC and amendment bills were eventually published addressing these issues and many more.*

*The Industrial Court, acting in terms of the Labour Relations Act, 1956, found on a number of occasions that the operational reason advanced by the employer did not constitute the real reason for dismissal. You were provided with the example in SA Chemical Workers Union & Others v Toiletapak Manufacturers (Pty) Ltd & Others (1988) 9 ILJ 295 (IC). Toiletapak transferred its business to another company. The transfer necessitated the dismissal for operational reasons of the employers. The Industrial Court held that the real reason for the transfer was Toiletapak Manufacturers’ desire to rid itself of a number of employees whom it suspected of misconduct. It had tried to avoid having to hold disciplinary hearings by disguising the dismissal as one for operational reasons.*

*An important issue is whether the Labour Court should also consider the business merits of the decision. There are different views on this issue. Make sure that you know and understand the different views.*

If we look again at large-scale dismissals by big employers, in terms of s 189A(19) the following four requirements for substantive fairness are set in this instance:

- the reason for the dismissal must be for operational requirements as defined in s 213.
- the reason must be the real reason for the dismissal and not a cover-up for another such a misconduct the reason must be justifiable and based on rational” grounds.
- an objective test must be applied when determining the rationality of the reason
- there must have been proper consideration of alternatives. In other words the employer must apply his mind and be able to give reasons for dismissing alternatives, if any.
- he must be able to show that the dismissal was a measure of last resort.
- selection criteria must be fair and objective.

### **- LARGE SCALE DISMISSALS BY A BIG EMPLOYER**

We now turn to large-scale dismissal by a big employer. A big employer must comply with the seven requirements set out above. In addition however, he has to comply with s 198A.

#### **The facilitation route**

We will now consider the facilitation route, that is, when the parties choose to go this way. The employer can approach the CCMA to appoint a facilitator when it gives notice in terms of s 189(3) to the employee



party that it is contemplating a large-scale dismissal. In the event of the employer not requesting this, the employee party representing the majority of the employees that the employer contemplates dismissing, may request a facilitator. This must be done within 15 days of the employer's notice of contemplated dismissal. If neither party requested a facilitator within the time frames, they may still agree to request a facilitator during the consultation process. If a facilitator is appointed, the facilitation must be conducted in terms of the regulations (not yet in operation) made by the Minister of Labour. Remember that an employer may not dismiss before 60 days have elapsed from the date on which the employer gave notice of contemplating a large-scale dismissal. Once the period has lapsed, the employer can go ahead and give notice to terminate contracts of employment. The notice must comply with the time periods set out in s 37(1) of the BCEA. Make sure that you know what these time periods entail. Payment instead of notice may also be made in terms of s 38 of the BCEA.

### **The non-facilitation route**

We now consider the non-facilitation route. Where neither of the parties had requested a facilitator, a minimum period of 30 days must have lapsed before a dispute about the contemplated dismissal can be referred to the CCMA or a council for conciliation. The minimum period for conciliation is 30 days during which the employer may also not dismiss. In practice this means that the soonest an employer would be able to dismiss, will be after the expiry of both the 30 day periods, in other words only after a period of 60 days from the date on which it gave notice of contemplating a large-scale dismissal. Once again the notice must comply with s 37 of the BCEA and s 38 of the BCEA may also be used.

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## **STUDY UNIT 9- TRANSFER OF EMPLOYMENT CONTRACTS**

### **- COMMON LAW AND THE LABOUR RELATIONS ACT**

In common law, when a business is sold, an employee may not be forced to continue with his or her contract with the new employer. Nor is the new employer obliged to employ such an employee. In the matter of insolvency, contracts of employment are generally terminated when an employer is insolvent. There was a great deal of criticism of the common-law position (because of its failure to protect employees from job loss) and eventually the LRA intervened to protect employees in these instances.

Activ- In your own words, summarise the content of section 197.

*Remember that section 197 only applies in the case of a transfer of business. The concept of a "business" has been defined to mean whole or a part of a business, trade, undertaking or service. "Transfer" has been defined to mean transfer of a business as a going concern. This wording has been interpreted under the old section 197 and will remain relevant for the new section 197.*

Activ- Distinguish between the scope of application of section 197, the meaning of "transfer" and the meaning of "as a going concern".

*Next we shall look at the meaning of the word "transfer". The meaning appears to be wide and to include, for example, a sale, a merger, a takeover or a broader process of restructuring within a company or group of companies. We shall also look at the meaning of the phrase "as a going concern". Take note of the fact that a business can be transferred by a sale of assets, a sale of shares and the sale of the business itself.*

### **- TRANSFER IN CASE OF INSOLVENCY**

Always keep section 38 of the Insolvency Act, 1936, in mind. This section states that all contracts of employment between an insolvent employer and its employees terminate automatically. Study section 197A carefully. Let us, firstly, look at some of the similarities between ordinary transfers and transfers in the case of insolvency.

- Remember that the section only applies to a "transfer" of a "business" as interpreted under section 197 earlier on, and therefore brings the same problems referred to earlier on.
- Also remember the section's scope of application: it only applies if the old employer is insolvent, or a scheme of arrangement or compromise with creditors has been entered into to avoid windingup or sequestration.
- The general effect of section 197A is that all the employees of the insolvent old employer become employees of the new employer. This is despite section 38 of the Insolvency Act and also subject to agreement between the employees and the new or old employer or both to the contrary.
- The new employer's terms and conditions of employment should, on the whole, be not less favourable than the old terms and conditions.
- The new employer is bound by pre-existing arbitration awards and collective agreements, but the parties may agree differently.
- The employee is transferred from one pension fund to the other in terms of the Pensions Fund Act, 1956.

Secondly, we shall look at the differences between ordinary transfers and transfers in the case of insolvency:

- In the case of transfer with insolvency, rights and obligations between the old employer and the employees at the time of the transfer remain rights and obligations between the old employer and the employees. This is not true in the case of an ordinary transfer.
- Anything done by the old employer in respect of an employee must be sorted out between the employee and the old employer. Issues relating to the valuation and provision of accrued benefits in the case of ordinary transfers do not apply to transfers with insolvency.
- Note the extra duties (as laid down by section 197) on an employer in terms of giving notice of financial problems.

In this study unit, we discussed a number of problematic issues. Make sure that you have a basic understanding of section 197 and the problems relating to the interpretation of this section.

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## **STUDY UNIT 10- UNFAIR LABOUR PRACTICES**

### **- UNFAIR CONDUCT: PROBATION**

This type of unfair labour practice has been included only recently after the 2002 amendments. Look at the Item 8 of the Code of Good Conduct. Examples of an unfair labour practice in this context would be for example the setting of an unreasonably long probationary period, the setting of unreasonable performance standards, or the failure to inform the employee properly about required performance standards. In a procedural sense it might be the failure by an employer to afford the employee reasonable guidance, evaluation, training, counselling and instruction as required by the Code during probation.

Activ- \* What does the principle of “causality” entails?

- What does an “occupational detriment” mean?

*As far as causality is concerned, the Labour Relations Act, 1995 requires that the detriment must be ‘on account of’ the protected disclosure. In contrast, the Protected Disclosures Act, 2000 outlaws occupational detriments ‘on account of, or partly on account’ of a protected disclosure. It is submitted that last-mentioned (broader) approach is the one that could and should be followed. In any event, it should be noted that jurisdiction in terms of the Protected Disclosure Act, 2000 is not confined to the Labour Court or CCMA and their jurisdiction over automatically unfair dismissals or unfair labour practices relating to protected disclosures. Should employees approach the civil courts, it is clear that the broader approach to causality will be the one used (this, of course, may be a good reason to approach the civil courts in the first place).*

*An occupational detriment means:*

- *being subjected to disciplinary action*
  - *being dismissed, suspended, demoted, harassed or intimidated;*
  - *being transferred against the employee’s will;*
  - *being refused transfer or promotion;*
  - *being subjected to a term or condition of employment or retirement which is altered or kept altered to the employee’s disadvantage;*
  - *being refused a reference, or being provided with an adverse reference from the employer;*
  - *being denied appointment;*
  - *being threatened with any of the above actions by an employer;*
  - *being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.*
- 

## **STUDY UNIT 11- EMPLOYMENT EQUITY & AFFIRMATIVE ACTION**

### **- THE DIFFERENCE BETWEEN DIFFERENTIATION, DISCRIMINATION AND UNFAIR DISCRIMINATION**

In *Harksen v Lane NO* (1998 (1) SA 300 (CC)), in which the equality clause (section 8) of the interim Constitution was interpreted, the Constitutional Court drew a distinction between differentiation and discrimination. According to this approach, differentiation (in the sense of treating people differently), which may or may not be rationally connected to the purpose it seeks to achieve, does not necessarily constitute discrimination. Discrimination therefore appears to be a particular form of differentiation and one which is based on illegitimate grounds. As to what would constitute illegitimate grounds (thus elevating differentiation into the realm of discrimination), there are two possibilities: first, there are the so-called “listed grounds” and second the so-called “unlisted” or “analogous grounds”. An objective test must be applied in order to ascertain whether differentiation is based on a listed or unlisted ground. Only once discrimination is established (on a listed or unlisted ground) can it be established whether the discrimination was unfair. Section 6(1) of the EEA provides us with a non-exhaustive list of 19 grounds. In addition to the 16 grounds listed in the Constitution, the EEA adds family responsibility, HIV status

and political opinion. As far as unlisted grounds are concerned, it was held in the *Harksen* case that there will be discrimination on an unlisted ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or if it affects them adversely in a comparably serious manner". Importantly, the listed grounds to a large extent determine what would be regarded as unlisted grounds. Although, in the *Harksen* case, it was unnecessary to attempt any comprehensive description of what based on attributes or characteristics" would mean, the Constitutional Court cautioned against a narrow approach: What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.

It appears that dignity is the underlying consideration in determining the reasons or grounds for making differentiation and, consequently, discrimination, illegitimate. For the most part, discrimination cases hinge on the listed grounds. The reason for this is, among other things, the extensive lists to be found in the EEA and the Constitution. A review of the reported case law shows a dominance of alleged discrimination on the grounds of race, sex and gender, pregnancy, marital status and age, interspersed with the odd case involving family responsibility, sexual orientation, religion, political opinion and disability or HIV/AIDS. Given our history, this pattern is hardly surprising. On the face of it, some cases from the labour courts have been reported that involve unlisted grounds. However, these cases should be approached with caution, because they depended on the phrase "any arbitrary ground" in the now repealed Item 2(1)(a) of Schedule 7 to the LRA. They add little to our understanding of discrimination, as opposed to differentiation. It is submitted that these cases violate the basic requirement as laid down in the *Harksen* case, this being that analogous grounds have to comply with the requirement to be recognized as such (as is the position under the EEA).

#### **DIRECT AND INDIRECT DISCRIMINATION**

Both direct and indirect discrimination are prohibited in terms of the EEA and the Constitution. The difference between the two is well documented. To take an example of racial discrimination drawn from *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* ((1998) 19 ILJ 285 (LC)). Direct discrimination occurs where a person is overtly treated differently because of his or her race or on the basis of some characteristic specific to members of that race. Usually, direct discrimination is easy to recognise. The true explanation for unfair differentiation is usually, although not always, known to or discoverable by the perpetrator of the differentiation (*Louw v Golden Arrow Bus Services (Pty) Ltd* ((1998)19 ILJ 1173 (LC)). Indirect racial discrimination occurs when criteria, conditions or policies are applied which appear to be neutral, but which adversely and unjustifiably affect a disproportionate number of a group. Indirect discrimination, however, is often disguised and difficult to detect. In the case of *Kadiaka v ABI* (1999) 20 ILJ 330 (LC), the court referred to the tests for determining indirect discrimination suggested by C Bourne and J Whitmore in *Race and Sex Discrimination* (1993) at par 2.45:

- Has a requirement or condition been applied equally to both sexes and all racial groups?
- Is that requirement or condition one with which a considerably small number of women (or men) or persons of the racial group in question can comply than those of the opposite sex or persons not of that racial group?
- Is the requirement or condition justifiable irrespective of the sex, colour, race, nationality, ethnic or national origins of the person in question?
- Has the imposition of the requirement or condition operated to the detriment of a person who could not comply with it?

The majority of reported discrimination cases have been found to involve direct discrimination. See, for example, *Swart v Mr Video (Pty) Ltd* (1998) 19 ILJ 304 (LC), *Langemaat v Minister of Safety & Security & Others* (1998) 19 ILJ 240 (T) and *Botha v A Import Export International CC* ((1999) 20 ILJ 2580 (LC)). Indirect discrimination featured in, for example, the following cases: *Leonard Dingler* (supra), *SADTU obo Makua v Mpumalanga Education Department, Adriaanse / Swartklip Products* (1999) 6 BALR 877 (LC); *Kadiaka v Amalgamated Beverage Industries* (supra); and *Lagadien v University of Cape Town* (2000) 21 ILJ 1119 (LC). It seems that the importance of the distinction between direct and indirect discrimination relates to their respective natures and to the applicable evidential issues. If indirect discrimination is alleged, the applicant will have to identify the basis of the claim (for example, race or sex) and, because indirect discrimination is in essence a statistical concept, provide the court with some figures to bolster this claim. Generally speaking, no distinction is made as is the case in other jurisdictions

with reference to the general principles of discrimination law, especially as far as justification is concerned.

## **JUSTIFICATION GROUNDS**

Section 6(2) of the EEA mentions two possible grounds of justification, namely, affirmative action measures that are consistent with the purpose of the EEA and the inherent requirements of the job. In addition, *Leonard Dingler* (supra) is authority for the view that there is a further, general fairness defence (simply because both the EEA and the Constitution only outlaw unfair discrimination). In the case of *Leonard Dingler* the test was formulated as follows: Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.

### **(i) Affirmative action**

The EEA gives effect to section 9(2) of the Constitution, namely, substantive equality. Designated employers must implement affirmative action measures. Section 15 provides that affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the workplace of a designated employer. Designated groups include black people, women and people with disabilities. Further detailed definitions are provided for black people, people with disabilities and suitably qualified people. Designated employers include the following: employers who employ more than 50 employees; employers who employ less than 50 employees but who have an annual turnover equal to or above the applicable turnover of a small business; municipalities; organs of state; and an employer who has been appointed as designated employer in terms of a collective agreement.

It is important to remember that the only affirmative action measures that will qualify as justification for discrimination are those that are consistent with the purpose of the EEA. (This being to ensure the equitable representation of designated groups in all occupational categories and levels in the workforce.) Section 15(2) gives further direction as to what must be included in affirmative action measures. It requires the employer to take the following measures: measures that will identify and eliminate employment barriers which adversely affect people from designated groups; measures to encourage diversity in the workplace; measures to make reasonable accommodation for people from designated groups; measures to ensure equitable representation of suitably qualified people from designated groups; and measures to retain and develop people from designated groups and to implement appropriate training programmes, including skills development. The last two measures include preferential treatment and numerical goals, but exclude quotas. Initially, most of the reported judgments made it clear that affirmative action measures had to be designed "to achieve a realistic objective (see eg *Public Servants Association of South Africa & Others v Minister of Justice & Others* (1997) 18 ILJ 241 (A), *MWU obo Van Coller v ESKOM* (1999) 9 BLLR 1089 IMSSA)).

Some consideration was also given as to whom would qualify as beneficiaries of affirmative action programmes. In the case of *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC), the very first case which dealt with affirmative action, the Industrial Court accepted the company's commitment to affirmative action. It found nothing wrong with affirmative action "of the sort" applied by the company. It held that affirmative action could be justified even though another employee may suffer discrimination because of the affirmative appointment. It was further held that an employer who applies affirmative action by preferring a candidate who has personally been unfairly discriminated against in contrast to a person who has not suffered such deprivation does not commit an unfair labour practice. However, this requirement of actual past discrimination was not followed in the following cases: *Public Servants Association & Others v Minister of Justice Public Servants Association v Minister of Correctional Services & Others* (Unreported J 174/97 25/7/1997 (LC); or *Auf der Heyde v University of Cape Town* (2000) 9 BLLR 877 (LC). In the last case, the Labour Court indicated that it was necessary for beneficiaries of affirmative action to be members of groups that have been disadvantaged by general societal discrimination, whether direct or indirect. Actual past discrimination as such, as a requirement to

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qualify for affirmative action in terms of the EEA, cannot be inferred from the provisions of the EEA. In the case of *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) the applicant had been employed on contract, which was subsequently renewed. The particular post was to become permanent and the applicant was told to apply as a matter of formality. After the interviews, the majority of the selection committee recommended that the applicant be appointed. This was not done. The applicant's main cause of action, that is, that she had expected her post to be renewed permanently, was found reasonable in the circumstances. She therefore claimed that she had been dismissed in terms of section 186(b) of the LRA. It was not disputed that the applicant (in her capacity as an applicant for employment) had been discriminated against on the basis of race or sex. However, the Technikon argued that the decision was justifiable in terms of its affirmative action policy which, in turn, was permissible in terms of Item 2(2)(b). It was accepted that the onus was on the Technikon to show this. The Labour Court scrutinized

the affirmative action and appointment policies of the Technikon in order to determine, firstly, whether these policies fell within the ambit of what was allowed by Item 2(2)(b) and, secondly, whether the selection of a person, other than the applicant, fell within the ambit of such policies.

The Labour Court found that, whilst the policies were seeking to promote the upliftment and advancement of previously disadvantaged communities, in particular the African community, it also sought to balance this against various other factors (such as the needs of the institution and the students). It was found that the policies indeed fell within the ambit of Item 2(2)(b). Although the Labour Court stated that it would be loathe to second guess the manner in which such an internal affirmative action policy is implemented, it identified the situation where the policy was not applied at all. This, it stated, was a quite different issue. It found that the appointment of a black male was not in accordance with the Technikon's affirmative action policy, read together with the other relevant policies. The Technikon could not justify the discrimination against the applicant in terms of Item 2(2)(b). Reinstatement with back pay was ordered. This case is a good example of the shift in emphasis which is taking place in affirmative action litigation, away from the design of affirmative action plans, to the way in which these plans are implemented. Other examples are found in the cases of *IMAWU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) and *Auf der Heyde v University of Cape Town* (supra). In the case of *Auf der Heyde v University of Cape Town*, the Labour Court agreed with the applicant's submission that the policy, by its own definition, should only have applied to previously disadvantaged South African citizens, namely, South African blacks, women and disabled persons. A non-South African citizen could not be a beneficiary. As far as the nature of affirmative action is concerned, it was found in the case of *Abbot v Bargaining Council for the Motor Industry (Western Cape)*(2000)20 ILJ 330 (LC) that an applicant for employment derives no right from a contractual or negotiated affirmative action policy. The Labour Court suggested that such a policy seemed to have the same footing as the terms of the advertisement inviting applications for a job.

The Labour Court dealt with affirmative action in the case of *Ntai v SA Breweries Ltd* (2001) 22 ILJ 214 (LC). It confirmed that South Africa's constitutional goal is substantive equality and not mere formal equality. However, it stated that an employer has no legal duty or obligation to apply affirmative action in terms of the LRA. By the same token, an employee acquires no right to affirmative action in terms of the LRA. It was found that, in terms of the LRA, the application of affirmative action constitutes merely a shield or defence. An employer may rely upon such defence should it be challenged on the basis of reverse discrimination (that is, when an affirmative action policy is implemented).

## **(ii) Inherent Requirements of the Job**

The EEA does not define the concept of inherent requirements of the job. Neither does Item 2(2)(c) of Schedule 7 to the LRA. However, if one briefly looks at the American and English law dealing with this, there are several useful criteria one can use to interpret the concept of an inherent requirement of the job. See *Essential Labour Law*, pages 272 to 273. In the South African context see, for example, *Association of Professional Teachers & Another v Minister of Education* (1995) 16 ILJ 1048 (IC) and *Swart v Mr Video* (supra). In *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) it was stated that the job itself would have to possess some "indispensable attribute" which inescapably related to its performance to meet the requirement of an "inherent requirement of the job". The Labour Court stated that the requirement would have to be so inherent to the job that, if not met, an applicant would simply not qualify for the position. If the job could be performed without the requirement, then it could not be said that the requirement was inherent and therefore protected under Item 2(2)(c). This was confirmed on appeal. In the case of *Hoffmann v SA Airways* (2000) 21 ILJ 891 (CC) the Constitutional Court indicated that the High Court was wrong to conclude that HIV-negative status was an inherent requirement for the job of cabin attendant. The High Court found the commercial operation of SAA, and therefore the public perception about it, would be undermined if the employment practices of SAA did not promote the health and safety of the crew and passengers. In addition, the High Court took into account that the ability of the SAA to compete in the airline industry would be undermined if it were obliged to appoint HIV-infected individuals as flight-deck crew members. This was apparently based on the allegation by SAA that other airlines have a similar policy. It is these considerations that led the High Court to conclude that HIV-negative status was, at least for the moment, an inherent requirement for the job of cabin attendant and that therefore the appellant had not been unfairly discriminated against.

Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interest. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected. The need to promote the health and safety of passengers and crew is important. So is the fact that if SAA is not perceived to be promoting the health and safety of its passengers and crew, this may undermine the public perception of it. Our treatment of people who are HIV-positive must be based on reasoned and medically sound judgements. They must be protected against prejudice and stereotyping.

The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of other airlines not subject to our Constitution. Prejudice can never justify unfair discrimination.

### **(iii) General fairness**

This test was laid down in the *Leonard Dingler* case (supra). It was further stated that: "The justification requirement lies at the heart of the enquiry into unfair discrimination and involves a careful consideration of the context in which the dispute arises. There is no fixed formula to be applied mechanically." In the case of *Whitehead v Woolworths (Pty) Ltd* (supra) it was argued that the need for uninterrupted job continuity could be justified on a commercial rationale. It was argued that this ground could be a successful justification if it fell within the ambit of the non-exhaustive list in Item 2(1)(a), and as long as it was not reprehensible in terms of society's prevailing norms (in terms of the *Leonard Dingler* case). The Labour Court held that if profitability is to dictate whether or not discrimination is unfair, it would negate the very essence of the need for a Bill of Rights. It was found that the fairness or unfairness of discrimination cannot be measured against the profitability or efficiency of a business enterprise. Profitability was found not to be a ground for justification for discrimination. However, on appeal (*Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC)) Willis AJ held that fairness is an elastic and organic concept. It has to take account of the norms, values and realities of our society. Fairness, he said, must not only be looked at from the perspective of prospective employees, but also from the viewpoint of employees and society as a whole. Employers must base their commercial decisions on reasonable probabilities. He then concluded that the employer had not acted unreasonably in that instance because it had taken into account rational and commercial considerations. The issue of fairness seemed to have been confused with reasonableness. This does not seem to be correct, since the test for justification is stricter than that for reasonableness.

### **PROCEDURE TO ENFORCE A CLAIM OF UNFAIR DISCRIMINATION**

Section 10(2) of the EEA requires that any dispute about unfair discrimination must be referred to the CCMA within six months after the alleged unfair discrimination took place. Bargaining councils have no jurisdiction here. Section 10(4) requires the referring party to satisfy the CCMA that a copy of the referral has been served on every other party to the dispute and that such party has made a "reasonable attempt to resolve" the dispute. In practice it seems likely that this would mean that a dispute may be referred to the CCMA only once formal or informal internal grievance procedures had been exhausted. As a first step towards enforcing compliance without resort to the courts, section 34 of the EEA provides that any employee or trade union representative may bring an alleged contravention of the EEA to the attention of any of the following persons: another employee; an employer; a trade union; a workplace forum; a labour inspector; or the Director-General of the Department of Labour or the Commission for Employment Equity. Although the affirmative action provisions of the EEA are not geared towards dealing with alleged unfair discrimination disputes, the EEA may nonetheless be a source of useful information to the parties involved in a dispute. The EEA can certainly help the parties to attempt to resolve the dispute before referring it to the CCMA.

As mentioned above, only the CCMA has jurisdiction to resolve an alleged unfair discrimination dispute. If a dispute remains unresolved after conciliation by the CCMA, the dispute has to be referred to the Labour Court for adjudication in terms of section 10(6)(a). However, all the parties may consent to arbitration of the dispute by the CCMA in terms of section 10(6)(b). Section 49 stipulates that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the Act. If the Labour Court finds unfair discrimination, it may make any appropriate order that is just and equitable in the circumstances, including compensation, damages, an order directing the employer to take preventive steps and publication of the order in terms of section 50(2). If one looks at section 10(7) of the EEA, it appears that parties may also agree to resolve their disputes through by drawing up a private agreement.

### **LIABILITY OF EMPLOYER**

Section 60 of the EEA requires an employee who alleges a contravention of the EEA to bring this to the attention of the employer. The employer must then consult all relevant parties and take the necessary steps to eliminate such conduct. The employer will be deemed to be liable for a contravention by its employee if it did not follow the procedure, or if it cannot prove that it did all that was reasonably practicable to prevent the employee concerned from acting in contravention of the EEA. This, of course, is true only if the contravention is proved. However, if one bears in mind that senior managerial employees are often regarded as the employer, knowledge or information related to the contravention will be attributed to the employer and it will therefore not escape liability for not having known. Furthermore, a duty is placed on every employer to take preventative steps in an attempt to eliminate unfair discrimination in any employment policy or practice. The employer must therefore be proactive in scrutinising all its policies and practices and do whatever is necessary to eliminate existing unfair discrimination.

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## COLLECTIVE LABOUR LAW

### STUDY UNIT 12- A BRIEF INTRODUCTION TO COLLECTIVE LABOUR LAW

**Activ-** ABC (Pty) Ltd regards itself as a progressive employer. Even prior to the new Basic Conditions of Employment Act, 1997 it afforded its male employees five working days paternity leave and afforded its female employees not only paid maternity leave, but also time off from work for breastfeeding. Time off for breastfeeding has led to lots of disruptions in the performance of work, and the employer now notifies the trade union that it is considering the withdrawal of this benefit, or at least the reconsideration of the basis on which it was granted. Apart from this, the workforce of ABC, who belong to the XYZ Trade Union, simply do not regard the existing arrangement as good enough. They feel that it is also the duty of the employer to fund a day-care centre in head office. A meeting takes place between the employer and the trade union, during which no agreement is reached about the employer's demands that the breastfeeding arrangement be amended. As a result, the employer forbids all employees to leave work to breastfeed. The employer also refuses to accede to the employees' demand that a day-care centre should be started. The trade union declares a dispute about the termination of the breastfeeding arrangement as well as the employer's refusal to establish a day-care centre. Do you think these disputes are disputes of right or disputes of interest?

*The dispute about the employer's refusal to start a day-care centre is a dispute of interest. There simply is no existing right, either in the common law, the existing collective agreement, or legislation, which entitles employees to this. As such, it is a dispute about the creation of a new right. Nevertheless, the dispute still has to be referred to conciliation if the employees feel so strongly that they want to strike about it.*

*The dispute about the employer's refusal to allow employees to breastfeed, is, on the face of it, a breach of a right contained in the existing collective agreement, which provides for breastfeeding. In other words, it is a dispute about the interpretation, application or implementation of an existing right contained in an agreement. As such, it is a dispute of right and the procedures contained in the Act for such disputes have to be followed. (Because the right is contained in a collective agreement, the dispute has to be resolved in terms of section 24 of the Act - see chapter 15 in the prescribed textbook.) This means the dispute will also have to be referred to conciliation, but, should conciliation fail, the dispute may be referred to arbitration -the employees are not allowed to strike about it.*

*But what about the employer's demand that either breastfeeding should be done away with or the basis on which it is allowed should be amended? This is a dispute of interest - it is about a change to an existing right of the employees. This dispute must also be referred to conciliation, and the employer may lock the employees out should conciliation fail but, until this dispute of interest is resolved, the employer, as a general rule, is obliged to adhere to the existing rights of the employees as contained in the collective agreement. This means that, pending settlement of the dispute, the employer must allow employees to exercise the right to take time off for breastfeeding. If not, the remarks in the previous paragraph apply.*

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### STUDY UNIT 13- FREEDOM OF ASSOCIATION

#### - **PROTECTION OF FREEDOM OF ASSOCIATION OF EMPLOYEES**

The freedom of association of employees is regulated and protected by the Labour Relations Act 66 of 1995, through a combination of the following three mechanisms:

- the affirmation of the right of an employee to form and join a trade union
- the extension of certain rights to an employee once he or she is a member of a trade union
- protecting employees against five types of actions by employers which employers might or will typically use to counter the presence and activities of trade unions and the exercise of rights conferred by the Labour Relations Act 66 of 1995, namely
  - Discrimination
  - prevention or prejudice
  - tempting employees into surrendering rights through some kind of advantage or promise of an advantage
  - dismissal
  - contractual provisions

Please note that of these five methods, only the provision regarding contractual provisions is expressly limited to protection of the right to freedom of association. All the other methods apply to the exercise of any right conferred by the Act (including, of course, the right to freedom of association). For example, an employee who has the right to refer a dispute about an unfair dismissal to the CCMA may validly contract out of this and agree to refer it to private arbitration. An employee cannot, however, validly contract out of freedom of association.

Activ- In the text, a number of examples are given of typical situations in which the employer will infringe on the right to freedom of association of an employee and the exercise of other rights contained in the Act. On a somewhat more advanced level, consider the following problem:

Employer A is notified by Trade Union B that it is calling a strike in support of a demand for higher wages. Employer A immediately notifies its workforce that all employees who do not strike will be paid a bonus of R5000. Do you think that this action by the employer violates section 5 of the Act? Do you think that it matters whether the employer announces the payment of the bonus before, during or after the strike?

*In the past, courts have struggled to find a balance between the right of employees to exercise their rights and freedoms in terms of legislation (such as the right to strike) and the right of the employer to the use of bargaining tactics as a legitimate way of exerting pressure on employees during the bargaining process. Under the old dispensation, courts tended to favour employers. Under the new dispensation, however, the status of strikes has changed: the right to strike is a constitutionally protected right while, at the same time, bargaining tactics which primarily undermine the role of the trade union as a representative of employees may arguably infringe on the right to freedom of association. It would seem, without providing any definite answers, that under the current dispensation, such tactics by an employer may well fall foul of the law (s 5 of the LRA).*

## - **TRADE UNIONS, EMPLOYERS' ORGANISATIONS AND FEDERATIONS OF TRADE UNIONS OR EMPLOYERS' ORGANISATIONS**

As far as these concepts are concerned, please note the following. Most of you have a good idea of what trade unions and employers' organisations are. These concepts are discussed in more detail in chapter 5 of the prescribed book. Here, you should simply note that these entities also have rights which are protected in the way described.

Sometimes, trade unions and employers' organisations join together in order to strengthen their case, especially in affecting the political processes in society via the joint undertaking of research, the formulation of joint strategies and the lobbying of political role players (and through representation on bodies such as NEDLAC). In South Africa, the most important trade union federation is COSATU and the most important federation of employers' organisations is Business South Africa (BSA). Although their activities seem far removed from the ordinary lives of individual employees, this is not always the case. Some of you might remember that during the debate preceding the Basic Conditions of Employment Act, 1997, COSATU called for protest action in support of their demands about the proposed Act. This ended in an important Labour Court case between BSA and COSATU and the granting of an interdict against the protest action, which the court found to be unprotected.

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## **STUDY UNIT 14- ORGANISATIONAL RIGHTS**

### - **THE PARTIES TO COLLECTIVE BARGAINING**

Why does the law regulate trade unions and employers' organisations? The reason is to be found in a combination of a number of factors:

- the important role these organisations play, not only in society, but as representatives of competing interests in the workplace;
- the ease with which these organisations may be formed; and
- the fact that their activities are dependent on the money they get from their members.

In other words, the argument is made that society demands that some form of control should be exercised over trade unions and employers' organisations to protect the interests of society and members of these organisations. As explained in the textbook, this is done through a system of registration. Although registration is voluntary, the Act contains a number of strong incentives for trade unions to register. Make sure you know these. One such an incentive that you have already encountered, as discussed in the previous study unit, is that only registered unions are entitled to the organisational rights in terms of the Act. In this chapter you find another incentive: only registered unions can enter into a collective agreement as defined in, and regulated by, the LRA. As far as the parties to collective bargaining are concerned, make sure that you have a good knowledge of the principles discussed in the textbook.

### - **COLLECTIVE AGREEMENTS**

The reason why the law defines and regulates collective agreements so extensively is to be found (as is the case with so many other aspects of Labour Law) in the inadequacy of the ordinary law of contract to deal with the nature and effect of these kinds of agreements. Make sure that you know the definition of a collective agreement well. Once you are comfortable with this definition, it is time to consider the following two important questions:

- Who is bound by a collective agreement?
- What is the effect of a collective agreement?

In order to challenge you and help you understand these two aspects of the regulation of collective agreements, we once again provide you with a set of facts. Read it carefully, compare it with the



examples in the textbook, and then try to answer the questions below.

Activ- Big Company is a fruit juice manufacturer. It has two functional units on its premises in the Paarl, namely a processing factory (the factory) and a marketing section. Entrance to both the factory and the marketing offices is gained through the same gate although they are situated in two separate buildings. There is a director for Processing, Mr P and a director for Marketing Mr M. Big Company employs 500 employees in total, 400 in the factory and 100 in marketing. Big Company falls in the registered scope of the Fruit and Sales Bargaining Council of which Big Company and Trade Union XYZ are both parties to this Bargaining Council. Trade Union XYZ currently represents 210 employees in the factory and 30 in marketing. There is also another trade union CD active in the workplace. CD represents 55 employees in marketing and 100 in the factory. XYZ and CD have tried to organise the employees in the workplace but was met with stiff resistance from the employer. Big Company refuses to recognise any union and to grant any organisational rights. In two weeks time there will be a public holiday which will fall on a Tuesday. XYZ has proposed working one Saturday (the normal work week is from Monday to Friday) in exchange for not working on the Monday before the public holiday - thus ensuring a long weekend for the employees. XYZ is prepared to enter into a written agreement to this effect and to support any required application for exemptions from the Basic Conditions of Employment Act to do so. Unfortunately, some of the supervisors in the factory and some of the secretaries in marketing are not keen to work on the Saturday because of other commitments - there is a rugby test on that Saturday. In addition they belong to another union. There is no provision in their contracts of employment in terms of which the supervisors can be required to work overtime. Mr P and Mr M are assigned by Big Company to seek legal advice on these two pressing issues namely the right of the two unions to organise the workers at Big Company and the issues surrounding the public holiday. They approach you for advice. Advise them.

**PROBLEM REGARDING THE PUBLIC HOLIDAY:**

*Section 23(1)(d) of the LRA states that a collective agreement can bind employees who are not members of the trade unions who are party to the agreement if three conditions are met: (a) employees are identified in agreement, (b) agreement expressly binds employees, (c) trade union holds majority status in the workplace. Definition of workplace. Reference to Speciality Stores SACCAWU v The Hub Factory. One office can contain separate workplaces. XYZ holds majority in factory (210 of 400) but not in marketing (30 of 100). Supervisors can be compelled in factory - not secretaries in marketing. Confirmed in Fidelity Guards v PTWU (1998) 19 ILJ 260 (LAC) that the legal effect of a collective agreement is that it may bind non-parties to the agreement and another is that where applicable a collective agreement varies any contract of employment.*

**PROBLEM REGARDING ORGANISATIONAL RIGHTS:**

*Issues to be looked at: there are basically 5 organisational rights: trade union access to the workplace, deduction of trade union subscriptions, election of trade union representatives, leave of office bearers for trade union activity, disclosure of information. Trade unions can either be sufficiently represented or majority union. The nature of representation will determine the rights a trade union will have access to. Unions must also be registered in order to claim organisational rights. A majority trade union can have access to all 5 organisational rights, while a sufficiently representative can have acquire access to the workplace, deduction of subscriptions and also leave for union activities for office bearers. XYZ is a member of the bargaining council. In terms of section 19 – if a trade union is a member to a bargaining council, the trade union automatically have access to s 12 & s 13 rights (access & deduction) regardless of the level of representation. The purpose of s 19 is to promote collective bargaining at sectoral level instead of at plant level.*

*Organisational rights may be obtained in one of the following ways:*

- collective agreement;*
- employer is a member of a bargaining or statutory council;*
- s 21 procedure; and*
- if all else fails the trade union can strike about this.*

*Trade union XYZ automatically gets access to organisational rights for both the factory and marketing department. Trade union CD has majority representation in marketing but will not even be sufficiently represented in the factory. The two trade unions can work together to be a majority in both departments. In terms of the Bader Bob case a minority union can strike to attempt to acquire organisational rights.*

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## **STUDY UNIT 16- STATUTORY BARGAINING FORUMS**

### **- PLACES AND LEVELS OF BARGAINING**

Collective bargaining can happen at:

- plant level where bargaining is limited to a single workplace;
- enterprise level where the operations of one employer are spread across different workplaces and bargaining takes place with reference to all the different workplaces that constitute the enterprise;
- industry level where one or more trade unions bargain with one or more employer organisations about terms and conditions for a whole industry (an industry is a number of different employers, companies or firms which are active in the same economic sphere); and
- or a combination of the above.

Collective bargaining can also take place at more than one of the above levels simultaneously. The typical combination encountered in practice is between industry level bargaining, where minimum terms and conditions are agreed upon for the whole industry, and plant or enterprise level bargaining, where actual terms and conditions are negotiated between a single employer and one or more trade unions.

Another way to distinguish between places for bargaining is to talk of centralised bargaining (at industry level, where the outcome of bargaining is not limited to the place of bargaining, but affects a large number of employers and employees not directly involved in the bargaining process) as opposed to decentralised bargaining (where the outcome of bargaining is limited to the place of bargaining, typically at plant or enterprise level). In the introduction to the prescribed chapter, brief mention is made of this distinction as well as of the preference of trade unions for centralised bargaining and of employers for decentralised bargaining.

### **- THE FUNCTIONS OF BARGAINING COUNCILS**

The two main functions of a bargaining council are to resolve disputes which arise within its area of jurisdiction and to serve as a collective bargaining forum with regard to the area and industry for which it is registered.

### **- DISPUTE RESOLUTION**

In order to understand this function of bargaining councils, note that:

- the function is exercised within the council's area of jurisdiction, irrespective of the parties to the dispute not being parties to the bargaining council;
- the question whether parties to the dispute are also parties to the bargaining council is only important to establish the procedure through which the dispute has to be resolved.

This means that if the parties to the dispute are also parties to the council, we look to the council's constitution for guidance as to the procedure to be followed. If one or both parties to the dispute should not be party to the council, but the dispute falls within the sector and area of the council's jurisdiction, the procedure to be followed is conciliation and arbitration by the council or an accredited agency (acting on behalf of the council), as required by the Act. Note also the remark in the textbook about the powers of the CCMA to arbitrate disputes which have been incorrectly referred to it where there is in fact a council with jurisdiction.

Suppose employer A is a bakery in the heart of Pretoria. Suppose further that the owner of the bakery decides to dismiss one of its employees and the employee complains of unfair dismissal. If there is a bargaining council for the bakery industry in Pretoria, the dispute has to be referred to the council for conciliation, even though the employer does not belong to an employer organisation which is party to the council, or the employee does not belong to a trade union which is party to the council. If no such bargaining council exists, the dispute must be referred to the CCMA for conciliation. If there is a council with jurisdiction and conciliation is unsuccessful, it will depend, of course, on the nature of the dismissal whether the dispute stays with the council for arbitration, or whether it is referred to the Labour Court for adjudication.

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## **STUDY UNIT 17- STRIKES AND LOCKOUTS**

Activ- Read through the following and decide whether the following actions fall within the first element of the definition of a strike.

- The members of Union A, who work in a snack bar owned by employer B, embark on an action in terms of which they report for duty every morning but refuse to work during the lunch-time period when the snack bar is at its busiest.
- The employees in an accounting section of a company lock the doors to their offices and refuse to answer their telephones for a period of a few hours every day. During this time they carry on with the work that they have on their desks, but other employees are prevented from bringing them work or raising queries with them.

*The actions in both of the above examples comply with the first element of a strike. Both constitute partial refusals to work. In the first case the employees are refusing to work their full hours. In the second case*

*they are refusing to perform all the tasks allocated to them. Remember that although these actions fall within the first element of the definition of a strike, this does not mean that they are strikes as defined. For this to be the case, the other elements of the definition must also be complied with.*

- **Overtime bans**

In terms of the previous definition of a strike (contained in the LRA) some uncertainty existed as to whether overtime bans constituted strike action in terms of the first element of a strike. This problem has been addressed in the LRA which now specifically includes both contractual and non-contractual (voluntary) overtime bans as legitimate constituents of the first element of a strike.

The following set of facts is taken from *SA Breweries Ltd v Food & Allied Workers Union & Others* (1989) 10 ILJ 844 (AD) and illustrates a typical overtime ban situation. Note that the employees in this case were not compelled in terms of their contracts of service to work overtime. They accordingly worked voluntary overtime. The facts are quoted from the headnote of the case:

The appellant, the SA Breweries, had recognized the respondent union as the sole collective bargaining agent of Breweries' employees. During 1987 the parties had conducted negotiations over wages and working conditions but these negotiations had eventually deadlocked. The union's members at Breweries had then engaged in an overtime ban. The performance of overtime was a voluntary matter under the individual employees' contracts of employment. Previously the employees had regularly worked overtime when requested to do so. The overtime ban occasioned substantial financial loss to Breweries through lost production and the disruption of distribution. It was not denied by the respondents that the union had instigated the ban and the employees concerned had engaged in it with the intention of compelling Breweries to comply with its bargaining demands. The court had to decide whether a non-contractual overtime ban fell within the first element of a strike. The court held that it did not constitute a strike in terms of the definition of a strike of the previous Labour Relations Act, 1956.

If this case had been brought after the promulgation of the LRA, the union's actions would have constituted strike action in terms of the first element of a strike. The reason for this is that overtime bans, whether contractual (compulsory) or non-contractual (voluntary) are specifically included in the definition of a strike as contained in the Act.

- **The second element: a concerted or collective action**

The second element of a strike also causes few problems in practice. Remember that a single employee can never embark on strike action.

Activ- • Can a strike be viewed as an example of a broad category of actions which is referred to as collective action?

- Is the right to strike afforded to an individual worker or to a group of workers?
- Can picketing and protest action be regarded as forms of collective action?

*You will be able to answer these questions if you apply what you have learned in par 17.4.1 of your prescribed book.*

- **The third element: the purpose of the strike**

The most difficult element of a strike is probably the one which has to do with the purpose of the strike.

The third element of a strike requires not only that there must be a purpose, but also that the purpose must fall within the ambit of section 213 of the LRA.

Activ- When you have read this section in your prescribed book, respond to the following scenario:

Five employees embark on strike action. When approached by management, the employees each give a different reason for striking. The employer wants to know whether she can approach the Labour Court and apply for an interdict to prohibit the employees from embarking on collective action. Advise her with reference to the relevant provisions of the LRA.

*If you have difficulty in formulating the correct advice, refer to the decision in *Floraline v SASTAWU* (1997) BLLR 1223 (LC) discussed in your prescribed book. Remember that the first question is always whether the employees' action complies with all three elements of a strike.*

Activ- It is pointed out in your prescribed book that the subject of a strike or a lockout must be one of mutual interest. Consider whether the following matters are of mutual interest to employers and employees and thus suitable topics for collective bargaining:

- The question whether the Government should introduce a statutory compulsory medical-aid scheme for all citizens;
- Employees demand that an employer should do something and go to the local authority about the fact that it has just increased bus fares; and
- The employees demand that the employer pay a transport allowance to compensate them for the increased bus fare which they must pay to get to work.

*Because there is no legal definition of what a matter of mutual interest is, it may be difficult to predict whether or not a matter will be regarded as one of mutual interest to the employer and employee. In the end, the concept of mutual interest will have to be interpreted by the Labour Court. We will now consider the above situations individually.*

*Despite what has just been said above, it does appear that the first example given would not involve a matter of mutual interest. Whether or not the Government should introduce a statutory medical-aid scheme for all citizens is not a suitable topic for collective bargaining between employers and employees in the private sector. Where the employees of the state make a demand that the state introduce a medicalaid scheme for them, this could be a matter of mutual interest to both them and the state as their employer.*

*The second example is more difficult, but it is likely that this would also not be regarded as a matter of mutual interest to employer and employee.*

*The third would clearly be a matter of mutual interest as the employees are demanding a change to their conditions of employment.*

Activ- Now that you have studied the three elements of the definition of a strike, try to complete the following two activities which will test your knowledge of all three elements of a strike. Read through them carefully and consider whether the following actions of employees constitute a strike as defined. Note that a particular action will only constitute a strike if all three elements of a strike are present.

1. The employees of an employer, who all work on a production line, decide to disrupt production by half of them refusing to work during the morning of each day and the other half refusing to work during the afternoon. The purpose of this action is to compel the employer to increase the wages paid to the employees.

2. The employees in a clothing factory deliberately produce fewer dresses than they normally do in order to try to compel the employer to dismiss a foreman whom they dislike.

3. The three employees employed by the owner of a small shop all refuse to work. The first employee refuses to work because she is unhappy about the salary she is paid; the second employee is unhappy about the hours she is required to work; and the third employee is feeling ill.

4. The shop assistants in a large retail store all refuse to clean up after the end of the working day. Although they are not required to do so in terms of their contracts of employment, they have, as a matter of practice, always done so. They are doing this because the employer has failed to take notice of their complaints that the electrical equipment used in the store is unsafe because of incorrect installation.

5. Four hundred workers who all work underground in a mine refuse to work because they consider the mine shaft to be unsafe. Upon hearing of the strike, the mine manager immediately dispatches an investigation team to inspect the mine. The mine is subsequently declared to be safe. The workers still refuse to work underground.

*The first two examples clearly fall within the definition of a strike. The first takes the form of a partial refusal to work in support of a demand relating to a matter of mutual interest between employer and employee. The second action also takes the form of a partial refusal to work for the purpose of remedying a grievance.*

*The third example does not constitute a strike because it is not a concerted activity. The employees are all refusing to work for different reasons; in other words, there is no common purpose.*

*The fourth example is not so clear. The actions of the employees are of a concerted nature. The action is being undertaken with the purpose of resolving a grievance the employees have. The question is whether their action of refusing to clean up complies with the first element of a strike. This will depend on whether a refusal to do non-contractual work falls within the definition. It would also be possible to argue that the employees have always cleaned up as a matter of practice and that their conduct has resulted in the amendment of their contracts of employment to incorporate a contractual duty to clean up. Whether the court would accept such an argument would depend on the specific facts of each case.*

*The fifth example does not constitute a strike as it could be argued that the substratum or reason of the strike has been removed. In other words, by removing the grievance the foundation of the strike has fallen away. Refer also to Afrox Ltd v SACWU & Others; SACWU & Others v Afrox Ltd (1997) 4 BLLR 382 (LC) discussed in your prescribed book.*

Read carefully through the definition of a lockout. As in the case of the definition of a strike, all the elements of a lockout must be present before a certain action will constitute a lockout. A lockout consists of only two elements because an employer need not act in concert with other employers in locking employees out. This is because a single employer can implement a lockout.

#### - **The first element: the action taken**

The definition of a lockout refers to only one form of action, namely the exclusion of employees from the employer's workplace. This exclusion is normally accompanied by a refusal to pay the employees' salaries.

- **The second element: the purpose of the action**

Activ- Read through the following paragraphs and decide whether the facts constitute a lockout.

Employer A owns a small factory that supplies specialised components to certain engineering firms. Business is bad and customers are not placing orders for A's products as a result of a downturn in their businesses. The factory has large amounts of stock. A realises that its employees will demand a large wage increase when the annual wage negotiations start because they did not receive a large increase the previous year. Because A has a large inventory of stock and it has become possible to buy the products it manufactures on the overseas market at a good price and supply them to its customers, A decides to act while it is in a position of strength. It makes a demand on its employees and their union that they should agree to a wage reduction of 10 percent. When they refuse, A prevents the employees from working by closing the factory gates and refusing to pay them. A tells the employees that they can return to work when they agree to the wage reduction.

Would your answer have differed if A took the above course of action, not with the purpose of compelling its employees to accept the reduction in wages, but simply to deprive them of their wages so that they would be less willing to strike at a later stage when the strike would be more likely to harm A's business?

*1 The first course of action, where the employer excludes the employees with the purpose of compelling them to accept the wage decrease, complies with both elements of the definition of a lockout.*

*2 The second course of action will not constitute a lockout as the purpose for which the employer is excluding the workers does not fall within the definition of a lockout.*

*The above may seem a technical distinction, but it is important to note that it is essential to determine the purpose for which the employer excludes its employees from its premises. This will often be the decisive factor in determining whether or not a lockout is taking place.*

- **Offensive and defensive lockouts**

The difference between an offensive and a defensive lockout is important. Make sure that you know the difference and that you will be able to identify these actions when given a set of facts. An offensive lockout is where the employer first decides that he wants to lock the employees out. Since the rule of no work no pay applies the employees will not be able to work and will forfeit their salary. A defensive lock-out is where the employees first decide to go on a strike and in response to that strike the employer locks them out.

In your prescribed book it is mentioned that partial strikes (such as go-slow or work-to-rule) are very effective from the point of view of the strikers: the employer is hurt, but the employees still earn their salaries because they are on the employer's premises and they are doing their jobs. The best way for the employer to counter this type of strike action is to institute a defensive lockout.

- **PROHIBITIONS ON STRIKES AND LOCKOUTS**

As a point of departure the important role of strikes and lockouts during the collective bargaining process must once again be emphasised. Without the ultimate sanction of strike action, collective bargaining would not be effective.

Because of the potentially harmful effect of strikes and lockouts to the parties to the dispute and to society in general, the Labour Relations Act 66 of 1995 places some restrictions on the exercise of these actions. In some instances strike action and the right of recourse to the lockout are absolutely prohibited. In other instances such action will be allowed provided that certain procedural requirements have been complied with.

If you refer back to the previous discussion, you will recall that we said that although strikes are recognised as a fundamental human right in the Constitution, no right is unlimited. Even rights entrenched in the Constitution may be limited in certain circumstances. However, section 23 of the Constitution, which grants employees the right to strike, does not specify the circumstances in which strike action may be prohibited nor whether certain procedural limitations may be prescribed before embarking on strike action. In fact, the Constitution does not make the distinction between a protected and an unprotected strike.

Once you have read through the entire chapter you will see that the Labour Relations Act 66 of 1995 prohibits strike action in certain circumstances. In those instances where strike action is allowed, the Labour Relations Act 66 of 1995 places certain procedural restrictions on strike action.

The question which immediately arises is whether this is allowed in terms of the Constitution. The answer is yes. As we pointed out, the Constitution recognises the principle that the entrenched rights may be limited in certain circumstances provided that such a limitation complies with section 36(1), which states that a right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- the nature of the right;
- the importance of the purpose of the limitation;

- the nature and extent of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.

Consequently, it is perfectly in order for the Labour Relations Act 66 of 1995 to limit the right to strike, provided that the limitations contained in it comply with the limitation clause (s 36(1) of the Constitution) quoted above.

#### - **Large-scale employer**

We now turn to large-scale dismissals by a big employer. A big employer must comply with the seven requirements set out above. In addition, however, he or she has to comply with s 198A.

#### - **Facilitation route**

The employer can approach the CCMA to appoint a facilitator when it gives notice to the employee party in terms of s 189(3) that it is contemplating a large-scale dismissal. In the event of the employer not requesting this, the employee party representing the majority of the employees that the employer contemplates dismissing may request a facilitator. This must be done within 15 days of the employer's notice of contemplated dismissal. If neither party requested a facilitator within the time frames, they may still agree to request a facilitator during the consultation process. If a facilitator is appointed, the facilitation must be conducted in terms of the regulations (not yet in operation) made by the Minister of Labour. Remember that an employer may not dismiss before 60 days have elapsed from the date on which the employer gave notice of contemplating a large-scale dismissal. Once the period has lapsed, the employer can go ahead and give notice to terminate contracts of employment. The notice must comply with the time periods set out in section 37(1) of the BCEA. Make sure that you know what these time periods entail. Payments instead of notice may also be made in terms of section 38 of the BCEA.

#### - **Non-facilitation route**

We now consider the non-facilitation route, where neither of the parties requested a facilitator. A minimum period of 30 days must have lapsed before a dispute about the contemplated dismissal can be referred to the CCMA or a council for conciliation. The minimum period for conciliation is 30 days, during which the employer may not dismiss. In practice this means that the soonest an employer would be able to dismiss is after the expiry of both the 30 day periods, in other words only after a period of 60 days from the date on which it gave notice of contemplating a large-scale dismissal. Once again the notice must comply with section 37 of the BCEA, and section 38 of the BCEA may also be used.

#### - **Essential and maintenance services**

##### **Essential services**

In your prescribed book it is mentioned that the Essential Services Committee has to decide whether a particular service should in fact be regarded as an essential service or a maintenance service. Read the following paragraph, which will provide you with more background information concerning this decision. Deciding whether a certain service constitutes an essential service in terms of section 213 of the Labour Relations Act 66 of 1995 can be fairly difficult. Because of this difficulty, the Essential Services Committee will probably consider the ILO's own interpretation of this definition. These decisions are a valuable source of guidelines on what services are essential. Whether a service is to be regarded as an essential service will depend, to a large extent, on the circumstances prevalent in a specific country. A nonessential service may become an essential service if the interruption of such a service carries on for too long or extends beyond a certain point, and it begins to endanger the life, personal safety or health of the population or a part of the population. The fact that a strike has or might have serious consequences does not mean that the service concerned is an essential service. Examples of services that have been regarded as **essential** services are hospitals, water supply services, telephone and electricity services and air traffic control services. Examples of services that have been regarded as **nonessential** are harbour services, aircraft repairs, banking, agriculture, teaching, mining and the petroleum industry. As a general rule, transport will also not be regarded as an essential service. Your prescribed book also refers to certain services which have been designated as essential services. Read through these examples. We do not expect you to remember all of them! These examples only serve to illustrate how complicated it can become to decide whether a service or part thereof should be classified as an essential service. From this list of services you will note that most are essential and, should they be interrupted, this could endanger the life, personal safety or health of the whole or any part of the population.

Activ- If you are confident that you are in a position to determine whether a service ought to be regarded as an essential service, try to determine, in the light of the ILO guidelines set out above, whether the following services should be regarded as essential services:

- Employees who deliver the post
- Employees who are responsible for paying out state old-age pensions to persons who are dependent on that money
- The employees who work at a petrol refinery which is the sole supplier of petrol to an isolated Area
- The employees who work in the fishing industry in a coastal area, where a lockout by the employer could have serious economic consequences for all the fishing villages in the area
- Employees who work for an ambulance service (Would your answer differ if the ambulance service was one of several which operate in a city?)

*Bear in mind that opinions may differ on whether some of the above constitute an essential service. This is not necessarily a bad thing. It simply illustrates the fact that the Essential Services Committee may face a difficult task!*

- **An arbitration award or collective agreement regulates the issue in dispute**

The following example illustrates this prohibition.

Employer A and Union B enter into negotiations on an annual wage increase. An additional item on the negotiating agenda is the creation of a provident fund for the employees employed by A. Good progress is made in the negotiations regarding wages, but it has become apparent that the issue of the provident fund needs further consideration. A collective agreement is entered into in terms of which A will grant a wage increase of 9 percent. It is also agreed that the issue of the provident fund will be referred to a special working committee consisting of employer and employee representatives. It is further agreed that no strike or lockout may be called in respect of this matter for a period of one year.

Because the issue of the wage increase is regulated by the collective agreement, section 65(3) prohibits a strike or lockout in this respect, unless the collective agreement makes provision for this to occur. The parties are prohibited from striking in respect of the provident fund issue by virtue of section 65(1)(a) because they agreed to such a prohibition in a collective agreement.

- **The issue in dispute is regulated by a determination**

Activ- 1. You have to give a lecture in which you will explain to students when strikes or lockouts will be prohibited in terms of section 65 of the Labour Relations Act 66 of 1995. Prepare a diagram in which you summarise, in three or four words and under separate headings, each of the circumstances in which this section prohibits strikes and lockouts.

2. Study the following paragraphs and decide whether a strike or lockout will be prohibited.

a) Employer A and Union B (which represents all but a small number of employees in A's factory) enter into a collective agreement in terms of which A agrees to pay the union members who are its employees a wage increase of 20 percent, in return for which it is agreed that they will work on Saturday mornings twice a month. The agreement will be binding for a period of two years. Can the workers demand a wage increase before 2 years have lapsed?

*A strike in support of a further wage increase will be prohibited because this matter is already regulated in the collective agreement that binds the union and the employees (s 65(3) of the Labour Relations Act 66 of 1995).*

b) After working in terms of the new arrangement for a period of three months, the union members lodge a grievance. Because transport is a problem on a Saturday morning, their travelling time to and from work is a lot longer than it is on ordinary weekdays. They demand a travel allowance, a condition of employment that they do not at present enjoy and which is not provided for in the collective agreement

*A strike over a travel allowance will probably not be prohibited as this matter is not regulated in the collective agreement between the employer and the union.*

c) Later, as a gesture to avoid growing discontent, employer A negotiates a concession with B in terms of which it is agreed that the union members will receive a travel allowance to assist them in their difficulties in getting to and from work on Saturday. In return, the collective agreement is amended to provide that members will not go on strike during the next year on any matter dealing with terms and conditions of employment and that any grievances that they may have will be referred to arbitration.

*Where the collective agreement is amended to prohibit strikes over wages and conditions of employment, and states that disputes over grievances will be referred to arbitration, strikes in respect of these matters will be prohibited (ss 65(1)(a) and 65(1)(b) of the Labour Relations Act 66 of 1995).*

d) In the course of the negotiations a shop steward and a manager become involved in an argument, as a result of which the shop steward is dismissed for insolence. The union members are incensed by this

action and wish to go on strike to secure the reinstatement of the shop steward.

*Disputes over the dismissal of an employee on the grounds of misconduct cannot be the subject of strike action. These disputes must be referred to arbitration (s 65(1)(c) of the Labour Relations Act 66 of 1995).*

- e) A dispute arises regarding the interpretation of the clause dealing with the working time on Saturday. The managers at the plant decide to embark on a lockout in order to enforce their interpretation of the agreement.  
*A lockout to resolve a dispute concerning the interpretation of a collective agreement is prohibited. This type of dispute must be referred to arbitration (s 65(1)(c) of the Labour Relations Act 66 of 1995).*
- f) Three non-union members become unhappy about the way in which their long-service bonus is calculated, and lodge a grievance in this regard. The employer rejects their grievance and they consider strike action in the form of a go-slow which could affect the whole plant's production.  
*There is a collective agreement in force that states that disputes arising out of a grievance must be referred to arbitration. If this collective agreement has been extended to nonunion members and it binds them, they will be prohibited from striking in respect of this matter (s 65(1)(b) of the Labour Relations Act 66 of 1995).*

Activ- Try to do the following self-test exercises.

1. In your own words, distinguish between the prohibition against strike action in terms of 65(1)(a) and section 65(3)(a)(i) of the Labour Relations Act 66 of 1995.
2. What is the rationale for allowing parties to prohibit strike action where a matter in dispute is specifically regulated in a collective agreement?
3. Can collective bargaining take place simultaneously at plant level (over actual wages) and at bargaining council level (over minimum wages)? (Refer to the decision in *Black Allied Workers Union v Asoka Hotel* (1989) 10 ILJ 167 (IC) quoted hereunder in your notes.)
4. A bargaining council agreement concluded in July contains a clause stating that the minimum wage for unskilled workers in the building industry in Gauteng will be R 500.00 per week. Employer A (who was a party to this agreement) is approached by trade union XYZ (also a party to this agreement) with a demand for a salary of R 530.00 per week for all the unskilled employees employed by Employer A. Employer A refuses to discuss the matter and holds the view that it is complying with the bargaining council agreement which states that all employers should pay a minimum wage of R 500.00. Advise trade union XYZ whether its members can go on strike to compel Employer A to pay a higher wage.

*In Black Allied Workers Union v Asoka Hotel (1989) 10 ILJ 167 (IC) the old Industrial Court drew a distinction between a demand for actual wages and a demand for minimum wages. The Court concluded that it is not prohibited to strike over actual wages.*

*The strike was occasioned by a demand for an increase in actual wages. The industrial council agreement makes provision for minimum wages. It makes no provision for the wages actually paid by any employer to its employees. The industrial council agreement furthermore contains no provision relating to an increase in actual wages which would be binding on the parties during the relevant period. It also contains no prohibition against actual wages being negotiated between an employer and its employees. The object of s 65(1)(a) of the Act [the old Labour Relations Act of 1956] is to ensure that agreements which are voluntarily arrived at and valid and binding between the parties are adhered to. The legislature therefore prohibited employers and employees from bringing pressure to bear on each other through the use of the strike or lock-out weapon to agree to amend agreements prior to the time agreed upon for the renegotiation of such agreements. It is for that reason that the Act prohibits a strike or lockout where there is a provision which deals with the matter giving occasion for the strike or lock-out. The court is aware of the fact that there is a general misconception that strikes and lockouts are, without qualification, prohibited during the currency of an industrial council agreement. This view of the law is incorrect. In this particular case, there is, as has been pointed out above, no provision in the industrial council agreement which deals with the matter giving occasion for the strike'*

#### - **When the procedures need not be complied with**

Section 64(3) of the Labour Relations Act 66 of 1995 sets out five circumstances in which a strike and lockout will be protected even if the prescribed procedural requirements for a protected strike or lockout have not been met. You will notice from reading this chapter that the Labour Relations Act 66 of 1995 (in the second instance) allows for parties to contract out of it should they wish to do so. In other words, the Act allows for parties to create their own procedures to be followed prior to embarking on strike action. This is in accordance with the intention of the legislature to allow parties some measure of control over their own destiny.

You might have gathered from studying this chapter that the last exception, that is, where a strike takes



place after the employer has acted unilaterally in contravention of section 64(4) of the Labour Relations Act 66 of 1995, is more difficult to understand. Spend some time again reading carefully through the explanation given in your prescribed book and then try to do the activity.

Activ- The following multiple-choice question is fairly difficult. Read carefully through the following set of facts and indicate which of the statements following upon it contains the most accurate advice. Try to resist the temptation to read the feedback before doing this problem! You may well find that you still have more studying to do.

Employer B decides that it is necessary to introduce compulsory overtime for all workers in a clothing factory in order to meet with growing consumer demands. The majority union in the factory is extremely unhappy with the proposed changes and demands a meeting with management to discuss the matter. Employer B responds by saying that it does not have time to enter into time-consuming discussions with the union as it is already losing big contracts because it cannot keep up with deadlines. Thereafter management informs all employees of its intention to implement the changes within 7 days. Voluntary retrenchment packages are offered to those workers who do not wish to work the required overtime. Upon hearing of the new developments, the union immediately refers the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation.

The CCMA informs the union that the earliest date on which the Commission will be able to convene a conciliation meeting is in two weeks. The union decides that due to the urgency of the matter it is not prepared to wait until after the proposed changes have been implemented, and that the situation warrants immediate action. The union holds a meeting with all its members to discuss the matter. After extensive discussions, a ballot is held there and then the majority of workers decide in favour of strike action, which is to begin as soon as the meeting ends. The union informs management of their intention to embark upon strike action after lunch and gives the employer one last opportunity not to proceed with the implementation of compulsory overtime. Employer B refuses to do so and the employees go on strike. Employer B approaches you for advice.

1. The strike by the workers will be unprotected because the workers went on strike before the conciliation requirements of the Labour Relations Act had been met.  
*1 is incorrect. From the facts of the question it is clear that Employer B refused to maintain the status quo by not changing the conditions of employment of the workers in terms of which they would not be required to work compulsory overtime. Although the conciliation requirements of the Labour Relations Act 66 of 1995 were not exhausted prior to embarking on strike action, the strike would nevertheless be protected because the employer refused to suspend the proposed unilateral changes pending an attempt at conciliation.*
2. The strike by the workers will be unprotected because the employer has not been given 48 hours in which to comply with the union's demands not to implement the changes to the workers' conditions of employment pending the conciliation meeting.  
*2 is incorrect. See the reasons in the previous paragraph. Although section 64(4) of the Labour Relations Act 66 of 1995 requires that an employer be afforded 48 hours to comply with the request of the union not to implement changes, the employer (according to the facts in the question) has already indicated that it is not prepared to suspend its intention to implement the proposed changes. The employees would thus be entitled to go on strike.*
3. The strike will be unprotected because the employees did not give their employer 48 hours notice of their intention to go on strike.  
*3 is incorrect. Although employees are normally required to give 48 hours notice of their intention to go on strike, they need not do so in the present circumstances*
4. The strike will be protected although workers have not given their employer 48 hours notice of their intention to go on strike.  
*4 is correct. See the previous explanation. This is the best advice to give to the union.*
5. The strike will be protected because the majority of the employees voted in favour of strike action.  
*5 is incorrect. It is not a requirement to hold a ballot before going on a protected strike.*

Activ- Here are a few more questions, just to make sure that you understand the nature of a secondary strike. The Labour Relations Act 66 of 1995 recognises secondary or sympathy strikes. Which of the following actions will not constitute a protected secondary strike as contemplated by the Labour Relations Act 66 of 1995?

1. Employees employed at a motor assembly plant, Motor (Pty) Ltd, embark on strike action in support of a strike by employees at a nearby petrol tank manufacturer, Petrol (Pty) Ltd, a supplier

of Motor (Pty) Ltd. Employees at Petrol (Pty) Ltd embarked on strike action as a result of their employer's refusal to bargain with their union, which is registered and a majority trade union. Strike action commenced immediately after Petrol (Pty) Ltd had locked out all employees. The dispute over the refusal to bargain has not yet been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. *1 will constitute a protected secondary strike. Employees at Petrol (Pty) Ltd embarked on strike action in response to a lockout that is not protected in terms of the Labour Relations Act 66 of 1995. The ensuing strike will be protected because employees need not comply with the procedural requirements for a protected strike where they strike in response to an unprotected lockout.*

2. Employees employed by Bakery (Pty) Ltd strike in support of a protected strike by employees employed by Flour Mill (Pty) Ltd, one of four suppliers of flour to Bakery (Pty) Ltd. Employees of Bakery (Pty) Ltd have given their employer five days written notice of their intention to embark on strike action. *2 is the correct answer. The action in 2 does not constitute a protected secondary strike 2 will not qualify as a protected secondary strike because the Labour Relations Act 66 of 1995 requires that the secondary employer (in this case Bakery (Pty) Ltd) be given at least 7 days notice prior to the commencement of the strike.*

3. Employees employed by Bakery (Pty) Ltd strike in support of a protected strike by employees employed by Shop & Buy (Pty) Ltd. Bakery (Pty) Ltd is a subsidiary of Shop & Buy. *3 will qualify as a protected strike. The secondary and the primary employee fall within the same group of companies. The secondary employer is a subsidiary of the primary employer.*

4. The members of Union A refuse to work voluntary overtime in support of a protected strike by members of Union B. All the members of Union A and Union B are employed by the same employer. *4 will constitute a secondary strike in terms of the Labour Relations Act 66 of 1995. A voluntary overtime ban falls within the definition of a strike as set out in section 213 of the Labour Relations Act 66 of 1995. A secondary strike could occur when some workers decide to embark on strike action in support of other workers employed by the same employer.*

#### - **Protection against dismissal**

Where an act in contemplation or furtherance of a strike or lockout constitutes a criminal offence, the striking employees or their employer will not enjoy any immunity against civil proceedings.

#### - **The dismissal of unprotected strikes or lock-outs**

In your prescribed book it is pointed out that employees who take part in an unprotected strike may be dismissed in terms of section 68(5) of the Labour Relations Act 66 of 1995. Such a dismissal will constitute a fair reason for dismissal because an employee on strike is breaching his or her contract of service in terms of his or her duties. The employer will usually argue that it is dismissing the strikers on the basis of misconduct.

In fact, the Code of Good Conduct specifically states that participating in an unprotected strike constitutes misconduct. An employer who decides to resort to dismissing strikers who took part in an unprotected strike must therefore ensure that the guidelines for a fair dismissal are followed. This means that the dismissal must be both substantively and procedurally fair.

#### - **THE USE OF REPLACEMENT LABOUR**

Owing to the disruptive effect of strike action, employers will always be tempted to use replacement labour during the course of a strike in order to try to maintain production. Employers may not do so except in certain circumstances. You must know these circumstances.

Activ- If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. It would merely jeopardize the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned. The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed by both.

- Black Allied Workers Union & Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC) at 972B - D.

Discuss the above quotation critically. Also discuss, with reference to the Labour Relations Act, 1995 and applicable case law, whether there are, or for that matter should be, any limitations on the exercise of

strike action.

*This question in essence dealt with the dismissal of striking workers based on operational requirements during a protected strike. You had to discuss the protection afforded by the Labour Relations Act to striking employees both in the context of protected and unprotected strikes. The essence of the quotation pertains to the context and reason for the protection. You therefore had to discuss the role of collective bargaining in the labour law and the protection afforded to collective bargaining in terms of the LRA and the Constitution. The LRA supports an explicit right to strike accompanied by strong protection against dismissal and other acts of victimisation. According to Du Toit, the acquisition of the right to strike and the accompanying protection provides trade unions with the strongest incentive for complying with the Act. You could even refer how this protection is embodied in the new LRA compared to the 1956 act. The crux of the discussion had to be about the dismissal of striking employees for operational requirements during a protected strike. Section 67(5) of the LRA accepts that the operational requirements of an enterprise may justify dismissals during a protected strike. The crux of the question related to the interpretation by the court of this right. Many employees and trade unions have interpreted this right as an easy excuse for employers to dismiss employees during a strike. Employees are trying to put economic pressure on employers during a strike and if they are successful and employers face economic difficulty then employers can resort to dismissing employees for economic reasons. This might seem to be unfair.*

*In BAWU v Prestige Hotels CC (1993) 14 ILJ 963 (LAC) (which was decided under the previous Labour Relations Act) stated that the test for dismissals during a strike was whether the employer's financial circumstances truly warranted the step. It must be motivated by genuine economic necessity. The limit of the right to strike is therefore reached at the point where the strike inflicts irreparable economic hardship upon an employer. This contemplates an investigation of the merits of the employer's decision to dismiss. In NUM v Black Mountain Mineral Development (1994) 15 ILJ 1005 (LAC) the court found the approach in Prestige Hotels too restrictive and allowed for a test where the employer may dismiss employees once there is a likelihood of substantial economic loss. The employer should be able to commence dismissal once it has reached its level of tolerance. This view and judgement has been criticised because at the very point at which the strike becomes effective, dismissal of strikers becomes fair. It also ignores the proposition that dismissing strikers will not necessarily guarantee the survival of the enterprise. This case went on appeal but before the matter was clarified at appeal it led the way for a number of other judgements to look at the issue in more detail.*

*In Cobra Watertech v NUMSA (1995) 16 ILJ 582 (LAC) the court criticised the decision of Black Mountain because it required of the court to look retrospectively to see if the parties acted rationally in the process of bargaining having regard to the employer's financial circumstances. The court moved away from the idea that the answer lies in a fixed test to be applied to the facts. Instead, it held that it was necessary to look at all the reasons advanced as well as the relevant facts to determine whether a dismissal was fair.*

*In NUMSA v Vetsak Co-operative (1996) 17 ILJ 455 (A) the court said it is not possible to define a definite test and the ultimate test will lie in the fairness and not the lawfulness.*

*On appeal of the Blackwater case, in NUM v Black Mountain Development (1997) 4 BLLR 355 (A), the court found:*

- *Collective bargaining is the means preferred by the legislature for the resolution of labour disputes and the freedom to strike is fundamental to collective bargaining.*
- *Although an employer may be entitled at common law to dismiss striking workers for breach of contract such a dismissal may constitute an unfair dismissal in terms of the LRA.*
- *However, unless the dispute is resolved and the employees return to work a point must be reached in every strike when the employer in fairness will be justified in dismissing the striking employees.*
- *Whether that point has been reached will depend on all the circumstances and facts of each particular case.*
- *The ultimate determinant is fairness to both the employer and the employee. In deciding this question the court must necessarily apply a moral or value judgement.*
- *Once the facts are established an onus is not appropriate in the evaluation of fairness. The enquiry is not whether another course of action may have been more successful in resolving the dispute but whether in all the circumstances the dismissal could be considered unfair. It would be untenable to protect a strike beyond the point where it can contribute a solution to the dispute. To do so would be detrimental to the interests of both sides as well as the community at large. In other words strikes that are not functional to collective bargaining will not be protected and more than legality is involved in functionality.*

*This issue was again addressed in SACWU v Afrox Ltd (199) 10 BLLR 1005 (LAC). The court found again that operational requirements even where they arise out of a protected strike may justify a dismissal. The true reason should however be the employer's operational requirements and not the employees' participation in a protected strike. The court must further determine whether the dismissal*

would have occurred if there was no participation in the strike. The second step would be to look at legal causation. Was participation in the strike the main or most likely cause of the dismissal. If so – the dismissal would be automatically unfair. If not, the employer can prove justification on the grounds of operational requirements. Once it is established that the employer's operational requirements were the reason for the dismissal, the burden shifts to the employer to justify the dismissal on grounds of fairness. The court recognised that a strike does not deserve protection beyond the point where it can contribute to a solution to the dispute. The test therefore lies in the functionality of the strike towards the collective bargaining process. Two very important considerations identified in Afrox are whether the employer considered alternative options to dismissal and whether the employer considered leaving the outcome of strike action to power play leaving the outcome of the strike. The dismissal must comply with the procedural requirements in s 189 of the LRA.

## **- PICKETING**

### **What is a picket?**

The most important and effective weapon in the hands of a trade union involved in a dispute with an employer is the strike. In order to exert the maximum amount of pressure on the employer during the strike action, unions often urge their members to engage in ancillary action which would advance the object or cause of the strike. An effective way of doing this is to go public with the dispute or grievance and to rally as much support as possible for the strike action. Picketing is not unusual in our labour relations system. Workers are often seen standing around with placards and other notices which publicise the dispute and their grievances. For a picket to be successful it is obviously important for the picketers to be as visible to the public and co-workers as possible. However, it should also be borne in mind that a picket may be disruptive and could interfere with an employer's business. In order to strike a balance between these two competing interests, the Act provides that the picket may be held in any place to which the public has access, provided that it is outside the premises of the employer. However, there are instances where a picket outside the premises of the employer would defeat the object of the picket, which is to rally support for the (protected) strike. This would be the case for example, where the employer involved in the dispute has its business on the third floor of a shopping mall. The union might argue that it is unreasonable to keep the picket outside the premises of the shopping mall. If the employer agrees, the picket may be conducted on the premises of the employer. However, the employer is under no obligation to grant such permission, but may not withhold such permission unreasonably.

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## **STUDY UNIT 18- PROTEST ACTIONS**

### **- THE RIGHT TO PROTEST**

The recognition in the Labour Relations Act 66 of 1995 of the right to take part in a protest action was not welcomed by the business sector. This was mainly because protest action has the potential to disrupt the economy of the country and the businesses of employers. The legislature nevertheless decided to grant trade unions the right to call a protest action, provided that certain procedures would be followed.

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## **STUDY UNIT 20- DISPUTE RESOLUTION**

Activ- Can an employee pick and choose the right they want to rely on in a given case? Discuss with reference to case law?

*Although much uncertainty exists in the law about this issue, after the Constitutional Court decision in Chirwa v Transnet Ltd & others the following general principles may be identified:*

*An employee (or employer, for that matter) may not rely directly on a Constitutional right where there is ordinary legislation giving effect to and interpreting a Constitutional right. The Constitution, of course, remains important to not only in guiding the interpretation of legislation, but also as a yardstick to measure the constitutionality of legislation.*

*As far as the choice between reliance on the contract of employment and reliance on labour legislation is concerned, the Supreme Court of Appeal, has consistently held that employees and employers retain the choice to rely on contractual rights rather than the rights contained in legislation. In that case the High Court retains jurisdiction (along with the Labour Court) to hear contractual disputes. In Murray v Minister of Defence the Supreme Court of Appeal held that employers now have a general duty of fair dealing with employees.*

*In light of section 77(3) of the BCEA which gives the High Court and the Labour Court concurrent jurisdiction in all matters arising from a contract of employment – that this choice (between contract and legislation) remains intact.*

*As far as the choice between labour legislation and administrative law as the basis for a case is concerned – a choice which only applies in case of public servants (and not private employees) – there are different views. It would seem as if the majority ruling in Chirwa eliminated this choice (forcing*

*employees to use labour legislation). Despite this, some lower courts have declined to follow Chirwa thereby maintaining the choice between legislation and administrative law.*

- **STATUTORY DISPUTE RESOLUTION INSTITUTIONS**

Once we know why a new system was needed, we also have to look at the institutions that make up this new system. The central place is occupied by the Commission for Conciliation, Mediation and Arbitration. You should note that this is a tripartite body.