UNISA university of south africa

DEPARTMENT OF MERCANTILE LAW

ADVANCED LABOUR LAW
LML403Q

TUTORIAL LETTER 501/3/2010

WELCOME AND GOOD LUCK!

Welcome to this module of advanced labour law. For most of you this will be your second contact with the subject after the MRL303P course. We hope you find it very stimulating and interesting.

We suggest that you use this workbook as the basis to work from. This workbook will follow the same content outline as your prescribed book – Basson et al *Essential Labour Law* (5th edition). Where the workbook refers you to a prescribed chapter in the textbook – we suggest you read the prescribed chapter first and then continue with the study guidelines in the workbook on that chapter. Please note that this workbook does not replace the textbook but should be used as an aid to help you understand the contents of the textbook better.

The workbook does not contain a demarcation. Any demarcation of the work will be communicated to you by way of a tutorial letter. Also do not try and read "clues" in the wording of the workbook for that purpose. For example we have used various words to describe your actions such as read, look, study, understand etc. All of these terms carry the same meaning and are used to denote the same level of importance of a specific section.

STUDY UNIT 1: INTRODUCTION TO LABOUR LAW
Prescribed chapter for this study unit from Essential Labour Law: Chapter 1

1 INTRODUCTION

Labour law consists of two main components namely individual labour law and collective labour law. For the sake of convenience, labour lawyers sometimes draw a distinction between n these components. Generally, individual labour law would include topics such as the formation of the employment relationship, the content of the relationship, and the termination of the relationship. The assumption here is that the employment relationship exists between two single entities i.e, between a single employer and a single worker.

Collective labour law focuses on relationships on a collective level, in other words a number of people are acting together (collectively) to influence this relationship. Collective labour law looks at groups. Examples of such collective entities are trade unions and employer's organisations.

It is vital to remember that there is no watertight distinction between individual labour law and collective labour law. Something that happens on a collective level (such as collective bargaining between an employers' organisation and a trade union) may have an impact on the individual employment relationship. An employers' organisation and a trade union may reach an agreement about wages, and this agreement will, in turn, form the basis of how much an individual employee is to be paid.

As you can see, labour law deals with a large number of relationships, some of them between persons and groups that we have not yet come across. Each of these relationships has a name:

- The relationship between the employer and a worker is called the employment relationship. The basis (or foundation) of this employment relationship is the contract of employment.
- The relationship between an employer and a trade union is called a collective bargaining relationship. Note that there could be collective bargaining relationships also between an employer's organisation and a trade union.
- There are relationships between trade unions and workers. This is a membership relationship - the worker becomes a member of the trade union in terms of the union's constitution. There is also a membership relationship between a single employer and an employer's organisation.
- The State has relationships with all its citizens (such as individual workers) and with all groups of citizens (groups formalised into, for example, trade unions). These relationships (that is, between the State and its collective subjects) are harder to classify and we do not really have a name for them.

We suggest that you now read through chapter 1, which provides some basic background to your studies. Make sure you pay particular attention to the following:

- Par 1.1.2 – relating to the difference between individual and collective labour law,
- The headings of pars 1.4.1-1.4.5, namely the sources of labour law, which are: the 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.

2 CONCLUSION

By now you should have a good idea of what labour law is all about. In the next study unit we will introduce you to the contract of employment.

ENCOURAGEMENT

A journey of a thousand miles begins with the first step.

STUDY UNIT 2: THE CONTRACT OF EMPLOYMENT

Prescribed chapter for this study unit from Essential Labour Law: Chapter 2

2.1 THE IMPORTANCE OF THE EMPLOYMENT CONTRACT

As you know, slavery is no longer practised in modern societies, but the contract of employment plays a very significant role in our working world. It is therefore important that we are able to define and understand the contract of employment and that we know how a contract of employment can be entered into and what the requirements are for a valid contract.

2.2 DEFINITION OF THE EMPLOYMENT CONTRACT

The 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**. Note that the essential elements of the employment contract are highlighted in the definition above.

2.3 THE DEFINITION OF AN EMPLOYEE

One of the reasons why the definition of an employee is important is because most protective labour legislation (such as the Labour Relations Act and the Basic Conditions of Employment Act) 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.

One of the important themes in this chapter is therefore the difference between an employee and an independent contractor and how to differentiate between the two. You must therefore look carefully at the discussion in these paragraphs on how to determine the difference between an employee and independent contractor.

The courts have developed certain tests to help them with this distinction. These tests are used to assist in defining an employee in a borderline situation. The tests developed by the courts to help with the distinction between an employee and an independent contractor are:

- the control test,
- the organisation test,
- the dominant impression test; and
- the economic capacity test.

The dominant impression test is the most popular of the above mentioned tests. See the discussion about these tests in par 2.3.3 of the textbook.

An important aspect of the employment relationship is control. When you look at the discussion of control in chapter 2 make sure that you can distinguish between actual control and the right to control. The element of control or subordination was at one time considered to be the most important distinguishing feature between a contract of employment and a contract of the independent contractor. In today's highly specialised world, however, the element of control has been reduced to the right of the employer to control the employee. Furthermore, it is now usually only one of the elements which the court will use to decide whether the contract is, in fact, a contract of employment. It is not easy to tell the difference between an employee and an independent contractor. This is particularly the case if the only determining factor is the element of control.

In 2002 a new presumption of who an employee is, was added under s 200A of the LRA. This presumption provides guidelines when the status of an employee or independent contractor must be determined. After you have studied s 200A, see if you can answer the following questions:

ACTIVITY

- What is the purpose of the statutory presumption of section 200A of the Labour Relations Act, 1995?
- List seven factors that will lead to the presumption that a worker is an employee.
- Must all these factors be present before a worker will be presumed to be an employee?
- How does the SARS distinguish between an employment contract and a contract of an independent contractor?
- According to the amended definition of an employee, two new categories of taxpayers have been created by the Income Tax Act. What are these two categories?

FEEDBACK

- *The purpose of the statutory presumption is to protect vulnerable workers.*
- *You will find the seven factors in section 200A of the LRA and on pp 28-30 of your textbook.*
- *No, only one or more of the factors must be present for the presumption to apply to the employment relationship.*
- *The SARS does this by distinguishing between the essence of an employment contract (placing a person's services at the disposal of another person) and a contract of an independent contractor (a contractor will only be responsible for the end result of the work).*
- *Any personal service company and any personal service trust.*

ACTIVITY

Look at the following descriptions of various categories of workers and decide upon the degree of control to which, you think, these workers are subjected (i.e. by their employers). Decide whether the degree of control by the employer would be high, moderate or non-existent.

- Gardener at the Parliamentary Buildings in Cape Town
- Surgeon working for the Department of Health in Gauteng
- Secretary in a typing pool
- Secretary to a managing director of a large, corporate firm
- Captain of a ship belonging to a cargo shipping company
- An insurance agent who has a registered close corporation and who is paid on commission

FEEDBACK

The gardener and secretary in a typing pool are likely to be subjected to a greater degree of control than the surgeon and captain of a ship. The secretary of the managing director is generally given a great deal of flexibility. One would have to ask whether the insurance agent was, in fact, an employee before deciding whether the agent was subject to the employer's control in the usual sense.

As we have mentioned above, the court has developed various tests which have been used to assist in deciding whether, in borderline cases, a contract is one of employment or a contract of work. Using the control test, the organisation test and the dominant impression test, evaluate the following situations:

ACTIVITY

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?

FEEDBACK

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.

Also see if you can correctly identify whether the following people are employees or independent contractors:

ACTIVITY

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?

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?

⇨ ***FEEDBACK***

As far as the first problem is concerned, it is clear that K, the builder, is an independent contractor. Using the control test as a criterion, S is an employee of K.

The second problem is more difficult. 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".

Try answering the following multiple-choice question to test whether you have understood the difference between an employee and an independent contractor.

⇨ **ACTIVITY**

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.

⇨ ***FEEDBACK***

(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.

2.4 THE IDENTITY OF THE EMPLOYER

It is therefore important to be able to define and identify who the employer is in borderline or difficult situations. While it is usually easy to find the employer, difficulties may arise if a labour broker (or temporary employment service) is involved: the question that arises is whether the employee is in the service of the labour broker or the labour broker's client.

The guidelines developed by the court to clearly identify the employment parties are discussed in more detail in this paragraph.

2.5 CONCLUDING EMPLOYMENT CONTRACTS

One of the most important 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. One of the terms of a contract of employment about which the parties must reach consensus is the period of employment. The parties can agree that the contract is for either a fixed term or for an indefinite period. If a contract is for a fixed term, this will usually be expressly stated in the contract itself. If the contract is not for a fixed term, it will usually be for an indefinite period. A contract for an indefinite period usually means that the contract will continue until one of the parties terminates the contract, by giving notice to the other party of the intention to terminate or, for example, when the employer dismisses the employee.

The Labour Relations Act, 1995, does not specifically define the different types of employees, but there are some situations in which we need to be able to distinguish between them like in the following:

- Permanent and temporary employees;
- Temporary and probationary employees;
- Temporary, casual and part-time employees;
- Full-time and part-time employees; and
- Managerial and non-managerial employees.

Make sure that you know the difference between these different categories of employees, and think of some situations in which we may need to be able to distinguish between these categories.

It is important that you know the requirements for a valid contract of employment. There must be an agreement; the conclusion of the contract has to be lawful; the parties must have the necessary capacity to enter into the contract; performance by the parties; obligations must be possible and the required formalities have to be complied with. Apply your knowledge by trying to do the following activity:

ACTIVITY

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.

FEEDBACK

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.

ACTIVITY

Try to determine who the actual employer is in the following case:

Catering staff, employed by Bread Bin CC, work full-time for Go-Ahead University in the student canteen. The same staff, work at the canteen every day. Jana is one of the cooks. Natty, the supervisor, terminates Jana's contract after she was late for work on two occasions. Jana declares a dispute with Go-Ahead University, who claims that Jana is not an employee of the University, and therefore she has not been dismissed by the University. Bread Bin claims that, since Jana works at the University every day, she is no longer their responsibility.

FEEDBACK

This is the sort of situation where we may need more facts before we can establish who the employer actually is but, on the face of it, Bread Bin would seem to be the employer. Read again 2.3.5 in your prescribed book on temporary employment services. You will see that the Labour Relations Act, 1995, has anticipated this sort of problem, and makes both the employer and the client jointly and severally liable in cases such as these so that employees remain protected by the Act.

2.6 THE CONTRACTUAL DUTIES OF THE PARTIES

The most important duties of the employee can be summarised as:

- the duty to enter into the service of the employer
- the duty to exercise due care and diligence
- the duty to obey the commands of the employer
- the duty to act in good faith
- the duty to tender his or her services

Although the duties of the employer are not summarised here you must know the duties of the employer as well as the employee.

ACTIVITY

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?

⇨ ***FEEDBACK***

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?

2.7 OTHER TERMS AND CONDITIONS OF EMPLOYMENT

Study par 2.7 (incl pars 2.7.1-2.7.4) of the prescribed book. Make sure you understand par 2.7.3 & 2.7.4 of the prescribed book.

Restraint of trade

Clauses regarding restraint of trade are becoming more and more important as employers try to protect themselves against competition from employees and ex-employees. You do not have to remember the names of the cases, but we do recommend that you read the facts and the decisions of the court in each particular set of circumstances. Examination questions are often based on similar facts (rather than on those of a reported court decision). The decision in the case of *Magna Alloys & Research (Pty) Ltd* [1984 (4) SA 874 (A)] is still the leading case on the question of restraint of trade and, in that case the court, in essence, held that:

- A contract in restraint of trade is, on the face of it, valid and enforceable; but
- Any contract which is unreasonable or contrary to public policy is unenforceable.

⇨ **ACTIVITY**

The leading case in regard to restraint of trade is *Magna Alloys & Research (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). Consider the following rules dealing with restraint of trade:

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.

Which of the above rules were formulated by the court?

1 A, B and D
2 A and C only
3 B and D only
4 C only
5 All of the above

⇨ ***FEEDBACK***

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.*

Vicarious liability

Vicarious liability means that the employer is held legally liable for the wrongful acts of its employees. The wrongful acts must however arise out of and in the course of the employee's duties. The requirements for vicarious liability therefore are:

- There must be an employee
- Who has committed a wrongful act
- In the course and scope of his/her employment

⇨ **ACTIVITY**

Read the following set of facts:

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.

⇨ ***FEEDBACK***

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.*

2.8 BREACH OF THE EMPLOYMENT CONTRACT

Please study par 2.8 (inlc 2.8.1 -2.8.2) carefully. Make sure you understand this part of the work.

2.9 TERMINATION OF THE EMPLOYMENT CONTRACT

Study par 2.9 (incl pars 2.9.1-2.9.2) of your textbook.

Lawful termination of the employment contract

This section discusses the lawful termination of a contract of employment. This occurs when there has been a breach of contract or, alternatively, when the employer or employee has given the other party to the contract notice of termination. As long as the termination complies with the requirements of either the contract itself, the common law or any relevant legislation, the termination will generally be lawful. We have not yet mentioned the fairness or unfairness of the termination. In the next part of the book, the law of unfair dismissal will be discussed and you will see that a termination may be perfectly lawful, but the court or arbitrator may declare that the termination of the contract is either substantively or procedurally unfair.

ACTIVITY

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.

FEEDBACK

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.

2.10 THE EMPLOYMENT CONTRACT AND THE CONSTITUTION

Study par 2.10 of the prescribed book.

In a number of important decisions, the court has considered the impact of constitutionally protected fundamental rights on the contract of employment.

ACTIVITY

See if you can discuss in your own words what the effect of the following cases are on the employment relationship after you have read this paragraph:

- *Fedlife Assurance Ltd v Wolfaardt*
- *Denel (Pty) Ltd v Vorster*
- *Murray v Minister of Defence*
- *Old Mutual Assurance Co SA v Gumbi*
- *Boxer Suprerstores Mthatha & another v Mbenya*
- *SC Mogothle v Premier of the North West Province & another*

⇨ ***FEEDBACK***

You will find the answer to this question in par 2.10. We suggest that you summarise the various judgments in a table to help you understand the findings and differences. For example:

Case name	***Court type eg SCA, CC, LC***	***Finding***	***Significance***
Fedlife Assurance Ltd v Wolfaardt			
Denel (Pty) Ltd v Vorster			
Murray v Minister of Defence			
Old Mutual Assurance Co SA v Gumbi			
Boxer Suprerstores Mthatha & another v Mbenya			
SC Mogothle v Premier of the North West Province & another			

This brings is to the end of this study unit!

ENCOURAGEMENT

The best way out is always through.

STUDY UNIT 3: THE BASIC CONDITIONS OF EMPLOYMENT ACT
Prescribed chapter for this study unit from Essential Labour Law: Chapter 3

3.1 EMPLOYEE PROTECTION

The purpose of the BCEA is 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.

3.2 APPLICATION OF THE BCEA

The BCEA is applicable on almost all employees. The act does contain certain general exclusions notably:

- 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.

Note that 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.

3.3 REGULATION OF WORKING TIME

In this context you must know the ordinary hours of work, the regulation of meal intervals, rest periods, overtime, and arrangements for Sundays, public holidays and night work.

3.4 LEAVE

Know the number of days allowed for annual leave, sick leave, maternity and family responsibility leave. Note that maternity leave does not need to be paid. Note that 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, read the section carefully – only sickness of a child will entitle a person to family responsibility leave.

3.5 PARTICULARS OF EMPLOYMENT AND REMUNERATION

Read this paragraph in your textbook.

3.6 TERMINATION OF EMPLOYMENT

Look at notice periods and severance pay. You must know how severance pay is calculated.

⇨ **ACTIVITY**

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.

⇨ ***FEEDBACK***

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).*

3.7 VARIATION OF BASIC CONDITIONS

Students tend to find this part of the chapter difficult. Read par 3.7 in your textbook carefully. It basically states that the BCEA provides the minimum standard of employment conditions. Parties can contractually agree to more favourable terms. They can however **not** agree to terms less favourable than the ones in the BCEA. However, if parties conclude a **collective agreement** they can (in that agreement) agree upon terms less favourable than the ones in the BCEA but even under those circumstances certain sections of the BCEA (for example the provisions regarding maternity leave) cannot be reduced not even by a collective agreement.

3.8 MINISTERIAL AND SECTORAL DETERMINATIONS

Read this paragraph in your prescribed book.

3.9 CONTRACTS, THE BCEA AND COLLECTIVE AGREEMENTS

Read this paragraph in your prescribed book.

3.10 ENFORCEMENT OF THE BCEA

Read this paragraph in your prescribed book.

3.11 OTHER PROVISIONS

Read this paragraph in your prescribed book.

This brings us to the end of this study unit.

ENCOURAGEMENT

To repeat what others have said, requires education, to challenge it, requires brains.

STUDY UNIT 4: THE MEANING OF DISMISSAL

Prescribed chapter for this study unit from essential Labour Law: Chapter 4

We suggest that you read through chapter 4 as a general introduction to the law of dismissal. The law of dismissal is a very important component of individual labour law and will be discussed from chapters 5-10 of the prescribed book.

4.1 THE IMPORTANCE OF UNFAIR DISMISSAL LAW

This chapter starts with a brief overview of the importance of protection of the employee, the development of unfair dismissal law, applicable ILO principles and unfair dismissal in terms of the LRA.

⇨ **ACTIVITY**

After you have studied this par, answer the following questions:

- Was dismissal defined in the Labour Relations Act, 1956?
- Is dismissal defined in the Labour Relations Act, 1995?
- What is meant by a defence raised by an employer?
- List and explain some of the pre-1995 defences raised by employers following an allegation by an employee of unfair dismissal.

⇨ ***FEEDBACK***

You will be able to answer these questions after you have studied par 4.1 in your prescribed book.

4.2 THE STATUTORY DEFINITION AND ONUS

4.2.1 Definition in the LRA

You must know the statutory definition of dismissal. We have already encountered both the termination of employment and dismissal in earlier chapters of Essential Labour Law.

⇨ **ACTIVITY**

After you have read through the section in your prescribed book, write down six meanings of "dismissal" in terms of section 186 of the Labour Relations Act, 1995. Do not copy out the definition from the textbook, instead try to identify the key issues and potential problem areas in each type of dismissal. You will see that many of the specific forms of dismissal sound familiar.

ACTIVITY

- If an employee has been dismissed in terms of the definition in section 186, does this mean that the dismissal is unfair and the employee has a remedy? Explain.
- Why do the six different types of dismissal in the definition sound familiar? Who, do you think, must prove that there has been a dismissal?
- If an act or omission is classified as one of the above dismissals", may the employer raise one of the defences listed in 4.1 above? If not, why not?

FEEDBACK

The answers to these questions will be found in 4.2 of your prescribed book.

4.2.2 Termination of the employment contract

When you study this part also refer back to chapters 2 and 3, which dealt with the termination of a contract of employment. This first part of section 186 states that dismissal means that an employer has terminated the contract of employment with or without notice.

ACTIVITY

There are a number of issues which need to be identified in this part of the definition of dismissal. Can you identify at least three issues?

FEEDBACK

Did you identify the following issues?

- *Firstly, it is the employer who has terminated the contract.*
- *Secondly, there must have been a contract of employment.*
- *Thirdly, the termination can be either with or without notice.*

ACTIVITY

When does a contract of employment commence, in light of the definition of "employee" in the LRA?

FEEDBACK

You should have discussed why the confusion arose, namely because the LRA defines an employee as someone who works for another person for remuneration. The interpretation of "work 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 (in other words render his services) before work really commences. You should also have discussed how the court interpreted this issue in Whitehead v Woolworths as well as in Wyeth SA (Pty) Ltd v Manqele and Jack v Director-General Department of Environmental Affairs. See the summary below. We suggest that you always make a similar summary for study purposes to capture the divergent views of the court.

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 and conditions of employment*

ACTIVITY

When a worker absconds, who terminates the contract of employment?

FEEDBACK

South African Broadcasting Corporation v CCMA and others	*A desertion constitutes a breach of contract but contract is only terminated when the employer accepts the employee's repudiation of the contract.*
SACWU v Dyasi	*If the employee cannot be traced, the employer may have no other option but to accept the employee's 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, and the employer chooses to terminate the contract, the employer terminates the contract.*

Dismissal in cases of desertion or abscondment is also later again discussed in chapter 6.

4.2.3 Failure to renew a fixed-term contract of employment

If you need to refresh your memory regarding the period of employment, go back to chapter 2.

ACTIVITY

After you have studied this section, do the following activities: Think of some examples of fixed-term contracts.

- Are the workers in your examples employees or independent contractors? Think about this carefully.
- What is your understanding of the concept of a temporary employee?
- What are the requirements for a dismissal in terms of section 186(b)?
- List some of the ways in which an employer may have given an employee a reasonable expectation that a fixed- term contract may be renewed.
- Who bears the onus of proof?
- What were the facts, the issue and the decision in the following cases?
    - *Dierks v University of South Africa* (1999) 4 BLLR 304 (LC)
    - *McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC)
    - *Bronn v University of Cape Town*
    - *University of Cape Town v Auf der Heyde*
    - *SA Rugby (Pty) Ltd v CCMA & others*
    - *Swissport SA (Pty) Ltd v Smith NO & others*
    - *Fedlife Assurance Ltd v Wolfaardt*

FEEDBACK

All the answers to these questions will be found in par 4.2.3 of the prescribed book. A comparison of the different judgments on the issue would be easier if you draw a table like the earlier ones we have done.

4.2.4 Dismissal for reasons relating to pregnancy

One of the very noticeable changes between the old and the new LRA is the statutory protection which has been given to pregnant women employees.

ACTIVITY

- Why are pregnant women protected to such a great extent in the Labour Relations Act, 1995? What are the implications of this protection for employers and employees?
- Read section 186(c) which deals with the definition of dismissal carefully and explain, in your own words, what it means, and the problems with the definition.
- What does the BCEA have to say about pregnancy and maternity leave? What is the significance of the provisions regarding maternity leave in the BCEA?
- What is the significance of the provision regarding pregnancy in section 187 (automatically unfair dismissals) of the Labour Relations Act? Come back and answer this question after you have read chapter 5 of Essential Labour Law.

FEEDBACK

The answers to these questions are to be found in par 4.2.4 of your prescribed book.

4.2.5 Selective re-employment

We discussed this concept briefly when we were examining the definition of "employee". Remember we said that the employment relationship continued even after the employment contract had been terminated, because there were situations in which it was necessary to keep the employment relationship alive. Selective re-employment is such a situation.

ACTIVITY

After you have read the definition carefully, list the requirements that should be met before selective re-employment qualifies as a dismissal.

FEEDBACK

- *Did you say that a number of employees must have been dismissed?*
- *Did you say that the employees must have been dismissed for the same or similar reasons?*
- *Did you say that the employer must have offered to re-employ one or more of these employees?*
- *Did you also say that the employer must have refused to re-employ the employee who is alleging that there has been a dismissal?*

This definition of dismissal begs a number of questions, all of which require interpretation by the courts. For example, what constitutes an offer and a refusal by the employer to re-employ some, but not others, in a situation of selective re-employment?

4.2.6 Constructive dismissal

Study par 4.2.6 of the prescribed book. You may also want to refer to chapter 10, the chapter on unfair labour practices. Constructive dismissal is a complicated form of dismissal and the definition in section 186(e) requires some interpretation.

ACTIVITY

After you have read the relevant paragraph in your prescribed book, answer the following questions:

- Who terminates the contract in a case of constructive dismissal?
- How does this differ from other forms of dismissal?
- What do you think is meant by the word intolerable?
- How have the courts interpreted intolerable?
- In what factual situations have the courts held that a termination of the contract by the employee may, in fact, be a dismissal by the employer?
- What were the facts, the issue and the decision in the following cases?

    - *Pretoria Society for the Care of the Retarded v Loots*
    - *Goliath v Medscheme (Pty) Ltd*
    - *Albany Bakeries Ltd v Van Wyk & others*
    - *Beets v University of Port Elizabeth*
    - *Lubbe v ABSA Bank Bpk*
    - *SALSTAFF v Swiss Port SA (Pty) Ltd*
    - *Van der Riet v Leisurenet Ltd t/a Health and Racquet Club*
    - *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC)
    - *Riverview Manor (Pty) Ltd v CCMA & others* (2003) 24 ILJ 2196 (LC)
    - *Smith v Magnum Security* (1997) 3 BLLR 336 (CCMA)
    - *Quince Products CC v Pillay*
    - *Grobler v NASPERS* (2004) 5 BLLR 455 (C)
    - *Mafomane v Rustenburg Platinum Mines Ltd*
    - *Watt v Honeydew Dairies (Pty) Ltd*
    - *Ntsabo v Real Security CC*

FEEDBACK

The answers to these questions will be found in par 4.2.6 of your prescribed book.

4.2.7 Section 197 transfer of employment contracts

Study par 4.2.7 of the prescribed book.

A new form of dismissal has been introduced by the 2002 amendments to the LRA. This new form of dismissal relates to the transfer of a business.

ACTIVITY

Which of the following examples would constitute a dismissal? If the example is a dismissal, what type of dismissal would it be?

Abi has worked as a labourer for a construction company in Johannesburg for the past 10 years. He is an active member of his trade union and, as a result, is not popular with management. The Company has just opened a branch in Nelspruit and insists that he be transferred to Nelspruit. Abi cannot move now because he has family problems and he therefore decides to resign from the company.

Maria has been working for a publishing company for a number of years. The company has consistently refused to negotiate for paid maternity leave, either with individual employees or with the trade union. Maria is pregnant and decides to take off four weeks prior to the birth of her baby, and eight weeks after

the baby is born. When she returns to work, her employer refuses to take her back on the grounds that she has breached her contract. Maria claims that this is an unfair dismissal, but the employer raises the defence that it cannot be unfair because there was no dismissal.

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 broker's, and subsequently he is given no further business from the brokers. Johan claims that he has been unfairly treated, as his affair had nothing to do with the selling of insurance

Brutus has worked for Tertiary Education (Pty) Ltd for the past five years. His contract has always been for a one-year period but, in the past, Tertiary Education renewed Brutus's contract annually. This year they decided not to renew the contract, telling him that cuts in the budget have meant that they can no longer employ lecturers who teach Latin. Brutus claims that he has been unfairly dismissed, but Tertiary Education claims that his contract was only for a year and that this contract has now come to an end.

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 from the company

Judy has been employed at Supreme Stockbrokers in Pretoria for the past five years. Supreme Stockbrokers has been sold to Competitive Consulting in Johannesburg and, as a result, Judy will have to travel to Johannesburg every day. Even worse, the only position available to her in the new company is in the derivative section of Competitive Consulting, which means a significantly reduced income. Judy has always dealt in fine metal stocks, and she resigns.

 ***FEEDBACK***

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.

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 example the employer discovered (while Maria was on maternity leave) that she was stealing money from the employer and he then refuses to allow her back into service – it will still amount to a dismissal but it will not be automatically unfair and will also be based on misconduct.

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.

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.

Nandi's resignation was not a measure of last resort and will therefore not amount to a constructive dismissal.

4.3 UNFAIR DISMISSAL AND THE RIGHT TO FAIR LABOUR PRACTICES

Study par 4.3 of the prescribed book. You may want to refer back to the previous paragraphs of your prescribed book to refresh your memory about the concept of an unfair dismissal and the meaning of substantive and procedural fairness. This section is just a brief introduction to what we call other unfair dismissals. To understand the whole picture, you will need to study this paragraph together with chapters 6, 7 and 8 of the prescribed book.

We have reached the end of study unit 4!

ENCOURAGEMENT

The purpose of learning is growth, and our minds, unlike our bodies, can continue growing as we continue to live.

STUDY UNIT 5: AUTOMATIC UNFAIR DISMISSALS

Prescribed chapter for this study unit from Essential Labour Law: Chapter 5

5.1 THE CONCEPT OF AUTOMATICALLY UNFAIR DISMISSALS

5.1.1 International labour standards

The concept of an automatic unfair dismissal evolved from international labour standards and was for the first time formalised in the 1995 LRA. Study par 5.1.1 of the prescribed book. You should also go back and read 2.10 on the Constitution as a source of our law as well as chapter 4, which gave you a general introduction to the law of unfair dismissal. We trust you still remember what was said in the previous chapter about the meaning of dismissal and unfair dismissal.

5.1.2 The Constitution

Study par 5.1.2 of the prescribed book. Where an automatic unfair dismissal takes place, a basic human right of an employee is also infringed. The inclusion of an automatic unfair dismissal in the LRA therefore gives effect to the constitutional right to fair labour practices.

5.2 AUTOMATICALLY UNFAIR DISMISSALS IN TERMS OF THE LRA STUDY

Study par 5.2 of the prescribed book.

⇨ **ACTIVITY**

After you have read par 5.1 and 5.2 of the prescribed book carefully, try to answer the following questions:

- Can you define an automatic unfair dismissal?
- How do these dismissals differ from other unfair dismissals?
- What is the meaning of "discretion"?

⇨ ***FEEDBACK***

The definition should indicate the 9 types of actions that can amount to an automatic unfair dismissal. These can be found in the box in par 5.2. Remember that the first form of an automatic unfair dismissal is a dismissal contrary to section 5 of the LRA. This means a dismissal that infringes the right to freedom of association.

An automatic unfair dismissal differs from a normal unfair dismissal because in the case of an automatically unfair dismissal the employer cannot defend the termination of the employee's services by proving that it was for a fair reason. For example if an employer dismisses a trade union official, the

trade union official must show that the he was dismissed and show that the real reason was because of his trade union affiliation. He does not have to prove this on a balance of probability – he only needs to make out a prima facie case. The burden of proof then shifts to the employer to show that the dismissal was not automatic unfair or unfair. The employer can therefore only proof this if he can say that the trade union official was dismissed for another reason for example theft. (Remember that the employer must then be able to prove that). Remember that all dismissals must have a fair reason and follow a fair procedure. If the employer wants to show that the reason for dismissal was one of the grounds for automatic unfair dismissal – it would be impossible to show that the reason is fair. For example if the employer would like to say that he dismissed a female employee because she was pregnant and he followed a fair procedure, the mere reason for the dismissal would make the dismissal automatically unfair.

The only exceptions in this regard would be where the employer dismissed an employee on the basis of inherent job requirements or because of the fact that the employee reached the normal or agreed retirement age. This happened in the Wooolworths/Whitehead case. A pregnant female employee was dismissed because the employer said the inherent job requirement is that the employee cannot be away for 4 months' maternity leave. The court found that the dismissal was not automatically unfair.

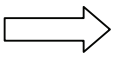
Discretion means the freedom to decide as one thinks fit: where a dismissal is automatically unfair, therefore, the court is not usually given a choice to decide whether the dismissal is fair or unfair it is automatically unfair. Make a summary of what you have just learned. Try to remember, without looking at your textbook, what would not constitute valid reasons for the termination of a contract of employment, in terms of Article 5 of Convention 158 of the ILO.

Section 187(l) contains a list of automatically unfair dismissals. We shall be looking at each of these types of automatically unfair dismissals in turn, and in a fair amount of detail. Take special note of the contents of section 187(2): the escape clause section applies only to the provisions of section 187(l)(f) - the section that deals with discrimination. The escape clause does not apply to any of the other sections (subsections (a) to (h)). Spend some time working through section 187. Make sure that you understand how it works, how it is put together, and how the exceptions work. It may be necessary for you to work through the contents of section 187 a number of times - but, by the end of this study unit, you will, we hope, know and understand the provisions contained in this section. We shall discuss each of the automatically unfair dismissals individually (see below). Study the whole of 5.2 – 5.9 of Essential Labour Law first, and then go through each of the specifically defined automatically unfair dismissals step by step.

5.3 INFRINGEMENT OF FREEDOM OF ASSOCIATION

5.3.1 Protection of freedom of association

Freedom of association is dealt with in various chapters of the prescribed book. Try to remember what you read about freedom of association in each of the different sections so that you can eventually build up a complete picture of all the rights and duties of the parties involved.



ACTIVITY

In the context of this chapter, try to answer the following questions:

- What do you understand by freedom of association? Try to explain the concept in your own words.
- In which situations is it particularly important to protect this freedom?
- Are all employees entitled to freedom of association? Explain.
- What about those persons who have not yet entered into a contract of employment - are they entitled to freedom of association?

- What is the consequence if an employer dismisses an employee, or in any way discriminates against the employee, for taking part in trade union activities?
- What was the significance of the court decision in *Keshwar v SANCA* (1991) 12 ILJ 816 (IC)?
- Is the right to join a workplace forum protected? What do you understand by a workplace forum?
- What is the significance of the special definition of "employee" in section 78 of the Labour Relations Act, 1995?

⇨ ***FEEDBACK***

The answers to most of these questions will be apparent to you if you have read 5.3.1 of your prescribed book carefully. You may also want to read the chapters on Freedom of Association: Chapter 13 and Workplace Forums: Chapter 19. A prospective employee is also entitled to freedom of association, and so-called "yellow dog" contracts are prohibited. There are exceptions to freedom of non-association (in Chapter 15). However, you are not expected to know about these exceptions at this stage of the course.

5.3.2 Managers and freedom of association

Study par 5.3.2 of the prescribed book.

⇨ **ACTIVITY**

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?

(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?

(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?

FEEDBACK

Our suggested answers to these questions are:

(1) The dismissal would probably be automatically unfair.
(2) Desperate's dismissal is a contravention of section 5 and would therefore be automatically unfair.
(3) 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.

5.4 PARTICIPATION IN A PROTECTED STRIKE

Employees have always been protected, to some degree, against dismissal for taking part in a lawful strike action. The difference, however, is that such a dismissal is now automatically unfair. There are exceptions to this. You will learn more about some of these later in par 5.4 of the prescribed book.

ACTIVITY

After you have read par 5.4 in you prescribed textbook, answer the following questions:

- What is the difference between a protected and an unprotected strike?
- Which chapter of the Labour Relations Act deals with strike and protest action?
- Is there a section in that chapter which protects an employee who takes part in a strike or in a protest action? If so, write this section out and explain what action is prohibited and what action is protected.

FEEDBACK

Chapter IV of the Labour Relations Act, 1995 deals with strikes and lock-outs, and section 67 sets out the requirements for a protected strike. Did you mention, in answer to the last question, that in terms of section 67(4) - the employer is prohibited from dismissing the employee; and the employee is protected when participating in a strike; or for any conduct in contemplation or furtherance of a strike; BUT the employee is only protected if the strike is a protected strike. Remember, what is not stated explicitly in section 67(4) of the Labour Relations Act, 1995, is that an employee will never be protected for any criminal activity, even if such activity took place during a protected strike. In par 5.3.2 above we gave you some examples of Righteous, the trade unionist, and of what happened to Desperate and Junior. Read through those examples carefully to make sure that you understand the different scenarios.

5.5 REPLACEMENT LABOUR

Study par 5.5 of the prescribed book, carefully. (If this part if difficult to understand you may want to read the chapter on strikes and lock-outs in Chapter 17 and in particular the part which discusses section 76 of the Labour Relations Act, 1995 - the section on replacement labour.)

ACTIVITY

Try to answer the questions below to test whether you have understand the important issues:

- What do you understand by the concept of replacement work?
- Must the strike be protected?

- Are there any situations in which an employer may dismiss an employee for refusing to do the work of another employee (that is, another employee who is on strike)? Explain.
- What do you understand by an 'essential service'?

⇨ ***FEEDBACK***

The answers to most of the questions will be found in 5.5 of Essential Labour Law. The question of what work is necessary to prevent an actual danger to life, personal safety or health is, at this stage, debatable. The essential services committee has, however, designated some types of work to be essential services. The issue of essential services is in greater detail in Chapter of Essential Labour Law. You may want to refer to that chapter now if this part of the work is unclear.

5.6 THE LOCK-OUT DISMISSAL

Study par 5.6 of the prescribed book carefully and think about the issues. Refer back to this section after you have read chapter 17 on strikes and lock-outs.

It is quite complicated to distinguish between a lock-out dismissal and operational requirements dismissal. Remember that if an employer threatens employees with dismissal to accept a demand, it will amount to a so-called lock-out dismissal which is automatically unfair. If the employer is serious about his demand and sticks to his guns right through the process it will not be automatically unfair but a fair dismissal based on operational requirements. For example, if the employer (after proper consultation etc) says the shift system will change on Monday 08h00 and if you are not there you will be dismissed and replaced with employees who are willing to work the new shift system, because that is the operational needs of the business to work the new shift system. If on Monday 08h00 20 workers are not there and the employer dismisses them, that dismissal is fair on the basis of operational requirements. If, let's say 10 of them come to work at 09h00 and say they are sorry and would like to work the new shift system, and the employer takes them back, that will mean the employer was merely threatening the employees to force them to accept the new shift system. The will therefore be an automatic unfair dismissal.

⇨ **ACTIVITY**

Try and answer the following questions:

- What do you understand by the term dismissal lock-out?
- In what circumstances would a dismissal lock-out be automatically unfair?
- What are some practical examples of a matter of mutual interest between an employer and an employee?
- Are there any circumstances in which an employer may be able to dismiss employees who refuse to accept the employer's demand to change a condition of employment (for example, to work overtime)?

⇨ ***FEEDBACK***

The answers will be found in par 5.6 of your prescribed book. To help you think about the last question, here is another activity which highlights the possible link between an automatically unfair dismissal lock-out and the circumstances where such a dismissal may be justified on operational grounds.

ACTIVITY

Slaughterhouse CC demands that its employees who pack and store the meat work overtime if and when the meat arrives late in the afternoons. The employees will be paid double time for this overtime work. The employees refuse to agree to this condition. Slaughterhouse CC, after having tried and failed to persuade the employees to accept the demand, dismisses the employees for operational reasons.

- Would this be a dismissal lock-out?
- What are the issues which must be considered by both sides in this scenario?
- Would this be an automatically unfair dismissal?
- Do you think there is any way in which the employer could fairly dismiss these employees?
- What do you think the situation would be if it was just one employee, Balshe, who blatantly disobeyed the employer's instruction to remain after hours to pack meat into cold storage? (The meat had arrived late and was left outside on the pavement.)

FEEDBACK

Read par 5.6 of the prescribed book Essential Labour Law carefully. When you have read chapter 8 on dismissal for operational requirements, come back to this section on dismissal lock-outs and you will find that the issue of a dismissal based on operational requirements is easier to understand. Whether Balshe's action was one of insubordination is debatable, and will depend on whether there was an agreement to work overtime. Refer back to chapter 2 (2.8 Breach of contract). Dismissal for misconduct will be discussed in chapter 6.

5.7 EXERCISE OF RIGHTS

Study par 5.7 of the prescribed book. Section 187(1)(d) is a relatively straightforward section. An employer may not victimise or dismiss an employee because the employee exercised one of the many rights conferred by the Labour Relations Act, 1995. As you work through the study material, try to list the rights which an employee may be entitled to in terms of the Act. The employee's right to freedom of association and to declare a dispute with the employer will be important.

5.8 PREGNANCY

Study par 5.8 of the prescribed book carefully, and make sure that you understand the examples given. The purpose of this subsection 187(1)(e) is quite clear: to protect employees who are pregnant or intend to become pregnant, from dismissal. This section goes even further than the next subsection, discriminatory dismissal, because there is no provision for a justifiable dismissal for inherent requirements of the jobs. (However, in the case of *Woolworths v Whitehead* the court did allow inherent job requirements to be used as a justification ground). What is not clear in subsection 187(l)(e), however, is the limit of the protection given to employees. The section says that a dismissal will automatically be unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy". This is a potentially contentious area of individual labour law and the Labour Court will have to define the limits of this protection given to female employees.

Make sure you understand the reasoning of the court in the controversial *Whitehead v Woolworths* case. Also make sure you understand how the burden of proof works in automatic unfair dismissal cases, especially in pregnancy-related dismissals.

ACTIVITY

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?

FEEDBACK

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.

5.9 DISCRIMINATION

Study par 5.9 of the prescribed book. This is the only automatically unfair dismissal which allows a statutory defence. Section 187(l)(f), combined with section 187(2), is a very important part of our law of unfair dismissal - make sure you understand it correctly!

In par 5.9.2 specific instances of discrimination are discussed. We suggest that you come back to this part again after you have studied chapter 11, which deals with Employment Equity. There is also a short discussion on disability discrimination in chapter 7 (the chapter dealing with dismissal for incapacity).

ACTIVITY

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.

⇨ ***FEEDBACK***

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.*

5.10 TRANSFER OF EMPLOYMENT CONTRACTS

Study par 5.10 of the prescribed book. Remember that transfers of employment contracts are discussed in more detail in chapter 9 of the prescribed book. This is a new form of dismissal. It seems to be a form of constructive dismissal without the need for the employee to prove that the employer has made continued employment 'intolerable'. Make sure you understand the findings of the court in the *Van der Velde v Business and Design Software (Pty) Ltd & another* case.

⇨ **ACTIVITY**

Go back to par 4.2.6 and after you have read through it, compare it with par 5.10, and then answer the following questions:

- In terms of section 187(1)(g), when will a dismissal be automatically unfair?
- What is an employee entitled to do in such circumstances?

⇨ ***FEEDBACK***

You will find the answers in par 5.10 of the prescribed book.

5.11 PROTECTED DISCLOSURES STUDY

Study par 5.11 of the prescribed book.

⇨ **ACTIVITY**

Answer the following questions:

- When will a dismissal be automatically unfair in terms of section 187(1)(h)?
- Make your own summary of the definition of "disclosure" in terms of section 1 of the Protected Disclosures Act, 2000.
- What is the meaning of an "occupational detriment"?
- What may an employee do if he or she is dismissed in terms of section 187(1)(h)?

FEEDBACK

You will find the answers in par 5.11 of the prescribed textbook.

Remember a disclosure should be made in the following manner in order to be protected:

- *must be made in good*
- *in accordance with the procedure prescribed by the employer*
- *must be made to the employer of the employee or institution assigned by the employer for that purpose*

If an employee for example discloses by way of an email to the whole workplace how one of the directors is stealing money, it will not amount to a protected disclosure.

Also remember that if an employee is not dismissed but suffers an occupational detriment as a result of a protected disclosure, it may amount to an unfair labour practice. See chapter 10. For example Susan made a protected disclosure and as a result she had not been promoted for the past 5 years. This non-promotion would not amount to an automatic unfair dismissal, since Susan has not resigned. She will only be able to rely on an unfair labour practice. If Susan is dismissed, it will amount to an automatic unfair dismissal. If Susan resigns (as a result of this and because the employer made continued employment impossible) she will be able to claim an automatic unfair constructive dismissal.

This has been a long study unit, which introduced you to a number of concepts in addition to purely automatically unfair dismissals. The new concepts are, however, all related to automatically unfair dismissals. You will find that this is a chapter which you will want to revise after you have read the whole of Essential Labour Law.

ENCOURAGEMENT

It is a thousand times better to have common sense without education than to have education without common sense.

STUDY UNIT 6: DISCIPLINE AND DISMISSAL FOR MISCONDUCT
Prescribed chapter for this study unit from Essential Labour Law: Chapter 6

A BIT OF HELP!

Students often get confused (and hopeless) at this stage of their studies of individual labour law. Remember to see the bigger picture of what you are busy with and then break it down into more sizeable chunks. You are now busy with individual labour law. In individual labour law there are basically three themes:

The employment contract – common law principles (chapters 1&2)	**The law of unfair dismissal (chapters 4-10)**	**Other legislation (chapters 3 & 11)**

⇩

Definition of dismissal (can apply to all forms of dismissal, meaning fair / unfair / automatically unfair)

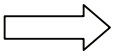
⇩

Automatic unfair dismissal	**Fair dismissal**	**Unfair labour practices**
Specific defined instances	Misconduct; Incapacity; Operational reasons → Must be substantively and procedurally fair	Specific defined instances – remember employee is still in service – there is no resignation or dismissal! Do not confuse with issues surrounding constitutional right to fair labour practices.
Remedies (remember the specific dispute resolution route is determined by the nature of the dispute)		

Start with chapters 1 & 2 and then study the part on unfair dismissal (which is the bulk of the work for individual labour law) together. Finally study chapters 3 & 11 together. Let's start with this chapter on dismissal based on misconduct. We suggest that you refer back to the outline above to determine where this issue fits into the bigger picture of individual labour law and specifically the law of unfair dismissal.

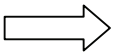
6.1 DISCIPLINE IN THE WORKPLACE

Dismissal is the most severe penalty that an employer can impose against an employee guilty of misconduct. It is crucial for employers to know and apply the correct principles and procedures as far as workplace discipline and fair pre-dismissal procedures are concerned. Employers who make mistakes in any of the stages of dismissal run the risk of dismissing an employee unfairly. It is therefore crucial that you understand this part of the work when you prepare for the exam.



ACTIVITY

1. Can an employer summarily dismiss an employee?
2. What is the role of disciplinary codes and procedures in the workplace?
3. Can the employer deviate from his own disciplinary code and procedure?
4. Discuss what progressive discipline means?



FEEDBACK

1. *A summary dismiss is where an employer dismisses an employee without notice. An employer could do it in terms of the common law and even today if the employee's misconduct was serious, for example in cases of theft or assault. Although the BCEA contains rules regarding notice periods and notice pay, in section 37(6)(b) the right of the employer and employee to terminate the employment relationship without notice (summarily) for any cause recognised by law, is maintained. This right to a summary dismissal must be read in light of the LRA provisions regarding fair procedure. Even under these circumstances the employee must get the opportunity to be heard. This was confirmed by the court in Old Mutual Life Assurance Co SA Ltd v Gumbi.*
2. *You will find the answers to this question in par 6.1.4.*
3. *You will find the answers to this question in par 6.1.4.*
4. *This is discussed in par 6.1.5.*

ACTIVITY

In order to summarise what you have learnt about other unfair dismissals, answer the following questions and do the activities given below:

- What is the difference between automatically unfair dismissals and other unfair dismissals?
- Draw three columns, side by side, and distinguish between the three types of other unfair dismissals. Have you emphasised the element of culpability in each of the three categories of dismissal?
- Distinguish between substantive and procedural fairness. Who bears the onus of proving that there was a dismissal?
- Who bears the onus of proving that the dismissal was fair?
- Which international conventions form the basis of our law of unfair dismissal? Summarise the relevant articles in our own words.
- Draw a diagrammatic representation of the steps which should be followed in a claim of an alleged unfair dismissal.

6.2 FAIR DISMISSAL FOR MISCONDUCT IN TERMS OF THE LRA

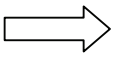
The employer's right to discipline employees originates from the common law. The Code of Good Practice recognises this and holds that all employers should adopt disciplinary rules which establish the standard of conduct required of employees. The Code constitutes the minimum guidelines for discipline. The Code also provides for progressive discipline. The principal requirements for a fair dismissal for misconduct are regulated in section 188 of the Labour Relations Act, 1995. There are two requirements for a fair dismissal for misconduct: **a fair reason and a fair procedure**. A fair reason for a dismissal relates to substantive fairness. A fair procedure relates to the procedural fairness of a dismissal. In the case of a dismissal for misconduct, fair procedure or procedural fairness entails a fair disciplinary enquiry. In essence, therefore, section 188(1) requires that a dismissal for misconduct must be both substantively and procedurally fair. Make sure that you understand the meaning of substantive and procedural fairness in the context of a dismissal for misconduct. Can you explain the two requirements in your own words?

If you read section 188 again, you will notice that subsection (2) requires that any person considering whether or not a dismissal for misconduct is substantively and procedurally fair must take into account any relevant Code of Good Practice issued in terms of the Labour Relations Act, 1995. A code has been issued in terms of the Labour Relations Act, 1995; this code is annexed to the Act as schedule 8 and is entitled Code of Good Practice: Dismissal. Remember that the Code is included in the prescribed book as appendix (1). The Code must therefore be taken into account when considering the substantive and procedural fairness of a dismissal on the grounds of misconduct.

We shall now go on to examine, in more detail, dismissal on the basis of misconduct. In par 6.2 of the prescribed book three broad categories of reasons for dismissal were identified, namely, misconduct, incapacity and the operational requirements of the business. In this study unit, we are going to study dismissal for misconduct. In particular, we are going to study the requirements laid down by the Labour Relations Act, 1995, and the Code of Good Practice: Dismissal for a fair dismissal on the grounds of misconduct.

6.3 SUBSTANTIVE FAIRNESS OF A DISMISSAL FOR MISCONDUCT

In par 6.3 of the prescribed book the requirements for a substantively fair dismissal for misconduct are discussed. The Labour Relations Act, 1995, does not set out the requirements for a substantively fair dismissal. However, the Code contains a number of guidelines for a substantively fair dismissal for misconduct. These guidelines are set out in item 7. Item 7 is quoted in full in par 6.3 of the prescribed book. Study it carefully.



ACTIVITY

The guidelines contained in item 7 are discussed in detail in chapter 6 of the prescribed book. Before you study these guidelines in detail, try to list them. It will be much easier to study them in detail if you know beforehand what they are and how they fit in with one another. Check your list against item 7.

6.3.1 Contravention of a rule by an employee

Firstly, it must be established whether or not the rule of conduct which the employee is alleged to have contravened existed. Secondly, if the facts indicate that the rule did exist, it must be determined whether the employee contravened this rule.

Let us return to the first step. The question of whether or not the rule existed is a factual one. In other words, one must look at the circumstances surrounding the matter to determine whether or not the rule existed. As you will see, in the workplace, there are a number of sources of rules of conduct.

ACTIVITY

Can you list the different sources of rules of conduct which may be found in a workplace?

FEEDBACK

The answer to this activity will be found in par 6.3.1 of the prescribed book under the heading "Did the rule exist?".

The most important source of rules of conduct in the workplace is probably the disciplinary code. Accordingly, if there is a disciplinary code for the workplace and if it does not contain the rule under consideration, this may be a significant indicator that such a rule does not exist in the particular workplace. However, the disciplinary code is not the only source. In other words, if the code does not contain a particular rule, this does not necessarily mean that the employee can never be dismissed for that specific type of conduct. There are a number of other sources which may contain the rule. Of particular importance is the common law.

ACTIVITY

Explain how, in the workplace, the common law can be a source of rules of good conduct.

FEEDBACK

If you have problems understanding this, take another look at par 2.6.1 of the prescribed book where the employee's common-law duties are discussed. Pay particular attention to the employee's duty to act in good faith. Also look at those examples of misconduct that constitute a serious breach of the employee's duty to act in good faith.

The employer can act against the employee if the latter is guilty of misconduct in the workplace and 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 and/or after working hours.

ACTIVITY

Consider the following example: 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. (Do you know what the rule is?) If the employee alleges that the cool drink was bought during lunchtime and can show the cash slip, a dismissal on the grounds of unauthorised possession of company property would be unfair, because the employee did not contravene the rule regarding unauthorised possession of employer property.

FEEDBACK

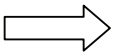
Once it has been determined that the rule which the employee is alleged to have contravened actually exists, we come to the second step. This involves deciding whether or not the employee actually contravened the rule. As in the case of the first step, this is a matter which must be determined on the facts. In other words, the facts must indicate that the employee contravened the rule. If the employer wants to dismiss the employee for unauthorized possession of company property, it must be proved that the employee was in possession of the property without the necessary authority.

The employer only needs to prove the contravention of the rule on a balance of probabilities. This may have interesting repercussions. Say, for example, 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 and the

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.

6.3.2 Validity and reasonableness of the rule

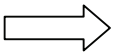
Once it is clear that the rule existed and that the employee has actually contravened it, the attention becomes focused on the rule itself. The first aspect which must be determined is whether the rule is valid or reasonable. This is once more a factual question.



ACTIVITY

Before we proceed, try to answer the following questions:

- What is the first guideline for a substantively fair dismissal for misconduct?
- Who must prove that the rule which the employee is alleged to have contravened, existed?
- Who must prove that the employee contravened the rule?
- By what standard must it be proved that the employee contravened the rule?
- On what facts may the employer rely to prove the contravention of the rule?



FEEDBACK

- *Whether the employee contravened a rule.*
- *The employer*
- *The employer*
- *On a balance of probabilities*
- *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.*

ACTIVITY

There are a number of factors which determine whether or not the rule is valid or reasonable. Can you name them?

FEEDBACK

Whether the rule is valid or reasonable is a factual question. Generally, a rule will be valid or reasonable if it is lawful and can be justified with reference to the needs and circumstances of the business. There are a number of factors which may determine whether or not a rule is justified, for example:

- *the nature of the employer's business,*
- *the circumstances under which the business operate,*
- *the type of work which an employee does,*
- *whether the rule was included in a disciplinary code that is contained in a collective agreement between the employer and a trade union,*
- *the employer's willingness in the past to enforce it.*

Let us consider one more example of the nature of the employer's business as a factor which may determine the reasonableness of the rule which the employee has contravened: a dynamite factory may

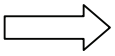
have a rule that employees are prohibited from smoking in the factory. This rule is probably reasonable, since it is aimed at protecting the lives and property of both the employer and the employees.

The disciplinary code is listed as a factor which may determine the reasonableness of the rule which the employee contravened. However, not all codes will constitute such a factor. You must distinguish between codes which are the result of bargaining between the employer and the trade union, and those that employers unilaterally impose upon the employees. The codes which are agreed upon may be a factor, since the probabilities are that the rules contained in these codes are reasonable. However, a rule in a disciplinary code which is the product of negotiation may be considered as unreasonable if the employer has elected not to enforce it.

The following example illustrates the point. The disciplinary code of employer PPP contains a rule which states that late coming is unacceptable. The code stipulates that an employee may face dismissal if the employee has four or more warnings for coming to work late. The reasonableness of the rule becomes questionable, however, if employer PPP has not enforced this rule in the past. Such non-enforcement could indicate that the employer does not consider it to be a reasonable rule. Also, if the employer suddenly tries to enforce the rule, the employer will be acting inconsistently. This type of sudden enforcement is referred to as "historical inconsistency" and may make the dismissal of the employee substantively unfair. (See par 6.3.4 where the consistent application of a rule as a guideline for a substantively fair dismissal is discussed.)

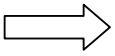
6.3.3 The employee's knowledge of the rule

In par 6.3.3 the third guideline for a substantively fair dismissal is discussed. It must be determined whether the employee was aware, or could reasonably be expected to have been aware, of the rule.



ACTIVITY

- 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?



FEEDBACK

- *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.*

6.3.4 Consistent application of the rule

The fourth guideline for a substantively fair dismissal is discussed in 6.3.4. It must be established whether the rule has been consistently applied by the employer.

ACTIVITY

Many of the concepts which are dealt with in par 6.3.4 are rather complicated. Try to do the following activity before you proceed to the next section:

- Explain, in your own words, the difference between historical inconsistency and contemporaneous inconsistency.
- What must the employer do if he or she wants to enforce a rule fairly which was not enforced in the past?
- Can you think of an acceptable reason why the employer may enforce a particular rule against one employee but not against another? This is definitely not an easy question to answer! What do you think about the following situation: An employer decides to proceed against a drunken employee who is working in a workshop full of dangerous machinery. However, the same employer decides not to proceed against a manager who comes back from a business lunch slightly intoxicated.

FEEDBACK

- *Historical inconsistency occurs where the employer has in the past not proceeded against employees when they have contravened a certain rule, but then suddenly decides to proceed against an employee for contravening that rule. Contemporaneous inconsistency is where employees who breach the same rule contemporaneously or at roughly the same time, are not all disciplined.*
- *The employer must ensure that all employees will know that the rule will in future be enforced. He could for example draw up a document or notice or inform the union. Not only must the employees know that the rule will be enforced in future but they must also know what the penalty for non-compliance will be.*
- *This links up with the previous discussion as well. Knowledge of a rule may also be ensured through meetings with workers, written briefs, notices on notice boards and through induction programmes for new employees. Another factor which may indicate that the employee was aware of the rule is previous warnings which the employee may have in respect of this rule.*
- *In the example the nature of the work performed by the employee will determine the reasonableness of the actions of the employer.*

6.3.5 Dismissal as appropriate action

The fifth guideline for a substantively fair dismissal for misconduct is discussed in par 6.3.5. It must be established whether dismissal was the appropriate sanction for the employee's contravention of the rule.

ACTIVITY

A number of factors are listed in the prescribed book which may determine the gravity of the misconduct:

- Can you name them?
- Try to think of an example where the nature of the employee's work could be a factor in determining the seriousness of the offence.
- Try to think of an example where the position which the employer occupies in the marketplace may be an important factor in determining the seriousness of the employee's misconduct.
- Think of an example where the relationship between the employer and the employee may be a factor that influences the seriousness of the employee's misconduct.
- Try to think of a situation where the employee's ability to do the job may play a role in determining the seriousness of the misconduct.

FEEDBACK

Remember that all the factors listed in par 6.3.5 must be taken into account when considering whether the sanction of dismissal was fair. The answers to the questions above are:

- *That would refer to the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.*
- *For the next three questions you had to think of examples. That would be for example where the employer works with the public or the earlier example of the intoxicated manager versus the employee working dangerous machinery. We are sure that you came up with your own good examples.*

This brings us to the end of our discussion on the Code's guidelines about what makes a dismissal for misconduct substantively fair. The guidelines for a procedurally fair dismissal for misconduct are set out in 6.4 and are discussed below.

6.4 PROCEDURAL FAIRNESS OF A DISMISSAL FOR MISCONDUCT

ACTIVITY

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

FEEDBACK

- *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.*

ACTIVITY

Can you name two exceptions to the guideline about disciplinary enquiries? Try to explain these exceptions in your own words.

FEEDBACK

The answer to this question can be found in par 6.4.1 under the heading " Dispensing with pre-dismissal hearings". This relate to the two broad categories of exceptional circumstances which have been identified by the courts: crisis-zone situations and where the employee waives his or her right to a hearing. Make sure you understand what these entail.

ACTIVITY

Answer the following questions:

- What is the purpose of section 188A (arbitration instead of a disciplinary hearing)?

FEEDBACK

You will find the answers to these questions in par 6.4.2 of your textbook. You can also read more on this in chapter 21 of the textbook.

We have come to the end of study unit 6!

ENCOURAGEMENT

Education is when you read the fine print. Experience is what you get if you don't.

STUDY UNIT 7: DISMISSAL FOR INCAPACITY
Prescribed chapter for this study unit from Essential Labour Law: Chapter 7

7.1 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.

7.2 POOR WORK PERFORMANCE

Read through par 7.2 first and see if you can answer the following questions. Then go back and study the contents of this part of the work in line with the detailed discussions below.

ACTIVITY

- What are the two broad categories of dismissal for incapacity?
- When you have named the categories explain, in your own words, the difference between the categories.
- Give examples of the two types of incapacity.
- State a possible third type of incapacity.
- What is meant by "incompatibility"? Would a dismissal for incompatibility be due to incapacity or operational requirements?
- What is the role of culpability in the case of a dismissal on the grounds of incapacity?
- How would the process differ when an employer dismissed an employee on probation and one after probation?

FEEDBACK

The answers to these questions can be found in par 7.1 to 7.2 of the prescribed book.

- *Poor work performance and ill-health*
- *Poor work performance is where the employee cannot do the work he is expected to because he does not comply with the required standard of performance. Ill-health means that the employee is too ill to do his work. This illness can be temporary or permanent.*
- *Example where a bus driver has broken his arm it will be temporary ill-health. If his arm is amputated it will amount to permanent disability.*
- *Incompatibility*
- *You will find the answer in par 7.2.9 of the textbook. It amounts to a so-called no-fault dismissal. Also look again at par 7.1. Culpability means that a person is in some way to blame for his or her*

acts or omissions. Incapacity involves some form of behaviour or conduct, or inability, which is neither necessarily intentional nor negligent. A dismissal based on incapacity is, therefore, what we call a "no fault dismissal". A dismissal based on the employer's operational requirements is also a "no fault dismissal", but such a dismissal is usually caused by an external factor that has had a detrimental impact on the employer's business. The employee is in no way to blame for the situation. This issue is discussed in chapter 8. A dismissal based on misconduct, on the other hand, by implication means that the employee has done something wrong and that, on a balance of probabilities, the employer has proof of the misconduct. You have already studied this in the previous chapter of your prescribed book.

- *You will find the answer in pars 7.2.1 & 7.2.2.*

We now are looking at dismissal in the context of incapacity specifically. If you have read the section in your prescribed book, you will see that the two main requirements are substantive and procedural fairness. What constitutes a fair reason and a fair procedure is determined by the guidelines set out in the Code itself and the reason and procedure will vary, depending upon whether the dismissal is for poor work performance or for ill health or injury. The reason may also vary according to the nature of the job and the size of the organisation. What other factors may affect the fairness of a dismissal for incapacity in terms of items 8 and 10 of Schedule 8?

7.2.1 Employees on probation

The Code of Good Practice in the Labour Relations Act, 1995, has confirmed that a newly hired employee may be placed on probation for a reasonable period of time.

⇨ **ACTIVITY**

Answer the following questions about the dismissal of an employee who is on probation:

- In what situations do you think that an employer may wish an employee to serve a probationary period?
- Is a probationary period always for the same period of time?
- If not, what factors determine the length of a probationary period?
- Distinguish between the probationary period of a shop assistant in a CD store, a computer programmer, a bricklayer and a university lecturer. Think of the various criteria which the employer would use to assess the probationary period in each case.
- If a probationary employee is not performing suitably, then the Code provides that the employee will be entitled, according to the Code, to a reasonable time to improve. What does this mean?
- What does a reasonable procedure entail before a probationary employee is dismissed? Do you think this is reasonable?
- Should all probationary employees be treated in the same way?

⇨ ***FEEDBACK***

Chapter 7 of Essential Labour Law, emphasises the fact that, unlike a temporary employee, a probationary employee has an expectation of permanent employment. The guidelines in the Code endorse the fact that an employee is protected against an unfair dismissal even during the probationary period. It is possible, however, that different employees may have different periods of probation, and for some there may be a greater onus on the employer to make sure that the proper training and evaluation is given to an employee. You will find the answers to these questions in par 7.2.1.

7.2.2 Poor work performance dismissals after probation

Study par 7.2.2 of the prescribed book. After the probationary period has expired, most employees will then become permanent employees. Item 8(2)-(4) contain the procedures which an employer must follow for a fair dismissal for poor work performance after probation. In short this entails appropriate evaluation, instruction, training, guidance or counselling. If the employee then continues to perform unsatisfactorily after a reasonable period of time for improvement, the employer should investigate why the employee continues with the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter. In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

ACTIVITY

After the probationary period has expired, what are the requirements for a dismissal on the grounds of poor work performance?

FEEDBACK

Did you mention the following?

- *The employer must give the employee appropriate evaluation, instruction, training, guidance or counselling.*
- *The employee is entitled to be given a reasonable period of time in which to improve.*
- *The employer must hold an investigation to establish the reasons for the unsatisfactory performance.*
- *The employer must consider ways other than dismissal (alternatives) to remedy the poor work performance.*
- *The employee is entitled to a hearing and to be assisted by a trade union representative or a fellow employee at the hearing.*

As you can see, there is not a great deal of difference between the periods before and after probation: the difference is, as your prescribed book says, one of degree rather than essence.

After you have read through the cases in par 7.2, briefly summarise the facts, issues and decisions of each of the cases. Make sure you know what the decision of the court was in each of the cases, and the significance of each decision.

7.3 ILL HEALTH OR INJURY

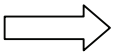
The Code of Good Practice has also addressed the issue of substantive and procedural fairness where dismissal is based on the employee's incapacity (due to illness or injury). Where either ill health or injury is an issue, it is necessary to establish if the incapacity is temporary or permanent. This is discussed at length in par 7.3 of your prescribed book.

7.3.1 Substantive and procedural fairness

ACTIVITY

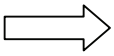
After you have read the sections and studied the cases and examples in your prescribed book, you must be able to answer the following questions:

- What are the different factors which an employer should take into account if the incapacity is:
    - Temporary
    - Permanent?
- Is the fact that the employee was injured or incapacitated at work relevant? If the answer is yes, how is this fact relevant?
- What is meant by the employer's duty to accommodate employees?
- How onerous is this duty?
- What do we mean by “reasonable accommodation”?
- What procedural requirements must be met before a dismissal for incapacity on the grounds of ill health will be fair?



FEEDBACK

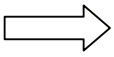
We suggest that you first study the chapter and then attempt to answer these questions. You will find the answers mostly in par 7.3.1 of the book.



ACTIVITY

Answer true or false to the following questions:

- Incompetence is distinguished from misconduct by some form of culpability on the part of the employee.
- Incompetence due to a physical disability is best classified as incapacity, while incompetence due to laziness is better considered a matter of misconduct.
- The employee should not be entitled to rebut evidence of his or her alleged incapability.
- 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.
- 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.
- The employer is not generally required to warn the employer that the employee's performance is not meeting the required standard.
- Senior managers should be capable of judging for themselves whether or not they were meeting the standard set.
- There is a greater duty to accommodate an employee incapacitated as a result of a work-related injury or illness.
- A trumpeter in an orchestra was placed on extended probation: in such circumstances, employment may be terminated without proper evaluation.
- 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.



FEEDBACK

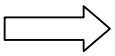
The answers to the true or false questions are:

- *TRUE*
- *TRUE*
- *FALSE*
- *TRUE*
- *TRUE*
- *FALSE*

- *TRUE - The answer to question 7 is a "qualified true", because the issue is still debatable. Although senior managers should be able to judge whether or not they have met the standard set, this does not necessarily mean that they are not entitled to receive warnings and an opportunity to improve (in certain circumstances).*
- *TRUE*
- *FALSE*
- *TRUE*

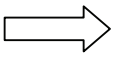
7.4 DISABILITY

Study 7.4 of the prescribed book. Answer the following questions:



ACTIVITY

- Which persons will be regarded as "disabled" people?
- What is "reasonable accommodation" of a disabled employee?
- Which labour law legislation protects disabled employees in the workplace?



FEEDBACK

- *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.*
- *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.*
- *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.*

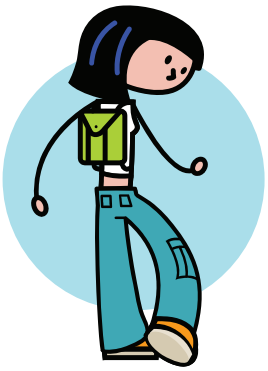
We have now come to the end of study unit 7!

ENCOURAGEMENT

You gain strength, courage, and confidence by every experience in which you really stop to look fear in the face. You must do the thing which you think you cannot do.

STUDY UNIT 8: DISMISSAL FOR OPERATIONAL REQUIREMENTS

Prescribed chapter for this study unit from Essential Labour Law: Chapter 8



8.1 THE CONCEPT OF OPERATIONAL REQUIREMENTS

Chapter 6 of Essential Labour Law distinguishes between the following three categories of reasons for dismissal: misconduct, incapacity and operational requirements. (Do you remember what is stated in the International Labour Organisation's Convention 158 of 1982 and section 188 of the Labour Relations Act, 1995?) Also refer back to the outline at the beginning of Study Unit 6 to refresh your memory on where dismissal based on operational requirements fit into the bigger picture of the law of unfair dismissal.

Chapters 6 and 7 of the book examine the law about dismissal for misconduct and dismissal for incapacity. In this study unit, we shall turn our attention to the law regarding dismissal on the grounds of operational requirements. The discussion of dismissal for operational reasons in chapter 8 is divided into three parts:

- The meaning of the term “operational requirements”,
- The requirements for a substantively fair dismissal,
- The procedural requirements for a fair dismissal on the grounds of operational reasons.

The term “operational requirements” is defined in the LRA. Essentially, the definition distinguishes between four broad categories of “operational requirements”, namely:

- economic needs
- technological needs
- structural needs
- similar needs

You will probably not experience any problems understanding the first three categories! But the fourth category, “similar needs”, may be more difficult to understand. The reason for this is that this category is so broad.

⇨ **ACTIVITY**

Before you study “similar needs” as a category of dismissal for operational requirements, try to define the following terms in your own words:

- operational requirements
- economic needs
- technological needs

FEEDBACK

As we have just said, "similar needs" is an extremely broad concept. The question of whether or not a need exists that is "similar" to the other needs specifically identified in the definition of "operational requirements" is a factual question. In other words, one must look at the particular facts of the matter to determine whether or not such a need exists (that is, to justify the dismissal of employees). Because of the broadness of the concept, it is impossible to give an exhaustive list of what constitutes "similar needs". Nevertheless, the following four categories of "similar needs" are identified: special operational needs of the business, the employee's actions or presence has a negative effect on the business, the employee's conduct has led to a breakdown of the trust relationship, the enterprise's business requirements are such that changes must be made to the employee's terms and conditions of employment.

When you study the first category, namely, the special operational needs of the business, remember that the concept "special operational needs" is not restricted to working over-time. It may include other special operational needs, such as the need for employees to be willing and able to work on Sundays or on public holidays or to be able and willing to work shifts.

In *National Union of Food Workers v Elliot Bros (East London) (Pty) Ltd* (1990) 11 ILJ 575 (IC) the special operational needs of the business were given as the reason for the dismissal of employees. This serves as an interesting example. Elliot Bros was a company of abattoir agents. They worked a seven-day week. Three persons were employed to handle and look after incoming livestock at the abattoir. They were dismissed after they refused to work overtime on weekends. It was common cause that there was no express term in their contracts of employment to work overtime. The Industrial Court held that it was irrelevant whether or not such a term existed. It held that the employer had fairly dismissed the employees because the operational requirements of the business were such that it needed employees who were willing and able to work over-time on weekends.

When studying the second category of "similar needs" namely, where the employee's actions or presence has a negative effect on the business, you must distinguish between two scenarios. In the first scenario the particular employee's actions create disharmony whereas, in the second scenario, the employee's mere presence causes dissatisfaction. Usually, when dealing with a case where the employee's actions cause discontent amongst co-workers, one is really dealing with an employee who is incompatible.

Different views exist as to whether or not an incompatible employee can be dismissed for operational reasons. What is your view? Do you think that such an employee can be dismissed for operational needs or do you think that the prescribed book is correct in saying that such an employee can only be dismissed on the grounds of incapacity? (If you are unsure of the requirements for a dismissal for incapacity, you should have another look at chapter 7 of Essential Labour Law.)

The Industrial Court has held in *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) that incompatibility must be clearly distinguished from eccentricity. Only those forms of eccentric behaviour which are of such a gross nature that they cause consternation and disruption at the workplace justify dismissal for operational reasons. The facts of the *Joslin* case were as follows: Joslin, a marketing manager of Olivetti, occasionally carried a camera round his neck at work. At other times, he had up to 36 pens in his shirt pockets or wore a Springbok cricket cap. Olivetti dismissed Joslin on the grounds that these actions created a negative impression amongst co-workers and was seen to be prejudicing rather than promoting the interests of the company. The court found the dismissal to be unfair. It stated that Joslin's actions constituted a mild or harmless form of eccentricity, and that these actions did not give rise to a ground for dismissal on the basis of operational reasons.

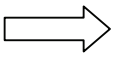
As you will see in this chapter, the courts have accepted that an employee whose mere presence causes dissatisfaction amongst co-workers or customers could be dismissed for operational reasons. However, it will be fairly difficult for the employer to convince the Labour Court of the fairness of such reason for

dismissal, particularly if the operational reason is rooted in arbitrary grounds such as trade union membership, ethnic origin, gender, race and marital status. The Constitution specifically prohibits unfair discrimination based on such arbitrary grounds (see section 9(3)). In addition, section 187(1)(f) of the Labour Relations Act, 1995, specifically brands dismissals on such arbitrary grounds as automatically unfair. (Refer to chapter 5 of your prescribed book, which discusses automatically unfair dismissals.)

Although it will generally be difficult to dismiss an employee fairly for such an operational reason, there may be circumstances where such a dismissal will be fair. Here, the requirements for a procedurally fair dismissal (for this reason) play an important role. Of particular importance is the requirement to consider alternatives to dismissal. If the employer has considered alternatives to dismissal and can convince the Labour Court that it had no other option, the court may find the dismissal to be fair (provided, of course, that the employer had also complied with all the other procedural requirements for a dismissal for operational reasons). Consider again the words of the Labour Appeal Court in *East Rand Proprietary Mines Ltd v UPUSA & Others* (1997)1 BLLR 10 (LAC): "While an employer might dismiss employees because it could not guarantee their safety in the light of the reprehensible ethnic hostility of other employees, this could only happen when the employer truly had no alternative."

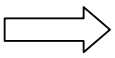
The third category of reasons for dismissal: that the employee's conduct has led to a breakdown of the trust relationship is mooted in the special nature of the employment relationship and the duties that the law adds to the contract of employment because of the special nature of the employment relationship. (If necessary, refresh your memory by referring back to chapter 2.) One of these duties is that the employee must act in good faith towards the employer. This duty is fairly comprehensive and means, among other things, that the employee must be honest with regard to the employer's affairs. Thus, if the employee steals from the employer or commits fraud against the employer, the employee will be breaching the duty to act in good faith. Usually, where such misconduct has taken place, the employer will hold a disciplinary enquiry and, if the misconduct can be proved on a balance of probability, the employee can be dismissed. Under such circumstances, the employee will be dismissed for misconduct. (If necessary, refer to chapter 6 where dismissal for misconduct is discussed.) However, if the employer cannot prove, on a balance of probability, that the employee committed the misconduct, the latter cannot be dismissed for that reason. This is where this third category of "similar reasons" for dismissal comes in. Although the employer cannot prove that the employee is guilty of misconduct, it no longer trusts the employee. This lack of trust may seriously damage the employment relationship which, in turn, may impact negatively on the operational success of the business. Accordingly, the employer may consider dismissing the employee for operational reasons.

Study the cases that are discussed as examples. You will note that the Industrial Court was not originally prepared to consider this "similar reason" for dismissal. However, in later cases it was not only prepared to consider it, but also to endorse it!



ACTIVITY

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?

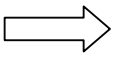


FEEDBACK

See the discussion on the employer's "similar needs" in your prescribed book and the discussion above.

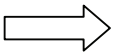
As we indicated above, the fourth category of "similar reasons" for dismissal that has been identified is where the enterprise's business requirements are such that changes must be made to the employee's terms and conditions of employment. An example of this "similar reason" is where the business is 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.



ACTIVITY

- What does the term "operational requirements" entail?.
- Can you distinguish between "economic needs" and "technological needs"?
- Can you explain, by way of examples, what "similar needs" entail?



FEEDBACK

Section 213 defines "operational requirements". The definition refers to four categories of operational requirements, namely the employer's economic needs, technological needs, structural or similar needs. All these categories have nothing to do with the employee's conduct at work or his capacity to do the work. See the discussion in par 8.1 and 8.1.2 of the prescribed book.

Substantive fairness relates to the reason for dismissal. In the case of dismissal for operational reasons, the employer must prove a number of things to substantiate its substantive fairness. In the first instance, the employer must prove that the offered reason for dismissal falls within the definition of `operational reasons' defined in section 213 of the Labour Relations Act, 1995.

8.2 SUBSTANTIVE ISSUES

Secondly, the employer must prove that the dismissal for operational reasons was fair. This entails that the employer must prove that the operational reason on which the dismissal is based actually existed and that it was the real reason for dismissal. In other words, the employer must prove that the proffered operational reason is not a mere cover-up for another reason for the dismissal of the employees.

Section 189A distinguishes between the size of employers and the size of dismissals when regulating substantive and procedural fairness of dismissal for operational reasons. A small employer is one that employs 50 or fewer employees. A big employer is one that employs more than 50 employees. Distinguish between a large-scale dismissal and a small-scale dismissal by a big employer. Look at the figures set out in the textbook as to what will constitute a large-scale dismissal. You will see that the concept relates to a stipulated minimum number of employees relevant to the size of the employer.

Note however that a dismissal by a big employer of fewer employees than the prescribed minimum might nevertheless constitute a large-scale dismissal. You will find this in the instance where the number of the employees to be dismissed, together with the number of employees that have been dismissed (for operational requirements) in the 12 months prior to this dismissal, is equal to or exceeds the numbers as specified. Look at the example in the textbook and ensure that you understand this concept. Also note that the 12-month period is always calculated from the date on which the employer gives notice of the latest proposed dismissals.

ACTIVITY

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

FEEDBACK

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 Toiletpak Manufacturers (Pty) Ltd & Others (1988) 9 ILJ 295 (IC). Toiletpak 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 Toiletpak 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.

ACTIVITY

- Do you think that the reason for the dismissal must necessarily be the "best" reason?
- What will be fair and objective selection criteria?
- Do these requirements apply to only large-scale dismissals by big employers?

⇨ ***FEEDBACK***

You will find the answers to these questions in par 8.2.1 towards the end of the paragraph.

8.3 PROCEDURAL ASPECTS

There are seven requirements for a dismissal by a small employer or a small-scale dismissal by a big employer.

- prior consultation
- attempt to reach consensus over certain matters
- written disclosure of relevant information
- allow an opportunity to make representations
- consider representations
- selection of employees for dismissal
- severance pay

The requirements are intertwined and it is not always possible to keep them totally separate. Bear this in mind when you study this paragraph!

The first procedural requirement namely prior consultation is discussed in par 8.3.1. Section 189(1) of the LRA requires that consultation must take place when the employer contemplates dismissal. In other words, consultation must take place at the stage when the employer has not reached a final decision to dismiss, but has merely foreseen the possibility. The actual timing of the consultation may present a lot of problems in practice. In *National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) the Labour Appeal Court stated that the employer must consult "at the earliest opportunity". Does this mean that the employer must consult the moment the possibility of dismissal is foreseen, even if that could only arise in a year or two? The following example illustrates the various difficulties.

Company XYZ Ltd is satisfied with its profit margin for the past financial year and is confident that it will also do well in the next financial year. The company has acquired a site on which it is planning to build a new factory which will be equipped with the latest technology. If everything goes according to plan, the factory should be completed in two years' time. XYZ Ltd foresees that a number of employees will have to be dismissed once the company moves to the new factory as fewer employees will be required to operate and maintain the machinery. The company also foresees that a number of the employees will either be unable or unwilling to work at the new factory because of transport problems. The question which arises is when must the employer consult about the foreseen dismissals? It is suggested that the actual timing of consultation will depend on the circumstances of the case. In this regard, the interests of both parties should be taken into consideration and balanced. It could be argued that the employer must consult immediately so that the possibility of, for instance, the retraining of employees may be considered. However, from the employer's perspective, it could be argued that it will be extremely bad for employees' morale should they be informed of the possibility of their dismissal two years in advance. It could also negatively affect discipline which, in turn, could work against the effective and successful running of the business.

The term "consultation" is not defined in section 213 of the LRA. However, the meaning of the term is regulated in section 189 itself. In terms of subsection (2) thereof "consultation" means to "attempt to reach consensus". In addition, section 189 also regulates with whom the employer must consult.

The second procedural requirement, that the consulting parties must attempt to reach consensus over certain matters, is discussed in par 8.3.1. There are six matters about which the parties must try to reach agreement namely:

- appropriate measures to avoid the dismissals
- appropriate measures to minimise the number of dismissals
- appropriate measures to change the timimg of the dismissal
- appropriate measures to mitigate the adverse effects of the dismissals
- the selection criteria
- severence pay

The third procedural requirement for a fair dismissal for operational reasons is discussed in 8.3.2. It relates to the disclosure of information by the employer to the party with whom it is consulting about the possibility of dismissal for operational reasons.

Before you study this requirement, we shall provide you with a little background which will help you to appreciate the importance of this requirement. You will recall that we said that the final decision to dismiss for operational reasons remains that of the employer (see par 8.2.1 in your textbook). The question which needs to be considered is whether the other party must simply accept the word of the employer that a fair reason for the dismissal exists or can proof of the employer's reasons be demanded? If the employer claims that the decision to dismiss is based on bad economic conditions, the other party may be able to judge the truthfulness of this on facts which are common knowledge. Furthermore, the other party may also be aware of certain facts which are indicative of the fact that the employer is experiencing financial difficulties. For example, the employer may have endeavoured to avoid dismissal by implementing alternatives to a dismissal, for example short time. However, circumstances may be such that it is not that self evident that the employer is experiencing financial difficulties. It may also be that the employer is not experiencing financial difficulties but actually wants to increase the enterprise's profit margin. Under these circumstances, the trade union may need proof of the employer's financial situation. Even if the trade union knows and accepts that the employer is experiencing financial problems, it may want proof regarding the extent of the difficulties so as to be able to judge whether the employer's suggestions regarding dismissal are acceptable. Short-time is where employers and employees agree that work should be done on for example only Mondays, Wednesdays and Fridays as there is not enough work for a full working week.

The information which an employer must make available to the other party during consultation about the possibility of a dismissal for operational reasons, is regulated in section 189(3), read with section 16 of the Labour Relations Act, 1995. Note that the disclosure must be in writing. Note also that the information which must be disclosed is relevant information. The concept “relevant information” is not defined in the list of definitions in section 213 of the Labour Relations Act, 1995. However, its meaning is regulated in section 189(3), read with section 16(3) of the Labour Relations Act, 1995.

The other party's right to demand information is not unrestricted. Section 16(5) regulates the information which an employer is not required to disclose to the other consulting party. In terms of this provision, four categories of information need not be disclosed. However, a commissioner of the CCMA acting as an arbitrator, may order the disclosure of two of these categories of information under certain circumstances.

Before you go on to discuss the next procedural requirement for a fair dismissal for operational reasons, it is necessary to consolidate what you have learned.

The fourth procedural requirement for a fair dismissal for operational reasons, that the employer must allow the other party to make representations, is discussed in par 8.3.3. Should the employer not allow the other party to make representations during consultation, the dismissal will be procedurally unfair. The

fifth requirement, that the employer must consider and respond to the representations made by the other party, is discussed in par 8.3.3. The sixth requirement, which is the selection of employees for dismissal, is discussed in par 8.3.4. The seventh and last requirement for a procedurally fair dismissal, the payment of severance pay, is discussed in par 8.3.5.

A little background will help you to appreciate the importance of this procedural requirement! The Labour Relations Act, 1956 did not regulate the payment of severance pay. Employers accordingly argued that they did not have to pay severance pay as there was no statutory duty on them to do so. Employees and trade unions demanded that employers pay severance pay. They argued that a dismissal for operational reasons was a "no-fault dismissal" in the sense that the employee was not the cause of the dismissal. Thus, the employer had to compensate the dismissed employee for the faultless loss of the job. They argued that the purpose of severance pay was to soften the blow of the faultless dismissal. It was aimed at assisting the dismissed employee until another job had been found.

The payment of severance pay is now regulated in section 41 of the BCEA. Note that section 41 creates a duty for the employer who is dismissing for operational requirements to pay severance pay. Note also that it regulates the minimum amount of severance pay that must be paid.

However, the employer's duty to pay severance pay is not absolute. Note that section 41 regulates the circumstances under which the employer need not pay severance pay. Make a summary of these circumstances.

8.4 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.

8.5 RESOLUTION OF DISPUTES

Study par 8.5 of the textbook. This section is self-explanatory.

8.6 THE DISMISSAL OF STRIKERS

Study par 8.6 of the textbook. This aspect will again be discussed when you do collective labour law.

You may not believe it, but we have reached the end of our discussion of the law regarding dismissal for operational reasons! You are not going to be able to deal with all the information in one sitting. You are going to have to summarise, and perhaps summarise more than once.

ENCOURAGEMENT

The important thing is this: To be able at any moment to sacrifice what we are for what we could become.

STUDY UNIT 9: TRANSFER OF EMPLOYMENT CONTRACTS

Prescribed material for this study unit from Essential Labour Law: Chapter 9

9.1 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.

9.2 THE ORIGINAL SECTION 197 OF THE LRA

The original section 197 of the LRA caused a number of problems. See par 9.2 in your prescribed textbook for some examples. You do not need to study these examples, but you do need to regard them as background information in your study of the discussion that follows.

9.3 TRANSFERS IN THE NORMAL COURSE OF BUSINESS

9.3.1 The scope of application of section 197

Study section 197 of the LRA as set out in par 9.3.1 of the prescribed book. Section 197(1) makes it clear that the right of employees to have their contracts transferred is dependent on the transfer of a business meeting the exact wording of section 197. This leads to a few key concepts that need to be interpreted. Make sure you understand how these have been interpreted. These concepts are:

- business
- transfer
- going concern

⇨ **ACTIVITY**

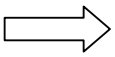
- In your own words, summarise the content of section 197.
- Distinguish between the scope of application of section 197, the meaning of "transfer" and the meaning of "as a going concern".

⇨ ***FEEDBACK***

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

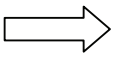
been defined to mean transfer of a business as a going concern. This wording has been interpreted under the old section 197 and will remain relevant for the new section 197.

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.



ACTIVITY

- List some of the problems relating to the interpretation of the concept of "a going concern".
- List the factors which a court may take into account when considering whether there was a transfer (of a business).



FEEDBACK

You will find the answers to these questions in par 9.3.1 of the textbook.

9.3.2 The effect of section 197

Study par 9.3.2 and list the consequences of a transfer of a business as set out in section 197(2). Consider the implications of these for the new employer who wants to restructure the business and retrench some of his or her employees. Describe one of these implications and the effect it will have on a new employer. Study the other consequences of section 197, as set out in sections 197(7) to (9).

The basic effect of section 197 is, therefore, that the employees of the old employer become the employees of the new employer with the same terms and conditions of employment; they also have continuity of employment. However, there are some exceptions to this.

9.4 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 winding-up 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.

ACTIVITY

- Critically discuss the application of section 197 of the LRA
- Look at chapter 9 of the prescribed textbook and make sure that you have covered all the relevant issues. Consider the following set of facts: B decided to restructure its vehicle rental business by closing down its workshops and contracting with A to service and repair its vehicles. The employees working in B's workshops were offered jobs with A, but on less favourable terms than those they had with B. The employees refused to accept the new terms and A told them that they would be retrenched. The employees applied to court for relief on the grounds that the transaction between A and B amounted to a sale of a business as a going concern. They alleged that their contracts with B were accordingly transferred to A on the same terms and conditions by virtue of section 197 of the LRA 1995.

FEEDBACK

These were the facts of Schutte & Others v Powerplus Performance (Pty) Ltd & Another (1999) ILJ 655 (LC). It was found that, in order to determine whether a business has been transferred, the court will look at the substance of the agreement and not at form. The court will weigh the factors that are indicative of a section 197 transfer against those that are not. No one factor is conclusive. The transfer of assets, together with taking over most of the employees, were found to be indicative of a transfer of a business as a going concern. The court explained this by referring to the fact that some businesses comprise only intellectual property and intangible assets. The court found that, although the sale of business is the normal way for a business to be transferred as a going concern, it is not the only way. It pointed out the various ways in which a business may be transferred, namely, a merger, takeover, part of a broader process of restructuring, an exchange of assets or donation. The court pointed out that the fact that there was no audited evaluation of the business did not necessarily mean that there was no intention to transfer the business as a going concern. The court pointed out that the need for an audited evaluation might not arise in the specific circumstances of a transfer of a business. Consideration may also take another form. The court stated that outsourcing as part of a broader process of restructuring, which included an acquisition of the outsourcer's shares, would be one such form. The court found that B had transferred its workshop business as a going concern on the following facts:

- *A and B were part of the same group of companies.*
- *A took over most of the affected employees and managers.*
- *The service provided to B by the workshops continued to be provided without significant interruption.*

- *The intention to transfer stock and equipment to A.*
- *The use of the same premises.*

Factors which weighed against the finding were:

- *There was no audited evaluation of the business.*
- *There was no sale agreement giving effect to the transfer.*

Although this decision was in terms of the old section 197, it is still relevant to the new section 197. This case is a good example of how certain practical problems were dealt with. See also par 9.3 of the prescribed textbook, which discusses some of the aspects of this case.

We have come to the end of study unit 9!

ENCOURAGEMENT

Education is a process of living and not a preparation for future living.

STUDY UNIT 10: UNFAIR LABOUR PRACTICES

Prescribed chapter for this study unit from Essential Labour Law: Chapter 10

10.1 THE RELEVANCE OF THE UNFAIR LABOUR PRACTICE

In chapter 2 of your prescribed book; if you remember, the problems and deficiencies of the common law regarding the regulation of the employment relationship are discussed. We suggest that you refer back to that discussion to refresh your memory of this topic. In order to understand the discussion of an unfair labour practice, it is important that you remember that the deficiencies in the common law regarding the employment relationship gave rise to the requirement or concept of "fairness"; this requires something more than mere lawful conduct on the part of the employer (when dealing with employees). For example, you now know (because you have studied the previous chapters) that it is not sufficient for a dismissal merely to be lawful in terms of the common law. A dismissal must also be fair. A fair dismissal requires a fair reason (substantive fairness) and a fair procedure (procedural fairness). Fairness is not only required when dismissing employees – in other words, when the employer terminates the employment relationship. Fairness is also required when the employer deals with existing employees (for example, when employees are promoted, or when benefits are granted to employees). It should also be noted that the requirement for fair conduct on the part of an employer goes beyond the actual employment relationship: when a person applies for employment, an employer is also required to act fairly, even though the person is not yet an employee in the strict sense of the word (but merely an applicant for employment). Before discussing what constitutes an unfair labour practice as it appears in section 186(2) of the Labour Relations Act, 1995, it is therefore important that you understand the various stages at which fairness is required of an employer.

The first stage is the pre-employment stage. Here the employer deals with a person who has not yet been employed, but who is in the process of applying for employment. As we pointed out above, the law requires that an employer should be fair in its dealings with an applicant for employment, even though an employment relationship has not yet formally been established. The Employment Equity Act, 1998, specifically regulates fair conduct during the pre-employment phase. In terms of the Employment Equity Act, an employer may not unfairly discriminate against any person who applies for a position. This Act is discussed in more detail in chapter 11 of your prescribed book. The second stage at which the employer is required to deal fairly with an employee is the stage at which the employer wishes to terminate the employment relationship. We have already discussed the requirements for a fair dismissal. You may refer back to the discussions in chapters 4 to 8 of your prescribed book. The third stage during which the employer is required to act fairly is during the course of the (existing) employment relationship. The emphasis in chapter 10 is on fair conduct during the course of the employment relationship. Think about the following: Is it necessary for an employer to act fairly in promoting or demoting employees? Is it necessary for an employer to act fairly when granting employees certain employment benefits (such as car allowances)? What about suspensions? Can an employee complain of unfair conduct if he or she is suspended for doing something wrong? If you think carefully about these questions, you will realise that the opportunity for unfair conduct during the employment relationship is a reality. This is why the

legislature acknowledges the unfair labour practice - to ensure fair conduct on the part of the employer in dealing with its employees.

ACTIVITY

In the discussion that follows, we will look more closely at some of the questions asked here. However, before we do so, first try to answer the following questions. If you find you can answer these questions, we suggest that you proceed with a more detailed study of what constitutes an unfair labour practice:

- What are the problems and deficiencies of the common law as far as regulating the employment relationship is concerned?
- Name the three stages of the employment relationship.

FEEDBACK

Refer back to the discussion in par 10.1 of your prescribed book. The employment relationship has three stages, namely the beginning (when the employee is an applicant for employment), the middle (as long as the relationship continues) and the end (dismissal, resignation or retirement). It should be clear that the rules regulating unfair dismissal only protect employees on termination of the employment relationship. An unfair labour practice provides the employee with remedies in response to unfair conduct by the employer in the course (middle phase) of the employment relationship.

10.2 THE DEFINITION OF UNFAIR LABOUR PRACTICES

Carefully read the definition of an unfair labour practice as quoted in par 10.2 of your prescribed book. Can you now see why a whole chapter is devoted to this one definition? Remember to refer constantly to this definition when you study the rest of this important chapter.

10.2.1 Scope of protection

ACTIVITY

Read through par 10.2.1 and then answer the following questions:

(1) Can an employer commit an unfair labour practice against an applicant for employment? Justify your answer.
(2) Assume that an employer commits an unfair labour practice against five employees. Discuss briefly whether these employees may act as a group against the employer, or whether they must each, as individuals, approach the CCMA for relief.
(3) Can an employee commit an unfair labour practice?
(4) Can a trade union commit an unfair labour practice?

FEEDBACK

(1) The answer is no. The definition of an unfair labour practice refers to employer and an employee only. This means that an unfair labour practice can only be committed within the ambit of an employment relationship. Prospective employees may, however, claim that they have been discriminated against at the stage when they applied for a position. At this stage you only need to take note of this fact - we will discuss unfair conduct (in particular discrimination) at the pre-employment phase in more detail when we come to chapter 11 of your prescribed book.

(2) The answer is "yes". The employees in this question may act as a group, because they all have been the victims of the same unfair labour practice (notwithstanding the fact that s 186(2) only refers to an employee in the singular).

(3)and (4) The answer to both of these questions is no. See 10.2.1 of your prescribed book for more on this.

10.2.2 Is the list exhaustive?

In order to understand the discussion, we suggest that you re-read the definition of an unfair labour practice as quoted in par 10.2 of your prescribed book. The relevant question here is whether the list of unfair labour practices in section 186(2) of the Labour Relations Act, 1995, is exhaustive. In other words, can an employee complain of other forms of unfair conduct which are not listed in the definition of an unfair labour practice? The answer to this question is "no". The list of unfair labour practices is exhaustive. This means that an employee will not be able to complain of any other forms of "unfair" conduct which fall outside those listed in section 186(2). Note that unfair discrimination as an unfair labour practice has been deleted from the Labour Relations Act, 1995. Unfair discrimination is now regulated in the Employment Equity Act, 1998. See the discussion in chapter 11 of your prescribed book.

In summary, it appears from this definition that only the following (unfair) acts or (unfair) omissions that arise between an employer and an employee may constitute an unfair labour practice:

- the unfair conduct of the employer relating to the promotion, demotion, probation or training of an employee;
- the unfair conduct of the employer relating to provision of benefits to an employee;
- the unfair suspension of an employee or any other form of disciplinary action short of dismissal;
- the failure or refusal of an employer to reinstate or re-employ a former employee in terms of an agreement; and
- an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, on account of an employee having made a protected disclosure defined in that Act.

10.2.3 Circumventing section 186(2) by relying on the Constitution, contract of administrative law

The Constitution affords everyone the right to fair labour practices. This has lead to the question whether employees may rely directly on the Constitution (where the right to fair labour practices is not limited) rather than the Labour Relations Act, 1995 (where the right to fair labour practices is limited to the practices mentioned in the definition). The Constitutional Court has held that one may not rely directly on the Constitution (for example, the right to fair labour practices in section 23) where there is legislation (such as section 186(2) of the Labour Relations Act, 1995) giving effect to a Constitutional right.

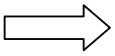
10.3 UNFAIR CONDUCT: PROMOTION AND DEMOTION

10.3.1 Basic principles

Section 186 (2) of the Labour Relations Act, 1995, refers to the unfair conduct of the employer relating to the promotion or demotion of an employee. It is important that you know what is meant by the words "promotion" and "demotion". The reason why it is so important to understand these words is because it is not always very clear, on the facts, whether a person has indeed been promoted (or demoted). Take the following example:

Ms Marais, a senior manager of a chain store, is informed that she has been selected by management to help with the training of newly appointed managers in some of the company's other stores. Because of her added responsibilities, and because of the fact that she will have to travel to the other stores, she is informed that, once appointed, she will receive a special allowance and a car to use for travelling to the various stores. Ms Marais is extremely happy. She regards her new status as a promotion in recognition for her hard work over the past three years. A week later, Ms Marais is informed by management that she will not be used to do the training. She hears along the grapevine that a certain Ms Cooper (a senior

manager at one of the other stores) has been approached to do the training, apparently because she is considered by management to be better qualified to do the training. Ms Marais is extremely upset. She feels that she deserved the promotion and that her employer has acted unfairly. Ms Marais makes an appointment with management to discuss her unhappiness about the situation. Management responds by telling her that she is welcome to discuss any grievances she has with them, but claim that, whatever grievance she has, it definitely does not concern a promotion. Two questions arise from this example. The first question is whether the position which was offered to Ms Marais constituted a "promotion" as envisaged by the Labour Relations Act, 1995. You will agree that the offer which was made to Ms Marais certainly looks like a promotion. However, what if the employer argues that management, as part of its managerial prerogative, is entitled to require of its employees to perform functions which reasonably tie in with their existing functions? Does the mere fact that a person has to perform additional duties mean that the person has been promoted? The meaning of "promotion" is discussed in your prescribed book. We will return to the position of Ms Marais later in the discussion of chapter 10.



ACTIVITY

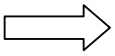
Let us now return to the meaning of "promotion". Study your prescribed book and then answer the following questions:

(1) Employers may use one of two systems to promote employees. Name these systems and give a brief description of each.

(2) Ms Dlamini is employed as an assistant manager in a furniture store. Her immediate manager has recently been transferred to a new store. The position of manager is advertised. Ms Dlamini, who recently successfully completed a certificate course in management, applies for the position. She believes that she is the right person for the job, because she has the necessary qualifications and the necessary experience to fill the position. Much to her surprise, she is not appointed to the vacant position. Instead, she hears that the owner's cousin, Ms Radebe, who has no experience as a manager, has been appointed to the position. Discuss, with reference to applicable case law, whether the employer committed an unfair labour practice by not appointing Ms Dlamini to the position.

(3) Discuss, with reference to the decisions of *Mashegoane & Another v University of the North* and *Nawa v Department of Trade and Industry* (quoted in your prescribed book). What do you understand by the term "promotion"

(4) Return to the question about Ms Marais. Can you now answer the first question?



FEEDBACK

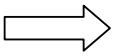
(1) The two systems are the level progression system and the application for vacancy system. Remember that you were required to give a brief description of each.

(2) Refer back to the discussion in par 10.2.1, where we pointed out that only "employees" are protected against unfair labour practices. (This means that there must be an employment relationship between the employee and the employer who allegedly commits an unfair labour practice.) Applicants for employment are therefore not protected against unfair labour practices in terms of section 186(2) of the Labour Relations Act, 1995. The difficult question which arises from this particular set of facts is whether Ms Dlamini (who is an employee of the furniture store) acts in her capacity as an employee" when applying for a position with her own employer. Or does she act in her capacity as an applicant" for employment in applying for a new position with her own employer? When you read the various cases discussed in par 10.3.1, you will realise that the answer to this question is by no means simple! In Public Servants Association v Northern Cape Provincial Administration (discussed in your prescribed book), the CCMA held that a person who applies for a vacancy is doing so in the capacity as a job applicant" and not as an "employee". Because such a person is not considered to be an employee but an applicant, section 186(2) will not apply. In Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice, the CCMA followed a different approach and rejected the argument that a person seeking

promotion was an applicant for a newly created post. Remember to draw a conclusion after you have discussed the law. What can Ms Dlamini do? Do you think that the decision in Public Servants Association v Northern Cape Provincial Administration is correct? Remember that you must always substantiate your arguments.

10.3.2 Unfairness of the employer's conduct

The question about the unfairness of the employer's conduct stands on two legs. The conduct of the employer relating to a promotion and a demotion should be both substantively and procedurally fair. You need to study par 10.3.2 of your prescribed book carefully. Remember, it is not sufficient just to understand the law and to know what the courts have decided in the different cases discussed in your prescribed book. It is very important that you also be able to apply what you have learned to a given set of facts.



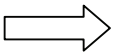
ACTIVITY

(1) When deciding whether or not to promote a person, an employer takes into consideration subjective factors such as performance? Discuss.

(2) Refer back to the problem of Ms Marais. Assume that the position offered to Ms Marais was indeed a promotion. Do you think that it was unfair of the employer to have reneged on the offer?

(3) Ms Naidu applies for a position which was advertised in the local newspaper. She is invited to attend an interview. At the interview she suddenly realises that one of the interviewers is her ex-boyfriend with whom she broke up after he told lies about her. Do you think that Ms Naidu can insist that her ex-boyfriend be removed from the selection panel?

(4) Mr Radebe is an assistant paymaster at a large firm. His duties involve checking the pay packets after the paymaster has calculated the week's pay, and then placing the pay in envelopes. He has been employed in this position for two years. When the paymaster suddenly falls ill, he is requested by management to take over the responsibilities of the paymaster until the paymaster returns. After acting as paymaster for three weeks, the paymaster resigns for health reasons. Mr Radebe performs his duties diligently and is assured by management, on various occasions, that they are extremely happy with his work performance. The position of paymaster is advertised and Mr Radebe, confident that he is able to do the job, applies for the position. Much to his surprise he is not appointed to the position. He feels that the employer acted unfairly. Do you agree? Discuss. If Mr Radebe decides to challenge his employer's decision, what legal steps can he take?



FEEDBACK

(1) The answer is "yes". It is difficult to decide whether or not to appoint a person without referring to subjective factors. However, the employer must still be able to provide reasons for its decision.

(2) This is a difficult question to answer. Bear in mind that the employer may well argue that Ms Marais was never "promoted", but that she was merely asked to do other tasks which tie in with her present job description. In this regard the employer could, for example, argue that once a person reaches senior status, that person may be required to train more junior managers. Do you agree with this argument? If not, remember that you should be able to give reasons why not! We also suggest that you study the decisions in Mashegoane & Another v University of the North (1998) 1 BLLR 73 (LC) and Nawa v Department of Trade and Industry (1998) BLLR 701 (LC) (both are discussed in your prescribed book in 10.3.1). Which of the two decisions should be applied to this set of facts?

(3) As a rule, an employee may challenge the composition (and the competency) of a selection panel. Where an employee reasonably suspects that a person on the panel will not be objective, he or she can object.

(4) The general rule is that, although an employer may expect employees to act in other positions, this does not entitle the employee to be appointed to the position. However, in the case of Mr Radebe, one could argue that the employer has created the expectation of being permanently appointed in the position in which he has been acting. Mr Radebe would probably argue that, in view of the positive feedback he

received from management, he was confident that he would be promoted. Although one is tempted to support Mr Radebe, you should note that, as a rule, an employee is not entitled to be appointed. At most, there is a duty on the employer to give the employee an opportunity to be heard prior to making the final decision. Remember, whenever you have to answer a problem type question and are asked to discuss the answer, it is very important that you first identify the nature of the problem. (For example, this question concerns a dismissal or this question concerns an alleged unfair promotion act.) Only once you have done this should you discuss the law itself. Here it is important that you refer to relevant legislation (such as the Labour Relations Act, 1995) to relevant case law, and to the information contained in your prescribed book. It is also very important to draw a conclusion in which you give an answer to the question.
(5) Mr Radebe can approach the CCMA.

10.4 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.

10.5 UNFAIR CONDUCT: PROVISION OF BENEFITS

Study par 10.5 of your prescribed book carefully and then answer the following questions:

ACTIVITY

1 Does the word "benefits" as it appears in section 186(2) of the Labour Relations Act, 1995, include remuneration? Discuss, with reference to applicable case law.
2 Discuss whether the following constitute a benefit as envisaged by section 186(2) of the Labour Relations Act, 1995:
    2.1 free transport to and from the workplace
    2.2 a claim for unpaid commission
    2.3 payment for accumulated leave
    2.4 payment for overtime
    2.5 a motor vehicle benefit scheme which is granted at the discretion of management
3 What does remuneration" mean?
4 What is the difference between a dispute over rights and a dispute over interests? Why is this distinction helpful in determining the meaning of a benefit"?
5 Can employees strike about a dispute which relates to a benefit"?

FEEDBACK

(1) See the discussion in par 10.5. After reading this paragraph you will realise that the question of what constitutes a benefit, rather than remuneration, is extremely difficult to answer. Make sure that you understand what the difference is. We also suggest that you look at the definition of remuneration in section 213 of the Labour Relations Act, 1995.
(2) The answers to these questions are to be found in par 10.5.
2.1 Free transport has been held to be a benefit.
2.2 Payment for unpaid commission was held to be remuneration and not a benefit.
2.3 Payment for accumulated leave constitutes remuneration and is not a benefit.
2.4 Payment for overtime constitutes remuneration and is not a benefit.
2.5 A motor vehicle benefit scheme which is granted at the discretion of management is remuneration and not a benefit.

(3) See par 10.5 and the comments made in relation to question 1.
(4) See par 10.5.
(5) Question 5 is a difficult question to answer. If we follow the second approach to the interpretation of a benefit, this would mean that a benefit is interpreted to refer only to pre-existing benefits. A strike over a pre-existing benefit will therefore be unprotected, because the strike will be over a dispute of right. See further the discussion in par 10.5 and, in particular, the discussion of the decision in SACWU v Longmile/Unitred (discussed in your prescribed book). In the prescribed book the correctness of this decision is debated. What do you think? Do you think that the decision was correct?

Although the following two activities overlap, we urge you to do both, because they will help you to understand and learn the contents of par 10.5.

ACTIVITY

- Make a summary of the two possible approaches to the interpretation of a "benefit" in terms of section 186(2) of the Labour Relations Act, 1995.
- Contrast the approach followed by the Labour Court in *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* with the approach followed in *SACWU v Longmile/ Unitred*. In your opinion, which approach is the preferred one?

FEEDBACK

You will find the answers for these questions in par 10.5 and in the discussion above.

10.6 UNFAIR CONDUCT RELATED TO TRAINING

Study par 10.6 of your prescribed book. The employer will act unfair regarding training where for example an employee is denied training and where such training is a prerequisite for advancement in the workplace, or where a legitimate expectation to such training was created and it furthermore can be shown that the employer acted inconsistently, arbitrarily or irrationally in denying the training.

10.7 UNFAIR SUSPENSION

Study par 10.7 of your prescribed book. If you are certain that you understand the contents of this paragraph, continue with the next paragraph.

ACTIVITY

- What is the difference between a preventative and a punitive suspension?
- Can only punitive suspension amount to unfair labour practices?
- What are the requirements for a fair suspension?

FEEDBACK

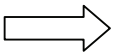
- *A preventative suspension is where disciplinary charges are being investigated against an employee and the employer wants to suspend the employee pending the outcome of the disciplinary enquiry. A punitive suspension can be imposed as a disciplinary measure short of dismissal after the disciplinary hearing has been held and the employee found guilty.*
- *No- both forms can. See the discussion in 10.7.1.*
- *You will find the answer in par 10.7.2.*

10.8 DISCIPLINARY ACTION SHORT OF DISMISSAL

Study par 10.8 of your prescribed book and then answer the following easy questions:

ACTIVITY

- Give three examples of disciplinary measures that are short of dismissal.
- On what principles would an employee challenge the actions of an employer short of dismissal?

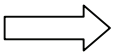


FEEDBACK

The answers to these easy questions are to be found in 10.8 of your prescribed book. Employees would be able to challenge the substantive and procedural fairness of any sanction short of dismissal (imposed by an employer) on the same principles an employee may use to challenge the fairness of a dismissal for misconduct. In other words substantive and procedural fairness. Remember that there are at least three important differences. First, as far as sanction is concerned, the employee has to show that the sanction actually imposed (such as a final warning) was not appropriate; secondly it is much easier for employers to justify sanctions lesser than dismissal; and, thirdly, as far as procedure is concerned, it stands to reason that the lesser a sanction, the more informal the procedure an employer may follow before a sanction is imposed fairly.

10.9 FAILURE OR REFUSAL TO REINSTATE

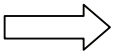
Note that 'unfairness' is not required here – the mere failure or refusal in itself is enough to constitute an unfair labour practice. it is clear from case law that section 186(2)(c) is most often relied on in the context of re-hiring agreements as part of retrenchment exercises (ie where the employer undertakes – an undertaking usually limited in time - to preferentially rehire employees from the pool of retrenched employees should vacancies arise after the retrenchment) Study par 10.9 of your prescribed book and then do the following activity:



ACTIVITY

Try to answer the following problem question:

Three employees were dismissed for misconduct following an incident in which they assaulted one of their co-workers. All three of them were employed as drivers. The dispute concerning their alleged unfair dismissal was referred for conciliation under the auspices of the CCMA. When the dispute remained unresolved, the dispute was referred for arbitration. On the day of the arbitration, the employer decides to settle the dispute because the witnesses for the employer have all left its employment and cannot be traced. The employer offers to reinstate the employees unconditionally, provided that they all tender their services the following day. All three employees tender their services the following day. Two days later all three employees are informed that they are to be retrenched because the employer is planning to outsource the driving division. Discuss whether the employer has committed an unfair labour practice in terms of section 186(2)(c) the Labour Relations Act, 1995.

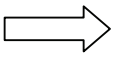


FEEDBACK

No unfair labour practice has been committed because the employer has complied with the agreement to reinstate. The dispute about the outsourcing is a different dispute and will have to be dealt with through other procedures. See the discussion of the decision in SACCAWU obo Africa & Another v Bredasdorp Spar in par 10.9 of your prescribed book.

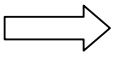
10.10 PROTECTED DISCLOSURES

This unfair labour practice has also been included in the Labour Relations Act with the 2002 amendments. Read 10.10 and answer the following questions:



ACTIVITY

- What does the principle of "causality" entails?
- What does an "occupational detriment" mean?



FEEDBACK

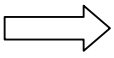
As far as causality is concerned, the Labour Relations Act, 1995 requires that the detriment must be 'on account of' the protected disclosure. In contrast, the Protected Disclosures Act, 2000 outlaws occupational detriments 'on account of, or partly on account' of a protected disclosure. It is submitted 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.*

10.11 THE RESOLUTION OF UNFAIR LABOUR PRACTICE DISPUTES

Study par 10.11 of the prescribed textbook.



ACTIVITY

Make a summary of the procedure for resolving an alleged unfair labour practice. Does this procedure differ from the procedure followed when an alleged, unfair dismissal of an employee is resolved? Who bears the onus of proving an unfair labour practice?

FEEDBACK

You will find the answers to this activity in par 10.11 of your book. If you are sure that you understand the contents of chapter 10 of your prescribed book and if you have done all the exercises, you can now turn to chapter 11 of your prescribed book. Chapter 11 discusses employment equity with reference to the Employment Equity Act, 1998.

ENCOURAGEMENT

Courage is going from failure to failure without losing enthusiasm.

STUDY UNIT 11: EMPLOYMENT EQUITY AND AFFRIMATIVE ACTION
Prescribed material for this study unit Essential Labour Law: Chapter 11

SPECIAL NOTE:

In the discussion of chapter 11 we will not deal with each and every paragraph of the textbook, instead we will look at the chapter in general and only highlight some of the important issues.

This is an important chapter in your book. You have to study and understand the principles regarding unfair discrimination. It is, however, equally important to be able to apply the principles to a set of facts. In other words, a mere theoretical knowledge is not sufficient. It is up to you to make sure you know the principles and how they are applied in practice. Below, you will find a set of facts designed to test these principles and to serve as an illustration of how these principles are actually applied in practice.

⇨ **ACTIVITY**

Ms A, a white Afrikaans speaking female, is relaxing next to the pool one lazy Sunday afternoon and reading the Sunday Times. She comes across an advertisement which reads as follows: “Wanted: Public Relations Consultant. No previous experience necessary, but must be fluent in three black languages and be prepared to travel a lot.” Ms A, who is married with three small children, is something of a language whiz and is indeed fluent in Xhosa, Sotho, Tswana and Zulu. Although she knows that she cannot really travel because of the children (her husband has absconded with a younger version of Ms A), she decides to apply for the job out of curiosity. During the interview, it becomes clear that company XYZ, which is a manufacturer of men's underwear, is looking for a black male to fill the position. In fact, the Human Resources Manager, honest man that he is, does admit during the interview that travel is not really essential for the job because the incumbent will service the greater Johannesburg area. He mentions that the requirement was inserted to ensure that the majority of people who apply are males, because the job entails selling men's underwear and this logically means that a man must fill the post. He also points out that the job entails going to a lot of functions at night, which means that Ms A is not really suitable. He adds that the declared policy of the company is to attain a level of 75% representativeness of black people in the public relations and selling divisions of the company; the purpose of this is to ensure that the company increases its share of the black male underwear market. This policy is now contained in a collective agreement entered into with the trade union (which represents the majority of the company's work force). He concludes that the advertisement was designed to reflect the company's two concerns of continued profitability and affirmative action. Ms A is therefore politely informed that her application is unsuccessful. At this point, answer the following questions:

- Is Ms A protected against unfair discrimination?
- If your answer to (1) is yes, briefly explain the steps she should take to process a claim for unfair discrimination.
- Do you think Ms A was discriminated against? If so, on what grounds and is the discrimination direct or indirect?
- Do you think that the discrimination was unfair? Put differently, do you think that company XYZ will be able to justify the discrimination?
- Suppose Ms A tells her story to her friend, Ms B, who is a staunch supporter of the AWB, but who is prepared to travel (she is unattached) and who is also fluent in three black languages. Ms B, however, never heard of the job because, in line with her convictions, she only reads the Afrikaans Sunday paper. The advertisement was placed only in the Sunday Times. Do you think Ms B is entitled to relief?
- During the interview, the Human Resources Manager "added" the requirement of attending functions at night and, at the same time, set aside the travel requirement. Do you think an employer can do this, that is, exercise its discretion by softening certain requirements while adding others?
- How would you have worded the advertisement, given the existence of an affirmative action policy?
- If you were the Labour Court judge adjudicating the matter, what relief would you have afforded Ms A, if any?
- Suppose Ms A got the job. On her first day at work she goes to meet the MD. On his desk stands a plaque boldly proclaiming "even male chauvinist pigs need love". When she is issued with her diary, she finds out that the company, on the advice of a motivational consultant and in view of its product, subscribed to Playgirl's Annual Diary for all its female employees. When she complains to her immediate supervisor Mr D, who has been in the selling business for many a year, she is curtly informed: "You prissies might think underwear is about support, but it is about sex baby. Sex sells, support doesn't. If you don't like it, get out." Her immediate supervisor also suggests that they sleep together in order for her to loosen up. She takes the matter to her supervisor's supervisor Mr E, who tells her that her boss (Mr D) is a bit of a pervert, but if she is prepared to sleep with him (Mr E), then Mr D will probably leave her alone. That evening Ms A is in tears at home and phones her friend Ms B for advice. After a long discussion Ms A is convinced that she really needs the job, that she is probably overreacting and that she will give the job her best effort. The next Morning she walks into the office only to be confronted by a female colleague who calls her a slut for sleeping with the boss after one day at the office. Ms A storms out of the office never to return. Advise Ms A fully about her possible remedies.
- Would your advice have been different had Ms A put in leave for the day and consulted you on how she should deal with the matter within the framework of the law?
- Suppose Ms A was a gay man and Messrs D and E were also gay. Would your advice have been different to that given in? (In the feedback Ms A will then be Mr A).

⇨ ***FEEDBACK***

As an applicant for employment, Ms A is protected against unfair discrimination. The dispute has to be referred to either the bargaining council or the CCMA for reconciliation, and then to the Labour Court for adjudication. Ms A will have to prove the existence of discrimination, at which point the onus shifts to company XYZ to justify it. This is indirect discrimination (see the definition in the book) on the grounds of (arguably) race, sex, marital status and/or family responsibility. See par 11.3.4 of your prescribed book for more details. XYZ will only be able to justify its actions on the grounds of either affirmative action (in which case the policy and its application must conform to the requirements as discussed in the book), or the inherent requirements of the job. Although it is a matter for argument either way, it would seem that, in this case, affirmative action has the better chance of being an acceptable justification. In this case Ms B was eliminated as a possible applicant as a result of company XYZ's decision to advertise in an English

paper only. This decision might well be regarded as unfair discrimination because, in view of the stated requirements for the job, the rationale for this decision is lacking. Once again, potential applicants react to the wording of an advertisement. If the advertisement states certain requirements and the employer then changes these requirements to the extent that someone who did not apply could have applied successfully, this could provide the basis for a claim of unfair discrimination (especially if there is proof that the employer appointed someone who did not meet the published requirements). Ms A in fact resigned, but can claim constructive dismissal based on sex discrimination (in the form of hostile environment sexual harassment) - this would constitute an automatically unfair constructive dismissal. If she remained in employment, she could initiate disciplinary proceedings against her supervisors on the basis of their conduct. See 16.4.3 in this regard. Note also the provisions of item 6 of the Code of Good Practice on Handling Sexual Harassment Cases.

In this case we would be dealing with sexual harassment as sex discrimination based on a person's sexual orientation. Mr A would be entitled to the same relief as Ms A. Also take note of the provisions of item 6 of the Code of Good Practice on Handling Sexual Harassment Cases. The aim of the Employment Equity Act 55 of 1998 is to eradicate discrimination in the workplace through a combination of two mechanisms: the elimination of unfair discrimination and the obligation on certain employers to implement 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 tour 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 outlaws 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

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.

We have come to the end of study unit 11!

ENCOURAGEMENT

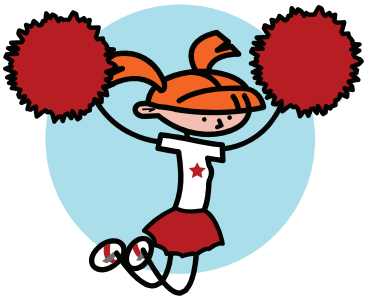
We make a living by what we get, but we make a life by what we give.

COLLECTIVE LABOUR LAW

We have now completed the part in the textbook on Individual Labour Law. The next part of the Workbook deals with collective labour law - chapters 12 -21 of the prescribed book: Basson A; Christianson M; Garbers C; Dekker AH, Le Roux PAK; Mischke C & Strydom EML Essential Labour Law (5th edition) Labour Law Publications (2009).

We hope that this part of the workbook will further help you to progress with your studies.

STUDY UNIT 12: A BRIEF INTRODUCTION TO COLLECTIVE LABOUR LAW
Prescribed chapter for this study unit from Essential Labour Law: Chapter 12



This chapter serves as a general introduction to collective labour law.

ACTIVITY

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?

FEEDBACK

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.

The most important implication of the distinction between disputes of right and disputes of interest should already be clear from the discussion. Although both disputes must be referred to conciliation as a first step towards their resolution, the further resolution (should conciliation fail) of disputes of right is their referral to arbitration or adjudication, while only disputes of interest are left to the collective bargaining process and, ultimately, the use of economic power (strikes and lockouts) for their resolution.

You should also take note of and know the different ways in which the Act encourages collective bargaining. Note, however, that freedom of association, organisational rights, strikes and lockouts, bargaining councils and collective agreements form the topics of subsequent chapters in the prescribed book. Advisory arbitration is discussed in more detail in the chapters dealing with strikes, while the role of conciliation, apart from featuring in the last chapter of the book, is mentioned in most of the chapters in the prescribed book, as and when necessary, because of its central role in dispute resolution.

ENCOURAGEMENT

Give me six hours to chop down a tree and I will spend the first four sharpening the axe.

STUDY UNIT 13: FREEDOM OF ASSOCIATION

Prescribed chapter for this study unit from Essential Labour Law: Chapter 13

This chapter marks the change from considering the broad concepts and structures which underlie collective labour law to a more detailed study of the actual way in which these broad concepts and structures are regulated. A number of remarks and examples are offered below in order to guide you through those aspects of the work where the application of principles is required. Again, chapter 13 is not discussed according to every paragraph in the textbook. The general concepts of the chapter are discussed below.

13.1 FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

In chapter 1 of the prescribed book you encountered section 23 (which protects an employees' right of freedom of association) and section 18 (which protects freedom of association in general) of the Constitution, 1996. At this early stage, it is important to note that the Labour Relations Act 66 of 1995 not only seeks to protect this constitutional right in the employment sphere, but also limits it in at least the following three important ways:

- by making union membership subject to the constitution of the trade union
- by allowing closed shop agreements
- by allowing agency shop agreements

Some of the above are discussed below, but please note that the discussion, as far as closed shop and agency shop agreements are concerned, is continued in paragraph 5.7, and especially paragraph 5.7.2 of the prescribed book.

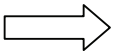
13.2 PROTECTION OF FREEDOM OF ASSOCIATION OF EMPLOYEES

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

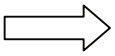
Please note that of these five methods, only the provision regarding contractual provisions is expressly limited to protection of the right to freedom of association. All the other methods apply to the exercise of any right conferred by the Act (including, of course, the right to freedom of association). 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.



ACTIVITY

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?



FEEDBACK

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).

13.3 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. (This case is dealt with in more detail in paragraph 10.2 which deals with protest action).

This concludes the discussion of study unit 13.

ENCOURAGEMENT

The true way to render ourselves happy is to love our work and find in it our pleasure.

STUDY UNIT 14: ORGANISATIONAL RIGHTS

Prescribed chapter for this study unit from Essential Labour Law: Chapter 14

THE APPROACH TO THIS STUDY UNIT

This discussion also does not follow the exact paragraph division as that of chapter 14 in the textbook. As a point of departure you should acquaint yourself thoroughly with the principles in the prescribed chapter of the textbook. From the study aims, however, it is also clear that you should be able to apply some of these principles to practical problems. This simply means that learning is not enough. The key to understanding this chapter is, firstly, the realisation of how important these rights are to trade unions (see the discussion in the introduction to the chapter in the textbook). Secondly, it is necessary for you to understand that the Labour Relations Act 66 of 1995 regulates organisational rights in two important ways. Not only does it list and describe certain organisational rights, but it also describes the ways in which these rights may be acquired. This, in turn, means that you have to know and understand not only the content of the rights and the ways they can be acquired, but also the (hidden) third dimension of the interaction between the rights in the Act and the acquisition of organisational rights in general.

After you have completed this study unit you must basically be able to answer the following questions:

- List the five organisational rights
- What representation level is required of a trade union to access all five organisational rights?
- To what rights will a sufficiently representative trade union be entitled?
- To what rights will a trade union (which is a minority) be entitled if it is member of a bargaining council?
- What avenues are available to a trade union to obtain organisational rights?
- Can a minority trade union strike in order to obtain organisational rights?

We suggest that you study this chapter and then return to these questions and see if you understand the work well enough to be able to answer these.

⇨ **ACTIVITY**

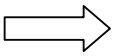
Below you will find a long set of facts designed to test your knowledge of most aspects of the prescribed chapter. Read through these facts carefully and then try to answer the questions.

Two years ago, Welikeleather (Pty) Ltd decided to expand its operations and to start a shoe manufacturing factory in Johannesburg. The factory is run as Shoesforafrica (Pty) Ltd and is divided into two functional units - Buying and Processing (BP), and Manufacturing and Selling (MS). In the BP unit, raw hides and rubber supplies are bought, which are then processed for use in the manufacturing unit. The prepared hides and rubber are transported to the MS unit by conveyor belt. Although the two units are in the same location and entry to both is gained through a single gate, the only contact between them is the abovementioned conveyor belt. The finances of the two units are kept separate and they are managed by two different directors of the company.

Shoesforafrica employs 200 employees in total, 80 in the BP unit and 120 in the MS unit. Shoesforafrica also falls within the registered scope of the Bargaining Council for the Leather and Shoe Industry for

Greater Johannesburg. Trade Union A is a party to this bargaining council. Since the start of operations, Trade Union A has been trying to organise the employees of both units, but has met with stiff resistance from the employer, who refuses to recognise it. It currently represents 32 employees in the BP unit and 20 employees in the MS unit. Trade Union B, which is much more militant, has also been organising in the plant. Despite being relatively unknown and not being a party to the bargaining council, it has managed to recruit 15 employees in the BP unit and 86 employees in the MS unit. Trade Union B has also met with stiff resistance from the employer, who refuses to recognise the union and to grant it any organisational rights because of its militancy.

- To which organizational rights, if any, is trade union A entitled?
- Do you think either of the two trade unions is, as a matter of principle, entitled to any other of the organizational rights in the Act?
- What options are available to the trade unions to secure the organizational rights mentioned in the 2 above?
- Briefly describe the procedures to be followed regarding each of the options identified in 3 above and indicate what, if anything, the trade union needs to prove in each instance.
- Suppose Trade Union A notifies the employer in terms of section 21 that it wants to exercise the right of leave for trade union activities in respect of each unit. What counter arguments do you think the employer might use?
- Suppose Trade Union B decides to use the section 21 option, and notifies the employer that it seeks to exercise all of the organisational rights contained in the Act, in respect of the whole plant. What arguments do you think the employer might use to counter this?
- Suppose Trade Union B decides to strike in support of its demand that it be recognised and granted organisational rights. What are the implications of this decision?



ACTIVITY

Trade Union B is recognised and granted all of the organisational rights in respect of the whole plant, which is regarded as one workplace. During the first round of substantive negotiations with the employer after recognition, the union demands a 25 percent increase as well as a revision of the existing medical aid benefit afforded employees, to bring it more in line with management's medical benefits. Management resists both demands - it informs the trade union that it cannot really afford to pay anything, but in the interest of good labour relations and the security of employees, it is prepared to link wage increases to inflation (6%). Management bases its position on the general economic conditions in the country and the devastating effect the trade union's recognition strike had on the cancellation of orders and the procurement of new orders. It also informs the trade union that it is simply impossible to compare the medical benefits of ordinary workers with those of management, because of the increased actuarially supported risk of AIDS in the case of ordinary workers. Management adds that this risk is partially borne out by the actual prevalence of HIV in the workplace. The trade union requests the following information:

a information about all orders received during the past year and the times and dates of those orders
b proof of all orders cancelled during the past year and the dates of such cancellations
c details of any investments made by the company during the year
d copies of all contracts with suppliers and buyers together with a summary of what prices the company expects to negotiate with these suppliers and buyers in the coming year
e details of any other payments made during the year
f details about the salaries and benefits of management of the company
g the actuarial report on which the medical benefit is based
h a list of all employees currently working for the company who are HIV positive

As far as a, b, c and e are concerned; the company provides the trade union with a copy of its most recent financial statements as well as with the most recent quarterly report from the Reserve Bank. The company also provides the actuarial report, but refuses to disclose any information regarding the salaries and

benefits of its management and of employees who have tested HIV positive. The company argues that this is private information and that the employers did not consent to the information regarding the suppliers and the buyers being disclosed because, according to the company, this information is confidential and if disclosed it may cause considerable harm to the company. What can the trade union do if management refuses to provide this information? How would you solve the problem if you were the commissioner faced with a decision about what information has to be disclosed?

⇨ ***FEEDBACK***

1 Trade Union A is a party to a bargaining council - as such it is entitled to the rights contained in sections 12 (access to the workplace) and 13 (deduction of union dues) of the Act. This applies irrespective of how representative it is in the workplace and irrespective of whether the two units form one or two distinct workplaces (in which case it can exercise the rights in both workplaces).

2 This depends firstly on what we regard as the workplace, secondly on each trade union's representativeness in the workplace, and thirdly on the fact that a distinction has to be made between sufficient and majority representativeness in determining a trade union's right to organisational rights - see the discussion in paragraph 14.4.3 of the prescribed book. If the two units are regarded as separate workplaces, we find the following levels of representativeness: [BP Unit: - Trade Union A: 32/80 = 40%; Trade Union B 15/80 = 19%], [MS Unit: - Trade Union A: 20/120 = 16%; Trade Union B 86/120 = 72%]. This means that both trade unions will, as far as the BP unit is concerned, at best be entitled only to those organisational rights for which sufficient representation is the cutoff point. In Trade Union A's case, the only right to which it will be entitled in addition to those acquired by virtue of its status as party of the bargaining council (see 1 above), is the right to leave for trade union activities. In Trade Union B's case, it may well be found that it is not sufficiently representative at all and is not entitled to any rights - see the discussion in paragraph 14.4.3 of the prescribed book. If the two units are regarded as a single workplace, the levels of representative are the following: Trade Union A 32+20 = 52 employees out of 200 = 26% Trade Union B 15 + 86 = 101 out of 200 employees = 50,5%. This means Trade Union B is entitled to all the rights in the Act (it has majority representation). Trade Union A is at best sufficiently representative and the same remarks apply as in the previous paragraph.

3 The basic options available to any trade union are either to strike in order to gain organisational rights or to use the section 21 procedure. Note that the strike option is not available as far as disclosure of information as an organisational right is concerned (see the discussion in chapter 14 of the textbook). As far as the section 21 procedure is concerned, the following options are available:

- *a If we regard the units as separate workplaces, the two trade unions might decide to combine forces, as allowed by the Act, in order to establish majority representativeness and to entitle each trade union to all the organisational rights contained in the Act with respect to each workplace. This might well happen in case of the BP unit, where neither union, on its own, has majority representation while Trade Union B might even fall short of sufficient representation. Trade Union B, however, does have majority representation in the MS unit, so it will be loath to accommodate Trade Union A. Nevertheless, Trade Union B might well agree to cooperate with Trade Union A with regard to the MS unit, in order to obtain Trade Union A's cooperation with regard to the BP unit.*
- *b If we regard both units as a single workplace, Trade Union B has majority representativeness and will probably seek to exclude Trade Union A as far as possible through an agreement with the employer, as also allowed by the Act, which sets levels of representativeness in excess of for example 30 percent (which is higher than Trade Union A's current representativeness). This, however, will not help too much, because as a party to a bargaining council Trade Union A is at least entitled to access and stop-order facilities.*

4 As far as the strike option is concerned, the dispute has to be referred to conciliation, and should conciliation be unsuccessful, the trade union may strike after giving the employer 48 hours notice. The section 21 procedure is described in paragraph 14.4.3 of the prescribed book. Note that the

trade union cannot strike in order to acquire disclosure of information as an organisational right. (It can strike only about the other four organisational rights in the Act.)

5 *Because Trade Union A seems to be sufficiently representative at least with regard to the BP unit, the best move for the employer is to argue that the two units constitute a single workplace and that Trade Union A is not sufficiently representative in the workplace.*

6 *Trade Union B has majority representation in the MS unit, so there does not seem to be any way out of granting all of the organisational rights to Trade Union B for the MS Unit. If, in this case, the employer argues that both units should be treated as a single workplace, Trade Union B becomes entitled to all of the organisational rights in respect of the whole plant; it also has majority representation. This means that the employer will probably seek a verification exercise in respect of the MS unit, and strenuously argue that the two units constitute independent workplaces, in order to limit the trade union's power to one workplace.*

7 *If the trade union wins the strike - fine: all the organisational rights will probably be included in the collective agreement that is reached. If, however, it loses the strike, it also loses the right to use the section 21 procedure for a period of one year from notice of the strike (see chapter 14 of the textbook).*

8 *The answer to this question is to be found in section 16 of the Act, which deals with the disclosure of information. The trade union may refer the dispute to the CCMA which ultimately arbitrates the dispute. In this case, the commissioner will probably find the following*

- a *The information supplied by the company is too vague - the company itself grounded its resistance of the trade union's demands in specific issues (such as cancellation of orders as a result of the strike) about which the trade union now wants specific information. The commissioner will therefore probably find, as point of departure, that the trade union is entitled to the information in a, b, c and e above because the information is relevant and no harm is done.*
- b *As far as the information in d above is concerned (the information about suppliers and buyers) the commissioner will probably find that the information is relevant as well as confidential. Remember, however, that confidentiality is not a barrier to disclosure as such, but that the harm likely to be caused by disclosure is the crucial factor. In this case, the commissioner might well order disclosure subject to directions about its use, and also subject to the penalties imposed by the Act if the trade union then violates this confidentiality.*
- c *As far as the information about the salaries of managers and employees with HIV is concerned, the information does seem to be relevant. Information about the salaries and benefits of managers might help the trade union to evaluate any differences between the actuarial and practical distinction between management and employees. The same applies to information about the prevalence of HIV. Furthermore, it is not necessary to link this information to the name of any individual employee - the information is not dependent on the names of individual employees, and the commissioner might well order disclosure of figures but not names.*

As you will see from the above example, things can get quite tricky in the field of collective Labour Law. If you have previously been cruising in comfort mode, we hope that this example has served to illustrate not only some of the principles regarding organisational rights, but also the degree of knowledge and insight required from any serious student of collective Labour law. And if you really want to test your insight, vary some of the facts in the example and try to establish the significance of such changes.

ENCOURAGEMENT

Never work just for money or for power. They won't save your soul or help you sleep at night.

STUDY UNIT 15: COLLECTIVE BARGAINING

Prescribed chapter for this study unit from Essential Labour Law: Chapter 15

This is an important chapter. This discussion does not follow the exact paragraph division as that of chapter 15 in the textbook. You will once again find that an initial study of the principles contained in the prescribed book is called for. Once again, these principles are not repeated in this workbook. As far as the binding nature and effect of collective agreements are concerned, you should be in a position to apply these principles in practice. This study unit is designed to aid you in this process.

REGULATION OF THE DIFFERENT ASPECTS OF COLLECTIVE BARGAINING

We have repeatedly emphasised the central role of collective bargaining in the study of collective labour law. You have also studied in some detail how the law accommodates freedom of association as a precondition for effective collective bargaining (study unit 13) and, furthermore, how the law encourages collective bargaining by facilitating the establishment and maintenance of a strong presence of trade unions in the workplace through the granting of organisational rights (study unit 14).

Now we turn our attention to different aspects of the actual process of collective bargaining, and we focus on who the parties to collective bargaining are as well as the purpose and outcome of collective bargaining (ie collective agreements).

It bears repeating that the law does not place a duty on an employer to bargain with a trade union. Nor does it regulate in any detail what employers and trade unions may or may not do (ie the tactics that they use) during the bargaining process. This typically falls within the field of study known as industrial relations. But certain aspects of the collective bargaining process are regarded as so worthy of protection that legal regulation is called for. In this study unit you meet some of these, namely the parties to collective bargaining (trade unions and employer organisations) as well as the purpose and outcome of collective bargaining, namely collective agreements.

However, you should also see this chapter in the context of the remainder of the prescribed book. In this study unit we deal with another aspect of collective bargaining, namely where (at which levels) employers and trade unions bargain with each other. This is followed by a number of chapters on strikes, lockouts and picketing. Strikes, lockouts and pickets, as discussed in chapters 17 and 18 of the prescribed book, are part and parcel of the collective bargaining process. Furthermore, we shall see that the concept of workplace forums is a direct result of the inadequacies of collective bargaining.

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.

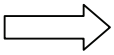
In other words, the argument is made that society demands that some form of control should be exercised over trade unions and employers' organisations to protect the interests of society and members of these organisations. As explained in the textbook, this is done through a system of registration. Although 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.



ACTIVITY

Trade Union A manages to establish a significant presence in the workplace of Employer B, so much so that the employer invites the trade union to a comprehensive round of negotiations to consider the following:

- the formal granting of organisational rights to the trade union
- terms and conditions of employment for the employees in the lower job grades (of which the trade union represents 60%) for the next year

As a result of the negotiations the following two collective agreements are concluded: (1) A recognition and procedural agreement which incorporates, by reference, the five organisational rights as contained in the LRA. The agreement also includes three annexures: (a) a grievance policy and procedure, (b) a disciplinary code and procedure, (c) a retrenchment procedure. The only mention of the duration of this agreement is that it will remain valid until cancelled on reasonable notice by either of the parties. (2) A substantive agreement which provides for: (a) a wage increase of 10 percent to all employees in the lower job grades, (b) the duty on each employee to work overtime at 24 hours' notice by the employer, provided that an employee is not required to work more than five hours' overtime in any week; (c) paid paternity

leave of five working days in the year. This agreement is expressly stated to be valid until 30 June 2000, on which date it will automatically lapse. Against this background, answer the following questions:

- What is the effect of the second collective agreement on the employment contracts of individual employees in the lower job grades? Suppose the individual contracts of employment provided for paternity leave of seven days prior to conclusion of the collective agreement.
- What happens on 1 July 2000?

⇨ ***FEEDBACK***

1 The first agreement binds the following:

1.1 The trade union and the employer, in terms of section 23(1)(a) of the Act. The significance for the trade union here is the inclusion of organisational rights which the trade union can enforce should the employer fail to keep the agreement.

1.2 The employer and every member of the trade union in so far as the agreement is applicable to them (s 23(1)(b)). This means that the agreement, as far as the grievance procedure, the disciplinary code and procedure and the retrenchment procedure are concerned, directly applies between the employer and the members of the trade union.

1.3 In so far as these procedures also afford a role to the trade union and its representatives, the trade union can enforce these rights in terms of section 23(1)(a) mentioned above.

1.4 The agreement, in principle, and in the absence of meeting the requirements for extension mentioned in section 23(1)(c) of the Act, does not bind non-members of the trade union, although they are employed in the same job categories or grades. Note the remarks in the textbook about the practice of employers to extend the benefits of collective bargaining to all employees.

2 The second agreement binds the employer and the members of the trade union in terms of section 23(1)(b) of the Act. The same remarks about the fact that it does not bind non-members, made in the previous paragraph, apply.

3 A collective agreement varies the contract of employment (s 23(3) read with s 199 of the Act). This means that the provisions of the collective agreement become part of every individual contract of employment of those employees bound by the agreement. Furthermore, this is the case with regard to all employees who were members of the union at the time of the conclusion of the collective agreement (notwithstanding their resignation from the union at a later stage), as well as those employees who join the union after conclusion of the collective agreement. As far as the paternity leave provision of the collective agreement (which is less favourable than that contained in the contracts of employment) is concerned, note the remark in the textbook that the provisions of the collective agreement presumably still vary the contract of employment of those employees bound by the collective agreement. This means that effect is given to the less favourable provisions of the collective agreement.

On 1 July 2000, the second collective agreement lapses. This does not mean that we revert to the position prior to the collective agreement - the contracts of employment of the union members have been varied and they stay that way. In practice, the parties to collective bargaining will be well aware of the impending lapse of the agreement and, typically, a trade union will table its demands for the new year prior to the lapse of the current agreement. But note the connection with strike laws - as discussed in chapter 17 of the textbook, employees are not allowed to strike about issues regulated in a collective agreement. This simply means that, as far as wage increases, overtime and paternity leave are concerned, the trade union is welcome to table demands prior to 1 July 2000. If the employer ignores these demands, the trade union will not be allowed to strike about these matters. Once the agreement lapses, however, the employees will be allowed to strike about these matters.

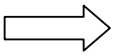
AGENCY SHOP AND CLOSED SHOP AGREEMENTS

The principles are largely self-explanatory. A couple of remarks may, however, help you understand the place of closed shops and agency shops in the bigger picture (that is, in terms of their relationship to other principles of Labour Law that you have already encountered, or will encounter in your future studies).

1 Both agency and closed shops are subject to agreement between employers and trade unions. There is nothing which says that an employer is obliged to agree merely because of a certain level of representativeness of the trade union. This means that a dispute about an employer's refusal to agree to an agency or a closed shop will be a dispute of interest which, once it has been referred to conciliation and failed, may become the reason for a strike and lockout. But note the remarks in the textbook about the reasons why an employer may well agree to an agency or closed shop.

2 The most contentious aspect of the closed shop is that through an infringement of an employee's right to freedom of association, the employee might lose his or her job.

This could happen where, for example, an employee refuses to join a trade union party to a closed shop agreement, or where the employee is expelled from a trade union party to a closed shop agreement. In Essential Labour Law the grounds for a possibly fair dismissal are discussed in detail. These relate to misconduct, incapacity and operational requirements. Note that a closed shop dismissal is, in actual fact, a possible fourth ground for a fair dismissal. Note also that after conciliation, the Labour Court retains jurisdiction to adjudicate on the fairness of such a dismissal.



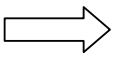
ACTIVITY

Read through the following set of facts and answer the questions below.

a The Very Large State Department (VLSD) has concluded an agency shop agreement with the State Employees' Association. Mrs X (an employee of the VLSD) has persistently refused to become a member of the State Employees' Association and has refused to pay the agency fee. She would qualify for membership of the Association, but feels that the Association is a communist organisation and contrary to her feminist viewpoint. What can Ms X do? Can she be forced to pay the agency fee to the State Employees' Association?

b Union A entered into a collective agreement with an employer in terms of which certain sales staff will work on Saturdays in return for an extra day off per month and the payment of a Saturday bonus. John Smith joined the union shortly after the agreement came into effect and has been willing to work on Saturdays because of the Saturday bonus. However, his career as a musician is taking off and the band he plays with is increasingly being asked to play at venues over weekends. He wants to stop working on Saturdays. His union says he is bound to work on Saturdays. Is John compelled to work on Saturdays? Will it assist John to resign from the union? Discuss.

c The employer wishes to compel employees who are not members of the union to work on Saturdays. Can the collective agreement be extended to such non-union members? Discuss.



FEEDBACK

a If Mrs X is a conscientious objector (which she seems to be because she objects on political grounds) she may request the employer to pay the agency fee into a special fund administered by the Dept of Labour. She will however still be paying the agency fee.

b You must discuss the legal effects of a collective agreement. See par 15.2.4 of the textbook. Johan will be bound because a collective agreement binds all the members of a trade union which was a party to the agreement.

c Here you need to discuss the requirements for extending collective agreements to employees who are not union members. See par 15.2.4 under this specific heading.

ACTIVITY

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.

FEEDBACK

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.

This concludes the discussion on study unit 15!

ENCOURAGEMENT

Treat people as if they were what they ought to be and you help them to become what they are capable of being.

STUDY UNIT 16: STATUTORY BARGAINING FORUMS

Prescribed chapter for this study unit from Essential Labour Law: Chapter 16

In this study unit you will again see that the discussion does not directly correlate with paragraph numbers in the textbook. It rather takes the form of a general discussion to give you some more information and background.

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.

FOCUS ON INDUSTRY-LEVEL BARGAINING

At the outset, the following two aspects of the prescribed chapter need to be emphasized:

- The focus of this chapter is on industry-level bargaining. In contrast to collective bargaining at plant or enterprise level, which is largely left to the design (by means of agreement) of the parties involved in collective bargaining, the law regulates collective bargaining at industry level through the institutions of bargaining councils and statutory councils.

- Collective bargaining is not the only activity or function of bargaining councils and statutory councils. Perhaps the most important of the other functions of these institutions is dispute resolution.

INDUSTRY-LEVEL BARGAINING AND THE IMPORTANT ROLE OF BARGAINING COUNCILS

You may not realise or remember it, but you encountered references to industry-level bargaining as early as chapter 12 of the prescribed book. If you refer to the primary objectives of the Act again (see s 1 of the Act quoted in chapter 12 of the prescribed book - see study unit 12), you will see that the Act aims to promote collective bargaining at sectoral level. As mentioned in that study unit, sectoral level simply means industry level.

Furthermore, we saw in study unit 14 that membership of a bargaining council automatically entitles a trade union to two of the organisational rights in the Act, namely access to the workplace and stop-order facilities. Furthermore, in your studies thus far of both individual and collective Labour Law, particularly in relation to dispute resolution, you will have noticed the statement: the dispute must be referred to a bargaining council, if there is such a council with jurisdiction, or, if no council with jurisdiction exists, to the CCMA. From this, it should already be clear that we are dealing with an important institution in the field of collective labour law.

THE ESTABLISHMENT OF BARGAINING COUNCILS

In the text of the prescribed book (see par 16.1.1) the two requirements for the establishment of a bargaining council are discussed. The parties adopt a constitution (which presupposes that the parties agree to establish a council and agree on the content of the constitution). This should be studied in conjunction with paragraph 16.1.2 of the textbook, dealing with who the parties to a council can be, and paragraph 16.1.3 of the textbook, covering what provisions have to be included in the constitution of a bargaining council. Once this step has been taken, application is made for registration, and if the application is successful, the council is registered. You require no more than a thorough knowledge of the principles in the textbook in respect of the above principles.

THE JURISDICTION OF A BARGAINING COUNCIL

In the text of the prescribed book (see par 16.1.5) the key to a proper understanding of the effect of the functions exercised by bargaining councils is to understand the jurisdiction of these councils or, as it is sometimes referred to, the registered scope of bargaining councils. Note that this rests on two pillars: a specified type of industry and a specified geographical area for example the bargaining council for the baking industry in the Pretoria magisterial district or the bargaining council for the motor manufacturing industry of South Africa. As should be clear from the examples that the limitation mean that councils may operate parallel to each other. Therefore there can be bargaining councils for the same industry but in different geographical areas, and bargaining councils for different industries but in the same geographical area.

NOTE: Bargaining councils exercise their functions with regard only to the industry and area for which they are registered.

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.

BARGAINING COUNCIL AGREEMENTS

As far as the binding effect of bargaining council agreements is concerned, note the distinction between the three types of situations drawn in paragraph 16.2 of the prescribed book, and note also that each of these situations demands a unique procedure.

You should be able to distinguish between these different situations, to describe the procedure applicable in each case in detail, and to apply the principles to a set of facts. You should also note how these agreements are enforced (16.2.5 of the textbook) as well as the possibility that, even though in principle a bargaining council agreement may apply to a certain employer, exemption may be granted (16.2.4 of the textbook). Luckily, the textbook contains a good example of the binding effect of bargaining council agreements to help you understand these principles. As such, this does not require any further discussion in this workbook.

A bargaining council agreement is also a collective agreement. Earlier it was said that bargaining often takes place at different levels, with bargaining council agreements typically providing for minimum conditions of service, and plant-level agreements regulating actual (higher) terms and conditions of employment. By now you also know that collective agreements take precedence over individual contracts of employment. But what do you think happens if there is a conflict between a bargaining council agreement and a plant-level collective agreement, and both are binding? Which one of the two takes precedence? The answer to this is that we do not know - the Act says nothing about it and arguments have been advanced in favour of both types of agreements. We shall have to wait for the courts to sort this one out!

STATUTORY COUNCILS

When you study par 16.4 in the textbook, note the following:

- the requirements for registration;
- the fact that statutory councils actually are (or could be) an exception to the general statement that the Act does not enforce, but encourages, collective bargaining;
- the powers and functions of statutory councils and the fact that these may be extended; and
- that agreements reached in statutory councils have the same binding effect as bargaining council agreements, which were discussed earlier.

CONCLUSION

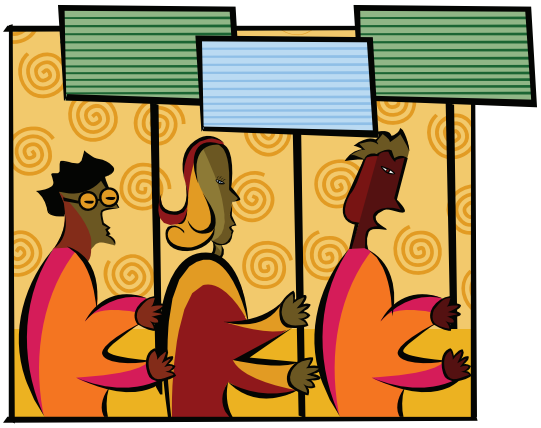
At this point, you have studied the preconditions for collective bargaining (freedom of association and organisational rights), the parties to the collective bargaining process, the purpose and outcome of collective bargaining (collective agreements), as well as the different places or levels where bargaining takes place.

It is now time to turn our attention to what parties are allowed to do in the bargaining process, that is, the tactics they are allowed to employ and the economic force they may use to ensure compliance with their demands. The law regulates one of these aspects - industrial or collective action - in great detail.

ENCOURAGEMENT

It is impossible for a man to learn what he thinks he already knows.

STUDY UNIT 17: STRIKES AND LOCKOUTS
Prescribed chapter for this study unit from Essential Labour Law: Chapter 17



This is a VERY important chapter. Make sure that you understand the contents of this study unit before you continue with the other study units. Do not attempt to study this chapter in one session. We suggest that you break the study unit into smaller sections and study every smaller section.

To further help you with this we suggest that you use the following table as an outline for the study unit. The crux of the discussion deals with whether a strike (or lock-out) is protected or unprotected. It is important to determine when a strike (or lock-out) will be protected or unprotected because the consequences of the actions of employees taking part in a protected and unprotected strike are different.

In the table below we only use the term strike but keep in mind that it equally applies to a lock-out.

The table is a basic outline – you must give it more flesh (and contents) by studying the rest of the chapter. Hopefully the further discussions in the chapter will make more sense if you can study it in view of the bigger picture.

REMEMBER: Everything in this chapter is important!

FIRST ANSWER THESE THREE QUESTIONS:	YES / NO
Their actions comply with the definition of a strike? Par 17.4.1 – 17.4.2	YES
The strike is allowed? (in other words it is not prohibited) Par 17.5	YES
Did they follow the correct procedure? Par 17.6	YES

Remember possibility of:
- secondary strikes
- picketing

If answer to all three = YES = PROTECTED STRIKE	If answer to one / two or all three = NO= Unprotected Strike

Consequences of a protected strike	Consequences of an unprotected strike
• Employer can get interdict • Labour Court can order 'just and equitable' compensation for any loss attributable to an unprotected strike or lock-out; • Fair ground for dismissal (participation in unprotected strike = substantive fair reason for dismissal. Has specific procedure to ensure fairness)	Cannot dismiss employee except for:: • Misconduct • Operational reasons

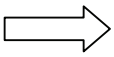
17.1 THE COLLECTIVE BARGAINING CONTEXT

Chapter 17 is of great importance and must be read with care. The rationale for protecting strikes is explained in par 17.1. Make certain that you understand the arguments in favour of recognising and protecting the role of strikes. Of particular importance is the point made that although strikes may (and often do) cause substantial economic losses to the employer, there are sound reasons for granting workers the right to strike in circumstances where it is necessary for the workers to support their demands during the collective bargaining process. However, because of the potentially destructive nature of strike action, the law does not allow strikes to take place unchecked. The law lays down certain ground rules for the exercise of strikes: firstly, strikes are prohibited in certain circumstances; and secondly, only strikes which have complied with certain procedural requirements will be granted protection by the law.

It is accepted that strike action will result in a certain measure of economic hardship for the employer and, provided that the strike has obtained protected status in terms of the law (in other words, the strike is not prohibited and the prescribed procedures have been followed), such economic hardship is considered to be part and parcel of the power struggle between employees and their employer. In fact, this is the whole idea!

Remember that when employees decide to embark on strike action, the purpose of such strike action is to force the employer to accede to their demands. The more the employer is hurt economically, the greater the chance that the strikers' demands will be met. However, the law also recognises that during this power struggle a point may be reached where the strike (even though it has protected status in terms of the Act)

has the effect of destroying the employer financially. When this point will be reached is difficult to determine as there is no clear test which can determine when the strike has inflicted more economic damage than that which an employer is expected to endure during strike action. This issue will be discussed in more detail later in chapter 17 of the prescribed book. It is enough for you to know at this stage that although strikes are meant to hurt the employer economically, the law will intervene at a certain point and allow the employer to dismiss strikers for economic reasons even if the strike is protected.



ACTIVITY

Bearing these comments in mind, read through the following excerpt carefully and, if necessary, make your own short summary of the gist of this excerpt. When we discuss the arguments raised in the Constitutional Court (par 7.2) concerning the question of whether or not to include the right to have recourse to a lockout in the Constitution of South Africa, we will ask you to return to this excerpt and evaluate the arguments raised in the Constitutional Court in the light of these comments:

'The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands than [sic] have his business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the hope that after a certain point, the financial harm or pain inflicted on the employees would have been so much that they would consider that they would rather agree to the employer's demands than continue to be subjected to the lock-out and to lose more wages.'

- *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 414 (LAC) at 422E–G

17.2 THE CONSTITUTION AND INTERNATIONAL LABOUR STANDARDS

In par 17.2 of the prescribed book we consider the views of the International Labour Organisation (ILO) on strikes and lockouts. This discussion is important as the standards set by the ILO play an important role in our law. Read through par 17.2 and make sure that you understand what a convention is and what its purpose is. Although only two important conventions are mentioned in this paragraph, namely the Freedom of Association and Protection of the Right to Organise Convention No 87 of 1949 and the Right to Organise and Collective Bargaining Convention No 98 of 1949, South Africa has ratified many other important conventions.

The ILO has a wide range of duties. Of particular importance is the drawing up of conventions. Once a country has signed or ratified a convention, that convention becomes binding on that country and it is expected that that country's legislation will reflect the standards set by the convention and also that its legislation will not conflict with these standards. In order to monitor compliance with the obligations contained in the convention, the ILO has the right to investigate whether a specific country's legislation violates the principles entrenched in ILO conventions. South Africa was visited in 1992 by a Fact Finding and Conciliation Commission of the ILO (FFCC). The purpose of this visit was to examine the present situation in South Africa in so far as it related to labour matters with particular emphasis on freedom of association (mandate of the FFCC). The Committee was critical of many issues concerning our labour legislation. Since this report, the LRA was passed and the two conventions referred to above were signed. South Africa has also been readmitted as a member of the ILO.

17.3 THE LRA'S APPROACH TO STRIKES AND LOCK-OUTS

You may wish to spend some time studying the contents of this paragraph and make a brief summary of the decision of the Constitutional Court which ratified the Constitution.

The text briefly explains the history leading to the scrapping from the Constitution of the right to have recourse to a lockout. It is also mentioned that the Constitution was presented to the Constitutional Court for certification. This process needs some explanation. The Constitution is the highest law (also referred to as the supreme law) of our country, and all laws which are inconsistent with it may be declared invalid by the Constitutional Court. This is what is meant by the concept unconstitutional. It literally means against the Constitution or opposed to a country's constitution. Section 2 of the Constitution confirms that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

You will have gathered from the discussion in the text that the Constitution was preceded by the Interim Constitution. When the Interim Constitution was drafted, 34 constitutional principles were included. These principles were intended to form the basis of the final Constitution and as such were crucial in certifying the Constitution. When the Constitution was presented to the Constitutional Court for certification, the Constitutional Court was called upon to scrutinise carefully whether the provisions of the (final) Constitution were not in any way in conflict with the constitutional principles contained in the Interim Constitution.

When section 23 of the Constitution was argued in the Constitutional Court, many objections were raised against the omission of an employer's right to have recourse to a lockout. These arguments are referred to in the text (par 7.2). Make certain that you understand these arguments as well as the response of the Constitutional Court to these arguments. The most important constitutional principle upon which these arguments in favour of including the right to a lockout were based, reads as follows:

XXVII - Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices.

The Constitutional Court concluded that the omission of the right to lockout from the (final) Constitution does not conflict with the constitutional principles. Although section 23 of the Bill of Rights contained in the Constitution of South Africa, Act 108 of 1996 does not recognise the right to a lockout, the LRA expressly grants employers the right to have recourse to a lockout. However, note that section 64(1) of the LRA does not afford employers a 'right to a lockout'; they only have recourse to lockout. On this point it may be argued that the difference in wording implies that the legislature intended to draw a distinction between the weight of the rights granted to employees and to employers. It therefore appears that strikes and lockouts are not considered by the LRA to have equal status. It is argued that an employer represents an accumulation of material and human resources (see Kahn-Freund) and as such has more bargaining power, while an individual employee has no such bargaining power due to a lack of financial resources. Although it is possible that in some exceptional circumstances individual employees may have bargaining power equal to that of their employers, most employees as individuals do not have equal bargaining power. Therefore, the majority of employees as individuals cannot resist an employer during negotiations on wages and other conditions of employment.

Having discussed the international position regarding strikes and lockouts, it now becomes necessary to consider the approach of the LRA with regard to strikes and lockouts. Your prescribed book lists five basic principles which are central to the approach of the Labour Relations Act 1995 regarding strikes and lockouts. Of particular importance is the acceptance by the Labour Relations Act that the right to strike and the right to have recourse to a lockout may be limited. A brief overview of these limitations is given in par 17.5.

17.4 STATUTORY DEFINITIONS OF STRIKES AND LOCK-OUTS

The LRA limits the right to strike and the right to recourse to a lockout in the interest of employers and employees and in the public interest. The LRA makes provision for limitations arising from the definition of a strike and a lockout and for substantive and procedural limitations. Substantive limitations refer to those instances where a strike or a lockout is absolutely prohibited because of the parties involved and the nature of the services rendered by the parties. Procedural limitations refer to those instances where the strike or lockout is not prohibited, but where the strike or lockout will only be protected if certain procedural requirements have been met. These limitations are discussed in more detail in chapter 17.

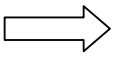
In par 17.3 it was mentioned that no right is absolute. This principle is also accepted by the LRA which accepts that the right to strike and the right to recourse to a lockout may be limited in the interest of employers and employees and in the public interest.

The Labour Relations Act 66 of 1995 contains the following three forms of limitations -

- limitations which arise from the definition of a strike and a lockout;
- substantive limitations on strikes and lockouts (strikes and lockouts are absolutely forbidden in certain circumstances); and
- procedural limitations on strikes and lockouts.

In this section we focus only on the first form of limitation, namely the definition of a strike and a lockout. We will return to the other two forms of limitations later. Study the definition of a strike as quoted in par 17.4.1 of the prescribed book carefully. Summarise the three separate elements of the definition of a strike. The first element: the prescribed nature of the strike

The first element of a strike does not normally create many problems and it is generally easy to determine whether employees are busy with strike action or not. What is important to bear in mind when studying the definition of a strike is that strike action does not necessarily require a complete cessation of work or activities - a partial work stoppage is sufficient.



ACTIVITY

After studying this section, answer the following questions:

- An employer implements a system of overtime work which is in contravention with the provisions of the Basic Conditions of Employment Act. The workers refuse to work such overtime. Does their action constitute strike action in terms of the first element of a strike? Discuss briefly with reference to relevant case law.
- Write short notes on the following types of action. Do they fall within the first element of the definition of a strike?
  - Go-slow
  - Work-to-rule
  - Voluntary overtime
  - Compulsory overtime
  - Overtime ban

FEEDBACK

This question deals with the elements of a strike. In order to qualify as a strike the action must consist of, first, an action or omission of a prescribed nature and, second, that the action or omission must be concerted. Thirdly, the action or omission must have a prescribed purpose. In order for an action or omission to constitute a strike in terms of the LRA, it must comply with all three elements simultaneously.

In the first question the overtime does not qualify as "work" since it is in contravention of the BCEA. You also had to discuss the case of Simba v FAWU in par 17.4.1 of the textbook.

The answers to the rest of the questions can be found in par 17.4.1 (under the heading "The first element: the nature of the strike").

ACTIVITY

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.

FEEDBACK

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.

ACTIVITY

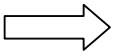
- Can a strike be viewed as an example of a broad category of actions which is referred to as collective action?
- Is the right to strike afforded to an individual worker or to a group of workers?
- Can picketing and protest action be regarded as forms of collective action?

FEEDBACK

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

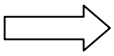
The most difficult element of a strike is probably the one which has to do with the purpose of the strike. The third element of a strike requires not only that there must be a purpose, but also that the purpose must fall within the ambit of section 213 of the LRA.



ACTIVITY

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.



FEEDBACK

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.

ACTIVITY

Try to answer the following questions. Some of these questions are fairly difficult; should you have any difficulty, refer again to your prescribed book.

- Name four issues which will be considered of mutual interest between employer and employee.
- Write a short paragraph on the concept of mutual interest between employer and employee with reference to the decision in *Rand Tyres and Accessories (Pty) Ltd & Appel v Industrial Council for the Motor Industry (Transvaal), Minister for Labour, and Minister for Justice* (1941) TPD 108.
- With reference to section 28(h) of the LRA, will employees be able to strike over issues which are broader than those which strictly affect the relationship between employer and employee? Substantiate your answer carefully.

FEEDBACK

- *This would for example relate to terms and conditions of employment, as well as matters of direct relevance to the workplace and the job security of employees, such as health and safety issues, the dismissal of workers, and the negotiation of disciplinary, grievance and retrenchment procedures.*
- *You will find the answer in par 17.4.1 under the discussion "The third element – the purpose"*
- *The term 'matter of mutual interest' is clearly capable of wide interpretation and has in fact been approached in this way. Nevertheless, it has its limits. This is illustrated by demands with regard to what can be termed 'political issues' such as a refusal to work in protest over the Government's decision to increase VAT, a demand to reform the Judiciary or the Reserve Bank, or the contents of proposed legislation. Here no demand is made concerning a matter of mutual interest between employer and employee – the demand is being made against the State.*

ACTIVITY

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.

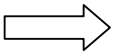
FEEDBACK

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 medical-aid 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.



ACTIVITY

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.

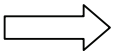
1 The employees of an employer, who all work on a production line, decide to disrupt production by half of them refusing to work during the morning of each day and the other half refusing to work during the afternoon. The purpose of this action is to compel the employer to increase the wages paid to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



FEEDBACK

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.

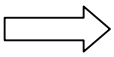
The fifth example does not constitute a strike as it could be argued that the substratum or reason of the strike has been removed. In other words, by removing the grievance the foundation of the strike has fallen away. Refer also to Afrox Ltd v SACWU & Others; SACWU & Others vAfrox Ltd (1997) 4 BLLR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

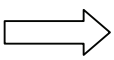


ACTIVITY

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?



FEEDBACK

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.*

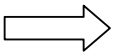
2 *The second course of action will not constitute a lockout as the purpose for which the employer is excluding the workers does not fall within the definition of a lockout.*

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 lock-out 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.

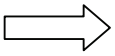
In your prescribed book it is mentioned that partial strikes (such as go-slow or work-to-rule) are very effective from the point of view of the strikers: the employer is hurt, but the employees still earn their salaries because they are on the employer's premises and they are doing their jobs. The best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



ACTIVITY

Now that you have studied the definition of a lockout, do the following exercises even if some of them overlap. It is important to do them all because questions may be formulated in different ways.

- Define a lockout in your own words.
- Name the two elements of a lockout.
- Write short notes on the elements of a lockout.
- What is a dismissal lockout? Is this form of a lockout recognised by the LRA?
- What consequences face an employer who institutes a dismissal lockout? (Refer to section 187 of the LRA.)
- What form of lockout action is recognised by the LRA? Give an example.
- If an employer locks out only one employee, will it constitute a lockout?
- Distinguish between an offensive lockout and a defensive lockout. Give an example of each.



FEEDBACK

You will be able to answers these questions after you have studied par 17.4.2. Also look at the explanation above about the difference between an offensive and defensive lock-out.

It cannot be emphasised enough that for an employee's action to constitute a strike, all three elements of the definition must be complied with. The same applies to the two elements of a lockout. In practice, the element that often causes difficulty is the purpose for which the action is embarked upon. This is illustrated in the activity above which deals with the definition of a lockout. Where an employer simply excludes employees from its premises in an attempt to soften them up prior to an envisaged strike, it will not constitute a lockout - the employer is not making a demand in respect of a matter of mutual interest.

Also remember why it is important to determine whether a certain action constitutes a strike or a lockout. If the action does not fall within one of these definitions (or that of picketing or protest action) it will not be regulated by the LRA and if it constitutes a breach of contract or a delict it could lead to a claim for damages or the granting of an interdict. If an employee is guilty of such conduct, he or she could be dismissed for misconduct. If the action falls within the definition of a strike or lockout, the action will be protected against liability if it complies with the requirements set by the LRA for a protected strike or lockout.

In this section we only dealt with the question of what forms of action constituted a strike or a lockout. We did not consider whether these actions were protected or not. If it has been established that an action is a strike or lockout as defined, the next step is to consider whether the employees or employer have

complied with the requirements of the Labour Relations Act 66 of 1995 so as to ensure that the strike is protected. This is a completely separate enquiry from the first question. It will now be dealt with.

We will now move on to the next topic where we deal with the requirements for a protected strike or lockout.

17.5 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.

17.5.1 Prohibition in a collective agreement

Only collective agreements as defined by the Labour Relations Act 66 of 1995 may prohibit a strike or lockout in respect of the issue in dispute. If you are uncertain about collective agreements, we suggest that you refer again to the discussion of collective agreements in your prescribed book. Because only registered trade unions can conclude a collective agreement in terms of the Labour Relations Act 66 of 1995, only these unions will be able to waive their right to strike on a certain issue. In terms of section

65(1)(a) of the Labour Relations Act 66 of 1995, parties can agree not to go on strike over a particular matter irrespective of whether that matter is regulated in a collective agreement or not.

17.5.2 Arbitration is prescribed in terms of an agreement

Section 65(1)(b) prohibits a strike or lockout where a person is bound by an agreement that states that the issue in dispute must be referred to arbitration. The following set of facts is an example of such an agreement:

Union A and Employer Organisation B are party to a bargaining council. They have embarked on a major exercise to describe and grade the jobs performed in their industry. The aim is that, in the future, wages will be negotiated for employees according to their job category. They agree that any disputes in this regard that cannot be resolved will be referred to arbitration. If this is included in a collective agreement, no strike or lockout will be permitted in respect of these issues. This collective agreement will, in the first place, bind Union A and Employer Organisation B as well as their members. Remember, however that other unions, organisations, employers and employees could also be bound by such an agreement in certain circumstances.

17.5.3 Disputes that must be referred to arbitration or the Labour Court

The crux of section 65(1)(c) of the Labour Relations Act 66 of 1995 is that employees are prohibited in terms of the Labour Relations Act from striking if the issue in dispute is one that a party has the right to refer to arbitration, or the Labour Court. If employees embark on strike action in support of an issue which has to be referred to the Labour Court or to arbitration, the employer may apply to the Labour Court for an order interdicting the workers from striking as such strike action would be unprotected in terms of the Labour Relations Act 66 of 1995. In the textbook you are referred to the decision in Ceramic Industries Ltd t/a Betta Sanitary Ware v Nation Construction Building & Allied Workers Union & Others [1997] 6 BLLR 697 (LAC). In this case workers embarked upon strike action in support of the following three issues:

- the failure of the company to pay employees for 14-15 and 29 January 1997;
- the harassment of shop stewards and three other employees; and
- the fact that workers at the casting and spraying department were compelled to work beyond agreed targets.

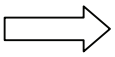
The employer approached the Labour Court for an order interdicting the strike on the basis that the employees were prohibited from striking as the issues in dispute had to be referred to arbitration or to the Labour Court by a party to the dispute. The three issues in dispute between the union and the employer were referred to the CCMA and a certificate was issued confirming that the disputes could not be settled.

With regard to the first dispute (the nonpayment of strikers), the court held that the Labour Court had the jurisdiction to deal with the matter. The Labour Court could, for example, make a declaratory order that in certain limited instances the strikers must be remunerated. The workers were therefore not entitled to strike over this issue.

The court held that the alleged harassment and victimisation of shop stewards (the second issue in dispute) was a contravention of section 4 of the Labour Relations Act 66 of 1995. This section protects employees' right to freedom of association or the perpetration of a residual unfair labour practice consisting of unfair discrimination against union representatives or members in contravention of item 2(1)(a) of Schedule 7 of the Labour Relations Act or both. The Act expressly grants a party the right to refer such a dispute to the Labour Court for adjudication.

The court found that the third issue in dispute had been settled prior to the dispute. Because it fell away, there was no need for strike action. If the dispute had not been settled it should have been referred to arbitration as it was clearly about the interpretation or application of the settlement agreement between the parties. The settlement agreement was a collective agreement in terms of the definition contained in sections 213 and 24(1) and (2) of the Labour Relations Act which provides that any person party to such a dispute may refer the dispute to arbitration.

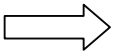
The court accordingly found that the strike was not protected in terms of section 67(1) of the Labour Relations Act 66 of 1995, and granted an interim interdict prohibiting the employees from continuing with their unprotected strike.



ACTIVITY

After you have read paragraph 17.5.3 the prescribed book answer the following questions.

- Make a list and, where necessary, briefly summarise the instances where a strike or lockout will be prohibited because the Labour Relations Act requires that these disputes be referred to arbitration or the Labour Court.
- A trade union representative is dismissed after she was found guilty of theft by a disciplinary enquiry. Can her fellow employees embark on strike action concerning her dismissal? Substantiate your answer with reference to relevant case law.
- Maria applied for a position as a sales representative at a large clothing store. Her application was unsuccessful. When she inquired about the reasons for the decision, she was told that her family responsibilities would have restricted her freedom to travel. Maria approached the trade union active in this store. After having heard her story, the trade union organised a strike. Is the strike prohibited in terms of the Labour Relations Act? Substantiate your answer.



FEEDBACK

The answers to these questions are to be found in par 17.5.3 of your prescribed book.

An exception: strikes over the decision to retrench

Note that there is one important exception to the rule that employees may not strike where the dispute concerns an alleged unfair dismissal. In very limited instances employees may embark on strike action in opposition to a dismissal for operational requirements. Note that there are four requirements that must first be met.

It is important to distinguish between three categories of reasons for dismissal, namely misconduct, incapacity, and operational requirements. These three forms of dismissal have been discussed earlier. The meaning of the term operational requirements is discussed in chapter 8.1 of Essential Labour Law. This term is also defined in the Labour Relations Act 66 of 1995 itself. Essentially, the definition distinguishes between four broad categories of operational requirements, namely economic needs, technological needs, structural needs and similar needs.

In this discussion we are going to place the emphasis on a situation where the employer is forced into a position where he or she has to start retrenching employees because it is no longer viable to keep the employees in employment, or where certain positions have become redundant due to structural changes in the organisation.

For a dismissal on the basis of operational requirements to be fair, such a dismissal must be both substantively and procedurally fair. As you know, substantive fairness relates to the reason for dismissal. (If you want to refresh your memory, turn to chapter 8 of Essential Labour Law.) In the case of dismissal

for operational reasons, the employer must prove a number of things to substantiate its substantive fairness.

In the first instance, the employer must prove that the reason offered for dismissal falls within the definition of operational reasons as defined in section 213 of the Labour Relations Act 66 of 1995. Secondly, the employer must prove that the dismissal for operational reasons was fair. This entails that the employer must prove that the operational reason on which the dismissal is based actually existed and that it was the real reason for dismissal. In other words, the employer must prove that the proffered operational reason is not a mere cover-up for another reason for the dismissal of the employees. It is important to note here that section 189A distinguishes between the size of employers and the size of dismissals when regulating substantive and procedural fairness of dismissal for operational reasons.

- A small employer is one that employs 50 or fewer employees
- A big employer is one that employs more than 50 employees.

It is important that you are able to distinguish between a large-scale dismissal and a small-scale dismissal by a big employer. Look at the figures set out in the textbook as to what will constitute a large-scale dismissal. You will see that the concept relates to a stipulated minimum number of employees relevant to the size of the employer. See in this regard chapter 8.2.2 of Essential Labour Law.

Note however that a dismissal by a big employer of fewer employees than the prescribed minimum might nevertheless constitute a large-scale dismissal. You will find this in the instance where the number of the employees to be dismissed, together with the number of employees that have been dismissed (for operational requirements) in the 12 months prior to this dismissal, is equal to or exceeds the numbers as specified. Look at the example in the textbook and ensure that you understand this concept. Also note that the 12-month period is always calculated from the date on which the employer gives notice of the latest proposed dismissals.

ACTIVITY

Why do you think that the legislature has made this distinction?

FEEDBACK

Trade unions were critical of the manner in which employers conducted retrenchment consultations. 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 embarked upon, rather than seeking options to avoid or minimise retrenchment. This had particularly severe consequences in the case of large-scale retrenchments. Government then made proposals to enhance the effectiveness of consultations in large-scale dismissals for operational requirements: the appointment of a facilitator to assist the parties in an endeavour to reach consensus (see Government Gazette no 6854 of 27/7/ 2000 no R756). 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 amendments bills were eventually published addressing these issues and many more.

Substantive fairness of a dismissal on the basis of operational requirements

It is a good idea to look again at the requirements for a substantively fair dismissal on the basis of operational requirements in the case of a large-scale employer: In terms of section 189A(19) four requirements for substantive fairness are set in this instance:

- The reason for the dismissal must be for operational requirements as defined in section 213.The reason must be the real reason for the dismissal and not a cover-up for another such as 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/her mind and be able to give reasons for alternatives to dismissal, if any. He/she must be able to show that the dismissal was a measure of last resort.
- Selection criteria must be fair and objective.

Procedural fairness of a dismissal on the basis of operational requirements

There are seven requirements for a dismissal by a small employer or a small-scale dismissal by a big employer:

- prior consultation
- attempt to reach consensus over certain matters
- written disclosure of relevant information
- an opportunity to make representations
- consider representations
- selection of employees for dismissal
- severance pay

Bear in mind that the requirements are intertwined and it is not always possible to keep them totally separate. The first procedural requirement, namely prior consultation, requires that consultation must take place when the employer contemplates dismissal. In other words, consultation must take place at the stage when the employer has not reached a final decision to dismiss, but has merely foreseen the possibility. The term consultation is not defined in section 213 of the Labour Relations Act 66 of 1995. However, the meaning of the term is regulated in section 189 itself. In terms of subsection (2), consultation means an attempt to reach consensus. In addition, section 189 also regulates with whom the employer must consult.

The second procedural requirement is that the consulting parties must attempt to reach consensus over certain matters. There are six matters about which the parties must try to reach agreement:

- appropriate measures to avoid the dismissals
- appropriate measures to minimise the number of dismissals
- appropriate measures to change the timing of the dismissals
- appropriate measures to mitigate the adverse effects of the dismissals
- the method for selecting the employees to be dismissed
- the severance pay for dismissed employees

The third procedural requirement for a fair dismissal for operational reasons relates to the disclosure of information by the employer to the party with whom it is consulting about the possibility of dismissal for operational reasons. The information which an employer must make available to the other party during consultation about the possibility of a dismissal for operational reasons, is regulated in section 189(3) read with section 16 of the Labour Relations Act 66 of 1995. Note that the disclosure must be in writing. Note also that the information which must be disclosed is relevant information. The concept relevant information is not defined in the list of definitions in section 213 of the Labour Relations Act 66 of 1995. However, its meaning is regulated in section 189(3) read with section 16(3) of the Labour Relations Act 66 of 1995. The other party's right to demand information is not unrestricted. Section 16(5) regulates the information which an employer is not required to disclose to the other consulting party. In terms of this provision, four categories of information need not be disclosed. A commissioner of the CCMA, acting as

an arbitrator, may however order the disclosure of two of these categories of information under certain circumstances.

The fourth procedural requirement for a fair dismissal for operational reasons is that the employer must allow the other party to make representations. Should the employer not allow the other party to make representations during consultation, the dismissal will be procedurally unfair.

The fifth requirement is that the employer must consider and respond to the representations made by the other party. The sixth requirement is the selection of employees for dismissal. The seventh and last requirement for a procedurally fair dismissal is the payment of severance pay. The payment of severance pay is now regulated in section 41 of the BCEA. Note that section 41 creates a duty for the employer who is dismissing for operational requirements to pay severance pay. Note also that it regulates the minimum amount of severance pay that must be paid. However, the employer's duty to pay severance pay is not absolute. Note that section 41 regulates the circumstances under which the employer need not pay severance pay.

Large-scale employer

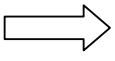
We now turn to large-scale dismissals by a big employer. A big employer must comply with the seven requirements set out above. In addition, however, he or she has to comply with s 198A.

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.



ACTIVITY

Assume that the employer gives notice of the termination of the contracts on the basis of operational requirements. What are the options that are available to the unhappy employees? Discuss in detail. (A question such as this can easily count 15 to 20 marks.)

FEEDBACK

You will find the answer to this question in chapter 8 of your prescribed book. In answering this question, you had to take note of the following:

- *Does this employer have more than 50 employees in his/her service? This is an important consideration since the strike option is only available where the employer has more than 50 employees in his/her service.*
- *How many employees will be dismissed (retrenched)? Remember, the strike option is limited to large-scale retrenchments. This question gives very little information - you are therefore required to discuss in detail the circumstances in which employees may strike.*
- *Did any one of the parties request a facilitator? Discuss the various options in detail. Again, this question is vague. You must therefore discuss all options in detail.*
- *How many days must pass before the employer may give notice of the termination of the contracts?*
- *Discuss whether the employees may now embark on strike action. How much notice must be given to the employer? Here you must draw a distinction between an ordinary employer and the State.*
- *Mention that the strike option is only available where the parties are unhappy about the fairness of the reason of the retrenchment. If they are unhappy about the fairness of the procedures, the strike option will not be available.*
- *Mention that the employees may decide not to strike, but rather to refer the dispute about the fairness of the reason for the dismissal to the Labour Court. In these circumstances the strike option will no longer be available.*

An exception: strikes and lockouts over organisational rights

As a general rule, organisational rights may not be the subject of strike action. You will recall that it was stated in chapter 14 of your prescribed book that disputes concerning the granting of the organisational rights mentioned in sections 12-15 of the Labour Relations Act 66 of 1995 must be referred to the CCMA for arbitration.

Section 65(2) of the Labour Relations Act 66 of 1995 overrides this proviso by providing that a dispute over the granting of the abovementioned organisational rights may be the subject of a strike or a lockout provided that certain additional requirements are met.

ACTIVITY

Unregistered trade union ABC wants to exercise the organisational rights afforded to trade unions in terms of sections 12 - 16 of the Labour Relations Act 66 of 1995. Advise the trade union on the legal position. The trade union specifically wants to know whether it can strike in support of these organisational rights.

FEEDBACK

We hope that you have been able to answer this fairly difficult question. If not, we suggest that you refer again to the discussion of organisational rights in chapter 14 of your prescribed book. Pay special attention to the requirements set for exercising organisational rights in terms of the Act. In your answer you had to take note of the following:

- *Unregistered trade unions cannot exercise the organisational rights entrenched in sections 12-16 of the Labour Relations Act 66 of 1995. If the trade union referred to in this question*

wants to exercise the rights set out in the Labour Relations Act 66 of 1995, it will first have to register.

- *If the trade union decides to register, it will still have to meet the different thresholds of representativeness for the different organisational rights required by the Labour Relations Act 66 of 1995. Does union ABC enjoy majority support or is it only sufficiently representative of the workers in the workplace? We do not know from the given facts. You will therefore have to discuss the different possibilities. It might also be necessary to discuss what constitutes the workplace. Remember that representativeness is determined with regard to the workplace and not just a certain section of the workplace.*
- *If the union then decides to register, it will be able to utilise the procedures set out in section 21 of the Labour Relations Act 66 of 1995. It can also strike in support of organisational rights (see section 65(2)(a) and (b) of the Labour Relations Act 66 of 1995). Although disputes concerning organisational rights must be referred to arbitration in terms of the Labour Relations Act 66 of 1995, workers are not prohibited from striking in support of organisational rights. However, if the union decides to strike in support of organisational rights, it will lose its right to refer the same dispute to arbitration for a period of 12 months from the date of the notice of the intended strike.*
- *If the union decides not to register, the question arises whether the union may still strike in support of the organisational rights recognised by the Labour Relations Act 66 of 1995. It appears from the provisions of section 65(2)(a) and (b) of the Labour Relations Act 66 of 1995, that only registered trade unions may strike in support of the organisational rights granted to trade unions in terms of the Labour Relations Act 66 of 1995. This is so because registration is a prerequisite for acquiring organisational rights in terms of sections 11-16 of the Labour Relations Act. However, nothing in the Act prevents an unregistered trade union from resorting to strike action. If the strike is successful and the union acquires some organisational rights, these rights will only be enforceable in the High Court.*

17.5.4 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.

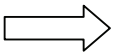
Deciding whether a certain service constitutes an essential service in terms of section 213 of the Labour Relations Act 66 of 1995 can be fairly difficult. Because of this difficulty, the Essential Services Committee will probably consider the ILO's own interpretation of this definition. These decisions 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

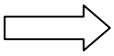
to illustrate how complicated it can become to decide whether a service or part thereof should be classified as an essential service. From this list of services you will note that most are essential and, should they be interrupted, this could endanger the life, personal safety or health of the whole or any part of the population.



ACTIVITY

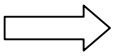
If you are confident that you are in a position to determine whether a service ought to be regarded as an essential service, try to determine, in the light of the ILO guidelines set out above, whether the following services should be regarded as essential services:

- 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?)



FEEDBACK

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!



ACTIVITY

After you have read through this paragraph of your prescribed book, answer the following self-test questions. The answers to these questions are to be found in your prescribed book.

- What is the rationale for prohibiting persons who are engaged in the provision of essential, maintenance or minimum services from embarking on strike action?
- One half of an employer's workforce is involved in the provision of essential services whilst the other half is regarded as providing a minimum service.
    - Discuss whether the employees who provide an essential service may embark on strike action.
    - Discuss whether the employees who provide a minimum service may embark on strike action.

Dispute procedures for employees engaged in an essential service

Bear in mind that where the State is the employer and the award has financial implications, the procedures contained in section 74(5) - (7) of the Labour Relations Act 66 of 1995 should be followed. These procedures are discussed in your prescribed book.

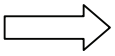
17.5.5 An arbitration award or collective agreement regulates the issue in dispute

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.

17.5.6 The issue in dispute is regulated by a determination



ACTIVITY

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?

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.

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.

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.

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.

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.

FEEDBACK

You will probably agree after having read these facts that this employer has many problems! Here are the issues you should have covered.

a *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 *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 *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 *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 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 *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).*

ACTIVITY

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.

FEEDBACK

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 lock-out 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'

17.6 PROCEDURAL REQUIREMENTS FOR A PROTECTED STRIKE OR LOCK-OUT

The Labour Relations Act 66 of 1995 limits the right to strike and the right to lockout by prescribing that certain procedural steps be followed prior to embarking on collective action. The primary aim of these procedures is to give the parties an opportunity to resolve the dispute before embarking on collective action. Remember that a strike or lockout will only acquire protected status if it conforms to the procedural requirements of the Labour Relations Act 66 of 1995. The legal consequences of protected strikes and lockouts will be discussed in detail later in chapter 17 of your prescribed book.
Summary

The following legal consequences would normally flow from a strike that has obtained protective status in terms of the Labour Relations Act 66 of 1995:

- The employer cannot sue the employees or union(s) for damages that arise from the strike.
- The employer cannot obtain an interdict to prevent the strike.
- The employer cannot dismiss employees on the grounds that their action constitutes a breach of contract or misconduct in terms of the Labour Relations Act 66 of 1995. (You will see from the discussion in chapter 9 that an employer will be able to dismiss strikers if the employer's operational requirements justify this or where the strikers commit acts of misconduct during the strike. In other words, even when the strike is protected, there may be a stage where the employer may be able to dismiss the strikers.)

Where the strike is not protected, the strikers will not be protected against these consequences and the employer will be able to:

- sue for damages as a result of the strike
- obtain an interdict against the strike
- dismiss the strikers fairly (provided, of course, that the employer complies with Schedule 8 of the Code of Good Practice contained in the Labour Relations Act 66 of 1995)

Later in the discussion you will see that certain additional procedural requirements are set for secondary strikes and where the dispute concerns a refusal to bargain.

17.6.1 Referral of the dispute to conciliation

ACTIVITY

Answer the following questions after you have read the relevant section in your prescribed book.

- There is a bargaining council with jurisdiction over the building industry in Gauteng. A wage dispute arises in the building industry in Gauteng. Can this dispute be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA)? Substantiate your answer.
- A dispute which ought to have been referred to a particular bargaining council is referred to the CCMA. What can the CCMA do under these circumstances?
- What is an issue in dispute?
- Make a summary of what you understand by the phrase issue in dispute. In your summary take special note of the remarks made by the courts in Ceramic Industries Ltd t/a Betta Sanitaryware & Another v NCBAWU & Others [1997] 6 BLLR 697 (LAC) and Fidelity Guards Holdings (Pty) Ltd v PTWU & Others [1997] 9 BLLR 1125 (LAC).
- What does it mean to refer?

FEEDBACK

This discussion of what is meant by a referral of a dispute is of special importance to those students who are engaged in the practical side of Labour Law. Note in particular the facts of the Columbus Joint Venture case quoted in your prescribed book.

17.6.2 Prior notice

In the case of a proposed strike or lockout, 48 hours notice must be given to the employer concerned. Remember that there are exceptions to this rule. The contents of this notice can be varied.

ACTIVITY

Write short notes on the following topics. The answers to these questions are to be found in your prescribed book.

- As a rule, to whom must notice of an impending strike be given? Are there any exceptions to this rule?
- How much notice must be given to an employer? Does a different rule apply where the state is the employer?
- What information must be included in a notice to an employer of the commencement of a strike? In your answer, refer to relevant case law.
- Can a notice of commencement of a strike be given orally to an employer?
- Is it necessary for a notice of commencement of a strike to stipulate exactly when the strike is to commence? Discuss with reference to relevant case law. (Remember that you are required to discuss what the Labour Court said on this point and, more importantly, what the Labour Appeal Court's view is.)
- Discuss with reference to applicable case law whether the right to strike may become stale or lapse.
- Discuss whether or not a strike can be suspended and reintroduced at a later stage. Refer in your answer to the relevant provisions of the Labour Relations Act 66 of 1995 as well as to applicable case law.

Ballots

In terms of the Labour Relations Act, 1956 a proper ballot was an important requirement for a legal strike. If the strike ballot was not conducted properly (in terms of that Act), the employer was entitled to approach the Industrial Court for an interdict prohibiting the proposed strike on the basis that the strike was illegal. Employers were extremely successful in bringing these applications interdicting strikes, particularly on technical points. The courts developed various guidelines to which the ballot had to adhere to for a strike to be lawful (protected in terms of the Labour Relations Act 66 of 1995). Some of these guidelines were so stringent that it was extremely difficult for trade unions to comply with them.

Although the new Labour Relations Act 66 of 1995 has done away with these stringent ballot requirements, this does not mean that a pre-strike ballot is no longer important. A pre-strike ballot is no longer a precondition for a protected strike in terms of the Labour Relations Act 66 of 1995. However, a ballot will still be important in those circumstances where certain trade union members refuse or fail to take part in a strike and the union wishes to discipline them.

17.6.3 Refusal to bargain disputes

Bargaining units and levels

Section 64(2) of the Labour Relations Act 66 of 1995 refers to bargaining units and bargaining levels.

The following is an example of a dispute concerning an appropriate bargaining unit.
Union A approaches Employer B and requests that it be recognised as the collective-bargaining representative of the machine operators, the technicians and the supervisors working in B's factory in Durban. B refuses this request. B argues that this is not an appropriate bargaining unit: the interests of the workers are too divergent, their terms and conditions of employment are different, and the majority of the supervisors and technicians already belong to another union. B suggests that an appropriate bargaining unit would consist of all the machine operators only. Here a dispute has arisen about an appropriate bargaining unit.

The following is an example of a dispute concerning appropriate bargaining levels. Disputes concerning an appropriate bargaining level are often simply variants of disputes regarding a bargaining unit.

Referring to our previous example, union A may also represent the majority of the machine operators at B's other factory in Pretoria. Negotiations with regard to the two groups of workers have always taken place separately. They constitute separate bargaining units. As a result, the terms and conditions of employment at the two factories differ considerably, with the Pretoria workers earning more. Union A decides that it no longer wishes to bargain separately in respect of the Pretoria and Durban factories. It wants one bargaining unit to cover all machine operators in both of Employer B's plants. It argues that this is advisable as it will bring about a considerable saving for the union in time and money. There will be only one bargaining session instead of two. In addition, it will also serve to bring additional pressure on the employer to standardise wages at both factories.

Employer B refuses to agree to this. It argues that the factories produce different products, serve different markets and use different technologies. Here we have a dispute about an appropriate bargaining unit. However, it is also a dispute about the level at which collective bargaining should take place: at factory level or at enterprise level.

At a later stage union A may wish to enter into negotiations about the creation of a provident fund for its members. Employer B may refuse to bargain on this issue. This will be a dispute about a bargaining subject.

ACTIVITY

To test your knowledge of this chapter, try to answer the following self-test questions.

- Does the Labour Relations Act 66 of 1995 recognise a legally enforceable duty to bargain collectively?
- In your own words, explain briefly the procedures to be followed where a dispute concerns the refusal to bargain.
- What is the nature of an advisory award?
- Can a trade union still embark on strike action where an advisory award states that the union may not embark on strike action in support of a demand to bargain on behalf of its members?

17.6.4 Strikes and operational requirements dismissal

Section 189A of the Labour Relations Act 66 of 1995 now makes it possible for trade unions to embark on strike action in very limited circumstances. Refer in this regard back to the discussion in chapter 8.1.3. Make sure that you know the circumstances in which a strike over a dismissal for operational requirements may be instituted.

17.6.5 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.

ACTIVITY

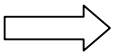
The following multiple-choice question is fairly difficult. Read carefully through the following set of facts and indicate which of the statements following upon it contains the most accurate advice. Try to resist the temptation to read the feedback before doing this problem! You may well find that you 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 and 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.
(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.
(3) The strike will be unprotected because the employees did not give their employer 48 hours notice of their intention to go on strike.
(4) The strike will be protected although workers have not given their employer 48 hours notice of their intention to go on strike.
(5) The strike will be protected because the majority of the employees voted in favour of strike action.



FEEDBACK

4 is the correct answer. This is the best advice to give to the union. Let us now look at why the other statements are incorrect:

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 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 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 is correct. See the previous explanation.

5 is incorrect. It is not a requirement to hold a ballot before going on a protected strike.

17.7 SECONDARY STRIKES

17.7.1 The definition of a secondary strike

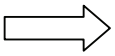
In this chapter it is pointed out that a secondary strike (also referred to as a sympathy strike) falls within the definition of a strike. If you have forgotten what the three elements of a strike are, we suggest that you refer again to the discussion where the definition of a strike is discussed in more detail.

The question of sympathy or secondary strikes remains one of the more controversial areas of our law relating to strikes. A secondary or sympathy strike takes place where the employees of one employer take concerted action (eg refuse to work) in support of a strike by other employees against another employer.

The following set of facts is an example of a typical sympathy or secondary strike.

The employees employed in a brewery (Employer A) go on strike in order compel their employer to grant them a wage increase of 10 percent. The strike is not very successful because not all employees are taking part in the strike. In order to put further pressure on the employer, these employees persuade the employees of Employer B, which is an important supplier of bottles to the brewery, to go on strike with the aim of disrupting production in the brewery. This strike is in support of the employees in the brewery and will constitute a sympathy or secondary strike.

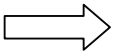
Bear in mind that the mere fact that a certain industrial action falls within the definition of a sympathy strike does not mean that such action is also protected in terms of the Labour Relations Act 66 of 1995. Before such action will enjoy protection in terms of the Relations Act 66 of 1995, certain procedural steps must have been followed. These Labour steps are discussed in chapter 8 of your prescribed book.



ACTIVITY

The following questions are fairly easy to answer and aim to test your knowledge of the definition of a secondary strike:

- Is a secondary strike a strike in terms of the Labour Relations Act 66 of 1995?
- In the following set of facts, identify the primary and secondary employer.
- Factory ABC is situated in Mpumalanga and supplies rubber to Factory OPQ (a manufacturer of tyres) situated in Gauteng. Trade union XYZ has been trying to negotiate with the management of Factory OPQ for a wage increase for its members employed at this factory. After negotiations have failed, trade union XYZ embarks on a protected strike in support of the wage demand. Trade union KLM, which represents all the workers at ABC, hears about the wage dispute and embarks on strike action against Factory ABC in support of the demand.
- Will subsequent strikes at different branches of the same employer be regarded as primary or secondary strikes? Substantiate your answer fully with reference to the decision in Afrox Ltd v SA Chemical Workers Union & Others (1) (1997) 18 ILJ 399 (LC).



FEEDBACK

The answers to these questions can be found in chapter 17.7 of your prescribed book

17.7.2 Procedural requirements for a protected secondary strike

In this chapter, the additional procedural requirements for a secondary strike to obtain protected status in terms of the Labour Relations Act 66 of 1995 are discussed.

The third requirement, namely that the strike must be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer, may be difficult to determine. The following example explains it.

Employer A supplies certain engine components to Employer B. These are then built into machines manufactured by B. B's employees have been on strike for a few weeks in support of a demand for a wage increase. Because the strike is only partially supported by the work force, and because employer B has adequate stocks with which to supply its customers for some time, the strike is not proving successful. Employer A's workers go on strike in support of the primary strike at B's factory. As a result, A loses its total production. It cannot supply components to B. Neither can it supply components to any of its other

customers. On the other hand, the strike has had no effect on B because it has adequate stocks and because it can acquire the components A supplies from other sources.

It may be possible to argue that the third requirement has not been met. The nature and extent of the secondary strike affect A seriously. But it has little direct or indirect effect on B. Where the secondary strike takes the form of only affecting B's production that is destined for A, and/or where A and B fall within the same group of companies and share some of the same directors, this requirement may be met. The nature and extent of the secondary strike does not affect A's total production - only that destined for B. In addition, the shared directors may be able to influence B's attitude towards the primary demand.

You will agree from having read though this example that it may be difficult to determine whether a secondary strike has an influence on the primary employer. However, it does appear from the decision in *Sealy of SA (Pty) Ltd & Others v Paper Printing Wood & Allied Workers Union* (1997) 18 ILJ 392 (LC) (quoted in your prescribed book) that the Labour Court is fairly flexible when determining whether or not the proposed secondary strike has an effect on the business of the primary employer. From these decisions it appears that the court will declare the strike to be a secondary strike even where it is only prima facie satisfied that there may possibly be such an effect.

ACTIVITY

Read the facts in the following extract carefully and answer the questions:

ABC Ltd carries on business as a manufacturer and distributor of various gases. It operates from various different branches, including Germiston, Trigaardt, Benoni, Wits West, Klerksdorp, Witbank and Pretoria West. The SA Chemical Workers Union (SACWU), a registered union, has members employed by ABC Ltd in all these branches. The union is the sole bargaining agent for its members employed by ABC Ltd.

A dispute arose at the Pretoria West branch between SACWU and ABC Ltd about SACWU's unwillingness to have its members work staggered shifts at the Pretoria West branch. As a result the workers at the Pretoria West branch embarked on strike action on 5 January 1998 after the dispute had been referred to the conciliation mechanisms. On 20 January 1997 SACWU's members who are employed at the other branches of ABC Ltd have also gone on strike in support of the Pretoria West branch's demand that ABC Ltd refrain from introducing the staggered shifts at the Pretoria West branch. The union argues that the strike against the other branches constitutes a secondary strike. ABC Ltd argues that the strike conducted by the workers at the other branches does not constitute a secondary strike.

On 26 January 1997, ABC Ltd decides that it can no longer afford the consequences of the strike and informs the union that it no longer intends introducing the shifts. However, the union persists with the strike action at all the branches of ABC Ltd. (The facts are loosely based on the Afrox Ltd v SA Chemical Workers Union & Others (1) (1997) 18 ILJ 399 (LC) and Afrox Ltd v SA Chemical Workers Union & Others (2) (1997) 18 ILJ 406 (LC).)

1 Are the workers engaging in a secondary strike?
2 Is the strike action, which is taking place at the employer's other branches, protected in terms of the Labour Relations Act?
3 Will the strike still be protected after 15 February 1998?
4 Assume that the strike is not protected: what can the employer do?

FEEDBACK

1 *The first question to be answered is whether the action of the strikers falls within the ambit of a primary or secondary strike. The mere fact that the union labels the dispute a secondary strike does not mean that it is a secondary strike. Read the definition of a secondary strike carefully. For your convenience, the definition of a secondary strike provided in section 66(1) of the Labour Relations Act 66 of 1995 reads as follows: 'a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand referred to a council if the striking employees, employed within the registered scope of the council, have a material interest in that demand.'*

Does this definition require that a different employer should be involved in the secondary strike, or can a secondary strike take place where there is only one employer but the strike takes place at different branches of the same employer? Read the quotation from the Sealy case (quoted in your prescribed book) carefully and come to a conclusion.

2 *If your conclusion about the previous question is that the strike is a primary strike because only one employer is involved in the dispute, the next question to be considered is whether the extended strike is protected in terms of the Labour Relations Act 66 of 1995. If the dispute has been referred to the conciliation mechanisms provided for by the Act, the strike will be protected. Will the extended strike also be protected? The answer is yes. Read the quotation in the Sealy case again where the Court held that a union is under no obligation to call its members out on strike at the same time and it is free to commence the strike with a small group of members and increase the number of its members participating in the strike where and when it considers that to be appropriate unless it has waived such a right.*

3 *Is the strike still protected after 26 January 1998? Read the facts in the question carefully. What has happened since the strike started? The employer has conceded to the demands of the strikers not to implement the shifts. If the basis of the strike action has fallen away, the purpose of the strike has fallen away with the result that the strike will no longer be protected in terms of the Labour Relations Act.*

4 *If the strike is not protected, the protection granted to protected strikes will not apply. The employer has various options at his or her disposal. The employer can apply for an interdict to restrain the strikers from continuing with their action, or it can decide to dismiss the strikers for misconduct. (The consequences of an unprotected strike will be discussed in more detail in chapter 9 of your prescribed book.)*

ACTIVITY

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.

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.

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.

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.

⇨ ***FEEDBACK***

1 2 is the correct answer. The action in 2 does not constitute a protected secondary strike.

2 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.

3 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.

4 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.

5 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.

Now that you have reached the end of this section you will realise that the contents of this section of your prescribed book are detailed and sometimes complex. We would also like to stress that this section is important and you will be required to have a good knowledge of the principles discussed in it.

Before you continue with chapter 17 of your prescribed book, and in order to put the study material in perspective, remember that the following should be borne in mind whenever you are confronted with a set of facts dealing with strikes and lockouts.

The first question to be asked is always whether the action in the given set of facts falls within the definition of a strike or a lockout. In other words, are all the elements of the definition of a strike or lockout present? If you are still uncertain about these two definitions, we suggest that you refer again to the relevant part of chapter 17 of Essential Labour Law before even attempting to continue.
Once it has been established that a certain action falls within the definition of a strike or a lockout, the next question would be to determine whether employees are allowed to take part in strike action. In other words, is there a prohibition on strike action or on the lockout?

If it is clear from the facts that no prohibition exists on the strike action or lockout, the last question would be to determine whether the procedural requirements for a strike or lockout as set out in terms of the Labour Relations Act 66 of 1995 have been met. Bear in mind that a collective agreement may replace the statutory requirements for a strike or a lockout to some extent.

17.8 LEGAL CONSEQUENCES OF PROTECTED STRIKES AND LOCK-OUTS

17.8.1 Protection against civil liability

Your prescribed book briefly refers to the common-law consequences of a breach of contract. For a more detailed discussion we suggest that you refer again to Essential Labour Law chapter 2. In essence, if one of the parties to a contract does not carry out his or her obligations in terms of the contract, such a party will be guilty of a breach of contract, entitling the innocent party to use the remedies provided by the common law.

Where employees take part in a strike, they are in effect breaching their contracts of employment by refusing to work. If their employer suffers losses as a result of such strike action, it will obviously want to claim the losses suffered from the employees or their union. In terms of the common law, this is precisely what the employer is entitled to do. The employer will be able to institute civil proceedings against the employees or their union to claim for such losses. (Refer in particular to the discussion in chapter 2.8.2 of Essential Labour Law.) If an employer is entitled to sue those employees who are on strike or their union for losses suffered as a result of the strike, the whole purpose of the strike, which is to hurt the employer economically, will be undermined. For this reason the Labour Relations Act 66 of 1995 specifically grants striking employees and their union immunity from civil liability. The same applies to lockouts. Strikers may not institute any civil action against their employer for losses in the event of a lockout.

17.8.2 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.

ACTIVITY

Read through the following set of facts and answer the questions.

5 000 employees employed at a coal mine embark on strike action. Determine whether the strikers and/or their union will enjoy immunity in terms of the Labour Relations Act 66 of 1995 in the following circumstances.

1 The strike is unprotected and the mine suffers losses of R5 000 000.00 a day as a result of a complete cessation of all mining activities.
2 Would your answer have differed if the strike had been protected and the mine had suffered losses? Substantiate your answer.
3 The strike is protected but some of the workers assault a fellow employee who is not taking part in the strike.
4 The strike is protected but some of the employees intentionally damage company property.
5 You are the industrial relations manager of the mine referred to in our previous activity. Discuss whether the mine can apply for an interdict to prohibit strikers from vandalising mine property.
6 Which court has the jurisdiction to hear the application for an interdict?

In this chapter, the circumstances in which strikers are protected against dismissal are discussed. The limitations on this protection are also discussed. This is an important section of chapter 17 and you must make sure that you study it carefully. You will note that your prescribed book refers quite extensively to case law, particularly in the discussion of the dismissal of strikers for operational requirements. We suggest that you carefully read these cases and then make a brief summary of the essence of each case.

ACTIVITY

After studying this chapter do the following self-test exercises.

1 What is the common-law position regarding employees who take part in a strike as far as dismissal is concerned?
2 What is the rationale for protecting strikers against dismissal? (In your answer, refer to relevant case law.)
3 Briefly discuss how the Labour Relations Act 66 of 1995 changes the common-law position regarding employees who take part in a protected strike.
4 Name the circumstances in which employees on a protected strike may be dismissed.

Dismissal for misconduct

ACTIVITY

Study the section in your prescribed book which deals with the dismissal of strikers for acts of misconduct and answer the following questions.

1 During a strike can an employer summarily dismiss employees who intimidate fellow employees who do not participate in the strike?
2 What procedures must be followed if an employer decides to dismiss strikers who commit acts of misconduct during a strike.

Dismissal for operational requirements

ACTIVITY

Study your prescribed book carefully and answer the following questions. Did you remember to make brief summaries of the cases discussed in this section of your prescribed book? If not, we suggest that you do that first and then attempt to answer the self-test questions.

1 Discuss briefly what test was used by the court in BAWU Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC) to decide whether the employer was entitled to dismiss strikers on the basis of operational requirements. What criticism can be levelled against this test? Do you agree with this criticism?
2 In National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd (1994) 15 ILJ 1005 (LAC) the court applied a different test to the one applied by the court in the Blue Waters Hotel case. What was this test and what criticism can be made of this test?
3 How do the tests applied by the Labour Appeal Court in Cobra Watertech v National Union of Metalworkers of SA (1995) 16 ILJ 582 (LAC) and National Union of Metalworkers of SA v Boart MSA (Pty) Ltd (1995) 16 ILJ 1469 (LAC) differ from the tests applied by the courts in previous cases?
4 Discuss briefly, with reference to relevant case law, what test was applied by the Appeal Court in deciding whether an employer may dismiss strikers for operational reasons. (This question is difficult. In formulating your answer, be careful not merely to reproduce the contents of your prescribed book. Try to extract the gist of the court's decision and formulate your answer in your own words.)
5 What procedures must an employer follow in terms of the Labour Relations Act 66 of 1995 to dismiss strikers engaged in a protected strike against a decision to dismiss on the basis of the operational requirements of the business? (Refer again to Essential Labour Law chapter 8.)

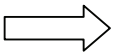
6 Explain how one distinguishes between a dismissal based on participation in the strike and a dismissal for operational requirements. (See Chemical Workers Union & Others vAfrox Ltd (1999) 20 ILJ 1718 (LAC).)

ACTIVITY

Read the following set of facts and answer the question:

Employer A declines to enter into wage negotiations with Union X who submitted a wage demand to A on behalf of its members. The dispute is referred to the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA). The dispute is not conciliated. A certificate is issued stating that the dispute concerns a refusal to bargain and that the dispute remains unresolved.

Two days later the union gives the employer 48 hours notice of its members' intention to commence striking. A day after the commencement of the strike, the employer issues an ultimatum and dismisses the employees. The dispute concerning the dismissals is referred to the CCMA. Discuss the fairness of the dismissals.



FEEDBACK

The point of departure, whenever you have to consider the fairness of the dismissal of employees who went on strike, is to determine whether the strike is protected or net. As explained in chapter 8 of the prescribed book, this in turn depends on three questions:

- *whether the action taken by the employees does constitute a strike as defined (This is not really an issue in this question.)*
- *whether there are any substantive limitations on the right of employees to strike as contained in s 65 of the LRA (This also is not an issue in this question.)*
- *whether the procedural requirements laid down by the LRA have been met in order to confer protected status on a strike*

As far as the last requirement is concerned, it seems to be clear that the trade union and its members complied with the two basic requirements required by the LRA, namely referral to, and unsuccessful, conciliation, as well as the giving of 48 hours notice. The problem, of course, concerns the nature of the dispute. If the strike really is about a refusal to bargain as the Certificate of Outcome mentions, there is an added procedural requirement that has to be met, namely that the dispute must be referred to advisory arbitration before notice of the strike is given. This would mean that the strike is unprotected and that the rules, as discussed in chapter 9 of the prescribed book, relating to the dismissal of unprotected strikers have to be applied to the facts in the question. But is the dispute really about a refusal to bargain? The question does not state whether the employer refuses to bargain with the trade union (in general) or merely whether such refusal constitutes a refusal to accede to the wage demands of the trade union, with which the employer has bargained before. The Labour Courts have repeatedly emphasised that they will enquire into the true nature of the dispute (irrespective of what the parties or the Commissioner say it is). If the dispute really is about the refusal to accede to the wage demands of the trade union, advisory arbitration is not a requirement, the strike will be protected and the rules regulating the dismissal of protected strikers will apply.

17.8.3 The payment of remuneration

Study chapter 17.8.3 of Essential Labour Law.

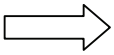
17.8.4 Protection against discrimination

Study chapter 17.8.4 of Essential Labour Law.

17.9 LEGAL CONSEQUENCES OF AN UNPROTECTED STRIKE AND LOCK-OUT

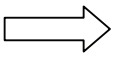
17.9.1 Interdicts and compensation

Study your prescribed book and complete the following self-test questions and activities. The answers to these questions are to be found in your prescribed book.



ACTIVITY

1 What court has the jurisdiction to grant interdicts against unprotected strikes and lockouts?
2 Is an employer required to give strikers notice of its intention to bring an application for interim relief to the Labour Court?
3 An employer approaches the Labour Court with an application for an interdict to prohibit employees from continuing with an unprotected strike. The employer gave the union and the strikers two hours' notice of the application. Because of the short notice period, the union was not able to get to the Labour Court in time to argue against the application for an interdict. The employer argues that it was impossible to give the union adequate notice prior to the lodging of the application because of the fight which broke out between members of the two rival unions in the factory. If you were the judge in this case, how would you decide this case? Remember to give reasons for your decision.



ACTIVITY

List the factors which the Labour Court will consider in deciding whether to order the payment of compensation for any loss attributable to an unprotected strike or lockout.

17.9.2 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.

ACTIVITY

Here are some questions and activities to test your knowledge of this section of your prescribed book. If you are unable to answer these questions without referring to your prescribed book, we suggest that you study the relevant section of your prescribed book again. You might also wish to make a brief summary of the substantive and procedural requirements for a fair dismissal of strikers who take part in an unprotected strike.

1 What are the two requirements in terms of the Labour Relations Act 66 of 1995 for the fair dismissal of workers who take part in an unprotected strike?
2 What factors must be evaluated in deciding the substantive fairness of a dismissal of strikers dismissed for participating in an unprotected strike? Briefly discuss each of these factors.
3 List the procedural steps which must be followed prior to dismissing strikers who take part in an unprotected strike.
4 Why is it necessary for an employer to contact the trade union prior to dismissing strikers on an unprotected strike?
5 Why is it so important for the employer to issue an ultimatum to strikers before resorting to dismissing them?
6 Discuss whether an employer can still dismiss strikers after they have heeded an ultimatum.
7 Must an employer hold a disciplinary hearing before dismissing strikers on an unprotected strike?
8 Can an employer dispense with a disciplinary hearing prior to resorting to dismissal where a fight breaks out among strikers?

17.10 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.

ACTIVITY

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.

FEEDBACK

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 lead 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.

17.11 PICKETING

17.11.1 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.

17.11.2 The legal framework for the regulation of picketing

Study par 17.11.2 of the prescribed book. You must understand that the common law was hostile towards picketing whereas the Constitution provides protection to picketers. This support is further protected in terms of the LRA.

17.11.3 Protected pickets

ACTIVITY

Read this section of your prescribed book carefully, and make a brief summary of the requirements for a picket in terms of the Labour Relations Act 66 of 1995. After you have done this, test your knowledge by answering the following self-test questions without referring to your prescribed book.

- Discuss whether an unregistered trade union may authorise a picket.
- Discuss whether non-union members who support the strike may take part in a picket arranged by the union.
- Discuss whether the general public may take part in a picket.
- Discuss with reference to the Labour Relations Act 66 of 1995 whether a picket will be protected where the picketers carry firearms.
- Will a picket be protected if it is staged in opposition to a lockout?
- Will a picket be protected where employees picket in support of protest action in terms of the Labour Relations Act 66 of 1995?
- Discuss whether a picket will be protected if it is staged in support of an unprotected strike.
- Discuss whether a picket will be protected if it is staged in opposition to an unprotected lockout.
- What is a secondary picket?

FEEDBACK

We hope that you have been able to answer these questions. They are not very difficult and we expect you to be able to answer these questions without having to refer to your prescribed book. However, if you have difficulty in answering these questions, we suggest that you study your prescribed book again.

When you read this section of your prescribed book, you will realise that it is difficult to prescribe hard and fast rules regarding the place where a picket may be staged. For this reason the CCMA plays an important role in assisting the parties for example when disputes arise about the location of the picket, or in drawing up appropriate rules concerning this.

At last we have come to the end of this study unit. We hope that you have enjoyed doing the activities. Remember that these activities are there for your benefit!

ENCOURAGEMENT

The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn, and relearn.

STUDY UNIT 18: PROTEST ACTION

Prescribed chapter for this study unit from Essential Labour Law: Chapter 18

18.1 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.

18.2 THE NATURE OF PROTEST ACTION

Study chapter 18.2 of the prescribed book.

18.3 PROCEDURAL REQUIREMENTS FOR PROTECTED PROTEST ACTION

⇨ **ACTIVITY**

Draw a diagram to illustrate the procedures which have to be followed prior to instituting a protest action. After you have drawn the diagram, answer the following self-test questions.

- Can an unregistered trade union call a protest action in terms of the Labour Relations Act 66 of 1995?
- Is it possible for individual employees to institute protest action?
- What is the purpose of the requirement that the union (or federation) must serve notice on NEDLAC in which the reason and nature of the protest action is stated?
- Discuss whether employees who take part in a protected protest action may be dismissed.

⇨ ***FEEDBACK***

You will find the answers to these questions in your prescribed book.

This brings us to the end of a very short, but difficult chapter of the prescribed book. You will be happy to learn that you have only three chapters of your prescribed book left. Good luck with the last three!

ENCOURAGEMENT

You can lead a man up to the university, but you can't make him think.

STUDY UNIT 19: WORKPLACE FORUMS

Prescribed chapter for this study unit from Essential Labour Law: Chapter 19

19.1 FROM ADVERSARIAL BARGAINING TO JOINT DECISION-MAKING?

The important point made in your prescribed book is that workplace forums are not intended to replace collective bargaining between employers and unions. The rationale of workplace forums is to supplement collective bargaining.

A question which immediately arises is whether workplace forums will assist in creating an atmosphere of co-operation between management and labour. We would like you to think about this question, but suggest that you reserve your final answer until you have studied the whole of chapter 19 of your prescribed book. We think that you will then be in a better position to answer this question critically.

19.2 THE ESTABLISHMENT OF A WORKPLACE FORUM

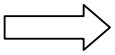
19.2.1 Statutory requirements

A number of important considerations were taken into account when the drafters of the Labour Relations Act 66 of 1995 decided on structures such as workplace forums. One consideration was the interests of small and medium enterprises and, in particular, their capacity to carry the cost burden imposed by the establishment of these forums. For this reason the Labour Relations Act 66 of 1995 provides that workplace forums can be established only in enterprises employing more than 100 employees.

A further important consideration was the choice which had to be made between voluntary and compulsory structures. A voluntary structure, as the term implies, is a body set up by agreement between an employer and the employee representatives in which employees will be able to participate in managerial decision-making. A compulsory system is one in which the law compels employers to establish such a structure. There are advantages to both systems. A voluntary system allows for the parties to model their own structures by agreement. However, the success of such an agreement presupposes two willing participants. Employers may be hostile to the idea of a workplace forum and as a result may not wish to submit to such a structure. Compulsion to establish such a structure will ensure that employers have to make constructive efforts to participate within it.

The LRA provides for a structure that is not wholly compulsory nor entirely voluntary. It does so by emphasising the primacy of a collective agreement to establish a workplace forum. A statutory model can be imposed by a commissioner of the Commission for Conciliation, Mediation and Arbitration only where the parties are unable to reach agreement on the establishment of such a forum.
It should also be noted that the primacy accorded to collective agreements extends beyond the formation of a forum. The parties are free to vary the subject matter for consultation and joint decision-making in terms of a collective agreement.

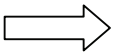
Lastly, bear in mind that the fact that the Labour Relations Act 66 of 1995 provides for the establishment of workplace forums does not prevent employers and unions from concluding agreements to establish a body similar to a workplace forum through which communication between the employer and employee can take place or in which participation in managerial decision making is made possible outside the ambit of the Act.



ACTIVITY

The following self-test questions are fairly easy and should assist you in evaluating your knowledge of the work.

- An employer who employs 80 people is approached by the union representing the employees with a request to establish a workplace forum. Discuss briefly whether it is possible to do so in terms of the Labour Relations Act 66 of 1995.
- What is the reason for restricting workplace forums to larger employers?
- An employer employs 102 employees of whom 99 are factory workers and the others are senior managerial employees. Can a workplace forum be established under these circumstances? Discuss briefly.



FEEDBACK

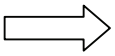
The answers to these questions are to be found in your prescribed book.

19.2.2 Statutory procedures

Study par 19.2.2 of the prescribed book.

19.2.3 Application for establishment

Study par 19.2.3 of the prescribed book.



ACTIVITY

Try to answer the following questions before you proceed to the next section.

- Can an employer initiate the establishment of a workplace forum?
- Can an unregistered trade union with majority representation apply for the establishment of a workplace forum?
- Can a registered trade union with minority representation apply for the establishment of a workplace forum?
- Briefly discuss the difference between a workplace forum initiated by a representative trade union and one which was initiated by a trade union which is recognised in terms of a collective agreement as the sole bargaining agent of the workers.

19.3 THE FUNCTIONS OF A WORKPLACE FORUM

The functions of a workplace forum are important and need to be studied carefully. Make sure that you are in a position to discuss each of the functions. For this purpose we suggest that you make a brief summary of each of these functions. In addition, we suggest that you complete all the self-test questions.

19.3.1 Consultation

The right of a workplace forum to be consulted by an employer arises once an employer wishes to introduce a proposal concerning a matter which the forum is entitled to be consulted about in terms of the LRA. Consultation in terms of section 85 of the LRA entails more than merely affording the workplace forum an opportunity to take part in a discussion about a proposal. Consultation is defined in your prescribed book. Make sure that you understand what consultation in the context of a workplace forum means.

ACTIVITY

Study your prescribed book and answer the following self-test questions.

- When does the duty to consult a workplace forum arise?
- Can a workplace forum initiate consultation about a proposed product development plan?
- Discuss the meaning of consultation in terms of section 85 of the Labour Relations Act 66 of 1995.
- Assume that an employer is required to consult with a workplace forum on a certain issue. When must this process of consultation begin?
- The Labour Relations Act 66 of 1995 lists many topics as matters for consultation with a workplace forum. List five of these. (Try to do this without referring to your prescribed book!)
- What procedures will apply in the event that the employer and the workplace forum are unable to reach consensus about a topic which is the subject of consultation?

19.3.2 Joint-decision making

ACTIVITY

Study your prescribed book and answer the following self-test questions.

- When does the duty to consult and reach consensus with a workplace forum arise?
- Discuss the meaning of joint decision-making in terms of section 86 of the LRA.
- Assume that an employer is required to consult and reach consensus with a workplace forum on a certain issue. When must this process of joint decision-making commence?
- The LRA lists four matters for joint decision-making with a workplace forum. What are they? After having listed these matters, write brief notes on each of them.
- What procedures will apply in the event that the employer and workplace forum are unable to reach consensus about a topic which is the subject of joint decision-making?

19.4 DISCLOSURE OF INFORMATION

The disclosure of information is nearly always a sensitive topic. On the one hand, it is necessary for the workplace forum to have access to certain information in order to fulfill its functions effectively. On the other hand, the employer may argue that the release of certain information may have harmful results. In order to strike a balance the LRA requires that only relevant information which will allow a workplace forum to engage effectively in consultation and joint decision-making must be disclosed. Certain information need not be disclosed by the employer. Make certain that you know what information an employer is not obliged to disclose. Note also that in two instances the prohibition is not absolute.

19.5 ORGANISATIONAL RIGHTS OF WORKPLACE FORUMS

In order to assist workplace forums in exercising their duties, the LRA provides that certain facilities be extended to a workplace forums. Make certain that you are able to answer a question about these facilities.

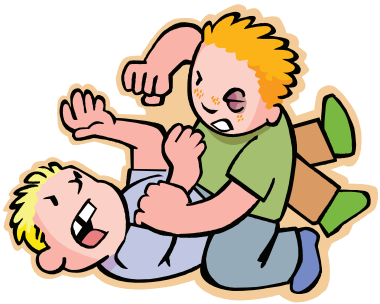
This concludes the discussion on study unit 19.

ENCOURAGEMENT

Education is the most powerful weapon which you can use to change the world.

STUDY UNIT 20: DISPUTE RESOLUTION

Prescribed chapter for this study unit from Essential Labour Law: Chapter 20



20.1 INTRODUCTORY MATTERS

20.1.1 The traditional distinction between disputes of interest and disputes of rights

ACTIVITY

What is the difference between an interest dispute and a rights dispute?

FEEDBACK

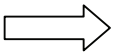
A dispute of interest usually is defined as a dispute about the creation of new rights. In other words, disputes of interest arise where employees, or trade unions acting on behalf of employees, seek to further their interest where there are no currently existing rights (for example, in the contract of employment or in legislation) that they may enforce. One example of a dispute of interest is where employees seek higher wages or, for that matter, new or improved conditions of employment in general (such as more leave, less overtime, shorter working hours for the same pay, the introduction of day-care facilities and the like). Conversely, an employer might demand that employees accept a downward adjustment in, or forfeit some of, their existing terms and conditions of employment. In these situations, there is no existing right to the changed conditions of employment that may be enforced, but employees (and their unions) and employers clearly have an interest in such changes. Over time, disputes of interest (where employees or employers demand changes to terms and conditions of employment, but the other side does not necessarily agree, or simply refuses) have not only come to be regarded as legitimate, but the law has recognised that this type of dispute is best resolved through the process of collective bargaining (which process, of course, includes the right to strike or recourse to the lock-out). As such, the law generally does not prescribe what the outcome of an interest dispute should be, but does regulate what the parties may and may not do during the bargaining process.

In contrast to a dispute of interest, a dispute of right usually is defined as a dispute about the interpretation or application of a right that already exists. Put differently, a dispute of right is a dispute where employees or employers do not seek to create a new right (as in the case of a dispute of interest), but rather seek to enforce an already existing right where it is felt that the other party to the employment relationship breached that right. In such a case, the dispute will not be about the entitlement to the right in question (it already exists), but rather how the right should be interpreted and applied in the circumstances of the specific case. Examples of disputes of right include disputes about unfair dismissal (the right not to be unfairly dismissed already exists in the LRA), disputes about unfair labour practices (the right to fair labour practices already exists in the LRA), disputes about unfair discrimination (the right not to be unfairly discriminated against already exists in the EEA) and disputes about a breach of contractual rights (the contract is also, just like legislation, a source of rights). The important point to be made for now is that, in contrast to disputes of interest (which is left to collective bargaining), the

traditional approach to the resolution of disputes of right has always been that the outcome of the dispute should finally be determined, after the presentation of evidence and argument, by an independent third party which may, for example, be a commissioner of the CCMA or a Labour Court judge. Put differently, disputes of right should be resolved through arbitration or adjudication.

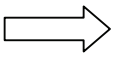
20.1.2 The resolution of rights disputes - different sources of rights and different causes of action

You must understand that chapter 20 deals with the resolution of rights disputes. There are various rights contained in various sources.



ACTIVITY

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



FEEDBACK

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 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.

20.1.3 The resolution of rights disputes in terms of labour legislation

During the course of our studies of labour law this year, we have repeatedly made mention of the fact that disputes are referred to certain bodies, the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court. You would also have noticed that the dispute resolution processes depend to a very large extent on two processes, namely conciliation and mediation.

The first important matter that we have to spend some thought on is why the drafters of the LRA created an entirely new system of labour dispute resolution. If you work through 20.1.3 in the prescribed book, you will see some of the reasons for the introduction of a new system.

20.2 CONCILIATION

The first thing that we need to ask ourselves is what conciliation is. Look carefully at the definition of conciliation in par 20.2 and make sure that you understand what it means.

As regards the powers of a CCMA commissioner who is conducting a conciliation, you must note the wide powers of the commissioner in terms of section 135(5) of the LRA. Also note by whom a party may be represented at a conciliation.

20.3 ARBITRATION

Again, the starting point here is for us to understand what arbitration is, and how it differs from conciliation. When working through the definition of arbitration in par 20.3.1, you should note the following:

- arbitration in terms of the LRA is a compulsory process (in other words, the parties may not have a choice whether or not to have a dispute resolved by means of arbitration).
- as is the case with conciliation, arbitration relies on the intervention by a third party in the dispute.
- the third party (the commissioner or the arbitrator) hears the parties' respective cases and then determines the issue. Arbitration is not based on agreement, and the commissioner or arbitrator takes a decision that binds the parties. In the case of arbitration, then, we can generally speaking say that the resolution of the dispute is imposed on the parties by the commissioner or the arbitrator.

Note that, with one exception, there is no appeal against an arbitration award handed down by a CCMA commissioner. As is the case with conciliation, a CCMA commissioner has wide powers to determine the process to be used, subject to a minimum requirement, namely that the commissioner must deal with the substantial merits of the dispute. Note the basic procedural guidelines contained in section 138(1) of the LRA: subject to the commissioner's discretion, parties may give evidence, call witnesses, question the witnesses of the other party and address concluding remarks to the commissioner.

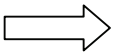
The final important aspect of labour dispute resolution is the distinction between appeal and review. Note especially the grounds of review contained in section 145 of the LRA and the procedures that a party must follow when it wants to refer an arbitration award to the Labour Court for review.

20.4 COURT ADJUDICATION

The first thing that we need to ask ourselves is what adjudication is. Look carefully at the discussion on adjudication in par 20.4, and make sure that you understand what it means.

20.5 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.



ACTIVITY

The following questions about the CCMA should help you focus on its most important aspects.

- What are the most important functions of the CCMA? (See par 20.5.1.)
- What is accreditation?

- Is the CCMA a court of law?

Bargaining councils and statutory councils also have important dispute resolution functions. Take special note of the types of disputes that must be conciliated by a bargaining council or a statutory council. Finally, when we talk about dispute resolution bodies, we must also consider the Labour Court and the Labour Appeal Court. Unlike the CCMA, these are both courts of law with special powers.

20.6 JURISDICTIONAL ISSUES

Study par 20.6 of the prescribed book.

20.7 REVIEW AND ENFORCEMENT OF ARBITRATION AWARDS

Study par 20.7 of the prescribed book.

20.8 THE RESOLUTION OF UNFAIR DISMISSAL AND UNFAIR LABOUR PRCTICE DISPUTES

Study par 20.8 of the prescribed book. Also refer back to chapters 6 & 7.

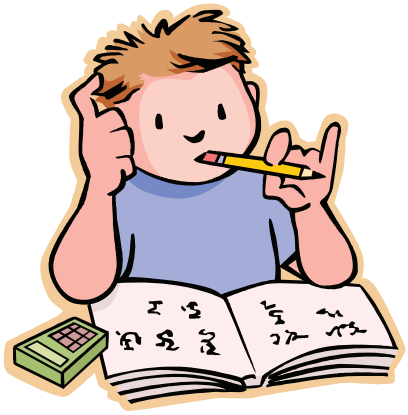
20.9 OTHER DISPUTE RESOLUTION PROCESSES

Study par 20.9 of the prescribed book.

This concludes study unit 20!

ENCOURAGEMENT

Education makes a people easy to lead, but difficult to drive; easy to govern, but impossible to enslave.



SOCIAL SECURITY LAW

We have now completed the parts in the textbook on Individual Labour Law and Collective Labour Law.

We hope that this part of the workbook will further help you to progress with your studies.

THE NEXT CHAPTER DEALS WITH SO-CALLED OTHER LEGISLATION WHICH ALSO INFLUENCES THE LABOUR RELATIONSHIP.

STUDY UNIT 21: OTHER LEGISLATION AFFECTING LABOUR LAW
Prescribed chapter for this study unit from Essential Labour Law: Chapter 21

This chapter is very straightforward and easy to understand. We are therefore not discussing every separate paragraph in detail. We suggest that you read through the chapter in detail and see if you understand the work. You must be able to understand which acts, apart from the LRA, EEA and BCEA, also influence the employment relationship. You must also know in what way they provide protection.

After you have read the chapter, see if you can answer the following questions:

Nr	Question	*Answer*
1	Does the common law make provision for protection against workplace injuries and diseases?	*Yes, the common law already recognises the duty of employers to take reasonable care for the safety and health of its employees. The vague common law duty is ill-suited to address fast changing and specific health and safety concerns in the workplace properly.*
2	What is the goal of the OHSA?	*The goal of the OHSA is to provide for the health and safety of employees and all persons (not only employees but also members of the public) against hazards and dangers which arise out of or in connection with work activities or the use of a plant (fixtures, fittings, implements, equipment, tools and appliances) and machinery.*
3	Are mine workers covered by the OHSA?	*No. Health and safety in mines are specifically regulated in terms of the Mine Health and Safety Act. This act is discussed in more detail below.*
4	List other exclusions as far as the scope of coverage of the OHSA is concerned?	*The OHSA is not applicable to:* • *Labour brokers* • *Persons in or on any load line ship, fishing boat, sealing boat and whaling boat as defined in section 2(1) of the Merchant Shipping Act, or any floating crane.* • *Employees specifically exempted from application of this act in terms of s 40 of the OHSA.*
5	What is the duty of the chief executive officer pertaining	*The act tasks the chief executive officer of a workplace with certain duties. He must as far as is*

	to workplace safety?	*reasonably practicable ensure that the duties of the employer are properly discharged.*
6	he CEO source this duty out to another responsible person, for example the HR Manager?	*A chief executive officer may assign any duty, to any person under his control. The chief executive officer remains ultimately liable to ensure that there is compliance with the act.*
7	What is the most important duty of the employer	*The duty to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of employees.*
8	What type of incidents must be reported to an inspector?	*If:* • *a person dies;* • *a person becomes unconscious;* • *a person suffers loss of a limb or part of a limb or is otherwise injured or becomes ill to such a degree that he is likely either to die or to suffer a permanent physical defect or likely to be unable for a period of at least 14 days either to work or to continue with the activity for which he was employed or is usually employed;* • *a major incident occurs. A major incident is defined in section 1 of the OHSA as meaning an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities in the workplace.*
9	Discuss the reporting duties of employees	*In the event of an incident in which a person died, or where the employee was injured to such an extent that he is likely to die, or suffered the loss of a limb or part of a limb, the site at which the incident took place must be left undisturbed until an inspector could investigate it. This includes a prohibition to remove any article or substance involved in the incident. The only action would be that which is necessary to prevent a further incident, to remove the injured or dead, or to rescue persons from danger.*
10	How are provisions in terms of OHSA enforced?	*Employees also have reporting duties — they must report unsafe or unhealthy conditions and incidents that may affect the health of the employee or cause an injury to the employee. This must be done as soon as is practicable to the employer or to the employee's health and safety representative. Non-compliance with these duties by an employee may lead to criminal liability and, perhaps more importantly for practical purposes, discipline (and even dismissal) by an employer. The OHSA promotes independent policing of the duties in the act by creating and empowering an inspectorate in the Department of Labour to ensure compliance with the act on a continuous basis.*
11	What is the general duty of the employer at a mine?	*To ensure that the mine is designed, constructed and equipped to provide safe and healthy working*

		conditions and that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety, of themselves or of any other person. He is further obliged to supply the mine with a communication system and supporting equipment to achieve this. Finally, he must annually report on compliance with the act. This report should include the annual medical report with an analysis of the employees' health. The MHSA also places some duties on the employer at a mine that is not being worked. The latter must take reasonable steps to continuously prevent injuries, ill-health, and loss of life or damage of any kind from occurring at or because of the mine.
12	What constitutional protection does social security receive?	*In terms of section 27 of the Constitution everyone has a right of access to social security and even to social assistance if they are unable to support themselves. The state is obliged to take reasonable legislative and other measures within its available resources to achieve this purpose.*
13	What are the two main categories of social security?	*Social assistance and social insurance.*
14	Explain what social assistance and social insurance mean in your own words	*Social assistance refers to payment (normally grants) made by the State to individuals without them having to have contributed previously to a particular scheme. These benefits are meant for "poor" people and therefore "means-tested" meaning that only people below a specific living standard can access these grants. Examples of the grants that currently exist in South Africa are: the child grants (child-support grant, foster-child grant and the care dependency grant), the old age grant and the disability grant.* *Social insurance refers to a system whereby people can benefit from a specific fund only if they have previously contributed to that scheme. This is for example a pension scheme, where only people who have contributed to a specific scheme can get a pension from that scheme when they retire. Other examples of social insurance are the unemployment insurance fund and the compensation fund for occupational injuries and disease. (The Unemployment Insurance Act and the Compensation for Occupational Injuries and Disease Act are discussed in more detail later in this chapter).*
15	What do you understand under the concept of a public-private divide in the South African social security system	*This refers to the fact that the state does not provide for all social security benefits on a national scale as is the case in some developed countries. Some social security benefits are provided by the state (for example social assistance or compensation for occupational injuries and diseases) and others are provided by private companies (for example private*

		pension schemes and medical aid schemes). Therefore the state and private role players work together to provide the social security framework in South Africa.
16	What are requirements before an employee will be able to claim compensation in terms of COIDA?	*The essential elements of the compensation system created by COIDA are as follows: An employee or a dependant does not have to prove fault (that the injury, death or disease was caused by a negligent or intentional act) on the part of his employer (or anyone else) in order to be entitled to compensation in terms of COIDA. The basis of a claim for compensation is simply that the employee was injured or died as a result of an accident arising out of and in the course of employment. An employee is also entitled to compensation for an 'occupational disease' as defined in COIDA, or for a disease which arose out of and in the course of his employment. This system amounts to a system of so-called "faultless liability".*

We hope that you have enjoyed your study of this study unit!

ENCOURAGEMENT

Study as if you were going to live forever; live as if you were going to die tomorrow.

CONGRATULATIONS! You have worked through the workbook. We are certain that you will have a clear understanding the contents of this course.

Good luck with your further studies and exam preparations. We wish you the best of luck with your exams!

THE LECTURERS
UNISA
