

# Intermediate Shop Stewards Training Course

**An Introduction to Labour Law for  
Shop Stewards**

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# 1. INTRODUCTION TO THE MANUAL

This course is aimed shop stewards who need to understand the basics of labour law, and be able to apply it as they carry out their work as shop stewards.

The course is a face-to-face course, which will be run over five days.

All the material that is required for the course can be found in this manual. Here you will find:

- The programme for the week
- The activities that you will carry out during the week

- Information on labour law that you will need to know
- Internet Links to the relevant labour laws that are referred to

The material is organised into different sections. The programme will direct you to the relevant activities or readings that you will carry out for each session.



## 2. PROGRAMME FOR WEEK LONG COURSE ON LABOUR LAW

### Aims:

- To familiarise shop stewards with a basic overview of labour law in South Africa
- To equip shop stewards with the skills to defend workers in the workplace

### Day 1

Time	Activity	Material
9 – 9.45am	Welcome Introduction Explanation of the programme	
9.45 – 10.30am	Buzz groups – sharing experiences of the law	<b>Activity 1</b> – buzz groups and report back in plenary ( <b>see page 9</b> )
Political Economy of law		
10.30 – 11am	Understanding the political economy of the law in South Africa	Input Power point slides (Political Economy of Law) Plenary discussion
11 – 11.30am	TEA	
Overview of labour law in South Africa		
11.30 – 12pm	Overview of South African Labour Law <ul style="list-style-type: none"> <li>• What are the different laws that exist?</li> </ul>	Facilitator starts by taking participants through the diagram – Overview of Labour Laws <b>Activity 2</b> – buzz groups and report back ( <b>see page 13</b> ) In your own time: read through Section 3.3. which gives a brief outline of what each piece of legislation is about
12 – 12.30pm	Sources of law	<b>Activity 3</b> – buzz groups and report back ( <b>see page 22</b> )
12.30 – 1pm	Sources of law	Input Power point slides (Sources of law) In your own time: read through Section 3.4. which gives an explanation of the sources of law
1 – 2pm	LUNCH	
2 – 2.45pm	Which laws are relevant?	<b>Activity 4</b> – group work and report back ( <b>see page 26</b> )
Labour Relations Act		
2.45 – 3.15pm	Organizational rights	Input
3.15 – 3.30pm	TEA	
3.30 – 5pm	Organizational rights	<b>Activity 5</b> – group work ( <b>see page 39</b> ) Report back

## Day 2

Time	Activity	Material
9 – 9.15am	Recap of day one	
9.15 – 9.30am	Regulating non-standard employment	Input Powerpoint slides (Regulating non-standard employment)
9.30 – 10.15am	Regulating non-standard employment	<b>Activity 6</b> – group work (see page 48) Report back
10.15 – 11am	Disputes- of interest or of right and procedures to follow	<b>Activity 7</b> – group work (see page 52) Report back
11 – 11.15am	TEA	
11.15 – 11.45am	Disputes	Input Power point slides (Disputes)
11.45 – 12.15pm	Understanding dismissals – is this a dismissal?	<b>Activity 8</b> – group work (see page 63) Report back
12.15 – 1pm	Overview of dismissals	Input Powerpoint slides (Dismissals)
1 – 2pm	LUNCH	
2 – 3.15pm	Dismissals – types of dismissal	<b>Activity 9</b> – group work (see page 86) Report back
3.15 – 3.30pm	TEA	
3.30 – 5pm	Handling dismissals – a case study	<b>Activity 10</b> – group work (see page 87) Report back

## Day 3

Time	Activity	Material
9 – 9.15am	Recap of previous day	
9.15 – 9.45am	Strikes and the law	Input Power point slides (Strikes)
9.45 – 10.30am	Strikes	<b>Activity 11</b> – group work (see page 98) Report back
Basic Conditions of Employment Act		
10.30 – 11am	Overview of what is covered by BCEA	Input Power point slides (BCEA)
11 – 11.15am	TEA	
11.15 – 12.15pm	BCEA quiz	<b>Activity 12</b> – group work (see page 108) Bingo game
Employment Equity Act		

12.15 – 1pm	Experiences of Employment Equity	<b>Activity 13</b> – BUZZ GROUPS (see page 109) Report back
1 – 2pm	LUNCH	
2 – 3pm	Overview of Employment Equity Act	Input Power Point slides (Employment Equity)
3 – 3.15pm	TEA	
3.15 – 4.15pm	Identifying fair discrimination	<b>Activity 14</b> – group work (see page 118) Report back
4.15 – 5pm	Employment Equity Amendments	<b>Activity 15</b> – group work (see page 119) Report back

#### Day 4

Time	Activity	Material
9 – 9.15am	Recap of previous day	
OHSA and COIDA		
9.15 – 10.15am	Mapping your workplace	<b>Activity 16</b> – group work (see page 120) Report back
10.15 – 11.15am	Overview of Occupational Health and Safety Act	Input Power point slides
11.15 – 11.30am	TEA	
11.30 – 12.30pm	OHSA and your workplace	<b>Activity 17</b> – group work (see page 121) Report back
12.30 – 1pm	COIDA – your experience	<b>Activity 18</b> - Buzz groups (see page 128) Report back
1 – 2pm	<b>Lunch</b>	
2 – 3pm	Overview of COIDA	Input Power point slides
3 – 3.15pm	TEA	
3.15 – 5pm	Implementing COIDA	<b>Activity 19</b> – group work (see page 136) Report back

#### Day 5

Time	Activity	Material
Assessment and evaluation		
9 – 11am	Making a poster	<b>Activity 20</b> – group work (see page 137) Gallery walk
11 – 11.15am	Tea	
11.15 – 12.15pm	Assessment of week	Quiz/test
12.15 – 1pm	<b>Evaluation and closure</b>	

### 3. INTRODUCTION TO LABOUR LAW IN SOUTH AFRICA

#### Activity 1: Your experience of South African Labour Law

**Aim:**

- To share the experience participants have of labour law in South Africa
- To generate ideas about the connection between the law and the broader socio-economic context in South Africa

**Time allocated:**

20 minutes in buzz groups  
25 minutes report backs

**Task:**

The Constitution of South Africa says that everyone has the right to fair labour practices.

Think about your experiences of how labour law has helped you or not helped you in the workplace. Then share your responses to these questions:

1. Give examples of when the law has helped you.
2. Give examples of when the law has not helped you.
3. Now think about the law more broadly. Do you think our laws favourably serve the economic, social, political and moral values of the majority of people in South Africa?



LABOUR AND COMMUNITY ACTIVISTS MARCHED TO PARLIAMENT FEBRUARY 2022, DEMANDING A BASIC INCOME GRANT OF R1,500. PHOTO BY NOBATHEMBU NDZENGU

### 3.1 Political economy of law

See Appendix A: *Political Economy of the Law*

After the 1994 democratic elections, the new ANC-government set out to overhaul the legislative framework governing labour relations in South Africa. These legislative changes, primarily driven by Cosatu, sought to transform the **dual system of labour laws** in South Africa by bringing all workers under one labour law. Key legislative changes were proposed in the areas of freedom of association, the right to collective bargaining, the right to strike, the right to equality, skills development, and a safer working environment.

But, as we will demonstrate in this manual and over the duration of this course, not all the legislative changes were positive. For example, a large proportion of workers are still excluded from accessing any labour rights because the labour laws do not deem them as genuine employees simply because they do not have a standard contract of employment. So, as we unpack the key provisions of the labour laws we cover below, we should identify the shortcomings – and how we can overcome or challenge those shortcomings – as part of our discussions.

#### The Constitution of the Republic of South Africa, 1996

Before we turn to the specific labour laws it is important to note that these laws are contained in the highest law of the land, the SA Constitution, as well as other sources of law as noted in the previous section of this manual. As we study these laws, we must keep in mind the fundamental labour rights outlined in Section 23 of the South African Constitution.

Section 23 of the Constitution provides:

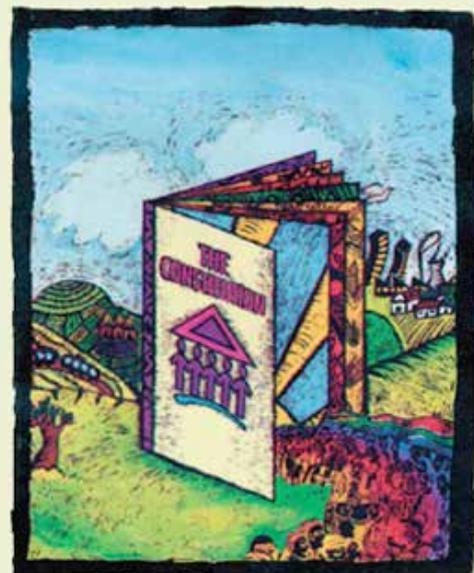
- *Everyone has the right to fair labour practices.*
- *Every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.*
- *Every employer has the right to form and join an employers' organisation; and to participate in the activities and programmes of an employers' organisation.*

- *Every trade union and every employers' organisation has the right to determine its own administration, programmes and activities; to organise; and to form and join a federation.*
- *Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).*
- *National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in the bill of rights, the limitation must comply with section 36(1).*

This constitutional foundation will guide us as we explore labour legislation. As we develop our understanding of labour law, we must be guided by the goals of social justice and fairness in labour rights.

## The Basic Provisions of the Constitution

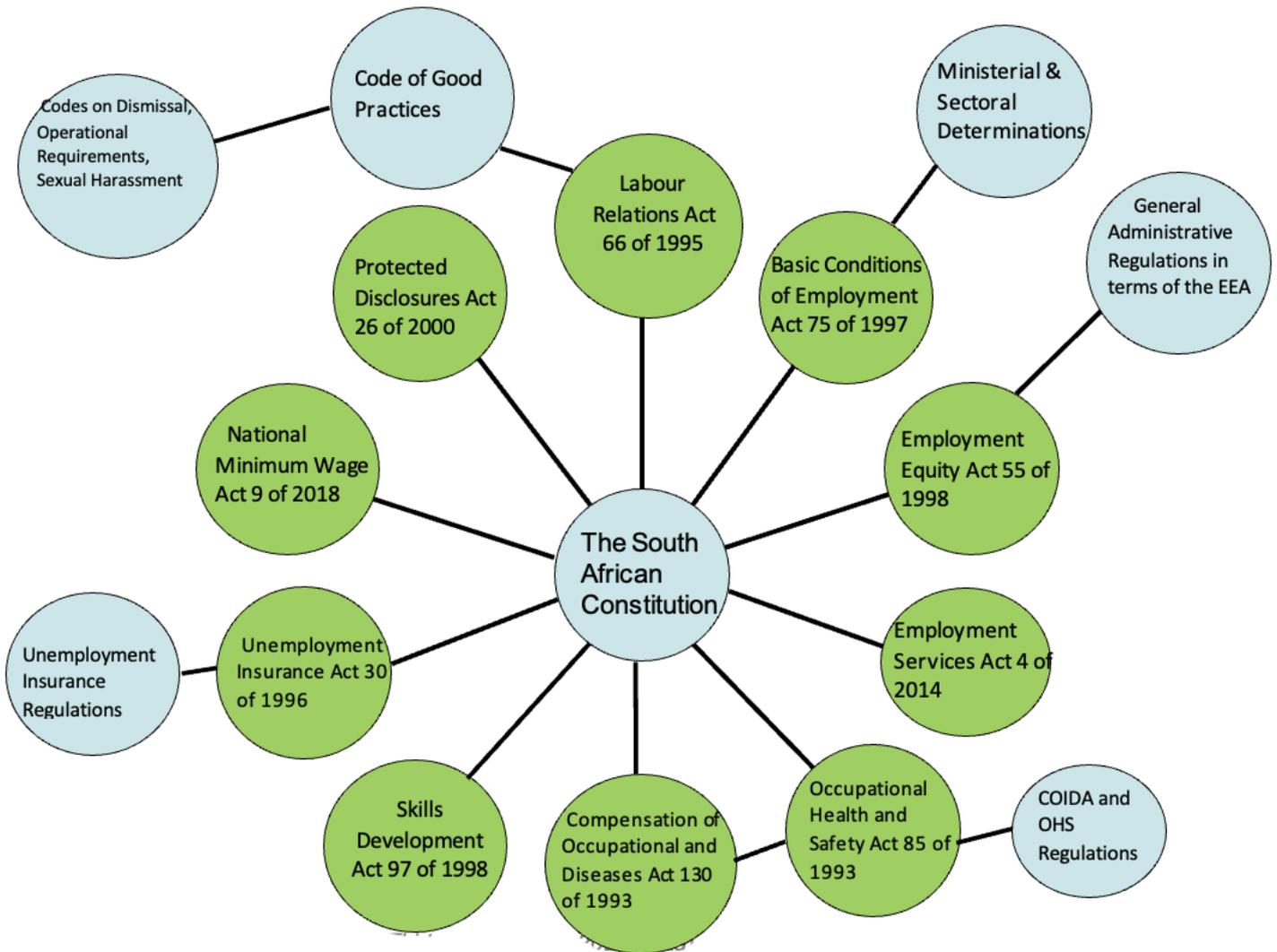
of the Republic of South Africa, 1996, Made Easy for Learners



PREAMBLE, FOUNDING PROVISIONS AND BILL OF RIGHTS

### 3.2 Overview of South African law

The diagram below gives an outline of all the labour legislation in South Africa.



Adaped from J. Grogan, *Workplace Law*, 2020 pp.9-10



STRIKE BY HEALTH WORKERS ORGANISED BY NEHAWU IN MARCH 2023. PHOTO: MZI VELAPI

## Activity 2: Overview of South African labour law

### Aim:

To consolidate participants' understanding of what each piece of legislation covers

### Time allocated:

10 minutes in buzz groups  
15 minutes report backs

### Task:

Look at the following table. In column A are a list of labour laws. In column B are descriptions of these laws. You need to match the labour law in column A with the description of that law in column B.

A: Labour laws	B: Description
1 Basic Conditions of Employment Act 75 of 1997 (BCEA)	a) Helps young, and other vulnerable people, looking for work; regulates labour brokers
2 Labour Relations Act 66 of 1995 (LRA)	b) Ensures that employees have right to work in safe and healthy environment by setting rules and duties for employers.
3 Protected Disclosures Act 26 of 2000	c) Gives financial help to qualifying workers when they are without a job, sick, or pregnant. Also gives financial help to dependants of workers who pass away.
4 Employment Equity Act 55 of 1998	d) Ensures that all employees have certain minimum standards for their employment – e.g. working hours, leave, and overtime pay
5 Skills Development Act 97 of 1998 (SDA)	e) Controls the process of collective bargaining, sets out the guidelines for strikes, and ensures that people have the right to form and join trade unions and employer organisations
6 Unemployment Insurance Act 63 of 2001 (UIF)	f) Addresses the effects of racial discrimination and inequality in the South African labour market.
7 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)	g) Protects employees who report illegal or irregular activities of their employers or co-workers
8 Occupational Health and Safety Act 85 of 1993 (OHSA)	h) Aims to improve skills level of workers and new people entering the job market by establishing a framework for workplace training and skills development.
9 Employment Services Act 4 of 2014	i) Sets up and regulates the National Minimum Wage.
10 National Minimum Wage Act 9 of 2018	j) Provides compensation for employees who get sick or injured while working.

### 3.3 Brief description of each piece of legislation

#### 3.3.1 The Labour Relations Act 66 of 1995 (LRA)

Click on this link to access a full copy of the LRA: [Link to the Labour Relations Act](#) as amended up to 2018.

The LRA sets out to promote economic development, social justice, labour harmony, and democracy within the workplace. It has specific objectives, including:

- Protecting and enforcing the fundamental rights of workers as outlined in Section 23 of the Constitution.
- Fulfilling the obligations of the Republic as a member of the International Labour Organisation (ILO).
- Creating a framework that allows employees, trade unions, employers, and employers' organisations to engage in collective bargaining. This process helps determine wages, terms of employment, and other important matters that affect everyone involved.
- Encouraging a fair and balanced approach to negotiations, ensuring that collective bargaining is conducted in an organised manner.
- Promoting active employee participation in decisions that impact their working conditions.

As shop stewards, it's crucial to understand the significant importance of the LRA's objectives in safeguarding the rights and well-being of workers. Together, we should strive to build a workplace that values fairness, inclusivity, and cooperation.

#### The purpose of the Labour Relations Act

The main purpose of the LRA is to control the process of collective bargaining and provide the laws to regulate strikes. It ensures that people have the right to form and join trade unions and employers' organisations.

The LRA also deals with unfair dismissal and unfair practices at work. To do all this, the LRA creates a single system for labour relations that covers all sectors of the economy, including the public service. It sets up institutions like the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils, and specialist labour courts (the Labour Court and Labour Appeal Court) to help resolve disputes.

The Act also contains different schedules with codes and guidelines to put the provisions into action. One crucial schedule is Schedule 8, which deals with fairness when dismissing someone based on their behaviour or abilities.

There are only a few groups of people not covered by the LRA. This includes members of the National Defence Force and the State Security Agency. But the most significant limitation of the LRA is that it only protects "employees" as defined in section 213 of the LRA. This means that independent contractors and workers employed in new forms of work practices (like Uber drivers and food delivery workers) are not included under the protection of the LRA.



THE FEDUSA-AFFILIATED PUBLIC SERVANTS ASSOCIATION (PSA) WAGED A BATTLE WITH THEIR EMPLOYER FOR A WAGE AGREEMENT REACHED IN THE PUBLIC SECTOR BARGAINING COUNCIL TO BE RESPECTED, NOVEMBER 2022. PHOTO: MZI VELAPI

### 3.3.2 The Basic Conditions of Employment Act 75 of 1997 (BCEA)

The Basic Conditions of Employment Act (BCEA), like the LRA, aims to advance economic development and social justice. It seeks to do so by giving effect to the right to fair labour practices as contained in section 23(1) of the Constitution and fulfil South Africa's obligations according to ILO Conventions.

#### The purpose of the Basic Conditions of Employment Act

The purpose of the BCEA is to set a floor of working conditions and ensure that all employees have certain minimum standards for their employment, like working hours and leave. These standards can be adjusted to fit the specific needs of different industries or workplaces.

The Act also empowers the Minister of Employment and Labour to set minimum wages and employment conditions for sectors where there is no collective agreement. This is especially important for sectors that are difficult to organise, like agriculture (Farm Worker Sectoral Determination 13) and domestic work (Domestic Worker Sectoral Determination 7).

The BCEA applies to all employees and employers, except for members of the State Security Agency and unpaid volunteers working for charitable organisations. Some, but not all, of the BCEA provisions applies to *persons* undergoing vocational training; employees on vessels at sea covered by the Merchant Shipping Act; senior managerial employees; employees earning above a certain threshold; sales staff; and employees who work less than 24 hours a month. Like the LRA, the BCEA also excludes workers considered as independent contractors.

### 3.3.3 The Employment Equity Act 55 of 1998 (EEA)

The Employment Equity Act (EEA) was created to address the legacy of Apartheid and effects of racial discrimination and inequality in the South African labour market. Unlike the LRA and BCEA, it aims to follow section 9(4) of the Constitution, which prohibit unfair discrimination against "anyone" and requires the enactment of national legislation to prevent such discrimination. The provisions of the EEA applies in the context of the workplace.

Another piece of legislation, also aimed at preventing and prohibiting unfair discrimination, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) apply to all persons not covered by the EEA. As such, workers deemed independent contractors could rely on the provisions of PEPUDA to institute unfair discrimination claims.

#### The purpose of the Employment Equity Act

The EEA has two main goals. First, it aims to stop unfair discrimination against all employees, promoting equal opportunity and fair treatment. Second, it includes affirmative action measures to address the disadvantages faced by black people, women, and individuals with disabilities. The goal is to ensure their fair representation in all job categories and levels in the workforce. Here, "Black" includes African, Coloured, and Asian people. Again, members of the Defence Force and the three national intelligence agencies are excluded from the Act.

### 3.3.4 Skills Development Act 97 of 1998 (SDA)

Skills Development Act (SDA) aims to improve the skills level of workers and new people entering the job market. It offers incentives for education and training and establishes a framework for workplace training and skill development. It's essential in the context of labour relations, as it relates to affirmative action and the advancement of qualified employees from previously disadvantaged groups. By aligning with this Act, these employees can gain the necessary qualifications to become more employable.

### 3.3.5 Occupational Health and Safety Act 85 of 1993 (OHSA)

Occupational Health and Safety Act 85 of 1993 (OHSA) ensures that employees have the right to work in a safe environment. It sets rules and duties for employers to make sure working conditions are safe and healthy. If the Act is not followed, there can be criminal consequences to an employer.

Those employed in the mining sector are covered by the Mine Health and Safety Act, 29 of 1996.

### 3.3.6 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

Compensation for Occupational Injuries and Diseases Act (COIDA) replaces the older Workmen's Compensation Act. It's meant to provide compensation for employees who get injured or sick while working. The compensation is given regardless of who is at fault, whether it's the employee, employer, or someone else. Employers must contribute to the Compensation Fund, which protects them from certain employee claims related to unsafe working conditions.

Those employed in the mining sector are covered by the Occupational Diseases in Mines and Works Act, 78 of 1973.



COMMUNITY HEALTHCARE WORKERS MARCH FOR RECOGNITION AS WORKERS AND NOT 'VOLUNTEERS' DURING THE COVID-19 LOCKDOWN. PHOTO: LILITA GCWABE

### 3.3.7 Other employment-related laws

There are a few other important laws related to employment, although we won't cover them in detail in this manual. Let's take a look at them briefly:

#### Protected Disclosures Act 26 of 2000

The Protected Disclosures Act (PDA) aims to protect employees, often called "whistle-blowers," who report illegal or irregular activities of their employers or co-workers. It provides ways for such disclosures to be made safely, and it ensures that employees won't face unfair treatment or dismissal as a result of their disclosures. If someone gets dismissed for making a protected disclosure, it's considered an automatic unfair dismissal. And if they face any other retaliation for it, that's considered an unfair labour practice.

## Unemployment Insurance Act 63 of 2001

Unemployment Insurance Act (UIA) gives financial help to workers who qualify when they are without a job, sick, pregnant, or if they pass away, their dependents can also get assistance. Some workers can't get these benefits, like those who quit on their own or work less than 24 hours a month. Both employers and employees contribute to the fund.

## National Minimum Wage Act 9 of 2018

The National Minimum Wage Act (NMWA) set up South Africa's first-ever national minimum wage (NMW). In 2023 the minimum wage is R25,42 per hour with a guaranteed minimum of 4 hours of work. The NMW rate applies to all workers in South Africa including domestic and farm workers.

## Employment Services Act 4 of 2014

Employment Services Act (ESA) was enacted mainly to help young people looking for work and other vulnerable individuals, providing them with employment opportunities. It also regulates labour brokers.

## 3.3.8 Codes of Good Practice

There are some Codes of Good Practice created by the Minister of Labour under different labour laws. These codes were carefully reviewed and approved by the National Economic Development and Labour Council (NEDLAC) before being issued by the Minister. Anyone who deals with employment laws must consider these codes:

### Codes of Good Practices under the Labour Relations Act:

#### Schedule 8: Code of Good Practice: Dismissal

This Code covers the proper way to handle dismissals. This code gives guidance for dealing with conduct and capacity-related dismissals. It allows some flexibility for unique cases, like when there are many employees in a workplace. This Code doesn't replace disciplinary codes agreed upon collectively or by employers and workplace forums.

This Code says employers and employees should treat each other with respect. It values fairness for employees and smooth business operations. Employees should be protected from unfair treatment, but employers can expect good behaviour and performance.



## **The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace**

According to the Employment Equity Act, when an employee is harassed, it's considered unfair discrimination. This kind of discrimination is not allowed based on any of the listed grounds in the Act, including any arbitrary reasons. The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace is meant to stop all kinds of harassment at work. It offers guidance on the policies and steps to follow if harassment happens in the workplace. The Code doesn't only address sexual harassment; it acknowledges other forms of harassment that can lead to unfair discrimination as well. This is different from the 2005 Code of Good Practice on the Prevention of Sexual Harassment in the Workplace, which only focused on sexual harassment.

### **Code of Good Practice: Who is an employee?**

This code explains the criteria for classifying someone as an employee. This Code provides rules to decide who qualifies as an employee.

Its goals are to make it clear who is considered an employee under the Labour Relations Act and other labour laws. It ensures that employees, who have less power than employers, are protected by labour laws and not excluded through contract arrangements. The Code also helps people understand the different types of employment relationships in the job market, like regular employment and independent contracting.

### **Code of good practice: Dismissal based on operational requirements**

Dismissals for operational requirements have been categorised as "no-fault" dismissals. In other words, it is not the employee who is responsible for the termination of employment. Because retrenchment is a "no-fault" dismissal and because of its human cost, the Act places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to dismissal are explored and that the employees to be dismissed are treated fairly.

## **Code of Good Practice: Collective bargaining, industrial action and picketing**

It sets rules for picketing during strikes. This Code aims to give practical advice on collective bargaining, resolving disputes of common interest, and using industrial action as a last resort. It's meant for those involved in collective bargaining or seeking to settle disputes through conciliation and mediation before ultimately resorting to industrial action.

### **Code of Good Practice on Picketing**

This Code of Good Practice is designed to offer practical guidance on picketing during a protected strike or against a lock-out. It aims to help those who are considering, organising, or participating in a picket, as well as employers, employees, and the general public who may be affected by it.

## **Codes of Good Practice under the Basic Conditions of Employment Act:**

### **Code of Good Practice on the Arrangement of Working Time**

This code covers how working hours should be organised. The aim of this code is to give employers and employees information and guidelines about how to organise working hours and how it can affect employees' health, safety, and family responsibilities.

### **Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child**

Employers must know that they can't discriminate or fire anyone because of pregnancy. This is clearly stated in paragraph 4.2 of the Code of Good Practice on the Protection of Employees during Pregnancy and after the birth of her child. It's important to note that the Code says "no person," which suggests that even the father of the child cannot be unfairly treated because of his wife or partner's pregnancy.

## **Codes of Good Practice under the Employment Equity Act:**

### **Code of Good Practice on Employment of Persons with Disabilities**

This code deals with the inclusion of employees with disabilities. It aims to promote equality and diversity in workplaces. The focus is on getting rid of unfair discrimination and making sure that people with disabilities have equal opportunities at work. Discrimination is something society has created, but we can overcome it by learning more about disabilities and understanding the challenges they face.

Even though there are barriers like ignorance, fear, and stereotypes that have led to unfair discrimination against people with disabilities in society and at work, South Africa has worked hard to create policies that protect their rights.

### **The Code of Good Practice on Employment Equity Plans**

The Code of Good Practice on Employment Equity Plans explains the purpose of an employment equity plan and how a company must put employment equity into action.

It connects the current workforce with any obstacles in the company's employment policies and procedures. Then, it outlines steps to fix these issues and achieve fairness in the workplace. The plan should be valid for at least one year but not longer than five years. It must detail the actions the employer will take to get rid of unfair discrimination and barriers at work. The goal is to achieve fair representation. The Employment Equity Act has codes that guide the process of creating these plans. Employers can use these codes to make sure their plans follow the Act's rules.

## **Code of Good Practice: Key Aspects of HIV & Aids and Employment**

The HIV & AIDS epidemic will affect every workplace, leading to staff illness, absenteeism, and lower morale. To address these issues, a Code of Good Practice and guidelines on Managing HIV & AIDS in the workplace has been introduced. It will assist companies implement policies and programs to manage the impact of HIV & AIDS, including strategies for small businesses and the informal sector.

## **Codes of Good Practice under the Occupational Health and Safety Act**

### **Code of Good Practice: for the Training Providers of Lifting Machine Operators**

This Code sets standards for evaluating training providers who teach lifting machine operators. It gives clear guidelines to everyone involved in accrediting and providing training for lifting machine operators in South Africa.

The Code follows the accreditation criteria and guidelines set by ETQA. It states that all lifting machine operators must be trained by accredited providers, regardless of the machine's capacity.

The Code covers guidelines for lifting machine operators, assessors, moderators, and providers. It also includes criteria for approving learning and training programs, facilities, and equipment to train operators to the required level of skill for specific types of lifting machines.

If other Occupational Health and Safety laws apply, they must be followed. SAQA will consult with the Authorised Body before approving and registering unit standards for lifting machine operators.

All these codes can be found on the Department of Labour's website at [www.labour.gov.za](http://www.labour.gov.za).

## Activity 3: Sources of law

### Aim:

To consolidate participants' understanding of the different sources of law and which are most authoritative

### Time allocated:

15 minutes in buzz groups  
15 minutes report backs

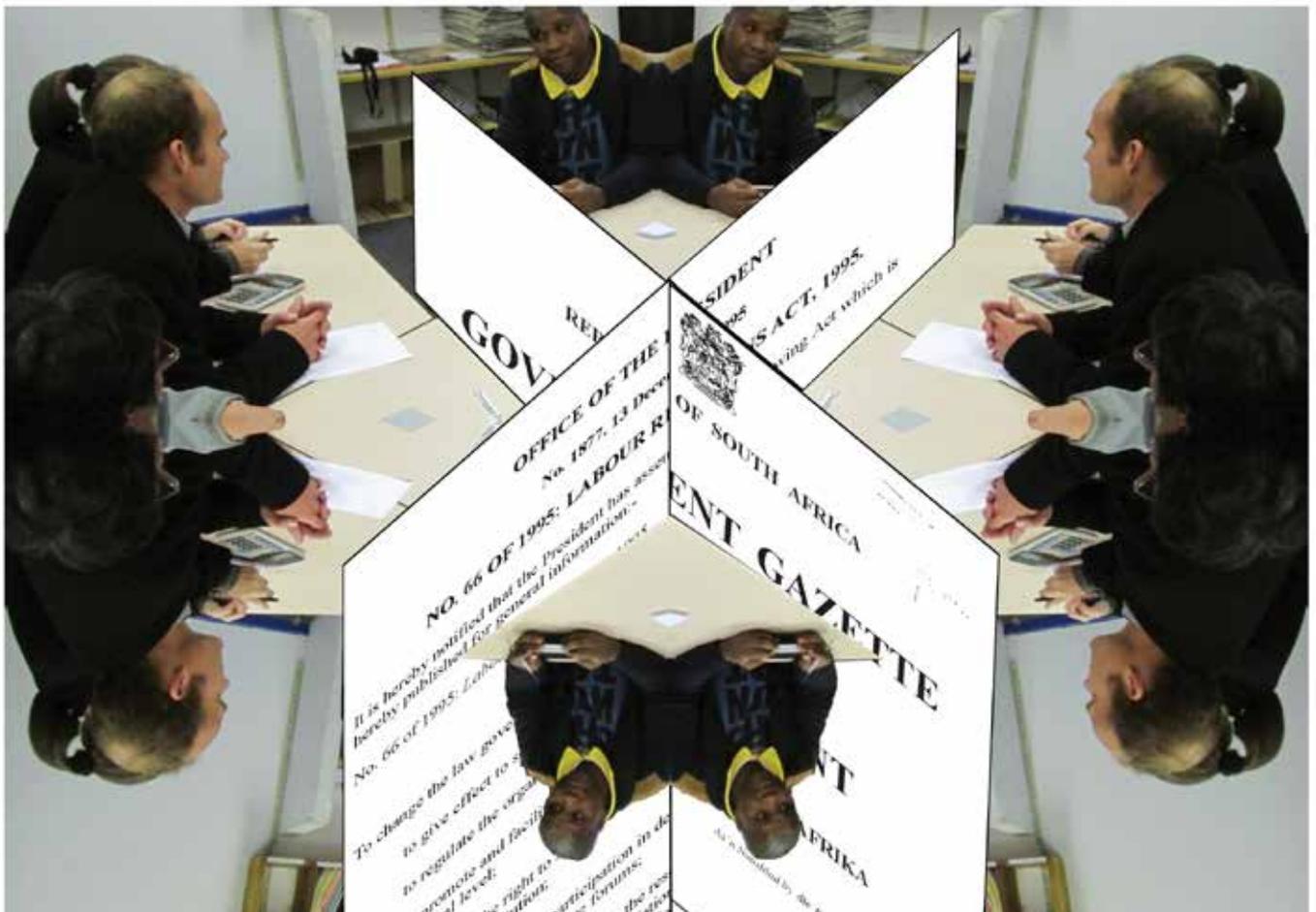
### Task:

Work in groups.

Look at this list of different sources of law. Put them in order – with the most authoritative source of law at the top, and the least authoritative at the end. Be ready to explain to the plenary your motivation for putting them in this order.

## Legislation

- ILO conventions
- Common law
- Judicial precedent
- Constitution of Republic of South Africa
- Legal writing of experts
- Collective Agreements
- International law
- Customary law



### 3.4 Sources of law

#### What is a source of law?

Labour law in South Africa has many sources, rather than only one source. Different sources of law, however, carry different weight. Rules coming from “more authoritative” sources may prevail over rules coming from “less authoritative” sources. The main sources of South African law, in order of influence, are the following:

#### The Constitution of the Republic of South Africa

Section 2 of the Constitution provides that, *“This 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.”* Section 8(1) of the Constitution further states that the Bill of Rights applies to all laws. These constitutional provisions are important in that no legislation (e.g., BCEA), collective agreement or employment contract can be in conflict with the rights set out in the Constitution.

#### International law, including International Labour Organisation (ILO) Conventions

Section 233 of the Constitution further recognises the application of international law. In the context of labour law, international law refers to rules and agreements that countries follow to protect workers’ rights and promote fair and safe working conditions across borders. These rules aim to ensure that workers are treated fairly and have certain rights, regardless of where they work. International labour law agreements, also known as Conventions help countries cooperate and set common standards to protect workers’ well-being and prevent unfair practices in the global workforce. It encourages fair treatment, fair wages, and safe working environments for all workers worldwide.

When countries agree to follow international labour rules by signing and ratifying a Convention, it becomes a source of law for that country. Ratification is like giving an official approval or agreement to something. When a country ratifies an international agreement, treaty, or

convention, it means that they formally accept and agree to follow its rules and provisions. It’s like saying, “Yes, we agree to be part of this and will do what it says.” Ratification shows that a country is committed to fulfilling its obligations under the agreement and respecting its terms.

The International Labour Organisation (ILO) takes care of all international rules about workers’ rights. It makes sure that countries follow these rules and treat workers fairly. The ILO works to create good working conditions, fairness, and safety for workers worldwide. It ensures that labour standards are respected and followed by all its member countries.

Section 3 of the LRA states that anyone applying and interpreting this Act must follow the international laws that South Africa agreed to. This is crucial because South Africa ratified several ILO Conventions that protect workers’ rights. Some of the core ILO Conventions that South Africa agreed to include freedom of association; the right to organise and bargain collectively; equal pay; abolishing forced labour; fighting against discrimination; ensuring occupational safety and health, and setting minimum working age standards. These Conventions are essential in safeguarding workers’ rights and ensuring fair treatment in the workplace.

#### Legislation

Legislation is a set of laws that are made by parliament to regulate various aspects of society including laws for the country’s labour force. It includes acts of parliament, which are like main (primary) official rules, created by the national and provincial governments. These acts outline what people can and cannot do in different situations.

Additionally, regulations are secondary rules that are made based on these acts to provide more specific details and instructions. They help to fill in the gaps and give more details on how to apply the laws in real-life situations.

For example, the Basic Conditions of Employment Act is one of the main laws that protect workers’ rights in South Africa. It ensures that workers

are treated fairly and get certain benefits like fair wages, working hours and leave. To further support this act, sectoral determinations are created. These determinations focus on specific sectors of the economy, like agricultural or farm workers and domestic workers, where workers may face more and different challenges. They provide extra protections for these workers, especially in cases where they may not have strong trade unions to support them. This helps ensure that workers in vulnerable sectors are treated fairly and have their rights protected.

### Collective agreements

A collective agreement is an agreement between one or more unions and an employer or employers' association. It normally covers wages and other employment conditions at a single workplace or within an industrial sector. Collective agreements are an important source of labour law as it not only covers the members of the union(s) but also those workers who are not members of the union(s).

### Common law

Common law is “unwritten” law (not in legislation) but applied by the people and courts over many decades or centuries. Common law is a type of law created by judges through past court decisions. It comes from cases and not written laws. Long ago in England, judges made decisions based on community customs, which formed the basis of common law. It later spread to other countries like the United States and South Africa.

In South Africa, common law came about because of its oppressive historical connection with Britain. South Africa was a British colony until it became independent. British settlers brought their legal system, including common law principles. During colonial times, discriminatory laws like apartheid were imposed on black South Africans.

In common law, the contract of employment plays a fundamental role in governing the relationship between an employer and an employee. The contract of employment is a vital aspect of common law as it establishes the terms and conditions under which an individual is employed by a company or organisation.



ESKOM WORKERS ON STRIKE, 14 JUNE 2018. THE PLACARD WARNS THAT SHOULD THERE BE RETRENCHMENTS AT THE POWER UTILITY, THE CEO SHOULD BE THE FIRST TO GO. PHOTO: LYNFORD DOR

## Judicial precedent

The principle of judicial precedent forms part of common law. Judges use past rulings, called *judicial precedents*, to decide new cases with similar facts. This helps make the law consistent and fair.

Unlike written laws, common law is flexible and can adapt to changes in society. It covers many areas, such as contracts, injuries, property, and family matters. Overall, common law is important in legal systems worldwide to ensure fairness and justice.

## Customary law

Before democracy, customary law was not considered as an official legal system, and its importance was often overlooked. Instead, other laws and regulations were prioritised, and customary law was not given the recognition it deserved. However, with the advent of democracy and the adoption of a new Constitution in 1996, customary law gained recognition and status as a valid legal system in South Africa. The Constitution now acknowledges the significance of customary law and safeguards the rights of individuals to practice their cultural traditions.

Customary law can influence certain cultural practices and norms in the workplace, particularly in industries or sectors with a significant representation of individuals who follow customary traditions. This can impact how workers interact, communicate, and resolve disputes in their work environment. Moreover, in cases of labour disputes or grievances, the principles of customary law may be considered by labour courts, along with other applicable laws and regulations. The Constitution mandates South African courts to apply customary law where relevant, subject to the Constitution and specific legislation.

## Legal writing of experts

The writings of legal experts (“textbooks”) may also be consulted to clarify the meaning of the law but are not independent sources of law.

This manual focuses on South African labour laws, which come from different sources of law. These laws include rules made by the government and regulations that go with them. They create a strong foundation for managing labour relations and employment relationships in the country.

It’s important to remember that labour law in South Africa also includes common law principles. These unwritten laws shape how work is done and give extra guidance in labour-related issues. When dealing with workplace problems, understanding how courts interpret laws and previous cases is helpful. Following past court decisions helps keep the law consistent and predictable in labour matters.

As pointed out above, South Africa also follows international law from the International Labour Organisation (ILO). The country agrees to certain rules that protect workers’ rights globally.

By combining all these different sources of law, we can have a good understanding of South African labour laws and how they apply to different work situations.



CASUAL WORKERS PROTEST IN PRETORIA, AUGUST 2007.  
PHOTO: ROB REES

## Activity 4: Which laws are relevant?

### Aim:

To deepen understanding of the different labour laws in South Africa and the context that they are relevant to

### Time allocated:

25 minutes in groups  
20 minutes report backs

### Task:

In the table below, the first column lists a number of situations that you might be confronted with as a trade union organiser or shopsteward. In your groups, identify the laws which you think might be relevant in taking up the issue, and protecting the rights and interests of the workers as much as possible.

Situation	Relevant laws and why they are relevant
<p>1. A worker has been dismissed. It is an unfair dismissal but there is no agreed disciplinary procedure in the workplace. The trade union is going to take up the case of unfair dismissal. In the meantime, the worker is without a job.</p> <ul style="list-style-type: none"> <li>• What laws will the shopsteward use in taking up the case?</li> <li>• What can the shopsteward advise the worker to do while they wait for their case to be heard?</li> </ul>	
<p>2. You have organised workers in a new workplace to join your workplace. The employer is refusing to recognise the trade union.</p> <ul style="list-style-type: none"> <li>• What law can you refer to?</li> </ul>	
<p>3. A worker is injured at work.</p> <ul style="list-style-type: none"> <li>• Which laws can you refer to? What are the different aspects of the different laws that can apply?</li> </ul>	
<p>4. Workers are being forced to work very long hours. There is no collective bargaining agreement in the workplace.</p> <ul style="list-style-type: none"> <li>• What law can you refer to, in taking up the workers' issue?</li> </ul>	
<p>5. A woman worker suspects she did not get a job because she is a woman.</p> <ul style="list-style-type: none"> <li>• What law is relevant here?</li> </ul>	

## 4. LABOUR RELATIONS ACT

Refer back to section 3.3.1. for a brief overview of what is covered in the Labour Relations Act. In this section we are going to focus on five key areas that are dealt with in the LRA:

- Freedom of Association
- Organisational Rights
- Disputes
- Dismissals
- Strikes

### 4.1. Freedom of Association

Freedom of Association is a fundamental right for workers and is captured in both the Constitution and ILO Convention 87. It means that workers have the right to join a trade union of their choice. Sections 4 and 5 of the LRA deal with Freedom of Association. However, as we will show in the next few paragraphs, the LRA limits this right to employees (and work seekers) only, whereas the Constitution and the ILO Convention refers to workers in the broader sense.

Section 18 of the Constitution provides a general right that “*Everyone has the right to freedom of association*”. The right of workers to freely associate is further protected by section 23(2) of the Constitution where it is recorded that every worker has the right to form and join a trade union and to participate in the activities and programmes of a trade union.

At the international level, South Africa ratified the ILO Convention on Freedom of Association and Protection of the Right to Organise Convention, 1948. Article 2 of this Convention provides for workers, without distinction, to form associations of their choice.

Sections 4 and 5 of the LRA clearly sets out the freedom of association and protection rights of employees. These are:



#### 4. Employees' right to freedom of association.

(1) Every *employee* has the right—

- a) to participate in forming a trade union or federation of trade unions; and
- b) to join a trade union, subject to its constitution.

(2) Every member of a *trade union* has the right, subject to the constitution of that *trade union*—

- a) to participate in its lawful activities;
- b) to participate in the election of any of its *office-bearers, officials* or *trade union representatives*; and
- c) to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office; and
- d) to stand for election and be eligible for appointment as a *trade union representative* and, if elected or appointed, to carry out the functions of a *trade union representative* in terms of *this Act* or any *collective agreement*.

(3) Every member of a *trade union* that is a member of a federation of *trade unions* has the right, subject to the constitution of that federation—

- a) to participate in its lawful activities;
- b) to participate in the election of any of its *office-bearers* or *officials*; and
- c) to stand for election and be eligible for appointment as an *office-bearer* or *official* and, if elected or appointed, to hold office.

#### 5. Protection of employees and persons seeking employment.

(1) No person may discriminate against an *employee* for exercising any right conferred by *this Act*.

(2) Without limiting the general protection conferred by [subsection \(1\)](#), no person may do, or threaten to do, any of the following—

- a) require an *employee* or a person seeking employment—
  - i) not to be a member of a trade union or workplace forum;
  - ii) not to become a member of a *trade union* or *workplace forum*; or
  - iii) to give up membership of a *trade union* or *workplace forum*;

b) prevent an *employee* or a person seeking employment *from exercising any right conferred by this Act* or *from participating in any proceedings in terms of this Act*; or

c) *prejudice* an *employee* or a person seeking employment because of past, present or anticipated—

- i) membership of a trade union or workplace forum;
- ii) participation in forming a *trade union* or federation of *trade unions* or establishing a *workplace forum*;
- iii) participation in the lawful activities of a *trade union*, federation of *trade unions* or *workplace forum*;
- iv) failure or refusal to do something that an employer may not lawfully permit or require an *employee* to do;
- v) disclosure of information that the *employee* is lawfully entitled or required to give to another person;
- vi) exercise of any right conferred by *this Act*; or
- vii) participation in any proceedings in terms of *this Act*.

(3) No person may advantage, or promise to advantage, an *employee* or a person seeking employment in exchange for that person not exercising any right conferred by *this Act* or not participating in any proceedings in terms of *this Act*. However, nothing in this section precludes the parties to a *dispute* from concluding an agreement to settle that *dispute*.

(4) A provision in any contract, whether entered into before or after the commencement of *this Act*, that directly or indirectly contradicts or limits any provision of section 4, or this section is invalid, unless the contractual provision is permitted by *this Act*.

The effect of restricting Freedom of Association to employees and work seekers, and defining trade unions as “an association of employees”, is that many workers are prevented from forming or belonging to a trade union. It means, for instance, that workers who are regarded as independent contractors cannot form or belong to a trade union. With new forms of work, such as Uber and delivery drivers and an increasingly precarious workforce this excludes large numbers of workers.

The good news is that this may start to change as the courts change how they interpret the legislative requirements to form trade unions, particularly if the trade union want to organise independent contractors or workers in non-standard employment relations. In a recent (June 2023) labour court judgment between Simunye Workers Forum and the Registrar of Labour Relations, the court held that:

*[27] I deal first with the manner in which section 95 and the guidelines ought to be interpreted. South Africa has ratified Convention 87, with the consequence that section 95 must necessarily be interpreted and applied in a manner that*

*best gives effect to its obligations in terms of the Convention. Further, and to the extent that the right to freedom of association in an employment context is regulated by section 23(2) and (4) of the Constitution, this court must adopt an interpretation that promotes the spirit, purport and objects of the Bill of Rights (see section 39(2) of the Constitution). Further, section 3 of the LRA requires the court to interpret its provisions to give effect to the LRA’s primary objects, in compliance with the Constitution and in compliance with South Africa’s public international law obligations.*

The above labour court judgment could very well pave the way for workers’ organisations to be registered by workers in non-standard employment relations. As the court commented:

*Since the LRA was brought into operation in 1995, the labour market has changed radically. Workforces, once homogenous, have fragmented and segmented into core and marginal groups where new, less secure forms of work have emerged...New forms of worker organisation will inevitably emerge to meet these challenges and better serve the interests of the more vulnerable.*



MEMBERS OF SIMUNYE WORKERS FORUM OUTSIDE THE LABOUR COURT IN JOHANNESBURG, JUNE 2023, PROTESTING THE DEPARTMENT OF LABOUR’S REFUSAL TO REGISTER THE FORUM AS A UNION. PHOTO: RAMATAMO SEHOAI

## 4.2 Organisational Rights

Organisational rights are rights that a registered trade union may exercise in a workplace. The purpose of these rights is to enable unions to organise and represent workers at their workplace. Organisational rights support a system of collective bargaining where union/unions can engage and negotiate with the employer over terms and conditions of employment and other matters of mutual interest. The LRA establishes a framework for Organisational rights that the trade union and employer can expand on. Note that a trade union that is a party to a bargaining or statutory council is automatically entitled to the rights in sections 12 and 13 of the LRA for all the workplaces that fall under that council.

Remember – there is nothing preventing an unregistered trade union from making a demand for Organisational rights. Whether you are able to achieve these rights will depend on your Organisational strength. As far as organisational rights are concerned - the key difference between registered and unregistered unions is that the unregistered union may not refer a dispute regarding Organisational rights for arbitration. It would have to be taken up through strike action.

The Organisational rights listed in the LRA are the following:

- Section 12 – Access to the workplace for officials or office bearers of a trade union.
- Section 13 – Deduction of trade union subscriptions or levies from an employee's wage/salary.
- Section 14 – The right of trade union members to elect representatives (shop stewards) from amongst themselves.
- Section 15 – Leave for office-bearers and shop stewards for purposes of performing their functions.
- Section 16 – Disclosure of information to trade unions and/or shop stewards for purposes of negotiation, consultation or for fulfilling functions of a shop steward.

Rights of access in the domestic sector are restricted. A trade union does not have the right to enter the employer's premises without

consent. Permission is required before entering a private residence. This can make organising workers in this sector very difficult.

It is also very difficult to organise workers in the agricultural sector. Trade union organisers who want to visit farms to recruit workers who reside on the farm and carry out trade union business, can use the Extension of the Security of Tenure Act 62 of 1997 (ESTA) to do so. The Act gives a right to access to people visiting lawful occupiers of rural and peri-urban areas.

### Accessing Organisational Rights

Representative unions and those claiming to be sufficiently representative may seek to access the various rights and, if denied by the employer, may initiate steps to have them legally enforced via the CCMA or they can take industrial action (such as a strike).

The rights can be accessed by individual unions or by unions acting jointly in the workplace. The latter option allows unions which on their own might not be strong enough to access some or all of the Organisational rights in the Act, to do so in combination with others. Rights are acquired in specific workplaces.

Different thresholds apply to the different rights. The right to elect shop stewards and the right to disclosure of information (to shop stewards for the performance of their duties and for collective bargaining purposes) are automatically extended to majority unions only. Minority unions may also claim these rights but cannot have them legally enforced in terms of section 21 of the LRA. They can only demand them as a matter of "interest" (not "right") and, if the employer refuses, may resort to industrial action to enforce their demands. All other rights are available as of right to unions that are sufficiently representative, but with the LRA remaining silent on what constitutes 'sufficiently representative'.

### Rights for minority unions

Section 19 of the LRA extends s 12 and 13 rights automatically to registered unions which

are parties to a bargaining council irrespective of their levels of representativity in particular workplaces. Section 20 permits the conclusion of collective agreements that regulate Organisational rights.

This implies that minority unions can seek Organisational rights either through agreement with employers or through the exercise of industrial action, as the Constitutional Court decided in **National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another (2003) 24 ILJ 305 (CC)**. The key findings in this case are summarised below and provide guidance in situations where your union may not be in a majority or sufficiently representative to qualify for Organisational rights.



CONSTITUTIONAL COURT OF SOUTH AFRICA

The Constitutional Court, in arriving at its decision, drew extensively on the provisions of ILO Conventions 87 and 98 and the decisions of the Freedom of Association Committee and Committee of Experts on the Application of Conventions and Recommendations when considering the rights of minority unions. At paragraph 31 of the judgment the court stated:

*[31] An important principle of freedom of association is enshrined in Article 2 of the Convention on Freedom of Association and Protection of the Right to Organise which states:*

*'Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.'*

Both committees have considered this provision to capture an important aspect of freedom of association in that it affords workers and employers an option to choose the particular organisation they wish to join. Although both committees have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.

It also found (at paragraph 34 of the judgment) that, based on the ILO jurisprudence:

*[34] [T]he principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and, secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in section 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in section 23(2)(a), and the right of trade unions to organise in section 23(4)(b). These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.*

The issue of the rights of minority unions was again the subject of interrogation by the Labour Court in **UASA and AMCU v BHP Billiton Energy Coal SA Ltd (Billiton) and NUM (Case No. J354/13)**. In this matter the court granted an interdict in favour of two minority unions (UASA and AMCU), preventing the employer from enforcing new thresholds for Organisational rights that had been set in a collective agreement concluded with between the company and NUM. It had previously been agreed that Billiton's 'workplace' did not incorporate its operations as a whole but was broken down according to its individual operations. An earlier agreement between UASA and AMCU, acting jointly, and the company had established thresholds on this

basis. A subsequent agreement between the company and NUM, the majority union across the company as a whole, made it more difficult for the two smaller unions to gain Organisational rights. The earlier agreement, which the minority unions were relying on, granted access to Organisational rights if a union or unions acting jointly represented 15% of the employees per operation. The new agreement changed this threshold to 30% across the company as a whole. The court held that, while section 18 of the LRA allows majority unions and employers to set thresholds, the company in this matter was bound by the terms of the earlier agreement and could not enforce the terms of the new agreement on UASA and AMCU pending an arbitration outcome at the CCMA.

Section 21 provides the procedure that must be followed in obtaining Organisational rights prior to approaching the CCMA. See box.

This includes the union notifying the employer in writing that it seeks to exercise one or more rights in a workplace. The notice referred to in subsection must be accompanied by a certified copy of the trade union's certificate of registration and must specify-

- the workplace in respect of which the trade union seeks to exercise the rights;
- the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union, and the
- rights the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

Within 30 days of receiving the notice, the employer must meet the registered union and try to conclude a collective agreement. If the union wants to exercise Organisational rights at a workplace where another union controls access to the workplace, that holder of the Organisational right must be given an opportunity to participate in the arbitration proceedings.

The requirements of Section 21(2) cannot be dispensed with by Commissioners. In **SACCAWU v Speciality Stores Ltd [1998] 4 BLLR 352 (LAC)** the Court held:

*Before a commission exercises its function of conciliation and arbitration under the Act, the substantive and procedural preconditions set out in the previous paragraph must exist. It cannot validly exercise those functions if the preconditions do not exist.*

This is an important point to keep in mind if you are a registered union seeking Organisational rights. A union could also submit substantive wage demands when claiming Organisational rights. This could serve as additional leverage and increase the pressure on the employer to recognise the union and start to bargain.



PHOTO: PHAKAMILE HLUBI-MAJOLA

### Claiming organisational rights

Trade unions must follow quite a long procedure in order to acquire and, if necessary, enforce Organisational rights.

#### Step 1: Acquiring representative status

In order to obtain Organisational rights offered by sections 12, 13, 15 of the LRA a union, or unions acting jointly, must prove sufficient representivity of employees in the workplace. To obtain the additional Organisational rights offered by sections 14 and 16 of the LRA, the union must prove majority membership. Of course, an employer is free to grant Organisational

rights to a union without the union proving its representativity, unless it has already established a threshold through an agreement with another union. What is likely is that unions and employers that have established a bargaining relationship will negotiate thresholds for sufficient and majority representation.

## Step 2: Informing the employer

According to section 21 of the LRA a registered trade union must inform an employer that it wants to exercise certain Organisational rights. It must say which rights it wants to have and for which workplace, and it must show evidence of its membership in that workplace. The union must make specific proposals connected to the rights that it wants to exercise; for example access to telephone and fax facilities, which sections of the workplace it needs access to etc. This communication from the union to the employer must be in writing and must be accompanied by a copy of the union's registration certificate.

## Step 3: Making a collective agreement on Organisational rights

Within 30 days of receiving this notice from a union, the employer must meet with the union to try to make an agreement on Organisational rights. Although the LRA does not make it a duty for employers to bargain with unions generally, this provision requires the employer to meet with the union/unions around Organisational rights. The employer may however refuse to meet or bargain with the union.

If the employer and the union reach an agreement on Organisational rights, then the process ends.

## Step 4: Referral to the CCMA for conciliation

If the parties do not reach an agreement, or if the employer does not respond to the notification within 30 days, then the union can refer the matter to the CCMA. This must be done in writing and a copy of the referral must be sent to the employer. The CCMA then has 30 days to settle the dispute. Unions can only make a referral to



the CCMA once they first tried to secure their rights directly from the employer.

If conciliation of a dispute over Organisational rights fails, then a union has two options:

- A union can refer the dispute to the CCMA for arbitration.
- A union can choose to go on a protected strike instead of going for arbitration once conciliation has failed. To do this it must follow the procedures required for a protected strike. A union can strike over the Organisational rights contained in sections 12 to 15 of the LRA. It cannot strike in the case of a disclosure of information dispute. Should the union decide to pursue strike action they cannot refer the matter for arbitration for a period of 12 months.

## Step 5: Referral to the CCMA for arbitration

Arbitration by the CCMA is guided by precedent. Court judgments can give a union a good indication of how its own dispute could be determined. Previous arbitration awards also provide some guidance in this regard.

The LRA empowers a CCMA commissioner to conduct investigations into a union's representativity if this is in dispute. The commissioner must follow the guidelines set out in section 21(8) of the LRA. This section says that:

The commissioner must try to keep down the number of unions in one workplace and must encourage unions to be properly representative

The commissioner must take into account:

- the nature of the workplace;
- the nature of the sector the workplace is situated in;
- which Organisational rights the union wants to exercise;
- the experience that unions have had at the workplace or at other workplaces belonging to the same employer. This point is Important because it allows the CCMA to take account of the way an employer might have obstructed the union's efforts to obtain Organisational rights. In such a case the CCMA can order that the threshold for sufficient representivity be reduced
- the composition of the workforce in the workplace, taking into account how many workers are on fixed term contracts, employed part-time, employed by labour brokers, and so on.

If the CCMA is satisfied that a union is entitled to statutory Organisational rights because of its representativity, then it can make an award that forces the employer to grant the union these rights and it can say how these rights must be exercised.

### Step 6: Enforcement of an arbitration award through the Labour Court

If an employer does not allow a trade union to exercise the rights that have been awarded by the CCMA, then the union can apply to the Labour Court to order the employer to do so. The Labour Court can also issue an interdict to prevent an employer from taking any action that prevents a union from exercising its rights.

### Representivity

Registered trade unions qualify for certain rights offered by the LRA depending on their representivity at a workplace. Some rights are available to unions that are “**sufficiently representative**” while others are for unions that represent a “majority”. As mentioned above, the LRA does not unpack what is intended by the term “sufficiently representative”. Sufficiently

representative unions qualify for sections 12, 13 and 15 rights.

What is regarded as sufficiently representative is a major issue for trade unions struggling to organise workers in a new workplace. And it is often a major struggle between workers and employers. The LRA does not define the term “sufficiently representative”- but the CCMA has generally found that unions which are at least 30% representative, are regarded as sufficiently representative for the purpose of acquiring Organisational rights. In some cases, particularly where it is a question of the deduction of union levies, CCMA commissioners have accepted lower levels of representativity.

Amendments in 2014 introduced two significant provisions allowing unions to prove representivity. These amendments were in response to growing number of labour broker and other non-standard employees in the workplace. Section 8 (b)(v) requires the commissioner to determine the composition of the workforce by considering the extent to which workers have been placed by labour brokers, the number of workers employed on fixed term and part-time contracts and, the number of employee in other categories on non-standard work.

Section 12 allows for a union seeking to exercise Organisational rights in respect of a labour broker, may do so in either the workplace of the labour broker or one or more clients of the labour broker. The reference to premises in the LRA then applies to the premises of both the labour broker and the client/s.



The term “**representative of the majority of employees**” can be understood (from past practice) to mean 50% plus one. But the LRA shifts the assessment of representation from bargaining units to “all employees in a workplace”. The LRA allows two or more unions to act together to achieve majority status in the workplace. Majority unions qualify for sections 12, 13, 14, 15 and 16 rights.

The 2014 amendments to the LRA provided for a commissioner to grant a registered trade section 14 rights even if the trade union is not a majority union, subject to certain qualifications. These rights are granted under what is termed “**most representative**” union. The rights however fall away if a majority union emerges in the workplace.

Amendments also introduced the concept of what is termed “**significant interest or substantial number**”. This allows the commissioner to award a union the same rights as a sufficiently representative union even if the union does not meet the threshold requirement of a collective agreement, provided that the union represents a significant interest or a substantial number of employees in the workplace and the commissioner has considered the provisions set out in section 8 for granting Organisational rights.

## The workplace

According to the LRA, Organisational rights are acquired for a specific workplace. Section 213 of the LRA, defines a workplace as:

“(I)n the private sector as “the place or places where the employees of an employer work. If an employer carries on or conducts **two or more operations** that are **independent** of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the work-place for that operation’.

In relation to the public service – for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining

council in a sector in the public service as the case may be; or for any other purpose, a national department, provincial administration, provincial department or Organisational component contemplated in section 792) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any other part of the public service that the Minister of Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcated as a workplace.”

The application and interpretation of this definition has led to a few arbitration and court proceedings, particularly in the private sector.

In the matter of **SACCAWU v Speciality Stores [1998] 4 BLLR 352 (LAC)**, the Labour Appeal Court confirmed Commissioners’ power to determine what constitutes a workplace for purposes of deciding Organisational rights disputes, subject to review by the Labour Court.

In **OCGAWU v Total SA (Pty) Ltd [1999] 6 BALR 678 (CCMA)** two factors were considered when determining the workplace.

1. The workplace needs to be consistent with the statutory definition.
2. The demarcation of workplaces needs to accord with the overall objectives of the LRA by being functional for the purposes of exercising Organisational rights, collective bargaining and the effective resolution of disputes.

The nature of the employer’s operation and how it conducted its business was analysed. The commissioner held that the word “independent” in the definition of a workplace in section 213 should be read in the context of the words ‘size, function or organisation’. A strict interpretation of the word independent would mean that few, if any, companies would have independent workplaces. Functional independence is determined not simply by the level of autonomy enjoyed by a specific operation but by whether it is a “functionally distinct operation” or whether it is merely incidental or ancillary to the company’s main business. The following example was presented by the Commissioner.

*[I]f the company's core business is retail and it also engages in some manufacturing/ production activity the manufacturing activity would be independent by virtue of the function it performs.*

*The power of the head office to set prices or control the accounts is not critical. This does not imply that every different function constitutes a workplace. It is only that operation which, on its own, performs a function different to that of the main business or other operations that should be defined as a workplace.*

In **OCGAWU v Woolworths (Pty) Ltd (1999) 8 CCMA 4.7.4**, the Commissioner needed to determine the meaning of workplace where the respondent company comprised 104 retail stores nationally with additional franchise stores. The trade union argued that each store constituted a workplace. The company argued that, because of the nature of how the retail chain conducted its business, with all key decisions being centralised and only implementation of decisions taking place at store level, a workplace in this context was the company's national operation.

The Commissioner analysed the definition of workplace and considered the concept within the context of the LRA as a whole. Reference was made to section 21(8) which requires a Commissioner in determining the representativeness of a trade union to "minimise the proliferation of trade union representation in a single workplace and to encourage a system of one representative trade union in a workplace".

Taking into account the provisions of section 21(8) of the LRA within the context that the LRA seeks to promote majoritarianism, sectoral bargaining and the non-proliferation of trade unions the commissioner held that if influenced by the argument that each store was declared a workplace, 104 different trade unions could emerge in each and the employer would be required to deal with them all. This would place a large administrative burden on the employer and would lead to the proliferation of trade unions. Accordingly, he found that on the facts of the case the workplace was the company's entire national operation. The case is also authority for the principle that only once the nature of the

workplace is determined should a Commissioner consider whether the trade union is sufficiently representative in that workplace.

In **Chamber of Mines of South Africa & others v AMCU & others [2014] 3 BLLR 258 (LC)**, the Court found that the individual mines owned by a number of gold mining companies did not constitute separate workplaces, and the combined operations of each company constituted one workplace. This decision was based *inter alia* on the fact that the mining licences were held by the company, not the individual mines; each mine was tightly controlled by a head office; financial, production and staffing planning was done centrally; employee remuneration was managed centrally; centralised support services were shared by the mines (e.g. human resources and IT services); procurement was managed centrally; operating procedures were standardised; all assets were owned by the company, with movable assets being transferred between mines; employees could be transferred between mines; and each mine was managed by a General Manager who reported to head office and was subject to company policies and controls.

The rights offered by the LRA to elected shopstewards are quite general and have to be given substance through a collective agreement. For example, the LRA states that a shop-steward is entitled to paid time-off to perform her/his duties. But how much time and for what activities is left for a union to negotiate with an employer.



PHOTO: SACCAWU

## Activity 5: Organisational Rights

### Aim:

To deepen understanding of Organisational rights in the workplace

### Time allocated:

50 minutes in groups  
40 minutes report backs

### Task:

Company A has 1,500 workers. 500 of these workers are organised into Trade Union B. Company A and Trade Union B regularly meet and negotiate around workers issues and reach agreement. But many workers are unhappy with the Trade Union B – they feel the trade union leadership is too close to management. They decide to form another trade union – Trade Union for Workers' Rights (TUWR). They manage to sign up 400 workers and are able to register as a trade union with the Department of Labour. Now they are demanding management gives them Organisational rights.



COSATU MARCH 2012. PHOTO: ROB REES/ NALEDI

In your groups discuss these questions:

1. Do you think you could argue you are "sufficiently representative" in the workplace to acquire Organisational rights?
2. If you are sufficiently representative, what rights do you automatically have access to? What rights don't you automatically have access to?
3. If the employer argues that you are not sufficiently representative, and refuses to negotiate with you over Organisational rights, what steps could you take?
4. Based on the guidelines contained in section 21(8) of the LRA, what are the points you can raise in support of being recognised as sufficiently representative?

## 4.3 Regulating non-standard employment

Section 198 of the Labour Relations Act (LRA) underwent significant changes with effect from January 1, 2015. New sections, sections 198A to 198D were added. These rules (explained later) are designed to protect workers who are employed by labour brokers or have jobs that are not standard (permanent). The goal is to safeguard these employees and other vulnerable workers.

The aim is to regulate non-standard work and focus on safeguarding three groups of non-standard employees, namely:

- Employees working under a Temporary Employment Service (TES) or commonly known as labour brokers (Section 198A).
- Fixed-term contract employees (Section 198B).
- Part-time employees (Section 198C).

### 4.3.1 The meaning of non-standard employment

In terms of the LRA, non-standard employees are employees who earn below a certain amount set by the Minister in terms of the Basic Conditions of Employment Act (BCEA). Most of these protections only begin after the employee has worked for 3 months. The 2023 earning threshold is R241 110.59 per year (or R20 093 per month). This means that if you are earning below R20 093 per month, you fall under the provisions of this section of the Act.

Typically, these employees receive fewer benefits than those employed on a permanent or indefinite basis. The objective of the amendments to the LRA is to ensure that they are adequately protected under the law.

### 4.3.2 Section 198A: Temporary Employment Services

Let's focus on section 198A of the LRA, which deals with Temporary Employment Services (TES) or labour brokers.

#### What is a Temporary Employment Service (TES)?

Temporary Employment Services (TES) are also known as labour brokers. TES companies hire temporary workers and place them in other businesses for short periods. The TES employs these workers, pays them, and provides some benefits while the client company gets the extra workforce without permanent hiring.

Section 198 states that an employer cannot act as a Temporary Employment Service (TES) unless it is officially registered as one. If a TES is not registered, it cannot use this as a defence against any claims made under section 198 or 198A of the LRA. In other words, not being registered will not protect them from any legal consequences related to these sections.

#### Genuine temporary employment is permitted

According to s198A of the LRA, if a TES places an employee with a client, the employee is considered an employee of the TES, not the client. This means that if the employee faces an unfair dismissal, the employee should talk to the TES about it, not the client. Even if the client's actions led to the dismissal, the TES is responsible for addressing it.

This section introduces a new meaning of "temporary service." An employee is considered to be on temporary service when they work in one of the following situations:

- They work for the client of the Temporary Employment Service (TES) for a period that doesn't go beyond three months.
- They work as a substitute for a temporarily absent employee, like someone on maternity or sabbatical leave, who intends to return to work.
- They work in a specific job category, and the time of employment is determined to be temporary based on a collective agreement

made in a bargaining council, a sectoral determination or a notice published by the Minister.

When a person starts working for a Temporary Employment Service (TES), the TES must give them written details about their job as required by section 29 of the BCEA. [Section 29 of the BCEA deals with written particulars of employment]. For those who were already employees before 1 January 2015, this information should be provided within 3 months from that date.

TES employees must have employment conditions that follow the rules set by the LRA or any other employment law, or any collective agreement that applies to the client company where the TES employee works (e.g. a bargaining council agreement). If there's a problem and the employee takes it to a hearing, the arbitrator or Labour Court can decide if the contract follows these rules. The CCMA or the Bargaining Council can then make an order or award to make sure the TES and/or the client follow the agreement or the law. A labour inspector can also issue a compliance order against either the TES or the client, or both. Any orders or awards against either the TES or the client can be enforced against them.

### **How does S198A protect TES workers?**

The importance is that the LRA introduces a new form of dismissal in s198A, where the Temporary Employment Service (TES) terminates employees who are working with a client for two reasons:

- To avoid considering them as permanent employees (deemed employment).
- Because the employee exercised a right under the LRA.

As mentioned above, Section 198A of the LRA says that employees working for a TES at a client's place for three months or less are considered to be providing a "temporary service" and will still be seen as employees of the labour broker.

But, section 198A(3)(b) says that if these workers keep working for the same client for more than three months, they will be deemed (seen) to be the employees of the client, unless there are other reasons for their work being temporary.

Therefore, the new provisions in section 198A(3)(b) concerning TES workers regards the client as the employer under the following circumstances:

- The worker earns less than the prescribed income threshold by the Minister under the BCEA.
- The worker works for the client for more than three months.
- The worker is not replacing an absent employee of the client.
- The worker is not doing a job or working for a time period considered as a "temporary service" by the Minister or any wage regulation measure that applies.

The effect of the new section 198A is that the client will be seen as the employer for any unfair dismissal or unfair labour practice by the labour broker concerning the worker.

### **Equal treatment**

According to section 198A (5), if an employee earns below the income threshold amount, they are considered an employee of the company they work for (the client). The client must treat them fairly and not give them less favourable treatment compared to other employees who do similar work unless there is a valid reason for the difference.

The *Assign Services* judgment (discussed below) explains that once this rule applies, the employee automatically gets the same job terms, conditions, benefits, growth opportunities, and job security as other permanent employees in the company. This means that the deemed employee should be treated equally on the whole to regular employees in terms of things like salary, bonuses, medical aid, provident funds, and any other benefits provided to permanent employees by the company.

In short, if the worker is a permanent employee, they must in terms of section 198A (5) of the LRA treat the worker(s) fairly on the whole, and not less favourably than an employee of the client doing the same or similar work, unless there's a justifiable reason for different treatment.

## Court decisions upholding rights for TES workers



### *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others CCT 194/17*

In 2015, a company called Assign Services, which is a TES, sent 22 workers to work at Krost Shelving and Racking (Pty) Limited (Krost). Some of these workers were members of the National Union of Metalworkers of South Africa (NUMSA). The workers provided their services to Krost for more than three months and worked full-time.

Assign Services believed that section 198A(3)(b) meant there was a dual employer relationship, but NUMSA argued that the section meant there was only one employer, the client Krost. The Commission for Conciliation, Mediation, and Arbitration (CCMA) supported NUMSA's interpretation that there was a sole-employer relationship. The Labour Court disagreed with the CCMA Commissioner and held that there was a dual employer, the TES and the client.

NUMSA appealed the Labour Court judgment. The case before the Labour Appeal Court was about how to understand section 198A(3)(b) of the LRA and whether it meant a sole employment relationship between a worker placed by a TES at the client company or a dual employment relationship involving the TES, the worker, and the client company.

The Labour Appeal Court overturned the ruling of the Labour Court and ruled that if a placed worker worked for more than three months, they were no longer considered a temporary

worker, and according to section 198A(3)(b) of the LRA, the client company would become the sole employer of the worker, not the TES.

### The decision by the Constitutional Court

The Constitutional Court made a decision on an appeal application against a ruling from the Labour Appeal Court. The Constitutional Court said that we need to understand the meaning of section 198A in connection with the right to fair labour practices (explained in section 23 of the Constitution) and the overall purpose of the Labour Relations Act. The majority of the Constitutional Court judges agreed that according to sections 198(2) and 198A(3)(b), the TES is considered the employer for the first three months when a worker is placed, but after that period, the client company becomes the sole employer.

They also said that the language used in section 198A(3)(b) of the LRA is clear, and when we look at it in the right context, it supports the idea of a sole employer.

### *NUM obo Members / Johnson Controls Automotive SA / Express Employment Professionals (Pty) Ltd, MIBCO MIPT 2010*

In the NUM obo Members / Johnson Controls Automotive SA / Express Employment Professionals (Pty) Ltd case, the commissioner ruled that NUM members placed at Johnson Controls Automotive SA by Express Employment Professionals (Pty) Ltd, and not doing temporary work, were deemed employees of the client company. These employees earned less than R 205,433.30 per year (the threshold at the time).

According to the commissioner's decision, these deemed employees were entitled to the protection provided by section 198A (5) of the LRA. They should be treated fairly and not be given less favourable treatment compared to other employees of Johnson Controls Automotive SA.

The commissioner's decision regarding the employment relationship being considered "sole employment" was in line with the judgment made by the Constitutional Court in the Assign case afterwards.

### 4.3.3 Section 198B – Fixed-term contract employees

Section 198B is one of the provisions in the LRA which seeks to protect vulnerable workers and addresses the employment of workers on fixed-term contracts.

For workers who earn below the income threshold amount, they can only be employed on fixed-term contracts for more than three months under specific circumstances. These circumstances include situations where the work itself has a limited or definite duration, such as short-term projects.

Section 198B does not apply to fixed-term contract employees in the following instances.

- Employees who earn more than the specified income threshold set by the Minister of Employment and Labour in the BCEA.
- Employers with fewer than 10 employees.
- New businesses with 10 to 50 employees, provided they have been operating for less than two years (with some exceptions listed in section 198B(2)(b)).
- Employees who have fixed-term contracts which are allowed by law, sector-specific rules, or collective agreements.

#### What are Fixed-term contracts?

Fixed-term contracts are agreements between employers and employees that have a predetermined end date or are based on completing a specific task or project.

As mentioned above, according to Section 198B, there is a distinction between fixed-term contract employees who earn above and below a certain earnings threshold. The earnings threshold amount is usually determined by the government and is subject to change over time. In 2023, the income threshold was (2023) R241,110.59 per year (equivalent to R20,092 per month).

#### How does S198B protect fixed-term workers?

The purpose of this provision is to protect vulnerable workers from being trapped in an endless series of fixed-term contracts without

reasonable justification. It aims to prevent employers from using fixed-term contracts to avoid granting workers the benefits and protections associated with permanent employment, such as paid leave, job security, and access to social benefits.

The employer must be able to demonstrate a justifiable reason for offering a fixed-term contract instead of a permanent one. In other words, they need to justify why they are not offering standard, long-term (permanent) employment.

Examples of justifiable reasons for entering into a fixed-term contract include the following (note that this is not a closed list):

- Temporarily replaces someone who is absent from work,
- Is needed due to a temporary increase in workload (lasting up to 12 months),
- Is a student or recent graduate being trained or gaining work experience,
- Works on a specific project with a defined duration,
- Is a non-citizen with a work permit for a set period,
- Is hired for seasonal work,
- Is part of a public works or job creation scheme,
- Is funded externally for a limited time, or
- Has reached the normal or agreed retirement age.

When an employer hires an employee on a fixed-term contract that lasts more than three months and cannot show that the nature of the work is limited or provide a valid reason for the contract's longer duration, the employee's employment will be automatically considered indefinite, meaning there is no specific end date to their employment.

Workers on fixed-term contracts could potentially institute two types of claims:

- Unfair dismissal claims under the extended section 186(1)(b) of the LRA: If the employer terminates the fixed-term contract before

the agreed-upon period, the employee may claim unfair dismissal.

To claim dismissal under section 186(1)(b) of the LRA, the employee must show a reasonable expectation that their fixed-term contract would be renewed or made permanent. This concept relates to past cases in Industrial Courts and unfair labour practices disputes under the 1956 LRA.

- **Claims for automatic conversion:** If the employer fails to justify the extended fixed-term contract, the employee can claim that the contract should be automatically converted into a permanent or indefinite contract of employment.

Simply put, if an employer doesn't have a valid reason for employing someone on a fixed-term contract that goes beyond three months, they could face claims for unfair dismissal or demands for automatic conversion into a permanent contract.



### **Equal treatment of workers on fixed-term contracts**

Equal treatment is addressed in sections 198B (8), (9), (10), and (11) of the LRA. If an employer cannot provide a valid reason for offering a fixed-term contract, the worker may have grounds to challenge the contract's validity and claim that they should be treated as a permanent employee, entitled to all the benefits and protections that come with such status.

Section 198B(8)(a) allows for treating employees differently only if there is a good reason for doing so. Section 198B (8), along with section 198D (2), gives examples of valid reasons, such as seniority, experience, length of service, merit, and the quality or quantity of work.

Where a worker is employed to work exclusively on a limited duration project in terms of section 198B(4)(d) for more than 2 years, the worker must be paid severance pay of one week's pay per completed year of service on completion of the project. This does not apply if the employer offers or procures employment for the employee with a different employer, on the same or similar terms, and commencing immediately on the expiry of the contract. The entitlement to severance pay may also be waived in a collective agreement.

### **In summary**

- Section 198B aims at fair use of fixed-term contracts and prevents workers from being continuously employed on short-term contracts without a genuine reason when their earnings are below the income threshold.
- Offers for fixed-term contracts or their renewal/extension must be in writing and must state the reasons for it or the extension.
- If a fixed-term contract is made or renewed without any justified reason it can be considered to be of indefinite duration.
- If necessary in legal proceedings, the employer must prove that there was a valid reason for the fixed-term contract and that both parties agreed to its terms.
- If an employer cannot provide a valid reason for a fixed-term contract, the worker may challenge the contract's validity and claim to be treated as a permanent employee, entitled to all the benefits and protections that come with such status.
- To claim dismissal under section 186(1) (b) of the LRA, the employee must show a reasonable expectation that their fixed-term contract would be renewed or made permanent.
- Section 198B doesn't apply to employers with less than 10 employees (or less than 50 if the business is under two years old, except in certain situations). It also doesn't apply to fixed-term contracts allowed by law, sector-specific rules, or collective agreements.

#### 4.3.4 Section 198C – Part-time employees

Section 198C of the LRA is designed to address the rights and protections of part-time employees. This provision applies to workers who earn below the earnings threshold.

Section 198C aims to ensure that part-time workers are not subjected to unfair or discriminatory treatment compared to their full-time counterparts. According to section 198C, an employer is prohibited from treating part-time employees less favourably than full-time employees unless there is a justifiable reason for doing so. This means that part-time workers should have equal access to various benefits, including training, skills development opportunities, and the ability to apply for job vacancies within the organisation.

The intention behind this provision is to promote fairness and equality in the workplace, regardless of an employee's employment status or working hours. Part-time workers should not be at a disadvantage merely because they work fewer hours than their full-time colleagues. They should still be entitled to the same opportunities for personal and professional growth.

However, there are specific exceptions to the application of section 198C. It does not extend to employers with fewer than 10 employees, or those with fewer than 50 employees if the business has been operational for less than two years (as also seen in the case of section 198B).

These exemptions recognise the potential challenges faced by smaller businesses in complying with certain labour regulations and aim to strike a balance between protecting part-time employees and accommodating the needs of smaller employers.

Furthermore, the provisions of section 198C do not apply to employees who work fewer than 24 hours per month. This exemption acknowledges that individuals with extremely limited working hours may have a different employment arrangement, making it less practical to apply the same regulations that govern full-time or more regular part-time positions.

Additionally, the section does not apply during the initial three months of continuous employment. This allows employers some flexibility in the early stages of an employment relationship, as both parties may still be evaluating whether the part-time arrangement is a suitable fit for their respective needs.

In conclusion, Section 198C endeavours to safeguard the rights of part-time employees earning below the specified income threshold, ensuring that they are not treated unfairly in the workplace. While it aims to provide equal opportunities and protection, it also recognises the unique circumstances of certain employers and employees, tailoring the application of the section to strike a balance between fairness and practicality.



SAMWU MARCH, TSHWANE 2007. PHOTO: ROB REES/ NALEDI

## Activity 6: Regulating non-standard employment

### Aim:

- To deepen understanding of the LRA clauses dealing with non-standard employment
- To practice skill of reading and applying the law

### Time allocated:

30 minutes in groups

15 minutes report backs

### Task:

In your groups consider the following scenarios and then discuss the questions. You can refer to sections 198A, 198B and 198C of the LRA to help you in your discussions. These sections are reproduced below:

### EXTRACT FROM LABOUR RELATIONS ACT:

#### 198A. Application of section 198 to employees earning below earnings threshold

(1) In this section, a 'temporary service' means work for a client by an employee—

- (a) for a period not exceeding three months;
- (b) as a substitute for an employee of the client who is temporarily absent; or
- (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

(3) For the purposes of this Act, an employee—

- (a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198(2); or
- (b) not performing such temporary service for the client is—
  - (i) deemed to be the employee of that client and the client is deemed to be the employer; and
  - (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

(4) The termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the client, for the purpose of avoiding the operation of subsection (3)(b) or because the employee exercised a right in terms of this Act, is a dismissal.

(5) An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

(6) The Minister must by notice in the *Government Gazette* invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the Minister in terms of subsection (1)(c).

(7) The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1)(c).

(8) If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1)(c)—

- (a) the collective agreement takes precedence over a sectoral determination or notice; and
- (b) the notice takes precedence over the sectoral determination.

(9) Employees contemplated in this section, whose services were procured for or provided to a client by a temporary employment service in terms of section 198(1) before the commencement of the Labour Relations Amendment Act, 2014, acquire the rights contemplated in subsections (3), (4) and (5) with effect from three months after the commencement of the Labour Relations Amendment Act, 2014.

### **198B. Fixed term contracts with employees earning below earnings threshold**

(1) For the purpose of this section, a 'fixed term contract' means a contract of employment that terminates on—

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to—

- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;
- (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—
  - (i) the employer conducts more than one business; or
  - (ii) the business was formed by the division or dissolution for any reason of an existing business; and
- (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.

(3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if—

- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
- (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee—

- (a) is replacing another employee who is

temporarily absent from work;

- (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
- (d) is employed to work exclusively on a specific project that has a limited or defined duration;
- (e) is a non-citizen who has been granted a work permit for a defined period;
- (f) is employed to perform seasonal work;
- (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
- (h) is employed in a position which is funded by an external source for a limited period; or
  - (i) has reached the normal or agreed retirement age applicable in the employer's business.

(5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must—

- (a) be in writing; and
- (b) state the reasons contemplated in subsection (3)(a) or (b).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8)(a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10)(a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.

(b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

(11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

### **198C. Part-time employment of employees earning below earnings threshold**

(1) For the purpose of this section—

- (a) a part-time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee; and
- (b) a comparable full-time employee—
  - (i) is an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer of that employee; and
  - (ii) does not include a full-time employee whose hours of work are temporarily reduced for operational requirements as a result of an agreement.

(2) This section does not apply—

- (a) to employees earning in excess of the threshold determined by the Minister in terms

of section 6(3) of the Basic Conditions of Employment Act;

- (b) to an employer that employs less than 10 employees or that employs less than 50 employees and whose business has been in operation for less than two years, unless—
  - (i) the employer conducts more than one business; or
  - (ii) the business was formed by the division or dissolution, for any reason, of an existing business;
- (c) to an employee who ordinarily works less than 24 hours a month for an employer; and
- (d) during an employee's first three months of continuous employment with an employer.

(3) Taking into account the working hours of a part-time employee, irrespective of when the part-time employee was employed, an employer must—

- (a) treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment; and
- (b) provide a part-time employee with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time employee.

(4) Subsection (3) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to part-time employees employed before the commencement of the Labour Relations Amendment Act, 2014.

(5) After the commencement of the Labour Relations Amendment Act, 2014, an employer must provide a part-time employee with the same access to opportunities to apply for vacancies as it provides to full-time employees.

- (6) For the purposes of identifying a comparable full-time employee, regard must be had to a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work—
- (a) in the same workplace as the part-time employee; or
  - (b) if there is no comparable full-time employee who works in the same workplace, a comparable full-time employee employed by the employer in any other workplace.

### Scenario one:

In 2023, 20 workers were placed by a Temporary Employment Services agency (TES) at a company called Filion paper products. They work full-time, and earn R18 000 a month. They have been working at the company for four months. They now want Filion to recognize that they are now employees of the company rather than of the TES.

1. What are the factors the union can rely on to make the argument that the workers are now full-time employees of Filion?
2. What clauses in the LRA would you refer to to justify your answer?



2011 NATIONAL CLEANING STRIKE, JOHANNESBURG.  
PHOTO: ROB REES/NALEDI

### Scenario two:

Thabo is a worker at Abundance Jams, a small factory making jam. He earns R10 000 a month. The company is currently employing 8 workers during the season. He is on a fixed term contract for three months, working on the production line to turn fruit into jam. His contract has just been extended for a further three months and his responsibilities are now to work in the factory shop where the jams are sold.

1. Thabo wants the employer to now recognize him as a permanent employee but the employer is refusing.
2. What clauses in the LRA can Thabo use to support his position?
3. What clauses in the LRA can the employer use to support their position?

### Scenario three:

Sonja works part-time for a upholstery company. There are 60 full time workers employed in the company who sew the chair coverings and 5 part time workers who sew on the trim.

1. According to section 198C of the LRA, what are the provisions that must be met before the provisions of this section will apply to Sonja so that she is treated the same as the full-time employees.

## Activity 7: Dispute of Interest or Dispute of Rights, and what dispute procedure to follow?

### Aim:

- To consolidate understanding of disputes of interest and disputes of right
- To practice skill of identifying appropriate dispute resolution mechanism

### Task:

Fill in the table below, by identifying whether the case is a dispute of interest or a dispute of right. Tick the appropriate column. Then identify what the dispute resolution mechanism is that you should use.

### Time allocated:

30 minutes in groups

15 minutes report backs

Case	Dispute of right	Dispute of interest	Dispute resolution mechanism
You are negotiating with a company over a production bonus, but you can't reach agreement. The company falls under a bargaining council.			
There is a dispute between a trade union and the employer over organisational rights of access and stop-order facilities. A bargaining council covers the workplace, and both trade union and employer are parties to the bargaining council			
A group of 20 employees lodge a dispute at the CCMA. They allege that they have not had an increase in years and want their employer to give them one. They are also demanding paternity leave, overtime payments and death benefits.			

<p>A worker is dismissed, allegedly for misconduct. However, the union believes the reason for dismissal is victimization.</p>			
<p>Busi Miya is dismissed for theft of an apple from the grocery store where she works. She says she did not steal the apple, but picked it out of the crate of blemished fruit that was being thrown away.</p>			
<p>A small group of workers have managed to sign up the vast majority of workers in their workplace to the union. The workers have elected a team of shopstewards to represent them. The shopstewards write to management asking them to recognize the union and the shopstewards. Management refuses.</p>			
<p>The union has been negotiating wages with Company A for three months. The company and the union are still far apart and it is clear that no resolution is going to be reached. Management wants to refer the dispute for arbitration. What is your response and what are the options that are open to you?</p>			



MARCH BY STRIKING ESKOM WORKERS TO MEGAWATT PARK, JUNE 2018. PHOTO: LYNFORD DOR

## 4.4 Disputes

A dispute is any disagreement between an employer and workers. Trying to resolve disputes in the workplace is one of the biggest tasks facing trade union activists. Many of these disputes, if not resolved in the workplace, end up at the CCMA, a bargaining council or the Labour Courts.

The LRA dispute resolution system aims to:

- create a framework in which employers, unions, and workers can regulate their own relations and resolve their disputes;
- establish a simple and quick dispute resolution procedure;
- reduce the level of strike action.

What sections of the LRA deal with dispute resolution?

- Chapter 7 of the LRA (sections 112 – 184)
- Schedule 4 of the LRA contains a number of flow diagrams showing the steps that must be taken for resolving different kinds of disputes.

### 4.4.1 Disputes of interest and disputes of right

Section 213 of the LRA does not provide much guidance in its definition of 'dispute'. It simply states that "dispute" includes an alleged dispute. It also does not clearly distinguish between what we have come to know as disputes of interests and disputes of rights. This distinction is however explained by the processes and institutions established to deal with disputes.

A dispute of rights may broadly be explained as a dispute regarding existing rights. A dispute of interest is generally about rights that either one or both of the parties are seeking to establish i.e. new rights. The LRA distinguishes between rights and interests disputes by dividing them into disputes that may be resolved by arbitration (CCMA, Bargaining Councils) or adjudication (the courts) and those that may form the subject of industrial action. The LRA does, however, make two very clear exceptions to this approach in

the area of organisational rights and large scale retrenchments. As we explain earlier in the manual, a dispute on the granting of section 12 – 15 organisational rights to a registered union may be pursued through either strike action or arbitration. Large scale retrenchments – which would normally be regarded as a rights dispute – may be pursued by way of adjudication or strike action.

Let us spell out a bit more what we mean by a dispute of right and a dispute of interest?

#### Disputes of right

A right is something that a worker is entitled to. Disputes of right generally have to do with legal rights that already exist in legislation, contract of employment or collective agreement, that have either not been granted or have been taken away.

Examples of disputes of right could include:

- disputes over unfair dismissal
- disputes over unfair labour practices
- failure to implement legally determined terms and conditions of employment
- failure to honour an existing or long-standing practice
- failure to implement a sectoral determination
- non-compliance with a collective agreement [S33A(4)]

They are generally dealt with by arbitration (in the CCMA or bargaining council), or adjudication (in the Labour Court). Once the internal dispute resolution mechanism has been exhausted, the dispute is referred to the CCMA or Bargaining Council for conciliation. If conciliation fails, they will either go forward to arbitration or to the Labour Court.

#### Disputes of interest

These disputes relate to wants or needs – where workers, for instance, are involved in negotiations over wage increases or changes to their conditions of employment. Workers are

not necessarily legally entitled to a particular wage increase, or to change their conditions of employment, and to achieve their want/need they need to win it in some way.

Disputes of interest are generally dealt with through negotiations, conciliation and strikes or lockouts.

### **Matters of mutual interest**

Another term used at various places in the LRA is “matters of mutual interest”. This term is also not defined in the LRA, but it is important to understand what it means for purposes of understanding the labour dispute resolution process in the LRA. It is generally accepted that a matter of mutual interest relates to any issue concerning the employment relationship. The Constitutional Court in *Department of Home Affairs (Department of Public Service and Administration intervening) v Public Service Association and Others (CCT148/16)* said that interest and rights disputes are both matters of mutual interest. Further that whether a matter is a dispute of interest or a dispute of rights is irrelevant for the determination of whether it may trigger conciliation under the LRA.

### **The distinction between disputes of interest and disputes of rights**

Notwithstanding the explanation given above, the distinction between interest and rights disputes are not always clear. In order to make this distinction one must first ask on what is the claim made? For example, if it is based on a collective agreement, the claim is a rights dispute. If there is a claim for closing the wage gap between senior management and workers, it may be framed as a rights dispute if the claimants allege discrimination. This was the basis of the claim in *Louw v Golden Arrow Bus Services (Pty) Ltd [2000] 3 BLLR 311 (LC)*. But, the demand to narrow the wage gap could also constitute a dispute of interest. The matter would turn on whether the employees were alleging that the wage gap was due to the employer’s discriminatory practices or simply alleging that they felt that they should be paid more given the difference between their pay and that received by management.

In *Rustenburg Base Metal Refiners (Pty) Ltd & another v NUM & others [2002] 11 BLLR 1097 (LC)* the unions had been involved in protracted disputes over the existing medical aid scheme and the union’s proposal to establish a new scheme. The union referred a dispute to the CCMA requesting conciliation, but the employer held that as the issue was governed by an existing collective agreement the CCMA should be interdicted from conciliating the matter. The Court held that as the dispute appeared to concern the interpretation and/or application of the relevant collective agreement, the CCMA had jurisdiction to entertain the dispute. The CCMA could establish if the dispute had shifted from the scope of the employees’ terms and conditions of employment to a dispute of interest.

The important part of the decision of the Court is that it confers broad jurisdiction on the CCMA to deal with industrial relations disputes, even if the CCMA did not have jurisdiction to arbitrate the case and even if it turned out during the course of conciliation that the matter was in fact covered by a collective agreement inhibiting the parties’ freedom to initiate strike action.

### **Does the LRA deal with interest and rights disputes in the same way?**

The LRA sets out a different procedure to resolve disputes of right and disputes of interest. Disputes of right may be referred to adjudication by the Labour Court or arbitration by an arbitrator. Disputes of interest are not referred to adjudication or arbitration, except in the case of essential services. Where no final and binding legal remedy is available, the parties may try to win their demands by the exercise of their economic power, through a strike or lock-out.

Disputes that the LRA requires must be dealt with by way of adjudication or arbitration may in general terms be classed as rights disputes. The use of power is generally not an option in relation to rights disputes. If there are competing legal claims, the matter must be adjudicated.

The bargaining process itself (which may include industrial action) must sort out interest issues; the interest basket is substantially judge-proof. But the demand giving rise to the strike must not

relate to anything that is illegal. In *TSI Holdings (Pty) Ltd v NUMSA (2006) 27 ILJ 1483 (LAC)* the LAC held that a demand couched as an interest dispute but demanding that a manager be dismissed is an impermissible demand since the proposed strike would violate the manager's right to due process and would require as an outcome that the employer act unlawfully. The strike was therefore for an illegal demand and interdicted as such.

### Disputes in essential services

Disputes that arise in services that have been designated as essential services, either by statute or the Essential Services Commission (ESC) must be determined by arbitration or litigation.

An essential service is defined in section 213 of the LRA as a service the interruption of which would endanger the health or safety of the community. If mutual interest disputes are not resolved at conciliation, they proceed to arbitration. The CCMA or a bargaining council has jurisdiction to arbitrate interest disputes in essential services if the issue is not regulated by a binding collective agreement or an arbitration award. This was confirmed in *Progressive Trade Union of South Africa / Western Province Blood Transfusion Service (2007) 28 ILJ 976 (CCMA)*.

### Disputes about the proposed termination of workers based on operational requirements

Section 189A of the LRA gives workers, in circumstances where the employer is contemplating mass retrenchments, the right to strike over the fairness of the reason for the dismissal. Those disputes can also be referred to the Labour Court for adjudication. While the dispute about the fairness of an operational requirements dismissal is classically a rights dispute, it may be resolved either by industrial action or adjudication. However, if the union elects to strike it cannot later change its mind and refer the matter to the Labour Court and vice versa.

### 4.4.2 Procedures for resolving rights disputes

A major difficulty lies in deciding when, and regarding which issues, workers and/or their unions, and employers should be compelled to rely on the courts or arbitrators, rather than resolving their disputes by industrial action. We look at this rather complex question below.

As previously stated, the underlying philosophy of the LRA is that industrial action should be reserved for 'disputes of interest', i.e. demands or needs to which the employees concerned are not legally entitled. Where a legal right or entitlement is at issue, the preferred solution is arbitration or adjudication.



EPWP WORKERS PROTESTING OUTSIDE THE BUFFALO CITY MAYOR'S OFFICE DEMANDING TO BE EMPLOYED PERMANENTLY. PHOTO: ELITSHA

The LRA contains three main procedures for resolving rights disputes:

- Conciliation;
- Arbitration; and
- Adjudication

DEFINITIONS	
<b>CONCILIATION</b>	This is a process in terms of which a neutral third party (a conciliator) attempts to assist the disputing parties in reaching a settlement. The conciliator facilitates the attempt to settle the dispute by means of consensus (seeking agreement) but does not decide who is right or wrong. For our purposes the conciliator is appointed by the CCMA, a bargaining council, a statutory council or an accredited agency. See also s 135 of the LRA.
<b>ARBITRATION</b>	This is a process in which a neutral third person (an arbitrator) hears evidence presented by both disputing parties and decides who is right or wrong on the basis of the evidence placed before him/her and the applicable law. The outcome of the arbitration is recorded in the form of an award and there is generally no right of appeal against the outcome of an arbitration. It is a process which resembles adjudication.
<b>ADJUDICATION</b>	This is a formal process which takes place in a court, for example the Labour Court. A judge hears the evidence presented by both disputing parties and decides who is right or wrong based on the evidence placed before him/her and the applicable law. The outcome of the adjudication process is recorded in the form of a judgment and there is a right to appeal from the Labour Court to the Labour Appeal Court. A final appeal can be lodged with the Constitutional Court if the issue in dispute raises a constitutional point.



STRIKING SIMBA FACTORY WORKERS PICKET INSIDE THE GATES OF THE COMPANY'S PREMISES IN ISANDO BECAUSE SECURITY WOULD NOT LET THEM OUT TO PROTEST. THEY WERE EVENTUALLY LET OUT A COUPLE OF HOURS LATER. PHOTOS: KIMBERLY MUTANDIRO/GROUNDUP

The jurisdiction of the Labour Court is set out in s 157 of the LRA. In terms of those provisions 'the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court'. This means that when an Act requires or empowers the Labour Court to adjudicate a matter, no other court has jurisdiction.

Despite this, the Labour Court has concurrent jurisdiction with the High Court in respect of 'any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution [the Bill of Rights], which arises from 'employment and from labour relations'; disputes 'over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer' and over 'the application of any law for the administration of which the Minister [of Labour] is responsible'.

Section 157 has been the subject of much debate, and the dividing line between matters over which the Labour Court has exclusive jurisdiction and those in respect of which it shares jurisdiction with the High Court is sometimes difficult to determine. At times, the High Court has declined to assume jurisdiction in cases involving alleged unfair labour practices by the State. For example, the court has refused to entertain applications concerning the suspension of public sector employees and the interpretation of collective agreements. At other times the High Court has held that its jurisdiction is excluded only when the matter falls clearly within the provisions of the LRA. Thus, the High Court has assumed jurisdiction to grant an interdict restraining employees from assaulting others, even though the underlying dispute concerned the appointment of a particular employee.

The civil courts have also guarded their jurisdiction over purely contractual claims. The Supreme Court of Appeal has held that the High Court retains jurisdiction over claims for contractual damages for unlawful dismissals. However, the Labour Court has concurrent jurisdiction over 'any matter concerning a contract of employment' (s 77(3), BCEA). But the High Court and the Labour Court also have

concurrent jurisdiction over disputes arising from the provisions of the Basic Conditions of Employment Act, because basic conditions of employment laid down by the Act become part of workers' contracts of employment.

The concurrent jurisdiction enjoyed by the High Court and Labour Court over administrative action by the state in its capacity as employer has raised the question whether public sector employers and private sector employers were subject to different legal principles when it comes to disciplining their employees. This is in theory possible because the High Court applies the principles of administrative law, while the Labour Court applies the principles of labour law. However, this debate ended with the Constitutional Court's judgment in **Chirwa v Transnet Ltd and others (2008) 29 ILJ 73 (CC)**. The court decided in that case that dismissals do not constitute reviewable administrative action and that dismissed public servants must seek their remedies under the LRA. This means that the Labour Court has exclusive jurisdiction in respect of all matters where relief can be obtained under the LRA.

The Labour Appeal Court has been given the appellate jurisdiction formerly exercised by the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) in labour matters. Until 2012 both the Supreme Court of Appeal and the Constitutional Court have the right to hear appeals from the Labour Appeal Court and even, in some cases, directly from the Labour Court. However, the Constitutional amendments adopted in 2012 have established the Labour Appeal Court as the highest court of appeal in labour matters apart from the Constitutional Court, which is now the 'apex court' in all matters 'of general public importance.

In addition, the LRA permits the parties to settle certain disputes by privately agreed procedures, in this case private arbitration.

## DIFFERENCES BETWEEN ARBITRATION AND CONCILIATION

Arbitration and conciliation are both designed to resolve labour disputes but are very different processes. Consider the comparative table below:

CONCILIATION	ARBITRATION
Informal, non-legalistic	More formal – a legal process
Facilitated by a neutral conciliator	Process controlled by arbitrator
Without prejudice and off the record	Mechanically recorded and everything said will be considered by the arbitrator
Conciliator controls process – has no decision-making powers	Arbitrator controls process and makes decisions, called rulings, throughout the process.
Parties control outcome – whether to settle the dispute or not	Arbitrator controls outcome by deciding which party succeeds in the dispute.
Conciliation is relatively short – one to two hours at most	Arbitration is usually longer, depending on the number of witnesses.
Parties “tell their story”	Parties and their witnesses give evidence under oath.
Parties may ask each other questions for clarity	All witnesses may be cross-examined by the other party.
Parties are frequently separated into side caucus	Parties are never separated but remain in the arbitration room together throughout process.
Documents can be presented and discussed but are not evidence	Documents used to prove any fact must be formally submitted to the arbitrator as evidence.
Parties are not entitled to legal representation (See section below on legal representation)	In certain dismissal disputes, parties are entitled to legal representation and may apply for legal representation in misconduct and incapacity disputes.
<p>The conciliator cannot force parties to resolve the dispute and even an advisory award is not binding on the parties.</p> <p>If the dispute is settled, an agreement will normally be drawn up that will end the matter. The commissioner will issue a certificate recording that the dispute has been settled. If the dispute is certified unresolved, the parties may give notice of a strike or lock-out or refer the matter to the Labour Court or for arbitration. The way the commissioner classifies the dispute binds neither arbitrators nor the Labour Court.</p>	<p>The arbitrator determines the dispute by issuing a final and binding award. Arbitration awards can be taken on review in terms of section 145 of the LRA. This is not an appeal.</p> <p>Section 24 (7) of the LRA does however provide for awards in certain disputes about agency shop and closed shop agreements to be taken on appeal.</p>

## Legal Representation

The issue of representation at CCMA proceedings is dealt with in Rule 25 of the CCMA's rules. The rules specifically state that workers may appear in person or be represented by a registered trade union. As only about a quarter of workers are unionized, this leaves many non-unionized workers to represent themselves in CCMA proceedings. It is especially vulnerable workers like domestic, farm, and labour broker workers that are most affected.

The CWAO, the Black Sash and the Maokeng Advice and Resource Centre, in 2016, filed an application to the courts challenging rule 25. They requested that the rule be amended to allow workers to be represented, amongst others, by community advice offices and/or fellow employees. The matter was settled out of court on the basis that the proper interpretation of rule 25 allows a commissioner to authorize representation of any party by another person, if good cause is shown. The CCMA was ordered to issue what is called a practice note advising commissioners how this discretion must be exercised. The practice note must also include specific reference to representation by community advice offices.

The CCMA complied with this and released Practice Note 2/2016 stating how commissioner discretion should be exercised, specifically that:

- Without derogating from the guidelines provided above, Commissioners should give consideration to applications for representation by community advice offices registered under the Non-Profit Organisations Act 71 of 1997, in assessing these applications Commissioners are advised to be alive to the following factors:-
  - Employees do not have an automatic right to representation by community advice offices. Good cause must be shown, taking into account the relevant factors listed above.
  - Representation by a community advice office will often be appropriate in complex matters, where employees would benefit from representation by lawyers or trade union representatives but are unable to access their services.
- Proof that the relevant community advice office is duly registered under the Non-Profit Organisations Act 71 of 1997 must be produced.

The wording of the directive is clearly unfair and continue to prejudice and discriminate against vulnerable workers. Unionised workers are automatically granted the right to be represented by their trade union office bearers and members.

What has worsened the situation is that intention of the Practice Note has been incorporated into the rules referred to above but on even more onerous terms. Rule 25 (6) reads as follows:

*(6) Despite the provisions of sub-rule (1), but subject to the provisions of sub-rule (1)(f), the commissioner may, on application brought in accordance with rule 31, allow a person not contemplated in sub-rule (1) to represent a party at arbitration proceedings before the commission, after considering-*

- (a) whether it is unreasonable to expect the applicant party to deal with the dispute without representation, after considering the factors set out in sub-rule 1(c)(ii)(a) to (d);*
- (b) The reason why a person contemplated in rule 25(1)(b) cannot represent the applicant party, which includes affordability, if applicable;*
- (c) The ability of the proposed representative to meaningfully represent the applicant;*
- (d) Whether the proposed representative is subject to the oversight and discipline of a professional or statutory body;*
- (e) Whether the proposed representative will contribute to the fairness of the proceedings and the expeditious resolution of the dispute;*
- (f) Prejudice to the other party; and*
- (g) Any other relevant factors.*

According to the CWAO, what was considered a victory when the out of court settlement was reached in 2016, has not delivered justice to vulnerable unorganised workers on the issue of representation.

### Some further notes on arbitration and what is termed 'con-arb'

- **Advisory arbitration:** The parties are not bound by the arbitrator's determination. It assists parties to better negotiate a solution. (See s 64(2) and s 135 (3) (c) of the LRA)
- **Final and binding arbitration:** the most common form. (See s 143 of the LRA)
- **Pre-dismissal arbitration s 188A of the LRA:** the employer may with the consent of the employee request the CCMA or a Bargaining Council or an accredited agency to conduct an inquiry into allegations about the conduct or capacity of that employee. This replaces the employer's internal hearing and the award that is made is final and binding.

**NOTE:** "Pre-dismissal arbitration" is renamed "Inquiry by arbitrator" in terms of the amended s 188A.

In the public service, a parallel provision to s 188A of the LRA is provided for in terms of clause 7.3.c of Resolution 1 of 2003 (a collective agreement setting out a disciplinary code and procedure). It provides that the employer and employee can agree to dispense with the internal hearing and appeal and go straight to arbitration before a relevant bargaining council. A panelist of a relevant council sits to chair the disciplinary enquiry.

Provision is also made at section 191(5A) for an expedited procedure, consisting of conciliation followed immediately by arbitration, in the case of any dispute that can be referred to arbitration. This is referred to as **con-arb**. Section 191(5A) of the LRA provides that the commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved for:-

- any reason relating to probation; or
- any alleged unfair labour practice relating to probation.

In other matters e.g. conduct, capacity etc. con-arb can only take place if neither party has objected.



THE HIGH COURT OF JOHANNESBURG PHOTO: ASHRAF HENDRIKS/GROUNDUP

## Activity 8: Understanding dismissals – is this a dismissal?

**Aim:**

To explore participants' understanding of what a dismissal covers

**Time allocated:**

20 minutes in groups

10 minutes report backs

**Task:**

Decide whether the following situations fall within the definition of "dismissal" in section 186. You are not required to decide if the dismissal is "fair", only whether or not a dismissal has taken place as defined in the LRA.

1. An employee hands in her resignation because the employer has served her with a notice to attend a disciplinary enquiry.
2. An employee who has been absent without leave for two weeks is told upon his return to work that he has "dismissed himself".
3. A woman who was absent from work for the statutory period of maternity leave is told upon her return to work that her job no longer exists due to a restructuring exercise that took place in her absence.
4. An employee who was appointed for four months in place of someone who was on maternity leave is told at the end of the period that her services have ended.
5. An employer re-employs the fifty most productive employees out of two hundred who were dismissed for participation in an unprotected strike.
6. An employee reaches the agreed retirement age. Her request for continued employment is turned down by her employer and she is told to leave.
7. An employee is employed on numerous fixed-term contracts for the same job. When the last contract expires, the employee is told that his contract would not be renewed, although the job continues and will now be occupied by someone else
8. An employee has become too ill to do her work. However, instead of dismissing the employee for incapacity, it is agreed between them to terminate their contract of employment by agreement.

## 4.5 Dismissals

### 4.5.1 The basics of dismissals

Labour law protects workers from unfair dismissal and has legal safeguards to ensure that employees are not subjected to unfair or unjust termination by employers. It is supposed to provide adequate protection to employees against wrongful dismissal, particularly in situations where the termination could lead to social and economic hardships for the affected worker.

This section will examine the law around dismissals.

#### What is a dismissal?

In a dismissal the employment relationship is ended, in one way or another, by the employer and can take on a number of different forms.

There are two ways an employer can end the employment relationship. The first is called “summary dismissal,” which happens when an employer immediately dismiss a worker because of serious misconduct. The second way is “termination by notice,” where the employer gives the employee advance notice before they stop working together.

It’s important to note that when an employee decides to leave on their own, it’s called “voluntary resignation” and not a “dismissal” because the employee made the choice to leave.

#### How does the LRA protect workers against unfair and unlawful dismissals?

*Section 185* of the LRA says that a dismissal must be lawful and it must be fair.

- **A lawful dismissal** means that the employer must give notice to the employee either in terms of the Basic Conditions of Employment Act or in terms of the contract of employment;
- **A fair dismissal** must be both substantively fair (there is a **good reason** for the dismissal) and procedurally fair (the **correct procedure** must have been followed)

There are only three reasons for a fair dismissal:

- **Dismissal based on misconduct** – Dismissal due to misconduct occurs when an employee purposefully or carelessly violates a workplace rule.
- **Dismissal based on incapacity** – Dismissal due to incapacity happens when an employee is unable to perform their work duties due to reasons like illness or the person’s inability.
- **Dismissal based on operational reasons** – Dismissal due to operational reasons (retrenchment) occurs when an employer needs to reduce the workforce due to business-related matters.

*Section 192* of the Labour Relations Act says that if you are alleging that a dismissal is unfair, you first have to prove that you were dismissed. Once you have done this, the employer then must prove that the dismissal was substantively and procedurally fair.

#### When is an employee dismissed?

*Section 186 (1)* of the LRA says that an employee has been dismissed if:

- An employer ends an employee’s contract of employment with or without giving notice to the said employee.
- An employee has a reasonable expectation that the employer will renew a fixed-term contract, and the employer either does not renew it or renews it on worse terms than before.
- An employer refuses to allow a female worker to return after maternity leave.
- An employer selectively re-employs some employees but fails to re-employ others from a group of employees who were dismissed for the same or similar reasons.
- An employer terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197(A), provided the employee with conditions or circumstances of work that are substantially less favourable to the employee than those provided by the old employer.

- An employer makes it intolerable for the worker to continue working so that s/he walks out or resigns from the job. This is known as **constructive dismissal**. In such cases, it is important to show how bad the problem with the employer was, and how attempts were made to resolve it. The most common instances here are harassment, discrimination, abusive treatment or victimisation. The employee needs to demonstrate that resigning was done as a means of self-defense as there was no other means of remedying (correct) the situation.

All these forms of dismissal share a common characteristic: they result in the termination (end) of employment by the employer.

### Why is establishing the date of dismissal important?

According to the LRA, there is a specific time frame within which an unfair dismissal dispute should be referred to the Commission for Conciliation, Mediation, and Arbitration (CCMA) or the relevant Bargaining Council. This time frame is set at 30 calendar days from the date of dismissal. It's crucial to note that all days, including weekends and public holidays, are counted when calculating the 30-day period.

If the 30th day happens to fall on a Sunday or a public holiday, the dispute may still be referred on the next working day. This provision allows parties to refer the dispute on the first working day following the weekend or public holiday when the 30-day deadline cannot be met due to these circumstances.

### What are the consequences if a party fails to refer the matter within the prescribed time for dismissal disputes?

If a party fails to refer the dispute within the 30-day time limit and does not have good reasons for the delay, the commissioner may dismiss the referral without hearing the case. However, there is an option for a late referral, but it must be accompanied by an application for condonation. The party referring the dispute which is late (or out of time) must explain the reasons for the delay and also demonstrate the chances of success in overturning the dismissal.

### What is the date of dismissal?

The date of dismissal is determined as the earlier of two possibilities:

- The date on which the contract of employment is ended or terminated, which is typically when the employer formally terminated the employment relationship.
- The date on which the employee stopped working for the employer, even if the formal termination process had not yet taken place. This situation often arises when an employee resigns, and the employer accepts the resignation immediately, without the need for the employee to work through a notice period.

It's important for both employers and employees to be aware of these time frames and regulations to ensure that they comply with the LRA and protect their rights in the event of an unfair dismissal dispute.

*Section 37* of the BCEA states that an employer must give the employee notice should s/he wish to terminate that employee's service.

The notice period is dependent on how long the employee has been employed:

- **one week**, if the employee has been employed for *four weeks or less*;
- **two weeks**, if the employee has been employed for *more than four weeks* but not more than one year;
- **four weeks**, if the employee has been employed for *one year or more*; or is a farm worker or domestic worker who has been employed for more than four weeks.

Should an employee not work out the notice period by agreement with the employer, then the date of dismissal is the date the employee leaves the employer's service.

Should an appeal hearing be held after the worker has left service, the date of dismissal is considered to be the date of leaving service. However, the dismissed employee can file the dismissal dispute within 30 days of receiving the outcome of the appeal process.

## Substantive fairness

Employers are required to adhere to legal requirements in both substance and procedure. As a result, any termination should exhibit fairness in both substantive and procedural fairness.

Substantive fairness in dismissals means that the employer must have a good reason to dismiss an employee or terminate employment. Having a “good reason” is essential to ensure that actions taken by employers are fair and legally sound.

The substantive fairness provision S188(1) in the LRA provides that;

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
- (a) that the reason for dismissal is a fair reason-*
- (i) related to the employee’s conduct or capacity, or*
- (ii) based on the employer’s operational requirements;*

In dismissals based on **conduct** “good reason” is established by the process of **inquiry** into an employee’s behaviour or actions that may be deemed inappropriate or against company policies. Conduct inquiries are typically conducted to gather facts, evidence, and information before making decisions related to employee discipline or potential dismissal.

In dismissals based on **capacity** “good reason” is established by the process of an **investigation** into an employee’s ability or capacity to perform their job effectively. It could involve assessing whether an employee possesses the required skills, qualifications, and capabilities to fulfil their job responsibilities.

Dismissal based on the employer’s **operational requirements** involves the legal obligation of an employer to engage in **consultation** with employees or their representatives, such as trade unions, when making decisions that involve significant changes to the business, such as retrenchments or layoffs based on operational requirements.

## Procedural fairness

The main requirement for procedural fairness is that the employee must be given an opportunity to present his or her case. This is referred to as the *audi altem partem* rule – the right to be heard. In practice, this is usually referred to as a disciplinary enquiry or hearing, but it does not need to be a formal enquiry.

Though the LRA does not lay down rules for disciplinary hearings, employers are expected to have due regard to the guidelines set out in the Code of Good Practice, item 4.

### What are automatically unfair dismissals?

Automatically unfair dismissals are a type of dismissal that happens when an employer terminates an employee’s job for reasons that violate their basic human rights or certain rights provided by the Labour Relations Act (LRA).

According to Section 187 of the LRA, a dismissal is automatically unfair if it occurs for any of the following reasons:

- Being involved in trade union activities or being a member of a trade union.
- Participating in a protected strike or engaging in legal strike procedures.
- Refusing to do the work of someone participating in a protected strike, except when it endangers someone’s health or safety.
- Being pregnant or facing any discrimination related to pregnancy.
- Not accepting an employer’s offer in a matter of mutual interest, such as a wage increase.
- Facing discrimination based on factors like age, gender, sexual orientation, religion, race, etc., except when retirement is specified in a contract or collective agreement. However, some jobs might require employees to share the same religious beliefs as the institution they work for, so a change or loss of faith in such cases could lead to dismissal.
- Dismissal resulting from a business transfer as per section 197 or 197A of the LRA or for reasons related to such a transfer. Also,

if an employee makes a protected disclosure under the *Protected Disclosures Act of 2000*.

Dismissals are also automatically unfair if the reason behind them violates the fundamental rights of employees and trade unions as outlined in section 5 of the LRA. Section 5 safeguards the right to freedom of association, including the right to be part of trade unions and workplace forums, and it applies to both employees and those seeking employment.

In the case, *SA Chemical Workers Union v Afrox (1999) 20 ILJ 1718 (LAC)* the union alleged that the workers were dismissed for taking part in a protected strike and that the dismissals were thus automatically unfair. The employer, on the other hand, alleged that the dismissals were based on its operational requirements.

Faced with these conflicting claims, the Labour Appeal Court laid down the following test for determining the true cause of the dismissal:

- The first step is to determine factual causation: would the dismissal have occurred but for the strike? If so, it cannot be automatically unfair.
- If not, factual causation is established and the enquiry must proceed to legal causation: was participation in the strike the 'main', 'dominant' or 'most likely' cause of the dismissal? If so, the dismissal is automatically unfair.

Once an automatically unfair reason for dismissal has been proved, an employer cannot raise any defence. However, section 187(2) provides two statutory defences relating to dismissals based on what would otherwise amount to unfair discrimination in terms of section 187(1) (f).

These defences are:

- That the reason for the dismissal in fact amounts to an inherent requirement of the job in question; and
- In case of dismissal based on age, the employee has reached the normal or agreed retirement age.

## 4.5.2 Dismissal based on misconduct

Dismissal due to misconduct occurs when an employee purposefully or carelessly violates a workplace rule. Court decisions and jurisprudence related to dismissals based on conduct have been consolidated in Chapter 8 of the LRA, along with guidelines in Schedule 8, which contains the Code of Good Practice: Dismissal.

### Some Principles

- The guidelines in place for arbitrators serve to limit their powers, ensuring that they conduct factual inquiries in a constrained and consistent manner.
- These guidelines also act as a reference, providing a checklist of issues to consider before a hearing, guidance on admitting evidence, and a template for organizing and evaluating the evidence presented during the proceedings.
- Additionally, arbitrators should take into account the Supplementary Guidelines that commonly arise in arbitration cases to ensure a comprehensive and fair assessment of the matter at hand.
- The Codes of Good Practice on Dismissal promote a progressive approach to discipline, meaning that disciplinary actions should be applied in a gradual manner, taking into consideration the severity of the misconduct and the employee's previous behaviour. Generally, employees should not get dismissed for a first offence, unless the misconduct is serious.
- Additionally, each dismissal case should be evaluated based on its unique circumstances and merits, rather than applying a one-size-fits-all approach.

Schedule 8 offers guidelines on how to determine if a dismissal based on conduct is substantively and procedurally fair.

### Substantive fairness

According to item 7 of the Code of Good Practice; Dismissal, the following questions need to be answered in order to decide whether a fair reason for a dismissal based on misconduct exists:

- Did the employee contravene a workplace rule?
- Was the employee aware of the rule or should he/she have been aware of it?
- Is the rule valid or reasonable?
- Has the rule been applied consistently?
- Is dismissal an appropriate sanction for the contravention?

We will examine each of these questions which an employer / or an arbitrator must interrogate to establish whether fair reason exists to dismiss an employee or confirm such a dismissal.

**Question 1: Did the employee break a workplace rule?**

For an employee to break a rule, such a rule must exist in the workplace. These rules may not always be written down, such as theft, but they are based on general legal norms and apply to everyone, including employees. It's better to have rules in writing to avoid disputes about their existence, but if they are not written down, verbal evidence may be needed.

Unlike in a criminal trial where the burden of proof is "beyond a reasonable doubt," for dismissal, the employer only needs to show evidence that is more likely than not that the employee broke the rule.

Workplace rules can be found in policy manuals, disciplinary codes, collective agreements, appointment letters, notice boards, and employment contracts. These rules deal with employee behaviour, not performance standards, which are different issues and can lead to dismissals based on poor work performance.

**Question 2: Was the employee aware of the rule or should s/he have been aware of it?**

This question becomes relevant when a rule is not written in a document that employees are made aware of, such as a notice board. It would be unjust to take disciplinary action against employees who are unaware of a rule they are accused of breaking. The key factor is whether the employee could reasonably have been

expected to know about the rule. If the answer is 'yes', then the lack of a written document is not significant. However, if the employee could not reasonably be expected to know about the rule, the employer must inform all employees about it and warn them about the consequences of violating it.

**Question 3: Is the rule valid or reasonable?**

Case law has established that an employee cannot face disciplinary action for not following rules that are unlawful, meaning rules that go against the Basic Conditions of Employment Act (BCEA) or other applicable laws. Additionally, an employee cannot be disciplined if obeying the rule would be unreasonable and put them at risk or cause harm.

Example: Imagine an employee working in a factory where the management implements a rule that requires employees to work overtime without proper compensation, exceeding the maximum working hours allowed by the BCEA. In this situation, the employee cannot be disciplined for refusing to work excessive overtime since the rule is unlawful and contradicts the protections provided by the BCEA. Similarly, if the factory has a rule that requires employees to handle hazardous materials without proper safety equipment, the employee cannot be disciplined for refusing to comply, as it would expose them to undue risk and harm.

**Question 4: Has the rule been applied consistently?**

Inconsistency in disciplinary actions can arise when a rule has been applied differently in the past or when it is being applied differently to employees facing similar misconduct charges. If there are no valid and objective reasons, such as personal circumstances, justifying the differing treatment, inconsistent discipline is likely to result in substantive unfairness.

Example: In a company, two employees are found to have engaged in the same form of misconduct, such as being late to work on multiple occasions. Employee A is given a verbal warning, while Employee B is immediately dismissed for the same offence. Both employees have similar work records, and there are no special circumstances or reasons for the difference in disciplinary measures. In this scenario, the inconsistency in

the application of disciplinary actions suggests substantive unfairness, as both employees should have been treated equally for the same misconduct.

**Question 5: Is dismissal a fair sanction for the contravention?**

Item 3(5) of the Code of Good Practice suggests that when considering whether to dismiss an employee, the employer should take into account various factors. These factors include the severity of the misconduct, the employee's circumstances (such as length of service, past disciplinary record, and personal situation), the nature of the job, and the specific circumstances surrounding the misconduct.

Relevant indicators of a fair dismissal may include previous valid warnings for similar infractions, actions that pose harm to the safety of others or the employer's property, the seriousness of the misconduct, and the context in which it occurred.

On the other hand, factors that may suggest dismissal is inappropriate include a clean disciplinary record concerning the same or similar violations, long-term service with a good overall performance record, genuine remorse shown by the employee, and openness about the misconduct.

It's essential to note that there is no fixed formula for weighing these factors. The decision on the appropriate sanction depends on the employer's judgment and the specifics of the situation.

Example: Let's consider an example of two employees in a retail store who are caught stealing from the company. Employee X has been with the store for five years, has no prior disciplinary issues, and expresses genuine remorse for their actions. Employee Y, on the other hand, has a history of warnings for similar incidents, and their actions resulted in significant financial harm to the store.

In this case, the employer might consider different disciplinary measures for Employee X and Employee Y. Despite the seriousness of both employees' misconduct, Employee X's clean disciplinary record and genuine remorse might

lead the employer to consider a final written warning or suspension, while Employee Y's past disciplinary issues and the severity of the latest theft might warrant dismissal. The employer's judgment will be crucial in determining the appropriate course of action in each situation.

Many years ago, in *Nampak Corrugated Wadeville v Khoza* (1999) 20 ILJ 578 (LAC), the Labour Appeal Court ruled as follows:

*The determination of an appropriate sanction is a matter largely within the discretion of the employer. However, this discretion should be exercised fairly. ... The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case, the sanction was reasonable. ... In my view, interference with the sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case ... where the sanction is so excessive as to shock one's sense of fairness.*

The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) laid down the following approach:

*First, [the arbitrator] has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based. This involves an inquiry into whether there was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes a determination on the issue of misconduct. . . . There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator.*

## Procedural fairness

The Code of Good Practice: Dismissal explains that, if there has been an alleged contravention of a rule, the employer has a duty to investigate the incident before dismissal or any other penalty can be imposed.

The following are the main guidelines for procedural fairness for misconduct dismissals:

- The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.
- The employee should be allowed the opportunity to state a case in response to the allegations.
- The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.
- After the enquiry, the employer should communicate the decision taken, 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 a council with jurisdiction or to the Commission or to any dispute resolution procedures established in terms of a collective agreement.
- In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

The Labour Court has emphasised in a number of cases that misconduct should not be seen in the framework of criminal law, where people are found 'guilty' of 'offences'. It is about whether duties arising from a contractual relationship have been contravened.

There is no requirement that an outside person should chair a disciplinary hearing. Natural justice requires only that the hearing must be in good faith. This means that the chairperson must be impartial and should not be the same manager who made the allegation of misconduct.

It is important to remember the difference between legal rules and guidelines. The Code of Good Practice (like employers' procedures) is only a guide to fairness.

## How does the legal status of procedures in a workplace influence how an arbitrator assesses the procedural fairness of a dismissal?

The legal status of procedures in a workplace will influence how an arbitrator assesses the procedural fairness of a dismissal.

### *There are three main categories of workplace disciplinary procedures:*

*Collective Agreements:* In cases where a collective agreement is in place, the Code of Good Practice on Dismissal is not directly applicable. Instead, the procedural fairness of the dismissal should be evaluated based on the agreed-upon procedures in the collective agreement. The arbitrator should follow these agreed procedures unless they are deemed unfair or do not cover an issue required by the Code.

*Contractually Binding Procedures:* If there are procedures that are contractually binding between the employer and the employee (e.g., outlined in the employment contract), they have a different status compared to collective agreements. In such cases, the procedural fairness of the dismissal is assessed against the Code of Good Practice on Dismissal. If there is a conflict between the contractual procedures and the Code, the employer must provide a valid justification for deviating from the Code. If the contractual procedures are more stringent (onerous) than the Code, procedural fairness is tested against the contractual procedures.

*Common Law and Non-Contractual Procedures:* In situations where there are no specific collective agreements or contractually binding procedures, the procedural fairness of the dismissal is assessed based on the common law principles and the Code of Good Practice on Dismissal.

In summary, the legal status of the procedures in a workplace will determine whether the arbitrator evaluates procedural fairness based on a collective agreement, a contractual procedure,

or the Code of Good Practice, and any conflicts or deviations from the Code must be adequately justified by the employer.

It means that an employer (or employee) may depart from the Code when appropriate, but must uphold its standards of fairness. However, where a disciplinary procedure is incorporated in an employee's contract of employment, the employee may insist that the procedure be followed to the letter.

### **Misconduct by strikers**

Employers may take disciplinary action against workers engaging in misconduct during either a protected or unprotected strike. Taking part in an unprotected strike is itself treated by the Code of Good Practice as a form of misconduct and the employer may take disciplinary action against workers for doing so, including dismissal. But, as in any dismissal, the employer must have a fair reason to dismiss related to such misconduct and follow a fair procedure.

However, any alleged misconduct must be linked to specific individuals; there can be no 'common purpose' or 'guilt by association' based on mere participation in a strike where the misconduct occurred. The employer may also not single out some workers – for example, strike leaders – if others were also involved in the same alleged misconduct.

A trade union must take all reasonable steps to prevent misconduct during a strike. However, a protected strike will remain protected even if misconduct occurs and innocent strikers will not be affected.

### **Substantive fairness in the dismissal of unprotected strikers**

The following questions must be taken into account in determining the substantive fairness of a strike dismissal:

- *Was the strike in fact unprotected?*

It can only be unprotected if the workers failed to follow pre-strike procedures in terms of section 64 of the LRA and/or strike action over the issue

in dispute was not permitted in terms of section 65.

- *Was the conduct in question serious enough to warrant dismissal?*

A factor that would aggravate the conduct is if the union made no attempt to comply with pre-strike procedures. Factors which may reduce the seriousness include provocative conduct by the employer, short duration of the strike, lack of violence and limited economic harm to the employer.

- *Has the employer waived its right to dismiss?*

If the strikers complied with an ultimatum to return to work, the employer will have waived its right to dismiss.

### **Misconduct by shop stewards**

Section 97(3) of the LRA states that shop stewards (trade union representatives) are:

*not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith ... while performing their functions for the trade union.*

They are also protected against any form of victimisation [s 5], and the dismissal of an employee for exercising any right in terms of the LRA is automatically unfair [s 187(1)(d)].

However, trade union representatives (shop stewards) still remain subject to their employer's disciplinary rules, including the duty to obey lawful instructions, even though in their union capacity they need to negotiate with the employer on an equal footing. This includes situations – for example, representing employees in disciplinary enquiries or wage bargaining – where the relationship may be adversarial. This means that shop stewards need to strike a balance between their role as such and their role as employees.

The Code of Good Practice: Dismissal recognises the dilemma by requiring the trade union to be notified of any disciplinary action against a shop steward. However, by then it may be too late.

In representing employees at disciplinary enquiries shop stewards are required to conduct themselves in an honest, diligent and appropriate manner.

In *Adcock Ingram Critical Care v CCMA & others [2001] 9 BLLR 979 (LAC)* a shop steward was dismissed as a result of a threat uttered in a meeting with his employers. The court held that negotiating parties should treat each other with respect, even though the normal rules of insubordination cannot be applied. The test is whether a shop steward's conduct falls within the limits of fair and acceptable bargaining tactics and is reasonably related to the exercise of the shop steward's functions. If not, the employer may take disciplinary action against the shop steward.

### **Derivative misconduct**

Derivative misconduct can be described generally as a form of misconduct which arises through the failure of an employee to offer reasonable assistance in the detection and identification of those employees who are actually responsible for some form of misconduct. In other words, those employees who are aware of an act of misconduct but choose to remain silent make themselves guilty of a derivative violation of the trust relationship.

Corporate entities with labour-intensive environments are often the victims of significant stock losses or malicious acts which result in significant and repeated financial loss to the employer.

Due to the large work force and/or closely associated employees, it becomes difficult to identify and discipline the culprits. To make matters worse, those involved generally conceal one another's identities either out of intimidation or to derive further secret profits.

### **What is an employer to do? The answer lies in collective disciplinary action on the basis of 'derivative misconduct'.**

The *Labour Appeal Court in Chauke & Others v Lee Service Centre t/a Leeson Motors (1998) 19 ILJ 1441 (LAC)* defined derivative or residual misconduct as, "the situation where employees

possess information that would enable the employer to identify wrongdoers, and that those employees who fail to come forward when asked to do so, violate the trust upon which the employment relationship is founded."

The concept of derivative misconduct was clarified by the Constitutional Court in the recent judgment of *National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others cCT 202/18*.

The National Union of Metalworkers of South Africa (NUMSA) represented Khanyile Nganezi and other Dunlop employees. During a protected strike led by NUMSA on 22 August 2012, there were allegations of serious violence, intimidation, and property damage. As a result, Dunlop dismissed the workers involved in the strike, including 65 workers who were not individually identified but were dismissed for derivative misconduct.

NUMSA contested the fairness of these dismissals and sought reinstatement for the affected workers through an arbitration process. However, both the Labour Court (LC) and the Labour Appeal Court (LAC) held that the employees had a duty to help identify the perpetrators of the violence, and their failure to do so made them guilty of derivative misconduct. The LC set aside the arbitration award, and the majority in the LAC upheld this decision.

The Constitutional Court, in a unanimous judgment led by *Froneman J*, ruled against using the duty to disclose as an easier way to dismiss employees instead of holding them accountable for their individual involvement in violent misconduct. This approach could lead to harsher penalties for employees who were not directly involved in the primary misconduct. The Court also clarified that the contractual duty of good faith does not impose a unilateral fiduciary obligation on employees to report misconduct by their co-workers to the employer. Imposing such obligations on either employees or employers may favour one side and could be problematic, particularly in matters related to collective bargaining, strikes, or lockouts.

The Constitutional Court emphasized that imposing a duty to disclose during a strike might affect the right to strike. Even if a protected strike turns violent, the right to strike remains relevant in the assessment, and the circumstances of the strike are essential in evaluating the reciprocal duties of good faith.

Requiring employees to act as informants for the employer during a strike, where worker solidarity is crucial in the power dynamics between workers and employers, would be unreasonable without a corresponding obligation on the employer. Dunlop had a reciprocal duty of good faith, which should have ensured the safety of its employees before expecting them to disclose information or defend themselves. However, this was not adequately fulfilled.

As a result, the Constitutional Court upheld the appeal, setting aside the orders of the Labour Court and the Labour Appeal Court.

### 4.5.3 Dismissal based on operational requirements

Section 213 of the Labour Relations Act (LRA) provides a definition for “operational requirements,” categorizing them as dismissals for economic, technological, structural, or analogous reasons.

The Code of Good Practice on Dismissal based on Operational Requirements explains the following:

*“As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.”*

Operational requirement dismissals also referred to as retrenchments, are thus based on the “economic, technological, structural or similar needs of the employer.” The phrase “similar”

should be strictly interpreted and not include reasons relating to the conduct or performance of employee(s).

Companies may need to alter their operational approaches due to economic fluctuations and global competitiveness. Dismissals based on these grounds are considered ‘*no-fault*’ dismissals, implying that the motivation for dismissal stems from the employer’s operational necessities rather than any misconduct on the employee’s part.

#### **Substantive fairness in dismissals based on operational requirements**

Employers are only entitled to dismiss employees for a *fair* reason based on operational requirements. The purpose may be to ensure the continued viability of a business or to increase profitability. However, the mere fact that a genuine operational requirement is at stake is not enough; the reason for the dismissal must also be fair.

In the case of *Mohlotsane v Mobile Telephone Network (Pty) Limited [2013] JOL 31073 (LC)* the employee argued that her dismissal by the respondent was procedurally and substantively unfair due to non-compliance with labour laws and the retrenchment policy. The challenge included a lack of justifiable reason, improper consultation, and failure to explore alternatives. The Court ruled that employers can terminate for operational reasons but must do so fairly. Fairness involves procedure and reason. The procedure includes consulting affected parties as per section 189, aiming to avoid or minimise dismissals, and agreeing on selection criteria. If the selection criteria are not agreed upon, fair and objective criteria must be used. The onus to prove fairness lies with the employer. The respondent failed fair procedure; the applicant’s dismissal was both procedurally and substantively unfair. The court ordered the respondent to reinstate the applicant with retrospective benefits.

The courts have been reluctant to ‘second-guess’ an employer’s operational decisions, which judges may not be competent to do. However, the courts have found it important to assess the real reason for dismissal; in other words,

whether the alleged operational requirement is real or whether it is a 'sham' (e.g., a cover for an ulterior motive).

This question becomes especially important when the employer's (alleged) operational requirements translate into a change in terms and conditions of employment, which the workers reject and may resort to strike action.

In **SA Chemical Workers Union v Afrox (1999) 20 ILJ 1718 (LAC)**, where workers on a protected strike against changes to their terms and conditions of employment were dismissed, the Labour Appeal Court held that *"it can no longer be said that the court's function in scrutinising the consultation process . . . is merely to determine the good faith of the employer . . . The matter is now one of proof by the employer, on a balance of probabilities, of:*

- (a) the cause or reason for the dismissal . . . ;*
- (b) the defined 'operational requirements that the dismissal was based on . . . ;*
- (c) a fair procedure in accordance with section 189 . . . ;*
- (d) the facts upon which a finding of a substantively fair reason for the dismissal can be made."*

The Labour Appeal Court determined that within section 189(2), it's understood that the employer, alongside participating in formal consultations outlined in the section, is also required to independently take steps to prevent dismissals. This means the employer not only possesses the right but also an obligation, to seek alternatives to dismissal before initiating consultations. By implication, dismissal is only considered when all such alternatives have been thoroughly explored.

Hence, the union should look for indications that the so-called operational reason is primarily a mere bargaining demand rather than an operational term and condition, e.g. a change in a shift system or hours of work, that is actually or potentially affecting the viability of the company.

For example, where the employer is faced with economic collapse as a result of a strike, it may resort to retrenchment, in this way transforming an interest dispute into a rights dispute. Similarly,

in the context of a restructuring exercise, an interest dispute may end in dismissals when collective bargaining fails. This can only be justified, however, if the employer can "show a need to dismiss not for bargaining leverage – that is not allowed – but because of genuine operational requirements".

This was illustrated in **Fry's Metals (Pty) Ltd v NUMSA & others (2003) 24 ILJ 133 (LAC)**, where the employer wanted to change its shift system in order to increase profitability. The unions rejected the plan and the employer warned of the possibility of retrenchments. The Court addressed the argument concerning the permissibility of operational requirement-based dismissals aimed at generating more profit, as opposed to those intended to secure the survival of a business or undertaking. The argument was rooted in the article *"Bargaining, Business Restructuring and the Operational Requirements Dismissal"*<sup>1</sup>. Zondo JP, in his consideration of this submission, found no statutory basis for such an argument within our legal framework. The Act recognises an employer's authority to dismiss based on operational requirements, without distinguishing between a struggling business and one seeking to enhance its profit margins.

In the end, The Labour Appeal Court decided that dismissal aimed at getting rid of employees who refuse to meet the employer's operational requirements and employing new employees who will do so is based on operational requirements.

The 2014 amendments to the LRA changed section 187(1)(c) to prohibit dismissal where the reason for dismissal is *"a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer"*.

This means that employers will now need to negotiate on changes to terms and conditions of employment until there is agreement or resort to a lock-out to try to break the deadlock. Retrenchments based on a genuine operational reason, other than the employees' refusal to agree to a demand, will not be affected. This will, however, have to be launched as a separate process in terms of section 189 and not simply as a response to the bargaining deadlock.

<sup>1</sup> Thompson, published in (1999) 20 ILJ 755

## Procedure

### 1) Written Notice by the employer

The consultation process with pertinent parties aims to establish a just and transparent approach to decision-making when considering dismissals based on operational requirements. Section 189(3) of the LRA ensures that the employer is obligated to furnish a written notice, extending an invitation to the other party involved in consultation, in order to engage in consultation.

This notice should also encompass written disclosure of all pertinent information, which includes, but is not confined to;

- Reasons for the proposed dismissals
- Alternatives considered and reasons for rejecting each of those alternatives
- Number of employees likely to be affected and their job categories
- Proposed selection criteria
- Time when the dismissals are likely to take effect
- Severance pay proposed
- Any assistance to the employees likely to be dismissed
- The possibility of future re-employment
- The number of employees employed by the employer; and
- The number of employees that the employer retrenched in the preceding 12 months.

### 2) Who must be consulted?

As per section 189(1) of the LRA, when an employer considers the possibility of terminating the employment of one or more employees due to the employer's operational needs, the employer is obligated to engage in consultation with the relevant party.

The sequence of consultation parties, as stipulated in the section, is as follows:

- Parties mentioned in a collective agreement.

- In the absence of a collective agreement, the workplace forum (if established), and any registered trade union whose members could be impacted by the intended dismissals.
- If no workplace forum exists, any registered trade union whose members are likely to be affected.
- In the absence of a trade union, the employees anticipated to be affected or their chosen representatives.

### 3) What is the nature of the consultation?

Section 189 serves as a framework to ensure equitability and is not intended to encompass every detail:

- Achieving agreement is the preferred outcome of the consultation process, yet it's not obligatory.
- There's no predetermined timeframe; the process should span a reasonable period to allow for proposal sharing.
- Consultation entails participation from both parties.
- While the employer may begin discussions with initial anticipations, they should remain open to novel ideas and be willing to modify their viewpoints.
- Establishing whether **joint consensus-seeking** was successful or not is pivotal.
- Even in cases of inevitable dismissal, seeking consensus remains crucial. Matters such as severance pay and re-employment still necessitate comprehensive consultation.
- The consultative process is an integrated whole; each phase leads to the next.

### 4) What constitutes a joint-consensus-seeking process?

A joint-consensus-seeking process is defined in S189(5) and (6) of the LRA, and it entails that the employer must grant the other consulting party a chance to present their viewpoints on any subject under discussion during the consultation. Additionally, the employer is obligated to assess

and address the viewpoints put forth by the other consulting party. In instances where agreement is not reached, the employer must clarify the reasons behind their disagreement.

### 5) What is the purpose of the consultation process?

- The main goal of the consultation is to always try to prevent or make dismissals as few as possible (minimize dismissals).
- This includes considering if the timing of the dismissals could be adjusted.
- Also, it's about lessening the negative impacts of the dismissals on everyone involved.
- When choosing who might be let go, the criteria for selection are important.
- The money given to employees leaving (severance pay) is also discussed.
- Agreement should be reached on how the selection criteria are set, or if there's no agreement, the criteria should be fair and unbiased.
- Criteria that harm people's fundamental rights can never be thought of as fair. For example, things like being part of a union, being pregnant, or other forms of unjust discrimination. On the other hand, criteria that are usually seen as fair include how long someone has worked, their skills, and qualifications. In general, using the 'last in, first out' principle often meets the requirements for fair and unbiased criteria.

### What is the duration of the consultation?

In small-scale retrenchments (employers with 10 or fewer employees and retrenching one or more employees), there's no set time frame for discussions before giving a termination notice.

However, the talks should be enough to provide chances for:

- Sharing updates with employees
- Having a conversation with the employer

- Asking for, receiving, and reviewing information

For large-scale retrenchments (employers with more than 50 employees and retrenching more than ten employees), there must be a minimum of 60 days from the notice as defined in section 189(3) before a termination notice can be issued.

### Challenging fairness: Small-scale retrenchments

The general rule is that there is no separation made between the substantive and the procedural aspects in a dispute involving small-scale retrenchments.

The workers have 30 days to refer their dispute to the CCMA or relevant Bargaining Council for conciliation. If this is unsuccessful, there is an option to escalate the matter by referring it to the Labour Court.

### Large-scale retrenchments

Section 189A is built on the idea of separating fairness into two parts when it comes to dismissals due to operational reasons in large-scale retrenchments. It establishes separate processes for disputes relating to the reason for dismissal as opposed to the procedure followed by the employer.

### What is a large-scale retrenchment?

Section 189A(1) of the LRA outlines a formula that defines what is meant by large-scale retrenchments, as follows:

*S189A(1) applies to employers employing more than 50 employees if-*

*(a) the employer contemplates dismissing by reason of the employer's operational requirements, at least-*

*(i) 10 employees, if the employer employs up to 200 employees;*

*(ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;*

(iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;

(iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or

(v) 50 employees, if the employer employs more than 500 employees; or

(b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (a).

In this context, the general rule is that there is a separation made between the substantive and the procedural aspects when a dispute involves large-scale retrenchments.

### Challenging fairness: Large-scale retrenchments

S 189A (13) provides that the Labour Court may:

- compel the employer to comply with a fair procedure;
- interdict or restrain the employer from dismissing an employee prior to complying with a fair procedure;
- direct the employer to reinstate an employee until it has complied with a fair procedure;
- make an award of compensation, if the above is not appropriate

An interdict (a legal order to prevent an action) must be sought within 30 days after the notice of termination, as outlined in sections 189A (13) and 189A (17).

Previously, it was established that if an employer failed to adhere to the timeframes outlined in section 189A of the LRA, it would render the dismissal invalid, effectively treating the retrenchment as if it had not taken place. However, in 2016, the Constitutional Court ruled differently. The court held that the view that non-

compliance with the procedural timeframes in section 189A(2)(a) of the LRA in conjunction with section 189A(8) results in an invalid dismissal is incorrect. Instead, it was determined that such non-compliance impacts only the procedural fairness of the retrenchment.

The leading case is **Edcon v Steenkamp (2018) 3 BLLR 230 (LAC)**, where an employer gave early notice of dismissal before the consultation period ended, the unanimous ruling of the Labour Appeal Court determined that not adhering to both section 189A(2)(a) and section 189A(8) doesn't automatically make a dismissal invalid. According to Murphy AJA, premature notice of termination leads to a cause of action under section 189A (13) due to non-compliance with proper procedure. This decision was upheld by the Constitutional Court in **Steenkamp v Edcon Ltd (2019) 40 ILJ 1731 (CC)**. Therefore, disputes about procedural unfairness may be referred to the Labour Court directly by way of application within 30 days of the notice of dismissal [s189A (13)]. The Labour Court may order compliance with a fair procedure, interdict the employer from proceeding with dismissals before complying with the procedural requirements, order the reinstatement of the dismissed employees or order compensation.

After the Constitutional Court's decision, the former employees who were dismissed later sought compensation under section 189A (13) (d). However, the decision was appealed, and the Labour Appeal Court clarified that section 189A (13) is meant to ensure fairness during current or recent consultation processes, rather than being a way to seek compensation long after being dismissed. Therefore, the argument presented by the workers was not in line with the intent and purpose of section 189A (13)

If no effort is undertaken to rectify the procedural oversight within the specified timeframe, employees essentially lose the ability to pursue it further. The importance of S189A (13) acknowledges the difficulty of undoing retrenchments involving substantial numbers of employees long after the fact and seeks to address procedural lapses while it is still feasible to restore the process.

Section 189A of the LRA introduces additional procedural requirements in the case of large-scale retrenchments. It provides for the appointment of a facilitator at the request of either the employer or employees to utilise the statutory period of 60 days to promote agreement between the parties. No retrenchments can take place during this period.

If no facilitator is appointed, a minimum period of 30 days is laid down for the parties to consult and a further 30 days for conciliation to run its course before retrenchments can take place. The Labour Relations Amendment Act of 2014 adds that *“a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.”*

If there is a facilitator involved, and they issue a notice of termination, conciliation is not necessary. The matter can proceed to either the Labour Court or a strike, as defined by section 189A (7). In cases where there is no facilitator, and a notice of termination is issued, the procedure involves going through the CCMA or the relevant Bargaining Council for conciliation. After this, the workers can proceed to the Labour Court or strike, as per section 189A (8).

### The right to strike against proposed retrenchments

Section 189A only applies where the employer has more than 50 employees and proposes to retrench (effectively) more than 10% of the workforce [s189A (1)]. If so, the union (or workers) have a choice whether to refer a dispute about the *reason* for the proposed dismissals (i.e., substantive fairness) to the Labour Court for adjudication or whether to take strike action.

In general, strike action over an issue that can be referred to arbitration or to the Labour Court is not protected (s 65, LRA). Strike action against proposed dismissals is therefore, in principle, unprotected. One of the main aims of the LRA is to reduce the number of strikes. Unfair dismissals have to proceed either to the CCMA or the Bargaining Council for arbitration. If conciliation fails, then the case proceeds to arbitration or

to the Labour Court for judgment. In response to union protests against job losses, however, Parliament in 2002 enacted a new section 189A of the LRA to create an exception to this rule.

Section 189A lays down a detailed process of engagement and possible facilitation that must be followed before the right to strike (or dismissals) can be implemented. The aim is to allow the parties to determine whether the reason for dismissal given by the employer constitutes a genuine operational requirement. This process is discussed in more detail below.

Thereafter the employees may challenge the dismissal either by referring the dispute to the Labour Court for adjudication or by embarking on strike action after giving the 48-hour strike notice required by section 64. This choice is final; once it is made the employees are bound by it.



MASSMART WORKERS MARCH TO THE WALMART-OWNED COMPANY'S HEAD OFFICE, JUNE 2021. PHOTO: JULIA EVANS/GROUNDUP

## Activity 9: Types of Dismissals

**Aim:**

To explore the different types of dismissals that exist

**Time allocated:**

45 minutes group work  
30 minutes report back

**Task:**

Complete the following table by ticking the block that describes what type of dismissal each example is.

	Misconduct	Incapacity	Operational requirements	Automatically Unfair Dismissals
1 Mr Singh was employed as a messenger. He lost his job when the work was combined with that of the tea maker and the tea maker did both the jobs.				
2 When the rest of the factory was on protected strike, Mr Malope was asked to do the work normally done by the strikers. It was not essential work, so he refused to do it and carried on with his own work. He was dismissed for this.				
3 Mr Dlamini was dismissed by his employer for sleeping on the job.				
4 Mr Zondo's son was killed. After the death, Mr Zondo lost interest in his job and his work performance declined. As a result, he was dismissed.				
5 Mrs Coetzee worked as a receptionist. She was dismissed because she was white and the company wanted a black receptionist.				
6 Mr Ngobeni was dismissed for being drunk at work.				
7 Mrs Moroka was two months pregnant was experiencing complications with her pregnancy. As a result she took more sick leave than she was entitled to. She does not always have a sick certificate. After several warnings for being absent without permission, or for excessive absenteeism for illness, she is dismissed.				

8	Mary is struggling with an abusive partner. Her situation at home is getting worse and worse. As a result of this, her work performance has been suffering. She is dismissed.				
9	Themba, who relies on public transport to get to work is late for work for the fourth time in a week. She says this is due to road works that have caused big traffic jams and will continue to do so for the next six months. She is eventually dismissed for continual late coming.				
10	Jan and Nkosinathi have recently been sent on the same computer literacy course to improve their skills. Nkosinathi has improved significantly, but Jan is still unable to meet the required performance standard. As a result he has been dismissed.				

### Activity 10: Handling dismissals: a case study

<p><b>Aim:</b> To consolidate participants' understanding of dismissals</p> <p><b>Time allocated:</b> 45 minutes group work 30 minutes report back</p>	<p><b>Task:</b> Read the case study and then discuss the questions that follow:</p>
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Thabo has worked for Company A for 20 years. He started off on the factory floor but is now a driver for the company. He has started being absent frequently on a Monday. In the last few weeks, there have been three occasions when alcohol can be smelt on his breathe at work, and he appears to be drunk. On the second occasion the company issued him with a written warning. On the third occasion he was issues with a notice to attend a disciplinary enquiry and was subsequently dismissed.

#### Questions for discussion:

What type of dismissal is this?

1. Do you think the company followed a fair procedure? What should they have done differently?
2. Does the Code of Good Practice provide for a right of appeal against disciplinary decisions?
3. What factors could have been used in mitigation of sentence?

## 4.6 Strikes

The Constitution provides that every worker has the right to form and join a trade union, participate in its activities and programmes and to strike. Like any other right, however, the right to strike is not absolute and is subject to certain procedural and substantive limitations. There are procedures that must be followed for the strike to be protected, but in some circumstances, the right to strike is prohibited.

The Constitutional Court has stated that the right to strike *'is what makes collective bargaining work'* and that *'it is to the process of bargaining what an engine is to a motor vehicle'* (at para 67).

This section does not deal with strikes from an organisational perspective. Instead, we examine strikes from a legal perspective. We look at the definition of a strike; the procedural and substantive conditions that should exist for a strike to be protected; and some relevant case law dealing with strikes.

### 4.6.1 Definition of strikes

A strike is defined in section 213 of the LRA as 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee' and every reference to 'work' in this definition includes overtime work whether voluntary or compulsory (emphasis added). This definition is analysed below.

'Lock-outs', which are intended to apply economic pressure on workers by preventing them from working in order to compel them to accept amendments to their contracts of employment, can either be 'offensive' or 'defensive.' The former is at the employer's initiative, the latter is in response to a strike whereby the employer indicates to employees that they can only return to work if they are prepared to drop (some or all) of their demands.

Given the above, the court in *Transport and Allied Workers Union of South Africa v Algoa Bus Company (Pty) Ltd (2013) 8 BLLR 823 (LC)* held that the exclusion of workers from a workplace in the context of a national strike where no specific demand was directed at the employees in question and where these employees could not concede to the employers demand which had been placed at a national bargaining council did not fall within the definition of a lock-out. The court in this matter did however indicate that employers could, at common law, exclude employees from the workplace if their purpose in coming into the workplace is not to perform their duties. Employees could also be excluded from the workplace for purposes other than a lock-out where, for example, they enter the workplace and refuse to work.

### Unpacking the definition of a strike

Understanding whether industrial action falls within the definition of a strike is important for two reasons. Only strikes as defined by the LRA are subject to the procedural and substantive limitations stipulated in the LRA and industrial action must amount to a strike, as defined, to enjoy the protections afforded by the LRA. The definition of 'strike' has been interpreted by the courts in many cases.

In *City of Johannesburg Metropolitan Municipality v SAMWU and others (2009) 5 BLLR 431 (LC)* the union had been in dispute with the employer over a number of issues. It eventually gave notice to strike over two of these: first, that pensioners are not re-engaged by the employer and, second, that certain senior managers be suspended. They qualified the second demand by adding "after due process". The employer applied to the court to interdict the strike. The Labour Court held that the matter turned on three issues:

- the identification of the issues that gave rise to the strike;
- whether the proposed action fell within the definition of a strike; and
- whether, if it was a strike, the participants were protected.

The court noted that industrial action only falls within the statutory definition of a strike if the demands of the strikers are lawful. The demand in respect of the suspension, given that the employer had not completed the process but was able to do so, and the demand relating to the pensioners were found to be lawful. Consequently, the court concluded that the withdrawal of labour in support of this demand would constitute a strike. The court held that, as the union had satisfied all the procedural requirements stipulated in the LRA, the participants would therefore be protected.

### **'Concerted'**

In ***Schoeman and Another v Samsung Electronics SA (Pty) Ltd (1997) 18 ILJ 1098 (LC)*** it was held that an individual worker cannot go on a protected strike as the definition refers to *persons* and the term *concerted* implies two or more persons acting with a common purpose.

The above decision, without reference to that matter, was overturned in ***Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA (2007) 1 BLLR 55 (LC)*** where the judge, at para 23, held that "Section 64 allows even a single employee to strike."

The matter was however settled by the Constitutional Court in ***SATAWU v Moloto NO (2012) 12 BLLR 1193 (CC)*** where it was confirmed that 'single worker's stoppage of work cannot amount to a strike under the Act.'

### **Refusal to 'work'**

The term 'work' applies to work which employees are contractually required to do and which is lawful (not in contravention of any statute). Overtime, both compulsory and voluntary, is included in the concept of work. This raises the question as to whether a work-to-rule falls within the definition of a strike. A work-to-rule generally refers to a situation where workers collectively decide to only do the minimum that they are legally contracted to do and nothing more. It can be argued that if this form of collective action carries with it a demand and/or is aimed at resolving a grievance, it could fall

within the definition of a strike.

### **Partial or complete retardation or obstruction of work**

This term covers a whole range of actions which may constitute strike action: a complete work stoppage, overtime bans, a refusal to carry out certain activities or where workers physically obstruct work. This approach flows from an earlier judgment by the Appellate Division in ***SA Breweries Ltd v FAWU (1990) (1) SA 92 (A)***, a matter brought under the 1956 LRA.

### **Remedying a grievance or resolving a dispute**

While the wording appears to imply that the action must be accompanied by a specific demand, the court in ***City of Johannesburg Metropolitan Municipality v SAMWU (2011) 7 BLLR 663 (LC)*** held that there is nothing in the LRA that requires that parties to articulate a demand or declare a dispute before referring the matter to pre-strike conciliation. All it needs to show is that a dispute in fact exists and that it involves a matter of mutual interest.

### **'Matter of mutual interest'**

Disputes in a collective bargaining context are generally divided into what are termed 'disputes of right' and 'disputes of interest'. The former relates to the interpretation and application of rights that are incorporated in collective agreements, statutes or contracts. The latter is about forming new rights by concluding agreements or adding to/amending existing agreements.

In general, strike action in connection with disputes of right (as discussed below) is not included in the right to strike; it applies mainly to 'disputes of interest'. The LRA does not use this term, but it does limit strikes to matters of 'mutual interest'. It has been left up to the courts to determine what constitutes a matter of mutual interest.

Disputes about the meaning of the term however go back to long before the enactment of the present LRA. In ***Rand Tyres & Associates (Pty)***

**Ltd v Industrial Council for the Motor Industry Transvaal (1941)** TPD the employer argued that the regulation of trading hours was not a 'matter of mutual interest' but a trade policy. However, the court decided otherwise:

"There is no reason, in truth, why a matter of trade policy should not be a mutual interest to employer and employees. Whatever can fairly and reasonably be regarded as calculated to promote the well-being of the trade concerned, must be of a 'mutual interest' to them; and there can be no justification for restricting in any way powers which the legislature had been at the greatest pains to frame in the widest possible language."

The Labour Court in **City of Johannesburg Metropolitan Municipality v SAMWU (2011) 7 BLLR 663 (LC)** distinguished between a dispute over a matter of 'mutual interest' and a 'dispute of interest' in the context of a strike. A matter of mutual interest, it was held, 'is any matter concerning employment.'

This term is therefore broad enough to encompass almost any matter, which affects the relationship between the employer and employee, but it does have limits. For example, a matter that falls within the employer's exclusive responsibility or authority, or is required by law, will not be a matter of mutual interest.

In **Transnet Ltd v SATAWU and Another (2011) 11 BLLR 1123 (LC)** the company had rejected demands from the union that the company abandon changes to its shift roster (because the shop stewards had not been consulted) and that a manager be disciplined for 'incompatibility' or incompetence. The dispute was not resolved at conciliation and the union issued a strike notice. The company's argument was that the strike notice was defective because it failed to indicate which employees would participate in the strike, that the employees were bound by a collective agreement, which regulated the dispute, and that the union had failed to indicate why the manager concerned should be disciplined. The court agreed that the notice was defective and confirmed that a strike notice must inform the employer of the extent of a strike.

As for the shift change, the company argued that consultation was not required by the collective agreement regulating hours of work. The agreement also provided that disputes concerning application or interpretation of the collective agreement must be referred for arbitration to the bargaining council. The current dispute, it was argued, was one of interpretation. The court agreed.

Regarding the demand to discipline the manager, the court noted that the union had provided no reasons other than stating that they did not like his management style. Instituting disciplinary action against an employee without any basis, it was found, is inherently unfair. The interdict was therefore granted.

In **Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU and Others (2011) 3 BLLR 231 (LC)** the employer had indicated that it intended changing the shift systems of its drivers in an effort to make the service more effective. The union submitted a dispute to the bargaining council regarding a unilateral amendment to terms and conditions of employment. The employer denied that its actions constituted unilateral action but that it was merely complying with a bargaining council agreement regulating working hours. The matter was not resolved, and the union gave notice that it intended to strike. The employer approached the court for an interdict. The court, after consideration of the information before it, held that the proposed changes indeed fell within the parameters allowed by the agreement, that the union had been consulted and that the changes simply amounted to a change of work practice. The interdict was granted.

Even here, a distinction needs to be drawn between concepts such as 'exclusive responsibility' and 'primary responsibility'. In **Pikitup Ltd v SAMWU obo members and others (2013) 11 BLLR 1118 (LC)** the court (after initially granting an urgent interdict in favour of the employer) upheld, on the return date, the right of the unions members to strike in support of a demand that the employer should desist from conducting compulsory breathalyser tests. While noting that strikes in support of unlawful demands are not protected, the court held that the mere fact that a demand relates to a matter

falling within what is generally taken to be managerial prerogative is insufficient in itself to take the issue outside the scope of a matter of mutual interest. In this case the court held that the employees had an interest in the purpose for which the employer intended introducing the random testing.

As such it is within the scope of the term 'matters of mutual interest' and the workers could take protected strike action. This decision was confirmed by the LAC in ***Pikitup (Soc) Ltd v SAMWU obo members* (2014) 3 BLLR 217 (LAC)** where the court rejected that matters of mutual interest are limited to terms and conditions of employment and that the term includes matters such as health and safety issues which, although primarily the responsibility of the employer, are issues over which parties may engage in collective bargaining.

In ***Greater Johannesburg Transitional Metro Council v IMATU & Another* (2001) 9 BLLR 1063 (LC)** the Labour Court found that demands concerning transfers and job security 'fall within the meaning of mutual interest, since they relate to the terms and conditions of contracts of employment of the respondent's member with the applicant.' More recently, in ***Itumele Bus Lines (Pty) Ltd v Transport & Allied Workers Union* (2009) 30 ILJ 1099 (LC)** it was held as follows:

"where an employer company offers a percentage equity shareholding in itself to its employees to be acquired by the employees at an agreed price, subject to very clearly conditions for such acquisition, and the employees accept such offer the whole scheme of arrangement becomes 'a matter of mutual interest' between employer and employee."

The court confirmed that a demand may be a matter of mutual interest even if it is not a term or condition of employment because it is aimed at creating new employment rights.

Many elements of the definition of a strike were demonstrated in ***National Union of Mineworkers v CCMA* (2011) 32 ILJ 2104 (LAC)**. The employees were dismissed following a work stoppage that had been sparked by the company's deduction of moneys due to the employees and their refusal

to negotiate with the company and for the rest of the employees to return to work. It was common cause before the CCMA that the company had wrongfully deducted the money and was in breach of contract; that the employees had been upset by this illegal action; that the strike had been fairly peaceful and that its financial impact had been minimal. The commissioner found, however, that the employees had breached the provisions of the LRA and had alternative remedies, so that dismissal was an appropriate sanction. The matter went on review and then on appeal to the Labour Appeal Court.

At the LAC the employees argued that, as they had not ceased work to address a grievance about a matter of mutual interest but were lawfully inquiring about wages to which they were entitled, their action could not be classified as a strike but rather as some other form of withholding of work. The court disagreed. In terms of s 213 a 'strike' has three key characteristics (see above); 'disputes of right' are not excluded from 'matters of mutual interest'. The court therefore found that the employees' action constituted a 'strike': it was a refusal to work, it was concerted and it had the purpose of obtaining redress for the company's decision to withhold payment. Given that the procedures set out in s 64 were not followed, the strike was unprotected. However, the court also found that dismissal was not an appropriate sanction and reinstated the employees as from the date of the judgment.

#### 4.6.2 Procedural requirements for a protected strike

Chapter IV of the LRA gives effect to the constitutional right to strike as well as regulating the employer's 'recourse' to a lock-out. The key provisions are contained in sections 64 and 65. Section 64(1) states that 'every employee' has the right to strike. The exercise of this right, as previously alluded to, is subject to complying with a set of procedures set out in the section.

At face value these seem to be minimal. The main requirements are that:

- a dispute has been referred to the CCMA or a bargaining council and a certificate has been issued that the dispute remains unresolved or 30 days (or any agreed extension of this period) have passed since the referral [S64(1)(a)(i) and 64(1)(a)(ii)];
- 48 hours' written notice of the commencement of the strike has been given to the employer unless the dispute relates to a collective agreement to be concluded in a bargaining council, in which case the notice must be served on the council, or the employer is a member of an employers' organisation, in which case the notice must be served on the employers' organisation [S64(1)(b)(i) and 64(1)(b)(ii)]; and
- where the State is the employer, at least seven days' notice of the strike must be given [S64 (1) (d)].

If the dispute relates to an alleged refusal to bargain, it must also be referred to advisory (non-binding) arbitration before a protected strike or lock-out can take place (section 64(2)).

However, these requirements do not apply where employees strike in response to an unprocedural lock-out by an employer, or where the employer unilaterally amends the terms and conditions of employees and does not restore the original conditions within 48 hours of a notice requiring it to do so (section 64(3)).

In **SATAWU & others v Moloto NO and others [2012] 12 BLLR 1193 (CC)** the majority of the Constitutional Court disagreed with the Supreme Court of Appeal, which had initially ruled that non-union members who had joined a SATAWU strike could not do so without giving a separate notice of strike action. The employer was Equity Aviation. The CC held that section 64(1)(b) only states that a strike notice must be issued 48 hours before the commencement of a strike and does not require the notice to specify precisely which employees will participate. The court could find no basis for reading an additional requirement into the section that a union must specify in the notice who will participate in the strike or that employees who are not members of union which declared the dispute must issue individual notices. This ruling overturned the judgment of the SCA and upheld the judgments

of the Labour Court and Labour Appeal Court which had previously ruled in favour of the union.

In **Edelweiss Glass and Aluminium (Pty) Ltd v National Union of Metalworkers of South Africa and Others (2012) 1 BLLR 10 (LAC)** the union had given notice that it intended striking over a range of issues including organisational rights and wages. After conciliation at the CCMA had failed, the union gave notice of its intention to strike. Prior to the strike, the employer called a meeting of all its employees and indicated that only NUMSA members could take part in the strike and that the strike could only relate to shop stewards' rights and not to 'substantive issues' failing which employees could be dismissed. While the strike was on, the union informed the employer that they would abandon the strike if the employer implemented a 13th cheque. The employer then assumed that the union had capitulated on its organisational rights demands and informed the workers that their strike was unprotected and could be dismissed. The shop stewards were then called to a disciplinary enquiry and summarily dismissed. This occurred on a Friday. On the following Monday, the employees were given an ultimatum to resume work within 30 minutes. An hour after this notice, they were given notices terminating their service. The union referred the matter to the Labour Court claiming that the dismissals had been automatically unfair. The Labour Court agreed with the union and ordered the reinstatement of some of the workers and compensation in respect of others. The employer appealed, claiming that as the issue of the 13th cheque had not be referred to conciliation, the Labour Court had erred in finding that the strike remained protected.

The LAC subsequently held that the articulation of the 13th cheque demand did not cause the protected strike to become an unprotected strike. This would only have happened if the employees had used the protected strike to leverage other objectives in respect of which no strike action could be taken. Strikers are entitled to develop and vary demands as a means to bring a strike to an end.

In **Scaw South Africa (Pty) Ltd v National Union of Metalworkers of South Africa (2013) JOL 30979**

(LC) the employer had been granted an interim interdict prohibiting NUMSA and its members from participating in an unprotected and unlawful strike. The parties were in dispute regarding the employer's refusal to allow NUMSA to have a full-time shop steward.

On the return date, the employer argued the parties had a recognition agreement which governed shop stewards and time off for union activities and as such the issue in dispute was regulated by this agreement and therefore the union was precluded from striking. The court however found that the agreement did not regulate the issue relating to full-time shop stewards and as such section 65(3)(a)(i) could not be relied on to preclude NUMSA from striking. Further, the issue of full-time shop stewards was not contemplated by section 14 of the LRA. The interim order was discharged.

In *Plastic Convertors Association of SA v Association of Electric Cable Manufacturers of SA and others* (2011) 11 BLLR 1095 (LC) the court held that the employees of the applicant's members (the applicant had withdrawn from the MEIBC before the negotiations had commenced but its members still fell within the scope of the bargaining council) could engage in protected strike action along with employees employed by employers who remained party to the bargaining council. The court held that no separate dispute, conciliation or strike notice was required.

### 4.6.3 Substantive limitations on the right to strike

The substantive limitations on the right to strike and recourse to a lock-out are covered in section 65. Circumstances where strikes and lockouts are prohibited include:

- where it is about a 'dispute of right' or, as the LRA puts it, where the issue in dispute is one that the parties can refer to arbitration or to adjudication by the Labour Court;
- where the parties are bound by a collective agreement which specifically prohibits a strike or lock-out in respect of the issue in dispute;

- where the parties are bound by a collective agreement which requires the issue in dispute to be referred to arbitration; and
- where the parties are engaged in an 'essential' or 'maintenance' service. As discussed below, workers and employers in such services must refer their disputes to arbitration instead of taking industrial action.

In *County Fair Foods Ltd v FAWU* (2001) 5 BLLR 494 (LAC) the court held that the prohibition referred to in section 65(1)(a) only relates to the specific issues (substantive issues in dispute) prohibited by the provisions of the collective agreement and not the non-compliance with any dispute resolution procedure provided for in the collective agreement.

In *Vodacom (Pty) Ltd v CWU* (2010) 8 BLLR 836 (LAC) a strike was held to be unprotected on the ground that the dispute was regulated in terms of a collective agreement even though a certificate had been issued in terms of section 64(1)(a) stating that the dispute remained unresolved. In other words, compliance with the procedures required by section 64 thus cannot override the limitations of section 65.

In *Chamber of Mines of SA v AMCU* (2014) 3 BLLR 258 (LC) where the majority unions had concluded a collective agreement with the employers, it was held that a strike threatened by a minority union over additional demands would be unprotected because the collective agreement had been extended to employees who were not members of the majority unions.

#### Is the 'right to strike' interpreted too narrowly?

Some commentators have argued that the LRA, rather than giving positive expression to the constitutional right to strike, actually limits this right and that the courts have done likewise by focusing on giving effect to these limitations. For example, in *Ceramic Industries t/a Betta Sanitary Ware v NCBWU* (1997) 18 ILJ 671 (LAC) it was held that workers had to stipulate the exact date and time they intended going on strike. According to the court this was necessary to give effect to 'the promotion of orderly collective bargaining' (one of the primary objects of the LRA) in that the employer needed to be given proper notice

in order to prepare for 'power-play'. A further example of the perceived limiting approach adopted by the courts is found in **Johannesburg Metropolitan Bus Services (Pty) Ltd v SAMWU and Others (2011) 32 ILJ 1107 (LC)** where it was held that a unilateral change to a work practice by the employer does not constitute a matter over which workers can take protected strike action.

On the other hand, no right is absolute. Cases that come before court tend to be applications by employers to interdict strikes, where the question the court must decide is precisely whether 'limitations' to the right to strike have been crossed. While in some cases (such as the above) it can be argued that the courts have interpreted the right too narrowly, other judgments interpreted the statutory framework in a less restrictive way. For example, in **Tiger Wheels Babelegi (Pty) Ltd v NUMSA (1999) 20 ILJ 677 (LC)** the Labour Court found that nothing in the LRA requires strikers to commence their strike on the day stipulated in the notice; and in **Transportation Motor Spares v NUMSA (1999) 1 BLLR 78 (LC)** it was held that it is not necessary to issue a fresh notice if a strike has been suspended and workers subsequently decide to recommence strike action. In the **Bader Bop** matter (referred to above) the court held that minority unions could strike in support of demands for organisational rights.

#### 4.6.4 Amendments to LRA regarding strikes

A number of amendments were introduced to South African laws during 2018. This included the introduction of the new National Minimum Wage Act which we spoke about earlier. These amendments were introduced within a context of increasing levels of inequality, unemployment and poverty. The amendments were all debated and agreed at NEDLAC. One of the issues that generated a lot of debate was a move to introduce provisions that were aimed at addressing the high number of protracted and often violent strikes. It is suggested that the introduction of the proposed National Minimum Wage opened the door for the amendments in the area of strikes.

Although these amendments have passed constitutional scrutiny, it undoubtedly impact on the ability of workers to exercise their collective muscle in the battle with employers. In summary, the amendments cover the following:

- A set of picketing rules must be in place before a certificate of non-resolution will be issued. If the parties to a dispute cannot reach an agreement on the rules, the commissioner shall issue a set of picketing rules guided by a default set of rules. (sec 69). The Minister of Labour, in December 2018, issued a Code of Good Practice: Collective Bargaining, Industrial Action and Picketing; and a set of Picketing Regulations inclusive of default picketing rules.
- The LRA now also makes provision for something termed Advisory Arbitration in the Public Interest. This Director of the CCMA must set up this arbitration if directed to do so by the Minister of Labour; if one of the parties to the dispute request; if ordered to do so by a Labour Court order; or by agreement of all the parties to the dispute. Any award made will be circulated to the parties for comment within 7 days. Parties must indicate if they reject or accept the award. If no response is received within the 7 days or a period extended by a maximum of 5 days, the award will be deemed to have accepted by a defaulting party. (sec 150A -150D)
- Unions have to conduct secret ballots prior to embarking on strike action. The ballot must be recorded. All union constitutions must be amended to comply with this requirement. Note must however be taken the absence of a ballot does not render the strike unprotected (sec 67(7)) of the LRA.

## Activity 11: Strikes

### Aim:

To consolidate participants' understanding of the right to strike

### Task:

Discuss these questions in your groups:

### Time allocated:

30 minutes group work  
15 minutes report back

1. What *rights* does the LRA give to workers and their unions to use strike action to win a dispute against an employer?
2. What *obstacles* does the LRA present to workers and their unions in using strike action to win a dispute against an employer?
3. Do you think the LRA is fair to both workers/trade union and employers in the mechanisms it offers to settle disputes?



MARCH IN JOHANNESBURG IN SUPPORT OF A NATIONAL STRIKE CALLED BY COSATU AGAINST UNEMPLOYMENT AND RETRENCHMENTS.  
PHOTO: DIBUSENG PHALOANE/ELITSHA

# 5. BASIC CONDITIONS OF EMPLOYMENT ACT

The law that sets basic conditions for all employees is the Basic Conditions of Employment Act 75 of 1997. The BCEA makes rules about things like how many hours you work, when you can take time off, how you get paid, and when you can stop working. These rules are important and have to be followed. The law says that these rules are like the basic terms of any employment contract, unless another law or the contract says something better. The current BCEA is more flexible than the old one. Some rules can be changed by individual contracts or collective agreements; by agreements concluded in bargaining councils or by ministerial determinations. Some rules in the BCEA only apply to certain categories of employees.

Below we provide an overview of key aspects of the BCEA.

## 5.1 Who is covered under the BCEA?

The BCEA applies to all employees and employers except members of the State Security Agency and unpaid volunteers working for an organisation serving a charitable purpose. As is the case with many other labour laws, the BCEA only protects 'employees' meaning that those workers classified as an 'independent contractor' falls outside the protection of the BCEA. Section 55 of the BCEA does, however, provide for a sectoral determination to set minimum employment conditions for persons other than employees and section 83 of the BCEA permits the Minister to deem certain persons to be employees for the purposes of the BCEA or any other employment law.

Certain categories of employees are excluded from particular provisions of the BCEA. These include persons undergoing vocational training; employees on a merchant ship; senior managerial employees; those earning above the threshold set by the minister (R241,110.59 per annum as of 01 March 2023); travelling sales staff and employees working less than 24 hours per month.

## 5.2 Remuneration

The BCEA doesn't set the minimum wages you must be paid. Instead, you should look at the National Minimum Wage Act (NMWA), which started on January 1, 2019. Unlike most other employment laws, the NMWA applies to all workers and their employers, including those defined as independent contractors or own-account workers. Members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service are excluded and also volunteers. (section 3).

The minimum wage is the least amount of money you should get for one hour of work, but it doesn't include extra things like travel, food, or accommodation money (section 5). The current minimum wage, as of 01 March 2023 is R25.42 per hour for most workers and R13.97 per hour for EPWP workers. Even if you work for less than four hours a day, you should still be paid the minimum wage for at least four hours (section 9A of the BCEA). In terms of section 4 of the NMWA, no contract or agreement can make you get paid less than the minimum wage. (employers are however permitted to make application for exemption but there are certain criteria that must be met (section 15 of the NMWA)).

Workers can get paid in either money or in kind. If they are paid in money, it has to be in South African currency, and they can receive it every day, week, two weeks, or month. Payment can be in cash, by cheque, or directly deposited into a bank account chosen by the worker. The money or cheque should be given to employees at their workplace during working hours or within 15 minutes of starting or finishing work. It should come in a sealed envelope with information about the payment period, the amount, any deductions and their reasons, and, if applicable, details about overtime pay, regular and extra hours worked, and hours worked on Sundays and public holidays. All payments must be made within seven days after the work period or within seven days after the job ends (section 32).

In terms of section 34 of the BCEA deducting money from an employee's pay is not allowed, unless the employee agrees to it for a specific debt, or it's required or allowed by a law, work agreement, court order, or arbitration award. However, deductions can be made to repay an employer for losses or damages caused by an employee during their employment but only if the employee agrees, and the damage was their fault. The employer should also give the employee a fair chance to explain why the deductions should not be made, and the total amount deducted should not be more than the actual loss or damage or one-quarter of the employee's pay in cash. Punishing employees with fines for mistakes or misconduct is not allowed. Employees who are suspended while a disciplinary process is happening should still receive their full pay during that time.

### 5.3 Working hours

According to section 9 of the BCEA, no employer can make or allow an employee to work more than 45 hours a week, or nine hours a day if the employee works five days or fewer each week, and eight hours a day if the employee works more than five days a week. Any work beyond these hours is considered overtime, and it can only be done if the employee agrees to it. This agreement should be given annually if it's included in a contract or collective agreement.

Overtime work should not exceed 10 hours in a week, and the total hours worked (including overtime) should not go over 12 hours in a day (section 10). Employees who serve customers can be asked, through an agreement, to work an extra 15 minutes each day at their regular rates, but this should not exceed 60 minutes in a week to complete their tasks. Work that needs to be done urgently because the employer couldn't have reasonably planned for it is not counted as overtime.

Besides following these set hours, employers also need to manage working hours in line with the rules of any law related to occupational health and safety. They should also consider the health, safety, and family responsibilities of their employees, and take into account any code of

good practice issued by the Minister under the BCEA (section 13).

### 5.4 Overtime

The overtime pay rate is one and a half times the regular wage (excluding benefits). However, an employee can be given time off in lieu of payment of 30 minutes off for each hour of overtime worked at their regular wage, or 90 minutes off if no overtime pay was given. This time off instead of extra pay should be taken within a month of working the overtime, unless the employee agrees in writing to a longer period, up to 12 months (section 10).

Even though overtime is typically voluntary, the BCEA does not affect the employer's right to require employees to work overtime based on their employment contract or collective agreement. Refusing to work contractual overtime can be considered a disciplinary offense. If contracts, agreements, or wage determinations limit overtime to a certain number of hours, employers may compel the employees to work the overtime provided for.

In general, employees are not obliged to perform non-contractual voluntary overtime, and employers can't force them to do so (section 79). Dismissing employees for reasonably refusing to do voluntary overtime has been deemed unlawful in civil courts and unfair in labour courts.

There is some flexibility allowed through "compression" and "averaging" of working hours. "Compression" means that the employer and employees can agree to work longer regular hours on some days as long as it doesn't exceed 12 hours in a day, and it doesn't result in more than 45 regular hours or 10 hours of overtime in a week, or more than five days in a week (section 11). For example, an employee can work 12 hours on Mondays, Tuesdays, and Wednesdays without overtime but needs to work a regular nine-hour day on Thursdays and Fridays.

"Averaging" can only happen through a collective agreement, which is a written agreement between the employer and a registered trade union. These agreements can allow employers and employees

to work an average of five hours of overtime each week for an agreed-upon period (section 12). The first two such agreements expire after 12 months, but subsequent agreements can be permanent. Additionally, the Minister can reduce the maximum allowed working hours, including overtime, based on advice from chief inspectors appointed under the Occupational Health and Safety Act 85 of 1993 or Mine Health and Safety Act 29 of 1996.

## 5.5 Night work

Night work means work undertaken after 18H00 and before 06H00 the next day. Night work is only permitted by agreement in the form of an individual employment contract or collective bargaining agreement. Employees must be paid a shift allowance or a reduction of working hours. In addition, there must be available transport between the employee's residence and place of employment (section 17).

If employees regularly work at night (at least 50 times a year), their employer has to tell them about any health and safety risks related to their work and let them know that they can request a medical checkup, which the employer will pay for. If employees experience health problems due to night work, the employer should try to move them to daytime work if it's possible and practical. However, employees need to show that working at night is harming their health or give the employer a chance to have them checked by a doctor. They can't simply refuse to work at night (section 17).

## 5.6 Meal and rest periods

Employees have the right to take a one-hour meal break after working for five hours. If they have to work during this break or be available for work, they should be paid for it. Meal breaks lasting more than 75 minutes should also be paid, unless the employees live on the work premises. Meal breaks can be shortened to at least 30 minutes through an agreement, or they can be skipped altogether if the employee works for less than six hours in a day. However, if meal breaks are

reduced to less than an hour, they remain unpaid if employees are paid by the hour (section 14).

Every employee should have a daily rest period of at least 12 consecutive hours between the end of one workday and the start of the next. They are also entitled to a weekly rest period of at least 36 consecutive hours, including a Sunday, unless there's a different agreement. Daily rest periods can be reduced to 10 hours through a written agreement if the employee lives on the premises and has a meal break longer than three hours. Weekly rest periods can be changed to 60 hours every two weeks through an agreement, or they can be shortened by up to eight hours in one week if the rest period in the following week is extended accordingly (section 15).

## 5.7 Sundays and public holidays

If an employee works on a Sunday, the employer has to pay them double their usual wage for each hour worked, unless the employee normally works on Sundays, in which case the employer must pay them one and a half times their usual wage for each hour worked. Also, if an employee's shift spans both a Sunday and another day, it's considered as if the entire shift was worked on the Sunday, unless most of the shift took place on the other day, in which case the whole shift is considered to have occurred on that day (section 16).

Employers can't make employees work on official public holidays unless employees agree to it. If employees are not required to work on public holidays that fall on regular workdays, they should be paid their regular wage for those days. If employees do work on public holidays that fall on regular workdays, they should be paid double their usual rate. If the public holiday falls on a day when employees don't typically work, they should be paid their regular wage plus the amount they earn for working on that day, calculated by time or any other method (section 18).

Just like with shifts that cover a regular workday and a Sunday, if a shift includes a public holiday, it's considered entirely on that holiday if most

of the shift takes place on the holiday. When a public holiday falls on a Sunday, both the Sunday and the following Monday are separate public holidays. Workers who usually work on Sundays are entitled to both days off with full pay (section 18).

## 5.8 Annual leave

In terms of section 20 of the BCEA, all employees, except those working for less than 24 hours, are entitled to take at least 21 consecutive days of annual leave each year. This leave starts either when they begin their job or at the end of the previous leave year, which lasts for 12 months.

During their annual leave, employees should be paid their regular full wages. The employer can decide when employees take their leave unless there's a different agreement in place. However, the leave should be used within six months of the previous leave cycle. If a public holiday happens during the leave, the leave should be extended by one day. Employees can ask to use paid annual leave during unpaid leave.

Employees can agree to have their leave changed to one day off for every 17 days worked, or one hour off for every 17 hours worked. If an employee takes some leave, the continuous annual leave period can be shortened accordingly. Leave can't be taken during sick leave or when the employee is serving out their notice period. Employers can't pay employees instead of giving them leave, except on termination of employment. Employees should be paid for their leave before it starts, or as agreed, on their regular paydays.

On termination of service, an employee should receive payment for any leave they haven't taken, and for leave they earned during an incomplete annual leave cycle at the rate of one day's pay for every 17 days worked.

If employees don't use all 21 days of leave in one year, they can accumulate the unused days and can claim this leave in the following year. However, employees cannot request payment for leave they didn't use in previous leave cycles when their employment terminates, whether due to dismissal or resignation. They can,

however, ask for leave they've accumulated from earlier cycles if they have more days than what the BCEA requires, as long as their employment contract doesn't have a clause that takes away this right.

## 5.9 Sick leave

Sick leave is only earned when an employee can't work due to illness or injury, which makes them unable to work. Employees get one day of paid sick leave for every 26 days they work in the first four months of employment. After that, they are entitled to the number of days they typically work in six weeks during every 36-month cycle (section 22).

The amount paid during sick leave can be lowered by mutual agreement as long as the number of sick leave days is increased proportionally. However, the rate should not go below three-quarters of the regular wage, and the number of days granted should be at least equal to what the employee usually works in six weeks. Employees on sick leave should receive their full salaries. If their absence lasts for more than two days or occurs more than once within eight weeks, they must provide a medical certificate from a registered medical practitioner or a certified healthcare professional authorised to diagnose and treat patients. An isolated single-day sick leave doesn't require a medical certificate. If the employee lives on the employer's premises, the employer should provide "reasonable assistance" if needed for the employee to obtain a medical certificate (section 23).

## 5.10 Maternity leave

The current BCEA grants the right to four consecutive months of unpaid maternity leave. This leave can start anytime from four weeks before the expected delivery date or when a medical practitioner or midwife certifies that it's necessary for the health of the mother or child. After giving birth, the employee cannot work for six weeks unless a medical practitioner or midwife says it's safe to do so. The employee should inform the employer in writing, if possible,

about the date she intends to begin maternity leave within four weeks of that date or as soon as it's practical (section 25).

Pregnant or nursing mothers who choose to go back to work have certain protections. Employers can't assign them to work that might harm the health of the mother or child. If a mother is required to do night work and it poses a threat to her health, the employer should offer her suitable alternative work if it's possible (section 26).

New and expectant mothers on maternity leave receive partial wage supplementation from the government under Section 24 of the Unemployment Insurance Act 63 of 2001.

## 5.11 Parental leave

This is an amendment to the BCEA that came into effect on 01 January 2020 and provides for parental leave (section 25A); adoption leave (section 25B); and commissioning parental leave (section 25C).

Parental leave encompasses a policy that offers 10 consecutive days of leave for a parent when the other parent, typically the one who gave birth, is eligible for maternity leave. This policy is designed to apply equally to the non-birthing parent, usually the father.

In the case of adoption leave, it applies to parents who have adopted a child under two years of age. In scenarios involving two adoptive parents, distinct periods of parental leave are granted: one parent is entitled to 10 consecutive weeks of leave (equivalent to maternity leave), while the other is eligible for 10 consecutive days of leave.

Commissioning parental leave is accessible to employees who are commissioning parents in a surrogate motherhood arrangement. Similar to adoption leave, this policy entails two distinct leave periods: one parent is entitled to 10 consecutive weeks of commissioning parental leave (equivalent to maternity leave), while the other is granted 10 consecutive days of leave.

All types of leave related to parental responsibilities, such as maternity leave, do not come with monetary compensation. Nevertheless, sections 25A, 25B, and 25C pertain to the disbursement of parental, adoption, or commissioning parental benefits, the specifics of which are to be established by the Minister, in accordance with the guidelines of the UIA. In response, the Labour Laws Amendment Act introduced the essential clauses governing parental benefits and commissioning parental benefits into the UIA while making modifications to the existing provisions concerning adoption benefits.

While bargaining council agreement *ordinarily* may alter, replace or exclude certain employment conditions, it cannot do so in respect of parental leave.

## 5.12 Family responsibility leave

Employees who have worked for the employer for more than four months and work four or more days are eligible for three days of paid leave each year to attend to "family responsibilities." This includes events such as the birth or illness of an employee's child, or the death of a spouse, life partner, parent, adoptive parent, grandparent, child, adopted child, grandchild, or sibling. Any unused family responsibility leave expires at the end of the year. The employer can ask for evidence that the leave was used for valid reasons, and this entitlement can only be changed through a collective agreement (section 27).

## 5.13 Termination of employment and payment

All employees working more than 24 hours per month for an employer are entitled to receive termination notice as specified in their employment contracts. If the employment contract does not specify a notice period, employees are entitled to the following notice periods: one week if employed for six months or less, two weeks if employed for more than six months but less than a year, and four weeks if employed for a year or longer. However, a

collective agreement can reduce the four-week notice period to a minimum of two weeks (section 37).

Farm and domestic workers are entitled to four weeks' notice after six months of employment, and the only notice period that may be reduced through a collective agreement is the four-week notice after a year of employment. Notice periods for employees with less than a year of service and for farm and domestic workers cannot be reduced. Notice must be provided in writing and cannot overlap with any period of annual, maternity, parental or family responsibility leave (section 37).

For employees provided accommodation on the employer's premises, their right to reside in that accommodation terminates with the end of their employment contract. If the contract is terminated without the specified notice, the employee may continue to stay in the accommodation for at least one month, with the employer having the right to deduct the accommodation's value from any outstanding amounts owed to the employee as notice (section 39).

Employees receiving notice of termination in accordance with the BCEA are not prohibited from challenging the legality or fairness of the termination under the LRA. However, both employers and employees have the option to terminate the contract without notice in cases of a material breach of contractual obligations by the defaulting party, as recognised by law (section 37).

Employees are required to fulfill their duties during a notice period, unless the employer releases them from this obligation, in which case they must receive payment in lieu of notice. The notice of termination must be provided in written form, except when it is given by an illiterate employee (section 37).

Upon the termination of employment, employees are entitled to receive payment for any accumulated overtime and Sunday work that had been exchanged for days off but had not yet been taken. They must also be compensated for any accrued annual leave owed to them. Additionally, if the employee has worked for the

employer for more than four months, they are entitled to receive payment for their annual leave entitlement during an incomplete annual leave cycle, at a rate of at least one day's remuneration for every 17 days in which the employee was eligible to receive payment (section 40).

In cases where an employee is dismissed due to the employer's operational requirements, the employee must be granted severance pay, which should be at least one week's remuneration for each completed year of continuous service with the employer. This is unless the employee unreasonably declines an offer of alternative employment. It's important to note that any amounts owed for accrued leave cannot be offset to recover debts owed by the employee to the employer (section 41).

## 5.14 Certificate of service

Upon the termination of employment, irrespective of the cause for the termination, an employee is entitled to receive a service certificate that includes the following information:

1. The employee's full name.
2. The name and address of the employer.
3. A description of any council or sectoral employment standard applicable to the employer's business.
4. The dates of employment commencement and termination.
5. The job title or a concise description of the employee's role at the time of termination.
6. The remuneration at the time of termination.
7. If requested by the employee, the reason for the termination.

## 5.15 Monitoring, enforcement and legal proceedings

Chapter 10 of the BCEA sets out the appointment, functions and powers of labour inspectors and legal processes that can be instituted in the event of non-compliance. In brief, these include:

- Labour inspectors possess broad authority to conduct inspections, offer guidance, investigate grievances, secure written commitments, and issue compliance orders against employers who fail to meet their legal obligations. They can also refer disputes related to non-compliance with the BCEA, NMWA, UIA, and UICA to the CCMA under section 64.
- Written commitments and compliance orders that remain unenforced can be converted into CCMA arbitration awards as specified in section 73.
- In the event of an employer's failure to pay any amount owed in accordance with the BCEA, NMWA, a contract of employment, a sectoral determination, or a collective agreement, a worker or employee has the option to refer the dispute to the CCMA under section 73A(1).
- Additionally, a worker or employee can file a claim for any outstanding payments related to the BCEA, NMWA, a contract of employment, a collective agreement, or a sectoral determination in various courts, including the Labour Court, High Court, Magistrates' Court, or the small claims court, as per section 73A(3).
- For matters involving both unpaid entitlements in compliance with the BCEA and NMWA and an unfair dismissal dispute, an employee may raise the issue in the CCMA, a bargaining council, or the Labour Court as outlined in section 74(2).
- Furthermore, any disputes stemming from a contract of employment, regardless of whether they involve the enforcement of fundamental employment conditions, can be pursued in the civil courts or the Labor Court, according to section 77.



WOMEN FARM WORKERS MARCH TO THE WESTERN CAPE DEPARTMENTS OF AGRICULTURE AND LABOUR IN CAPE TOWN, MARCH 2019. PHOTO: VINCENT LALI/GROUNDUP

## Activity 12: Basic Conditions of Employment Act BINGO

### **Aim:**

To consolidate participants' understanding of the Basic Conditions of Employment Act

### **Time allocated:**

30 minutes group work  
30 minutes for the bingo

### **Task:**

In groups, work through the following questions. This is an opportunity to see how much you collectively know about the BCEA – so don't look up the information on cellphones or computers or in your manuals.

Step one: Each group will be given time to go through the questions and answer as many of them as you can in your group.

Step two: Now you will play bingo! The facilitator will call out a question. The first group to put up their hand will be asked to answer the question. If they get it right, they get a point. If they get it wrong, then the other group will be given a chance to answer the question.

- a. How many hours of work is the maximum allowed for a worker per week?
- b. How many hours overtime is the maximum allowed for a worker per week?
- c. How regularly should workers be allowed meal breaks?
- d. What is the rate of pay for work on Sundays
- e. Which workers are entitled to transport provision by the employer?
- f. How much annual leave must a worker be allowed? Can it be exchanged for extra pay?
- g. How much sick leave must a worker be allowed – and within what period?
- h. How much pregnancy leave must a worker be allowed?
- i. How much paid family responsibility leave must a worker be allowed?
- j. What information must be provided to a worker on their payslip?
- k. Within what period of time must an employer pay deductions & employer contributions to benefit funds?
- l. How is a monthly wage calculated relative to a weekly wage?
- m. What notice period must a worker be given if they have worked:
  - i. 6 months or less?
  - ii. More than 6 months but less than a year?
  - iii. 1 year?
- n. How much severance pay must be given to a workers dismissed for operational requirements or retrenched?
- o. Under what age can NO young person be employed?
- p. What recourse does a worker have if an employer is not meeting the obligations required by the BCAE?
- q. Collective agreements may replace or exclude Basic Conditions of Employment, excluding some of them. List 5 basic conditions that CANNOT be replaced or excluded by a collective agreement.

## Activity 13: Experiences with Employment Equity Act

### Aim:

To explore what experience participants have already had with the Employment Equity Act

### Time allocated:

25 minutes group work  
20 minutes for the bingo

### Task:

Answer the following questions:

1. Do you know if your workplace has an employment equity plan?
2. Do you know of any cases where affirmative action policies have been applied? Give details.
3. How effective was the affirmative action taken, in your opinion?
4. What are the problems you experience in relation to affirmative action and employment equity in your workplace?
5. Have you been directly involved in employment equity/affirmative action in your workplace? Tell us about your experience.



MARCH AGAINST LABOUR LAW AMENDMENTS WHICH INTRODUCED CURBS ON STRIKE ACTION, APRIL 2018. PHOTO: NIC

## 6. EMPLOYMENT EQUITY ACT

The right to equality is a fundamental principle in global, regional, and national laws. According to the United Nations Human Rights Committee, non-discrimination and equal protection under the law are essential principles in the protection of human rights.

The enduring legacy of apartheid in South Africa has given rise to deeply entrenched institutionalised inequality up to today, with far-reaching consequences spanning aspects such as race, gender, and age. This enduring discrimination primarily impacts Black African women and youth, who still continue to bear the heaviest burden of South Africa's historical injustices.

The Constitution mandates the creation of national laws that prohibit any form of unfair discrimination. One of these laws was the Employment Equity Act 55 of 1998 (EEA). The Employment Equity Act seeks to rectify historical imbalances and aims to promote genuine workplace equality.

### **The objectives of the Employment Equity Act are to promote:**

- Non-discrimination by preventing and eliminating unfair discrimination in the workplace, creating a fair and just employment environment where merit and capability determine advancement and opportunities.
- Equal opportunities and fair treatment in employment, ensuring that no person or group is unfairly disadvantaged or discriminated against in the workplace based on certain grounds such as race, gender, disability, or age.
- The redress of the effects of past discrimination and implementation of affirmative action measures that actively promote the equitable representation of designated groups (previously disadvantaged groups) in the workplace, aiming to correct imbalances and provide opportunities for those who were historically marginalised.

- A diverse workforce which is broadly representative of our people by fostering diversity and inclusion within the workforce, acknowledging and valuing differences in background, experience, and perspective to create a more equitable and enriched work environment.
- The achievement of economic development and efficiency in the workforce, and contribute to the economic growth and stability of the country by harnessing the talents and skills of all South Africans, thus benefiting individuals and the nation as a whole.
- Compliance with employment equity measures, and accountability through monitoring, and reporting by employers.

### **The Act has two main purposes. These are;**

- Firstly, to eliminate **unfair discrimination**, and thus promote equal opportunity and fair treatment in employment;
- And secondly, to implement **affirmative action measures** to redress the disadvantages in employment experienced by designated groups.

### **6.1 Who falls under the regulation and protection of the Employment Equity Act?**

EEA regulates unfair discrimination by the state or any individual and applies to all employees and employers.

Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups.

This Act does not apply to members of the National Defence Force, National Intelligence Agency and South African Secret Services.

## 6.2 Unfair Discrimination

The EEA, in section 6, addresses the prohibition of unfair discrimination. It stipulates as follows:

### *Prohibition of unfair discrimination.*

*(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.*

*(2) It is not unfair discrimination to—*

*(a) take affirmative action measures consistent with the purpose of this Act; or*

*(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*

*(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).*

*(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.*

*(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).*

It is important to note that the Act is talking of ‘**unfair discrimination**’ – implying that not all discrimination is unfair. Therefore, unfair discrimination does not occur when:

(a) Affirmative action measures are taken in line with the Act’s goals. This means that steps promoting equal opportunities can be implemented without being considered discriminatory.

(b) Distinctions, exclusions, or preferences are made based on the inherent requirements of a specific job. In other words, if certain job-related characteristics or qualifications are necessary, it’s not unfair discrimination to consider them in the hiring process.

The EEA is keeping a balance between overcoming discrimination and filling a job with a person who has the relevant skills and expertise to perform the duties associated with the post. In other words, the Act allows for differentiation in the way that employers treat certain groups of employees and does not necessarily regard this as unfair discrimination. It only becomes unfair when it is made for an unacceptable reason, as listed in 6(1).

However, clause (b) above must be very carefully monitored as it is open to abuse. It may be that the recruitment process was weak and did not reach out to find a suitably qualified black person or woman. This can be challenged as a discriminatory practice.



PHOTO: Nic

### 6.3 Direct and indirect discrimination

**Direct discrimination** occurs when people are treated differently based on their race, sex, religion, or other personal or physical characteristic that is prohibited by law.

**Indirect discrimination**, on the other hand, refers to an employment practice that looks neutral, but that actually disproportionately affects members of disadvantaged groups when this is not justifiable.

It is important to note that harassment is regarded as a form of unfair discrimination. Employers are required to take steps to eliminate and prohibit harassment in the workplace. Forms of harassment can be sexual harassment, religious harassment, sexual orientation harassment, and racial harassment. However, sexual harassment is the most common form of harassment. *The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* was published in 2022 to combat all forms of harassment at work.

### 6.4 Proving discrimination

The Employment Equity Act serves as the legal framework that explicitly forbids unfair discrimination based on certain specified grounds. In order to succeed with a claim under the EEA the complainant/s must establish that that the employee is subjected to direct or indirect unfair discrimination.

According to this Act, the burden of proof lies with the employer when the allegation of discrimination is made on one of these listed grounds.

As outlined in Section 11 of the Act, a complainant merely needs to allege that the employer has discriminated against them on a listed ground to initiate the process. However, today, a mere allegation is not adequate. The complainant must provide some evidence demonstrating that the employer differentiated between them and a comparator based on a practice or policy. Subsequently, the complainant must establish a link between this differentiation and a listed ground.

The employer, on the other hand, is tasked with proving, on a balance of probability, that the alleged differentiation did not occur as claimed or that it was rational, fair, and justifiable.

When discrimination is alleged on an arbitrary ground, the burden of proof shifts significantly to the complainant. Besides alleging differentiation, the complainant must also demonstrate that the differentiation was irrational and unfair before the burden of proof shifts to the employer to justify their policy or practice.

Additionally, the Act has incorporated the concept of 'dignity' into the assessment of alleged discrimination on arbitrary grounds. The Constitutional Court has introduced a two-stage test to determine unfair discrimination, considering whether differentiation constitutes "discrimination" and, if it occurs on a specified ground, whether it impairs human dignity or significantly affects individuals. Essentially, a worker can only argue that a violation of section 9(1) exists on an unlisted ground if they can demonstrate a degradation of their dignity.

In 2014, the EEA was amended which introduced changes to the burden of proof. Previously, the onus of proving fairness rested with the employer when unfair discrimination was alleged. However, the addition of the dignity requirement in the EEAA now places the burden of proof on the complainant when alleging discrimination on an arbitrary ground. This modification has sparked discussions about the impact of 'dignity' as a criterion for establishing workplace discrimination and whether it may unintentionally limit the EEA in fulfilling its commitment to workplace equality.

*In Harksen v Lane NO & others 1998 (1) SA 300 (CC)* it was held that differential treatment will be considered analogous to the listed grounds contained in section 6 if it has "the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner." The Labour Appeal Court in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 ILJ 2875 (LAC)* found an employee's mental illness to be an analogous ground and that the employee's dismissal on the basis of it amounted to discrimination.

The concept of the “burden of proof” in the context of unfair discrimination can be summarised as follows:

In cases where unfair discrimination is claimed based on a listed ground (such as race or gender), the burden of proof lies with the employer. It is the responsibility of the employer to demonstrate that the alleged discrimination either did not occur as claimed or that it was a rational, fair, and justifiable action.

If the claim of unfair discrimination is made on an arbitrary ground (a ground not specifically listed but still discriminatory), the burden of proof shifts to the complainant or worker. In such cases, the complainant or worker must provide evidence that the conduct in question was not rational, that it constitutes discrimination, and that the discrimination is, indeed, unfair.



## 6.5 Implementing affirmative action measures

The Employment Equity Act specifically allows for affirmative action and sets out ways to regulate affirmative action measures in the workplace. Affirmative action must be implemented mainly by medium and large employers, including the public service. Chapter III of the EEA (sections 12 – 27) dealing with affirmative action only applies to what is termed “designated employers”. The 2022 Amendment Act brings about a change to the definition of “designated employer” to restrict the application of these sections to a reduced group of employers and relieve some of the administrative burden on smaller employers.

A designated employer means:

- An employer who employs 50 or more employees;
- A municipality or other organ of state; and
- An employer bound by a collective agreement which appoints it a designated employer.

Affirmative action must be implemented in favour of suitably qualified people from designated groups, who are also citizens of South Africa.

### Who makes up the designated group?

- Black people (defined to include Africans, Coloureds and Indians and those of Chinese descent)
- Women
- Persons with disabilities - The definition of “people with disabilities” has been substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The definition of “people with disabilities” has been substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The amended definition includes within its meaning, “people who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into, or advancement

in, employment". This enhanced definition accords with a more expansive international understanding of what constitutes disabilities.

In *South African Police Service v Solidarity obo Barnard and another* [2014] JOL 32236 (CC) the Constitutional Court had the opportunity to examine the employer's affirmative action measures to determine whether any discrimination had been committed in that regard. Captain Barnard referred to a case of unfair discrimination based on race. She had twice applied for the position of superintendent and on both occasions, despite being recommended as the best candidate. She was not appointed. The reason given for the failure to appoint her was that, in terms of the SAPS Employment Equity Plan, she belonged to a designated group that was over-represented at the level she applied for. The Supreme Court of Appeal upheld an LAC judgment in favour of Barnard which ordered her promotion to the rank of Lieutenant-Colonel. The Constitutional Court was unanimous that the judgment of these two courts were wrong, albeit for different reasons.

Moseneke, ACJ, delivering the majority judgment, held that the SAPS Employment Equity Plan is a restitutionary measure contemplated in terms of section 9(2) of the Constitution and section 6(2) of the EEA and in that regard, it is not unfair discrimination to take measures consistent with the purpose of the EEA. He held further that to be fair, restitutionary measures must pass a threefold test as set out below.

- They must target a class of people that has been susceptible to unfair discrimination.
- They must be designed to protect or advance those classes of people.
- They must promote the achievement of equality.

'Suitably qualified' means a person who may be qualified for one or a combination of, the following:

- Formal qualifications
- Prior learning
- Relevant experience

- Capacity to acquire, within a reasonable time, the ability to do the job.

In 2014, the EEA was modified to mandate certification of psychological testing and similar assessments by the Health Professionals Council of South Africa (HPCSA). This change aimed to combat concerns that uncertified tests might lead to exclusionary practices in a culturally diverse country like South Africa. However, the HPCSA's ability to meet this requirement was legally questioned. The most recent amendment eliminates the need for HPCSA certification of such assessments.

**In deciding whether an affirmative action measure by the employer is covered by section 9(2) of the Constitution, the courts apply a three-stage test:**

*Stage one:* Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?

*Stage two:* Is the measure designed to protect or advance such persons or categories of persons? This implies that there must be a plan and that the measures must not be arbitrary and ad hoc.

*Stage three:* Does the measure promote the achievement of equality?

The Employment Equity Act requires employers to implement affirmative action measures. These measures go beyond the preferential appointment of members of the designated groups to vacant positions and include things like:

- Preferential promotion
- Development and training of employees to improve their chances of promotion
- A duty on employers to analyse their employment policies and practices and remove any barriers inherent in these
- Measures to advance and improve diversity in the workplace
- A duty on employers to make 'reasonable accommodation'.
- Ensure equitable representation of designated groups in all occupational categories and levels of the workforce;

- Consult with employees on a range of matters pertaining to employment equity;
- Conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers.

Examples of barriers include:

- Lack of role models from designated groups in senior positions
- The 'glass ceiling' for women, for example, expectations of long hours; lack of childcare facilities, 'old boys' networks
- Workplace structured according to the norms of a homogenous, male, white workforce.
- An inhospitable or non-supportive workplace climate
- Sexist language used by people in senior position.
- Prepare an employment equity plan; and
- Report either annually or bi-annually to the Director-General of the Department of Labour on the progress made in implementing its employment equity plan.

## 6.6 What is an Employment Equity Plan (EEP)?

On 12 April 2023, the Employment Equity Act (2020) was signed into law. It amends the existing Employment Equity Act 55 of 1998, aiming to promote diversity and equality in the workplace. It applies only to companies employing more than 50 people.

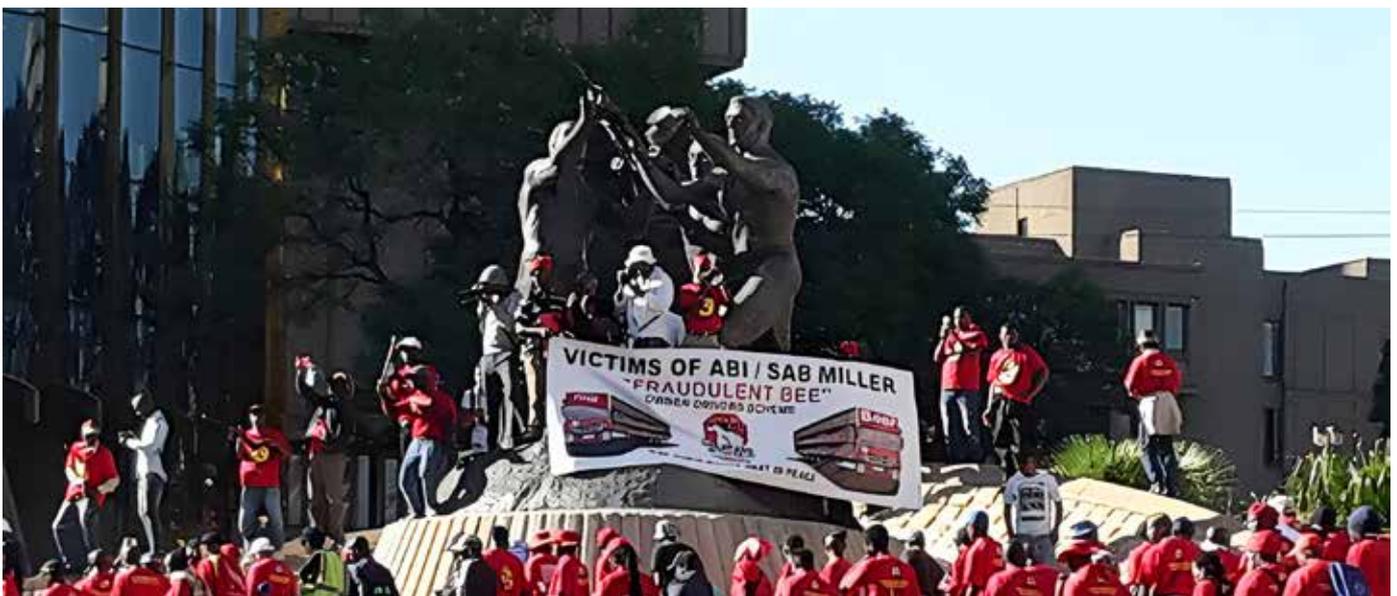
The Act says that it is a plan which must “achieve reasonable progress towards employment equity in that employer’s workforce” (Section 20 (1))

An EEP can be developed for no less than one year and no more than 5 years. It must state objectives and a timetable for each year concerning “affirmative action measures” and numerical goals.

The central issues on which objectives and timetables must be set are:

- The numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce --- and the strategies intended to achieve those goals.
- Meeting goals that have to do with other affirmative action measures such as removing unfair and discriminatory employment barriers, diversity training, and appropriate education and training.
- A procedure to monitor and evaluate the implementation of the plan and an internal procedure to resolve disputes.

DRIVERS, LEFT IN DEBT BY A 'BEE' SCHEME OF THE BEVERAGE INDUSTRY, JONI A MARCH AGAINST LABOUR LAW AMENDMENTS, JOHANNESBURG, APRIL 2018. PHOTO: NIC



## Activity 14: Identifying unfair discrimination

**Aim:**

To consolidate participants' understanding of what constitutes unfair discrimination

**Time allocated:**

30 minutes group work  
30 minutes for the report back

**Task:**

Discuss the following examples and say whether you think they are fair or unfair discrimination. If you think it is fair discrimination, give your reasons.

1. Charlotte is not appointed to a position she applied for because she is a single mother and her employer assumes that she has to collect her children from school during working hours.
2. Money matters CC, a predominantly white and male company, advertises a position for an accountant, stipulating that black women applicants will be given preference.
3. A furniture removal company is seeking two new drivers for their fleet of trucks. They have advertised in a local newspaper, and a part of the advertisement read "a valid driver's licence and a matriculation certificate are essential requirements for these two posts".
4. A drug company requires the services of a chemical engineer. In the advertisement placed in the paper, it is said that only people with a MSc (science degree) should apply.



WORKERS TAKING A PAUSE FROM A MARCH, OUTSIDE THE CHAMBER OF MINES, JOHANNESBURG, MARCH 2018. PHOTO: NIC

## Activity 15: Employment Equity Amendments

**Aim:**

To consolidate participants' understanding of what constitutes unfair discrimination

**Time allocated:**

20 minutes group work  
25 minutes for the report back

**Task:**

Read the following article and then discuss. For each bullet point, discuss to what extent this strengthens workers' interests in the workplace.

In welcoming the amendments to the Employment Equity Act, Cosatu made the following points about why they support the amendments.

"The Employment Equity Amendment (EEA) Act provides badly needed interventions to strengthen government's ability to hold employers accountable for their role and failures to adhere to the Employment Equity Act. Key progressive provisions in the Act include:

- Requiring employers to provide confirmation in their EE Annual Reports that they have paid all their workers at or above the National Minimum Wage.
- Expanding the definition of disabilities to include intellectual and sensory impairments, a long overdue correction.
- Empowering the Minister to set economic sectoral, sub-sectoral, regional, sub-regional and occupation specific targets; enabling more precise targets for sectors, occupations and regions that are notorious for their failures to reflect South Africa's demographics.
- Allowing for regional variations, which is critical given the diversity of South Africa's population found in different provinces, .e.g. the demographics of the Western Cape differ vastly from Limpopo.
- Requiring employers to consult trade unions on employment equity targets, and thus helping to foster a more inclusive approach to meeting targets and supporting collective bargaining.
- Empowering labour inspectors to inspect and ensure compliance with the EE Act.
- Empowering the Minister to issue compliance certificates to employers in good standing with the EE Act and to require such certificates for companies applying for government contracts.
  - This provision in particular is a welcome step forward requiring employers doing business with the state to be in compliance with labour laws and acting in a way that supports good labour practises. 'Workers' hard-earned taxes should not be used to reward abusive employers.'

## Activity 16: Mapping health and safety issues in the workplace

**Aim:**

To deepen participants' understanding of the health and safety issues they face in the workplace.

**Time allocated:**

30 minutes group work  
30 minutes for the report back

**Task:**

If possible, you will work in groups with others from the same workplace. If it isn't possible to divide you up in this way, then in your group you can choose one workplace to focus on.

Draw a rough map of your workplace (or the workplace you have chosen to focus on).

Now indicate on the map where all the possible health and safety issues are. These health and safety issues can be related to physical structures/buildings, equipment, chemicals or any other substances and so on.

**Now discuss:**

Which of these health and safety issues are being adequately addressed? Explain your answer.

## Activity 17: OHSA and your workplace

**Aim:**

To consolidate participants' knowledge of the OHSA

**Time allocated:**

30 minutes group work  
30 minutes for the report back

**Task:**

Discuss the following questions:

1. What Personal Protective Equipment (PPE) does the employer provide?
2. What other PPE do workers need that the employer is not yet providing?
3. Who are the health and safety reps in your workplace?
4. How were they chosen?
5. Is there a workplace health and safety committee?
6. Do you know how often the committee meets?
7. Do you know if a Health Inspector from the Department of Labour has ever visited your workplace?
8. If they have, do you know what the outcome of their report was?

# 7. OCCUPATIONAL HEALTH AND SAFETY ACT

## 7.1 The purpose of the Occupational Health and Safety Act No. 85 of 1993

The purpose of the Occupational Health and Safety Act is to;

- ensure the well-being and safety of individuals in the workplace and those associated with the operation of equipment and machinery.
- safeguard individuals who are not directly engaged in work activities against potential health and safety risks arising from or associated with the actions of those at work.
- establish an advisory council for occupational health and safety, along with addressing related matters.

Act excludes:

- Mines, mining areas, and works defined in the Minerals Act, 1991, unless specified otherwise in that Act;
- Load line ships, fishing boats, sealing boats, whaling boats, and floating cranes as defined in the Merchant Shipping Act, 1951, whether in or out of water within any Republic harbor or territorial waters, or individuals present on or in such entities.

## 7.2 Employer's General Duties to Employees in terms of S8 of the Act

The Act requires employers to provide and maintain a safe working environment for their employees, taking reasonable steps to eliminate or mitigate hazards. Specific duties are set out in S8 of the Act and include:

- Providing safe systems of work, plant, and machinery.
- Eliminating or mitigating hazards before relying on personal protective equipment.

- Ensuring safety in the production, processing, handling, storage, or transport of articles or substances.
- Identifying and establishing precautionary measures for potential hazards in work, articles, substances, or machinery.
- Providing necessary information, training, and supervision for employee health and safety.
- Prohibiting work without appropriate precautionary measures.
- Enforcing compliance with the Act and taking necessary health and safety measures.
- Ensuring work is supervised by trained personnel with authority to implement precautionary measures.
- Informing employees about the scope of their authority as per section 37 (1) (b).

In addition to specific duties, S13 of the Act ensures that employers have a duty to inform and therefore must:

- Make employees aware of health and safety hazards related to their work, articles, substances, and machinery, along with necessary precautionary measures.
- Notify health and safety representatives in advance of inspections, investigations, or formal inquiries notified by an inspector, and any exemption applications under section 40.
- Promptly inform designated health and safety representatives of workplace incidents.

## 7.3 Duties of the Worker

In terms of Section 14 of the Act workers have certain duties and rights in the context of occupational health and safety:

- Take responsibility for their own health and safety, as well as the safety of others affected by their actions or negligence, which includes avoiding horseplay.

- Cooperate with the employer when the Act imposes specific duties or requirements.
- Provide information to a Department of Labour inspector if required.
- Follow lawful instructions related to health and safety from the employer or an authorized person.
- Adhere to the rules and procedures provided by the employer.
- Use prescribed safety clothing and equipment where necessary.
- Report unsafe or unhealthy conditions promptly to the employer or health and safety representative.
- Report incidents that may affect their health or cause injury to the employer, an authorized person, or the health and safety representative.

In addition, no one may tamper with or misuse objects provided for health and safety. For instance, removing a safety guard from a machine and using it or allowing others to use it without the guard is prohibited.

## 7.4 Rights of the Worker

Workers have the right to:

- Access information, including the Occupational Health and Safety Act and regulations, workplace health and safety rules and procedures, standards, and hazard-related information.
- Request information from the employer about workplace health and safety hazards.
- Access precautionary measures and procedures related to exposure to hazardous substances.
- Request their private medical practitioner to investigate medical and exposure records.
- If a health and safety representative, investigate and provide written comments on exposure assessments and monitoring reports.
- Participate in workplace inspections when accompanying a Department of Labour health and safety inspector.
- Provide comments or representations on regulations or safety standards published under the Occupational Health and Safety Act.



## 7.5 Health and Safety Committees

In terms of S19 of the Act a health and safety committee shall consist of such number of members as the employer may from time to time determine: Provided that-

- For each workplace with two or more designated health and safety representatives, an employer must establish one or more health and safety committees.
- At every committee meeting, the employer must consult with the committee to initiate, develop, promote, maintain, and review measures ensuring the health and safety of employees.

The health and safety committee's membership is determined by the employer and includes:

- If one committee is established, all health and safety representatives for that workplace are members.
- If multiple committees exist, each health and safety representative must be a member of at least one committee.
- The number of employer-nominated persons on a committee cannot exceed the number of health and safety representatives on that committee.

Persons nominated by the employer on a committee are designated in writing for a determined period, while health and safety representatives serve for the duration of their designation per section 17(1).

The committee holds meetings as necessary, at least once every three months, with the time and place determined by the committee. An inspector may direct meeting details in writing, and if over 10% of employees request a meeting, the inspector may order one.

Committee meeting procedures are determined by the committee and may co-opt advisory members (non-voting) with expertise in health or safety matters.

If an inspector deems the number of committees insufficient for a specific workplace, the employer may be directed in writing to establish

the determined number of health and safety committees.

Employers are responsible for worker offenses unless they prove non-consent, reasonable preventive steps, or worker action outside competence. The same applies to employer representatives unless agreed otherwise.

### Functions of Health and Safety Committees

S20 of the Act sets out the functions of health and safety committees as follows:

A health and safety committee:

- Can make recommendations to the employer or, if unsuccessful, to an inspector on matters affecting the health or safety of individuals at the workplace or its designated section.
- Must discuss workplace incidents resulting in injury, illness, or death and may submit written reports to an inspector.
- Must carry out additional functions as prescribed.

The committee must maintain records of each recommendation to the employer under subsection (1)(a) and any reports to an inspector under subsection (1)(b). The committee or its members do not incur civil liability solely for failing to perform actions required by this Act. Employers must ensure that health and safety committees comply with Section 19(4) and fulfil duties outlined by the section by taking prescribed steps.

## 7.6 The role of Occupational Health and Safety (OHS) inspectors

### Designation of Inspectors by Minister under S28 of the Act

The Minister may appoint inspectors, subject to the chief inspector's control, for functions outlined in the Act. Those previously designated as inspectors under the Machinery and Occupational Safety Act are deemed inspectors under this section.

## **Functions of Inspectors in terms of S29 of the Act**

An inspector, for Act purposes, may:

- Enter premises without notice, question persons, request documents, and inspect articles or machinery.
- Seize relevant items for evidence.
- Direct employers, employees, or users to appear and answer questions.
- Perform other prescribed functions.

An inspector's assistant is deemed an inspector while acting under instructions. Employers must provide facilities to inspectors for effective and safe function performance. When seizing items, inspectors issue a receipt to the owner.

## **Special Powers of Inspectors - S30 of the Act**

- Inspectors may, in writing, prohibit acts endangering health or safety and may revoke the prohibition if the threat is addressed.
- To enforce a prohibition, inspectors may secure the area, and interference is prohibited.

If an employer fails to address health or safety concerns, inspectors may direct necessary steps in writing. If an employer violates regulations, inspectors may direct actions to comply. Time periods for directions may be extended but employers must inform health and safety representatives and employees of prohibitions, directions, or notices.

## **Investigations - S31 of the Act**

An inspector may investigate incidents to determine the need for a formal inquiry. After investigation, a written report is submitted to the attorney-general and the chief inspector. The attorney-general handles the report according to relevant laws. An inspector conducting an investigation incurs no civil liability for the report.

## **Formal Inquiries - S32 of the Act**

The chief inspector or a designated inspector may conduct formal inquiries based on incidents. Inspectors may subpoena witnesses and apply legal procedures. Inquiries are held publicly, with provisions for designated individuals to lead evidence and question witnesses. At the conclusion, a presiding inspector compiles a written report. The evidence and report are submitted to the chief inspector and, for severe incidents, to the attorney-general. A presiding inspector incurs no civil liability for the report.

## **Appeal Against Decision of Inspector in terms of S35 of the Act**

Both employers and employees have the right to appeal against the decisions of an inspector. Appeals should be submitted in writing to the Chief Inspector of Occupational Health and Safety at the Department of Labour who confirms, sets aside, or varies the decision. Appeal requests must be lodged in writing with the chief inspector within 60 days. Appeals against chief inspector decisions go to the industrial court, which confirms, sets aside, or varies the decision. Appeal requests must be lodged with the industrial court within 60 days. Appeals related to prohibitions do not suspend their operation.

## **Right not to be victimized**

An employer cannot dismiss a worker, reduce their salary, or alter their service conditions for several reasons, including supplying required information to those administering the Occupational Health and Safety Act, complying with lawful notices, performing actions mandated by the Act, refraining from prohibited actions per the Act, or giving evidence in matters concerning health and safety in the Labour Court or a Court of Law.

## 7.7 Personal Protective Equipment (PPE)

PPE is crucial for safeguarding workers against various workplace risks. It includes items like helmets, gloves, eye protection, high-visibility clothing, safety footwear, safety harnesses, and respiratory protective equipment.

*Risk Reduction:* PPE helps minimize injury risk from workplace hazards, complementing other safety measures.

*Hazard Mitigation:* PPE addresses specific hazards, providing protection against airborne contaminants, falling materials, eye injuries, contact with harmful substances, and extreme temperatures.

### Types of PPE include:

*Eye Protection:* Safety spectacles, goggles, face screens, face shields, and visors are used to shield the eyes from chemical exposure, flying particles, dust, gas, vapor, radiation, and more.

*Head and Neck Protection:* This includes industrial safety helmets, bump caps, hairnets, and firefighters' helmets to safeguard against impacts, chemical splashes, and extreme temperatures.

*Ear Protection:* Earplugs, earmuffs, and semi-insert/canal caps are employed to protect against noise-related hazards.

*Hand and Arm Protection:* Gloves, combined with sleeves covering part or all of the arms, defend against abrasion, cuts, punctures, electric shock, and various other risks.

*Feet and Legs Protection:* Safety footwear with protective toecaps and penetration resistance safeguards the feet and legs.

*Lung Protection:* Respiratory protective equipment ensures the protection of the lungs against workplace risks.



PHOTO: WILLIAM MATLALA

*Whole Body Protection:* This category includes high-visibility clothing and flame-retardant work wear to safeguard the entire body as necessary.

The selection of appropriate PPE should match the specific risks within a workplace, and users must ensure a proper fit and maintenance to ensure its effectiveness.

## 8. COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA)

### Activity 18: Your experience of COIDA

**Aim:**

To allow participants an opportunity to share any experiences they have had with COIDA

**Time allocated:**

15 minutes buzz groups  
15 minutes for the report back

**Task:**

In buzz groups, discuss the following questions:

1. Have you ever received compensation from COIDA or do you know of a fellow worker who has received compensation from COIDA?
2. What was the compensation for?
3. What was your /other workers experience of the COIDA process?

### 8.1 Basics of COIDA

#### The Scope of the Act

The Compensation for Occupational Injuries and Diseases Act 130 of 1993 replaces the older Workmen Compensation Act. The Act established a system for compensating employees who suffer disablement due to injuries or illnesses incurred on the job, as well as to address cases of fatalities resulting from these injuries or illnesses and to address related matters. In short, the Act is meant to provide compensation for employees who get injured or sick while working.

#### What is the objective of the Compensation Fund?

The Act establishes the Compensation Fund, a Schedule 3A Public Entity of the Department of Employment and Labour. The main objective of the Act is to provide compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees, or for death resulting from injuries or diseases, and provide for matters connected therewith.

#### How does the Compensation Fund work?

The Fund administers the Compensation for Occupational Injuries and Diseases Act No 130/1993 as amended. Employers must contribute to the Compensation Fund, and compensation is given regardless of who is at fault, whether it is the employee, employer, or someone else. The Compensation Commissioner is appointed to administer the Fund and approves the claims of workers. The worker gets compensation from this Fund and not directly from the employer.

#### How does the fund operate?

The Fund derives its income from contributions made by employers. In terms of section 82(1) (a) all employers must make annual payments to the Compensation Fund to cover employees who are injured or ill in the course of employment. These contributions are comprised of annual assessments paid by registered employers, calculated as a percentage or a fixed rate of their employees' annual earnings. The Act also

stipulates a minimum assessment to guarantee that it covers the administrative expenses incurred. Employers are required to register with the Compensation Fund within seven (7) days of hiring their first employee.

### **What services does the COID Fund offer?**

The Fund offers the following services:

- Employer Services
- Claims Services
- Medical Services
- Finance Services
- Legal Services
- Rehabilitation and orthotics

## **8.2 How to Claim Compensation**

### **Who can claim compensation under the Act?**

It is important to remember that casual and temporary employees' rights are exactly the same as full-time employees.

- Anyone employed under a contract of service and receives wages, or salary on a weekly or monthly basis may claim compensation in terms of the Act.
- Dependants of an employee who is fatally injured can also claim compensation.

It is important to note, that domestic workers can now claim compensation under COIDA, thanks to a Constitutional Court ruling in the case of *Mahlangu vs. the Minister of Labour*. This decision, made on 19th November 2020, declared that the exclusion of domestic workers from COIDA's definition of "employee" was unconstitutional.

The ruling applies retroactively from 27 April 1994. An amended version of the Act now covers domestic workers. A notice issued on 10th March 2021 explains the registration process for domestic worker employers to ensure their employees qualify for compensation. The case originated when Maria Mahlangu, a domestic worker, drowned in her employer's

swimming pool, and her daughter sought COIDA benefits. Domestic worker unions and legal representatives pursued the case, resulting in the declaration of the relevant COIDA section as unconstitutional in 2019, a decision confirmed by the Constitutional Court in 2020. This means that domestic workers injured even before the court order can now apply for compensation.

### **Which employers are exempted from annual assessments by the Compensation Fund?**

All employers must register with the Compensation Fund, however, the following employers are exempted from paying annual assessments:

- National departments
- Provincial Settlements
- Municipalities
- SAPS, SANDF and Correctional Services

Exempted employers will pay the compensation benefits through the Government Pension Administration Agency, i.e. Government employees including SAPS, SANDF and Correctional Services. Exempted municipalities will pay the compensation benefits to their employees.

### **What steps should an employee and employer take when an employee gets injured or contracts a work-related disease?**

#### **Step 1**

A worker should provide written or verbal notice of a work-related injury to the employer before the end of the shift. It is advisable for the employer to maintain a list of all witnesses to the incident for the purpose of investigating the occurrence.

#### **Step 2**

The employer is mandated to report an 'injury on duty' claim within 7 days of receiving notice and report an 'occupational disease on duty' within

14 days, or as soon as receiving notice. The official form that needs to be completed is *W.Cl 2 – Notice of Accident and Claim for Compensation*. This form should be completed whenever an employee meets with an accident out of, or in the course of, employment that leads to personal injury where medical treatment is required, or in the case of death. The Compensation Fund has an online system **Compeasy**, where claims should be registered electronically by the employer or a designated person.

### Step 3

When a worker goes to the hospital or to the doctor they should take the form (W.Cl.2 – Part B), which has been completed by their employer, with them. This form is important as it contains all the correct information regarding the employer, the worker's full name and how the worker was injured. It also shows that the worker was injured at work.

### Step 4

The employer or doctor must submit the First Medical Report (W.Cl.4) and Progress/Final Medical Reports (W. Cl.5), and all other reports that will assist the compensation fund through its **Compeasy** portal to adjudicate upon the liability of the claim. Once the claim is received and registered, a claim number is generated as soon as the injury on duty (IOD) is reported and relevant information is submitted and uploaded to the system. The Commissioner will assess the claim and decide after receiving the initial doctor's report with the accident details.

The treating doctor can now upload the worker's medical report directly onto the **Compeasy** portal. Employees must also have copies of the reports to submit to the employer for safekeeping, in cases where the employee or disease recurs, or experiences medical.

The First Medical Report is important to the Compensation Fund because the doctor provides a detailed clinical description of the injury or disease. The progress and final medical reports

are also important, for further treatment or the date when you are fit to go back to work, and describe the worker's permanent disablement, if any, as a result of the injury or disease.

### Step 5

After the Compensation Commissioner has considered the claim, liability is accepted for payment of the claim. Where a response, a W.Cl.56, is not issued, it normally indicates that the Compensation Commissioner has not accepted liability for any payment. If the worker disagrees with the decision, they can appeal the decision within 90 days by submitting form W929 to the Commissioner.

### Step 6

If further medical treatment is required, the doctor must submit a request for "Reopening of a Claim" on his/ her letterhead and on the online system (**CompEasy**) or submitted manually at a Department of Employment and Labour centre.

### Step 7

Employers are required to submit the Resumption Report (W.Cl.6) and the Final Medical Report (W.Cl.5) to the Compensation Fund when the worker returns to work. Only after every one of these forms has been submitted will the Compensation Commissioner make all of the payments and close the case.

## 8.3 What compensation can workers expect?

Compensation is money paid by the Compensation Fund to employees who were injured on duty, to replace loss of wages and/or to pay medical expenses. If a worker is off work for three days or less, he/she will not receive compensation.

For the first three months the worker is booked off from work, his/her employer is obliged to pay

you 75% of their earnings/wages as at the time of the accident, if the injury is serious and lasts for the first three months. An employer will claim this back, from the compensation fund.

If the worker is off work for more than three months, the money (salary/ wages) must be claimed directly from the compensation fund.

Employees can be granted different types of compensation based on the unique circumstances of each case, including:

- Lump sum payments
- Periodical payments
- Monthly pension payments

Medical expenses will, however, be paid. If an employee requests a second doctor's opinion, he/she will be responsible for the payment of medical costs for the second opinion. The compensation fund only pays for the medical expenses where liability by the employer is accepted for the claim. Furthermore, employees have the right to consult with a medical practitioner of their choice in their local area promptly after sustaining an injury or contracting a disease.

The doctor treating the employee will prescribe the type of treatment and the period thereof. This is generally determined by the nature of the injury sustained. The compensation commissioner will pay for the reasonable costs incurred for the first 24 months.

### **Compensation in the case of temporary disability**

If the doctor indicates in the medical reports that a worker has a temporary disability (a minor injury) he or she will only get 75% of the earnings they were receiving at the time of the accident. This will only be paid during the time that a worker is unfit for duty, recovering as a result of injury. The fund does not pay for pain and suffering.

### **Compensation in the case of permanent disability**

If the doctor indicates in the medical reports that a worker has a permanent injury, such as deafness, blindness, amputation of a limb or an injury that permanently disables the worker (for the rest of their life), it will be assessed according to the percentage of disability laid down in the Act.

- If a worker's disability is assessed at 30% or less, they will be paid a lump sum, which is a once-off payment for that injury.
- If a worker's disability is assessed at more than 30% they will receive a monthly pension together with the arrears payment from the date of stabilisation of the worker's condition which is reflected on the Final Medical Report, and a monthly pension is payable for life. The amount of this pension is calculated on the worker's earnings at the time of the accident, the percentage of disability and the benefits applicable at the time of the accident.

### **Compensation in the case of the death of a worker**

- When an employee dies as a result of an injury or disease, his or her dependant's (widow or widower) will get a pension for life. The fund regards a person as a spouse(s) if they were married according to civil law, civil union or customary law, or a life partner with a contract signed under oath before the date of death, or a court order.
- All children under the age of 18 years will qualify and will be included as part of the parent/guardian's pension. However, the necessary documents as proof are required, for example, an unabridged birth certificate which links the deceased with the child, or the guardian of a child must hand in the necessary adoption certificates. This pension will stop when the child reaches 18 years unless he/she is still at school or attending a tertiary institution.

**If the accident is a result of the employee's serious and wilful misconduct, will any compensation be paid on the claim?**

No, unless the accident results in serious permanent disablement or death. Refer to section 22 subsection (3) paragraph (a) and (b) of the Compensation for Occupational Injuries and Diseases (COIDA) Act.

**Orthotics and prosthesis**

An orthotic is an assistive device which supports and corrects a deformity caused by an injury or disease. Assisting in activities of daily living e.g. braces, spectacles, hearing aids etc. A prosthesis is a device that replaces a missing body part due to injury or disease, such as ocular, lower, or upper limb prosthetics.

Case management is necessary when a medical service provider requests an assistive device for a patient. The request is clinically evaluated by a nurse, disability manager, or orthodontist to ensure it aligns with the fund's protocols. Case management is conducted via phone or in person. Case management involves nurses, disability managers, and orthotists to ensure clients receive comprehensive support from the compensation fund.

These services can be obtained from any HPCSA-registered orthotist/prosthetist affiliated with the Compensation Fund. The provider assesses, quotes, measures, and fits the device to the worker's needs. Requests are processed within 15 working days, and the device is provided to the worker through the medical service provider.

**Rehabilitation**

Rehabilitation is the process of aiding individuals who have suffered injury or illness to regain lost skills and achieve maximum independence. Clinical rehabilitation services involve a multi-disciplinary team comprising physiotherapists, occupational therapists, speech therapists, audiologists, and biokineticists.

Rehabilitation is deemed crucial whenever an injured or ill worker experiences physical, emotional, or functional limitations, aiming to

enhance their ability to engage in daily activities effectively.

Rehabilitation case management involves assessing, monitoring, and evaluating the rehabilitation treatment process to manage and advocate for injured or ill workers' rehabilitation treatment provision.

The compensation fund is informed of the injured worker's admission to a rehabilitation facility, followed by planned visits by the rehabilitation case manager. The case manager educates the worker, their family, and medical providers about compensation benefits. Regular visits monitor the treatment progress until discharge.

Injured workers are case-managed from the start of treatment in a healthcare facility until discharged. The case manager collaborates with medical and rehabilitation providers to monitor the worker's progress and response to treatment. They also assist the worker and their family in understanding the diagnosis or injury's extent. Case management before discharge prepares the worker and their family for adjustment to disability at home and in the community.

Key participants in rehabilitation case management include the injured or ill worker, their family, compensation fund medical case coordinator, compensation fund disability manager, and healthcare providers like physiotherapists and occupational therapists.

## Activity 19: Implementing COIDA

**Aim:**

To consolidate participants understanding of COIDA and how to implement it

**Time allocated:**

45 minutes group work  
1 hour for the report back and summary

**Task:**

In your groups, work through the following questions. You can draw on the material in your manual dealing with COIDA.

1. Where does the money that is in the Compensation Fund come from?
2. Lerato is a part-time worker at Company A. She was injured at work. Is she entitled to claim compensation from the Compensation Fund?
3. Siya works for Fruity Canning. He is temporarily totally disabled because he broke both his legs in a workplace accident. He is worried that he will not receive his wages while he waits for his compensation claim to be processed. How does COIDA protect him?
4. What forms have to be submitted to the Compensation Commissioner by Fruity Canning, by Siya and by the medical doctor so that he can claim compensation?
5. Does a worker have to prove the company was negligent before claiming compensation?
6. Sara slips and falls at her employer's house while she is cleaning the shower. She fractures a bone in her foot and is unable to walk for 6 weeks. Can she claim compensation? What compensation will she get?
7. Tony is booked off work for three months after an accident at work. What income can he expect during this time, and who will pay it?
8. After this initial three months, Tony is then booked off for a further month. What income can he expect during this time, and who will pay it?
9. Lethabo was injured at work. As a result, he has been permanently disabled. What compensation can he expect?

## Activity 20: Making a poster

### **Aim:**

To consolidate the knowledge gained during the week

To help participants think through how they can share their knowledge with other workers/members

### **Time allocated:**

1 hour 30 minutes group work  
30 minutes for gallery walk

### **Task:**

For this task you will work in groups.

Each group will be assigned a different piece of legislation from all the laws that have been covered this week. The LRA can be divided up into different sections with different groups dealing with different sections.

You need to design and make a poster which you could use as an educational tool to share with your members what you have learnt about that law. The poster should show:

- The main points about the law
- Why it is important for workers
- How it helps workers
- What some of the problems with the law are
- And anything else that you think is relevant.

All the groups will put up their poster and participants will do a gallery walk of all the posters.

Be prepared to explain your poster to the other groups.

# APPENDICES

## Appendix A: The political economy of labour law in South Africa

# Political economy of Labour Law in South Africa



### *Labour law is a product*

#### **Functions of labour law (1) of the context it operates in**

‘The individual employment relationship is a product, a reflection of social and historical developments. To understand his own position fully the individual worker (or employer) needs to understand the historical whole by which his function is determined and on which his existence as employer or worker depends. The study of economic and political conditions is not extraneous, it is essential to the study of industrial relations.’

*(Du Toit D Capital and Labour in South Africa : Class struggles in the 1970s.)*



# The origins of labour law

- 1700's - Industrial Revolution (IR)
  - Prior to IR employment contract regulated relationship
  - Production was small scale and local
- With IR, production changed:
  - Movement of people into cities
  - Emergence of social classes based on ownership of capital and means of production
  - Employment of workers – large scale consumption at national and international level
  - More intensive and extensive substitution of capital for labour – growth of factories



## Functions of labour law (1)

- Developed as result of limitations of the common law  
Seeks to balance the

❖ collective forces of management  
and organised labour

- Scope of labour law applies
  - on an individual and collective scale
  - to industrial safety and industrial disputes
  - collective agreements
  - job security

**It is about the regulation of the power to command and the duty to obey!**



## Functions of labour law (2)

- The countervailing power of organised labour
  - Not the same as trade union power
  - Rule and decision making power in trade unions and role of the ordinary member – same as corresponding power on the management side
- Labour law can only make a modest contribution to the standard of living of people
- It is a secondary force in human affairs and especially in labour relations – the first force is organized strength



## Labour law in South Africa

- The function of labour law in South Africa pre-1994
  - Race Based
  - Inhibited development of shared interest among the whole working class – black and white
  - Greater purpose than maintaining industrial peace
    - It was also about dividing working class
    - Policing apartheid



# Changing context for labour law

## Political

- The democratic breakthrough of 1994
- Demands of allies
- The RDP
- Fragmented labour law dispensation

## Economic

- Continuing economic crisis
  - Falling GDP
  - Rising unemployment
  - Declining manufacturing sector
- Integration into world economy

(Du Toit et al, 2015)

**New labour dispensation would be confronted by conflicting demands of different interest groups**



# Labour law in context (1)

- A product of struggle
- Pre and Post 94 period – changes in context and law
- New forms of work
- Upheavals in the trade union movement
- Marikana
- All impact on strength of trade unions and role that law plays



## Labour law in context (2)

- On the whole – a capitalist society– interests of this class upheld by state power
- Working class inhibits ability of capitalist class to advance/enforce their interests by legal means
- Democratic transformation meant interests of all classes to be accommodated
- The Constitution –
  - Bill of Rights
  - Working class able to make socio-economic and political gains



## Labour law in context (3)

- But.... overall the rule of 'sovereign' still protects capitalist interests
- **The law is not neutral** but also not simply an instrument of capitalist rule
- Working class and labour movement have pushed for laws which advance and defend their interests
- Key demands of the working class have therefore become part of the 'command of the sovereign' (law)



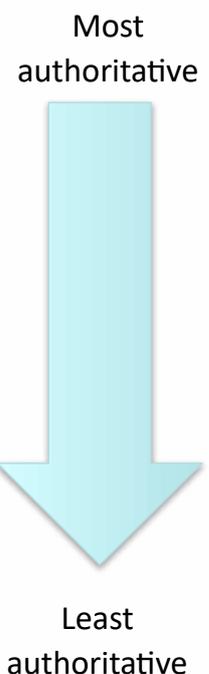
# Sources of law



## *Different sources of law and hierarchy*

### South African sources of law

- Number of different sources of law
  - BUT -
- Different sources carry different weight
  - Constitution
  - International Law
  - Legislation
  - Collective Agreements
  - The Common Law
  - Customary Law
  - Custom
  - Judicial Precedent ( Case Law)
    - Not law per se but used to establish the meaning of the law – *ex post*
    - **Tribunals like CCMA not binding but persuasive**
  - Academic Writing
    - Clarify points of law



# The Constitution (1)

- Pre- 1994 – system based on supremacy of Parliament
- Constitution is now the supreme law – laws or conduct that are inconsistent with it are invalid
- Binds legislature, the executive, the judiciary and all organs of state



# The Constitution (2)

## Section 23 – Labour Relations

(1) Everyone has the right to fair labour practices.

**(2) Every worker has the right-**

**(a) to form and join a trade union;**

**(b) to participate in the activities and programmes of a trade union; and**

**(c) to strike.**

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

**(4) Every trade union and every employers' organisation has the right-**

**(a) to determine its own administration, programmes and activities;**

**(b) to organise; and**

**(c) to form and join a federation.**

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. **National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).**

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).



## The Constitution (3)

- Fairness at the core of section 23
- LRA and BCEA expressly designed to give effect to section 23 rights
- EEA – Prohibition of unfair discrimination as stated in section 9 of Constitution **but cannot be read in isolation of section 23**
- All three laws to be interpreted in compliance with the Constitution



## Bill of Rights

- **Constitution - Section 39(2)**
  - Every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights
  - Values recognised and protected in the Constitution include:
    - Human dignity, the achievement of equality and the advancement of human rights and freedoms
    - Non-racialism and non-sexism.
    - Supremacy of the constitution and the rule of law.
  - Bill of Rights applies to all laws



## Relationship between Constitution and Statute

***SANDU v Minister of Defence and Others 2007 (8) BCLR 863 (CC) para 52***

*(A) litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.*



## Relationship between Constitution and Statute

***Minister of Health and Another v New Clicks SA (pty) Ltd and Others 2006 (1) BCLR 1 (CC) para 426 - 437***

*(W)here a litigant founds a cause of action on such legislation (ie legislation giving effect to a constitutional right), it is equally impermissible for a court to bypass the legislation and decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.*



## International Labour Organisation (ILO)

- Deals with all international rules about workers' rights
  - Fairness
- Aims to create in all countries:
  - Good work conditions
  - Safety for workers
  - Respect for labour standards
- Conventions South Africa has ratified
  - Freedom of Association
  - Right to organize and bargain collectively
  - Equal Pay
  - Abolishing forced labour
  - Fighting against discrimination
  - Ensuring occupational health and safety
  - Setting minimum age standards



## International law

- **Section 233 of Constitution** – recognizes role and importance of international law
- **Conventions** = International Labour Law Agreements
  - Helps countries cooperate
  - Sets common standards to protect workers' rights and promote fair and safe working conditions across borders
- When countries sign and ratify a Convention – becomes a source of law for the country



# Collective Agreements

Agreement at single workplace or within industrial sector between:

Agreement at single workplace or within industrial sector between:

One or more union

Employer or Employer Association

Covers wages and other employment conditions

**Why is it important source of labour law?**

Covers workers in union, and also workers who are not members of union



## Other Sources and Types of Law

- **Common law** is “Unwritten law” which is applied by communities and courts over a long period
- **Jurisprudence** - Created by judges through past court decisions and based on **cases**
- **Contract of employment** very important – it governs relationship between employer and employee



# Judicial Precedent and Hierarchy

- Judicial precedent is part of common law
- Principle of consistency and fairness – using law the same way in the same circumstances
- Principle of ‘legal certainty’ – law applied in a specific situation should be similarly applied in similar situations

## Hierarchy of courts:

- **Constitutional Court**
- **Supreme Court of Appeal (SCA)** – Highest court in all matters other than constitutional matters. Also previously heard appeals from the LAC.
- **Labour Appeal Court (LAC)** – Now the highest court of appeal on all labour matters other than constitutional matters
- **High Courts** – Limited jurisdiction over labour related matters. Bound by SCA decisions but not those of the LAC
- **Labour Courts** – Same status of High Courts. Bound by decisions of the LAC and the SCA
- **CCMA and Bargaining Councils**



## Customary law

- Before 1994 – customary law was not considered part of legal system
- Since 1994 – customary law gained recognition and status as valid legal system
- Constitution safeguards rights of individuals to practice cultural traditions



## Legal writings

- Legal writings of experts and academics may be consulted to clarify meanings of law
- But they are not independent forms of knowledge.



# Freedom of Association and Organisational Rights



## Freedom of association

- Fundamental to collective bargaining
- Purpose of 1995 LRA - to promote voluntary collective bargaining
  - Supporting rights of workers to form and join trade unions
  - Supporting certain organisational rights
- Section 4 and 5 sets out rights in relation to Freedom of Association
- But many of these rights only available to employees (and work seekers) and registered trade unions
  - Enter into agency and closed shop agreements
  - Become a party to a bargaining council
  - Conclude collective agreements that are enforceable under the LRA
  - May act or be a party to any proceedings in terms of the LRA in its own interest or on behalf of its members
  - Qualify for the organisational rights provided for in the LRA



## Freedom of Association (2)

2011 court case (see ***UNICA Plastic Moulders CC v National Union of South African Workers (2011) 32 ILJ 443 (LC)***) established that there is nothing in LRA that prevents unregistered unions from:

- recruiting or representing members at disciplinary hearings
- demanding that an employer bargains with it over wages
- embarking on a protected strike



## Freedom of Association (3)

2023 court case (see ***Simunye Workers Forum v Registrar of Labour Relations (2023)***) established that there is nothing in the LRA that prevents non-traditional trade unions from registering

- This opens way for workers in non-standard employment relations, and organised into non-tradition trade unions, to be organise, be recognized and register as trade unions



# Organisational rights (1)

## Rights that registered trade union can exercise in workplace

- 1995 LRA – Five organisational rights
  - 3 are extended to unions ( acting together or alone) who are **sufficiently representative** of employees in the **workplace**
    - **Access to the workplace (section 12)**
    - **Union subscriptions (section 13)**
    - **Leave for trade union activities ( section 14)**
  - 2 are extended to unions ( acting together or alone) that represent a **majority** of employees in the workplace
    - **Right to elect shop stewards ( section 15)**
    - **Disclosure of information (section 16)**
  - **Minority unions may also claim these rights but cannot have them legally enforced**
- **‘Sufficiently representative’** not defined in LRA but accepted as less than 50%
- **Majority** accepted as more than 50%



# Organisational rights(2)

- Nothing preventing an unregistered union from making demand for organisational rights.
- However may not refer dispute for arbitration.
- Nothing preventing minority unions from seeking organisational rights  
**NUMSA and Others v Bader Bop (Pty) Ltd and Another ( 2003) 24 ILJ 305 (CC)**  
**UASA and AMCU v BHP Billiton Energy Coal SA(Billiton) and NUM ( case No J354/13) – Labour Court matter**
- Unions may choose to strike over section 12 – 15 rights but if it does so, may not refer a dispute to arbitration for period of 12 months
- Disclosure of information dispute must be arbitrated
- Amount of time off for shop stewards the subject of separate negotiations
- Unions must first engage ( or seek to engage) with employer before CCMA referral



## Claiming organisational rights (1)

- The steps to follow are prescribed by section 21.
  - Union must prove sufficient representation in workplace
  - Informing employer which rights, which workplaces, provide of representivity, and registration certificate
  - Make a collective agreement with employer on organisational rights
    - Seek to reach an agreement within 30 days
  - If unable to reach agreement, refer to CCMA for conciliation
  - If unresolved, refer to CCMA for arbitration
  - Enforcement by Labour Court
- Registered unions can also submit wage demands and demands for organisational rights simultaneously



## Claiming organisational rights (2)

If dispute is about representivity then guidelines set out in section 21(8) must be followed:

- Attempt to minimise the number of unions in a workplace
- Encourage system of representative unions
- Minimise the burden on employers to administer org rights to more than one union
- The nature of the workplace
- The nature of the sector
- The rights that the union is seeking
- Prior relationship with employer
- Composition of the workforce



## Claiming organisational rights (3)

### Eligibility for rights

- Section 11 of the LRA provides that -“Unless otherwise stated **representative trade union** means a registered union, or two or more registered unions acting jointly, that are sufficiently representative of employees employed by an employer at the workplace.”
- Section 19 of the LRA provides that , registered trade unions that are parties to a council automatically have section 12 and section 13 rights in respect of all workplaces within the registered scope of the council regardless of the union’s representivity in the workplace.
- Registered union will still have to follow the section 21 dispute resolution process if employer refuses to extend organisational rights.



## Claiming organisational rights (4)

### Access to work premises

- **Rights of access are restricted in the domestic work sector.** In terms of section 17(2)(a), a trade union does not have the right to enter the employer’s premises without consent. Permission is required from the employer before entering a private residence.
- **Organisers who wish to visit farms to recruit workers who reside on farms** and carry out trade union business may use the Extension of the Security of Tenure Act 62 of 1997 to do so. This act gives a right of access to people visiting lawful occupiers of rural and peri-urban areas.
- **An arbitration award concerning organisational rights of employees where control of access to the premises vests in someone other than the employer** (for example, employees of a retail store situated in a shopping mall) can also be made binding on the party who controls access, provided that the party concerned has been given an opportunity to be heard on the matter.



## Claiming organisational rights (5)

### Representivity:

CCMA has generally found that at least 30% constitutes 'sufficiently representative'

- **2014 amendments:**

- Section 8(b)(v): Take into account workers placed by labour brokers, part time workers, fixed term contract workers and workers in other categories of non-standard workers
- Section 12 : Rights may be sought at either the premises of the client or the labour broker
- Section 21 (8B): Introduces "Most representative". Can gain section 14 rights. Falls away if majority union emerges
- Section 21 (8C) Introduces "Significant interest or substantial number". Can gain same rights as sufficiently representatives union provided commissioner has considered section 8 provisions.



## Claiming organisational rights (6)

### Workplace:

Dealt with on numerous occasions by both CCMA and the courts

- Section 213 definition:

**"(I)n the private sector** as "the place or places where the employees of an employer work. If an employer carries on or conducts **two or more operations** that are **independent** of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the work-place for that operation'.

**In relation to the public service** – for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service as the case may be; or for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 792) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any other part of the public service that the Minister of Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcated as a workplace."



# Claiming organisational rights (7)

## Workplace (Cont)

- **OCGAWU v Total SA (Pty)Ltd (1999) 6 BALR 678 (CCMA)**
  - Workplace needs to be consistent with statutory definition
  - Demarcation needs to accord with overall objectives of LRA
- **OCGAWU v Woolworths (Pty)Ltd (1999) 8 CCMA 4.7.4**
  - Workplace was found to be the 104 outlets collectively
- **Chamber of Mines of South Africa and Others v AMCU and Others (2014) 3 BLLR 258 (LC)**
  - Individual mines owned by companies not separate workplaces





REPUBLIC OF SOUTH AFRICA

# GOVERNMENT GAZETTE

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## STAATSKOERANT

VAN DIE REPUBLIEK VAN SUID-AFRIKA

*Registered at the Post Office as a Newspaper*

*As 'n Nuisblad by die Poskantoor Geregistreer*

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KAAPSTAD, 5 DESEMBER 1997

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OFFICE OF THE PRESIDENT

KANTOOR VAN DIE PRESIDENT

No. 1631.

5 December 1997

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 75 of 1997: Basic Conditions of Employment Act, 1997.

No. 1631.

5 Desember 1997

Hierby word bekendgemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 75 van 1997: Wet op Basiese Diensvoorwaardes, 1997.

# ACT

To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith.

*(English text signed by the President.)  
(Assented to 26 November 1997.)*

**B**E IT ENACTED by the Parliament of the Republic of South Africa as follows:—

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## CHAPTER ONE

### *Definitions, purpose and application of this Act*

#### Definitions

- |   |    |
|---|----|
| 1. In this Act, unless the context indicates otherwise—         | 50 |
| “agreement” includes a collective agreement;                    |    |
| “area” includes any number of areas, whether or not contiguous; |    |

## Appendix E: Labour Relations Act contents

### OFFICE OF THE PRESIDENT

No. 1877. 13 December 1995

#### NO. 66 OF 1995: LABOUR RELATIONS ACT, 1995.

It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

No. 66 of 1995: *Labour Relations Act, 1995.*

#### ACT

To change the law governing labour relations and, for that purpose-

- to give effect to section 27 of the Constitution;
- to regulate the organisational rights of trade unions;
- to promote and facilitate collective bargaining at the workplace and at sectoral level;
- to regulate the right to strike and the recourse to lockout in conformity with the Constitution;
- to promote employee participation in decision-making through the establishment of workplace forums;
- to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;
- to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;
- to give effect to the public international law obligations of the Republic relating to labour relations;
- to amend and repeal certain laws relating to labour relations; and
- to provide for incidental matters.

(English text signed by the President. Assented to 29 November 1995.)

**BE IT ENACTED** by the Parliament of the Republic of South Africa as follows:-

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