How to use the law in the workplace

A guide for trade unionists

Labour Law Training Manual

For the Intermediate Trade Union Training Course

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INTRODUCTION

This manual is a guide for trade union leaders, union officials and activists (all referred to as trade union activists in this manual). It is aimed at building an overall understanding of what is contained in South Africa's labour legislation. The approach taken in this manual is that the law is a tool, and definitely not the only tool, that can be used in the workplace for defending workers' interests and strengthening the struggle of workers. It is therefore important that leaders and activists know what is in the law and how to use it.

It is important to remember that the law is not cast in stone – it is a product of struggle, and it is also part of the context in which struggle takes place. Making use of labour law is a big part of a trade union activism. But unions cannot only rely on the law for strength or for taking forward the interests of workers. A union's strength lies in the collective power of organised workers. At the same time, however, the law is an important tool that trade unions can make use of - both to defend and advance the interests of their members.

Since 1994 the context within which we need to understand the labour laws has shifted significantly. First, there have been substantial changes in the labour laws. Some of these amendments have strengthened the position for workers, but some of them have weakened or undermined gains and victories that workers have already won. Second, there has been a shift in the type of work where many workers are employed. There has been a sharp rise in the number of non-standard workers i.e., workers who are employed in more precarious employment. These include labour broker workers, temporary workers and contract workers. And third, there have been major upheavals in the trade union movement – the Marikana massacre and the conflicts within and between unions that that threw up; the expulsion of NUMSA from COSATU; ongoing tensions between tri-partite alliance members the ANC, SACP and COSATU; and the establishment of a new trade union federation SAFTU. All of this has impacted on the strength of the unions in the workplace, the role that the law plays in taking forward workers' struggles, and the attitude of the government and employers to working class struggles. The most recent amendments to the Labour Relations Act impact further on the rights of workers.

What is law?

There have been debates for centuries about how to understand the nature of law. In ancient societies it was bound up with religious duties but, as capitalist society developed, the state became independent of the church and for most states the law became distinct from religion. Almost two centuries ago, law was defined as "the command of the sovereign" – i.e., command backed by the threat of sanction. And the "sovereign" is simply the highest body of state power, which is accountable to no-one else.

This may be true, but it tells us nothing about the purpose and content of law. It was Karl Marx who, from 1848 onwards, identified the ***class*** nature of society as a basis for understanding the nature of law. The ruling class in every society "rules" through the degree of control or influence it can exercise over the state ("the sovereign"). The "command of the sovereign" thus reflects the class interests of the ruling class – even if the state does not always have the power to absolutely enforce those interests.

South Africa, despite its dramatic political transformation in the early 1990s, remains a capitalist society where the interests of the (international) capitalist class are, in the last analysis, upheld by state power. But it also illustrates the growing contradiction of capitalist rule over the last 150 years – the increasing power of other social classes, and the working class in particular, to place limits on the legal enforcement of capitalist interests.

In South Africa the revolutionary tensions that had built up under apartheid, and are still present under the surface, have pushed the boundaries of formal political democracy further than in most other countries. The Constitution, in particular, represents a far-reaching class compromise which offers working people and the labour movement significant opportunities of making socio-economic and political gains. But the "sovereign" state still defends capitalist interests, and will continue to do so until an alternative system for governing the economy has developed that is able to replace capitalism. **The law is therefore not neutral.** But this does not mean it is simply an instrument of capitalist rule. Labour law, in particular, is contested terrain where

many historical demands of the working class have become part of the "command of the sovereign". While it remains a compromise, it offers real possibilities of defending or promoting the interests of working people. Understanding and using labour law from this perspective is a key part of this course.

Sources of law

Law in South Africa has many sources, rather than one primary source where the whole law can be found (known as a "code", usually in the form of series of books in which all laws are set out). Different sources of law, however, carry different weight, in that rules coming from "more authoritative" sources may prevail over rules coming from "less authoritative" sources. The main sources of South African law, in approximate order of influence, are the following:

- the Constitution;
- international law, including ILO Conventions.
- legislation (acts of the national and provincial legislatures, as well as regulations made in terms of legislation; for example, sectoral determinations made in terms of the Basic Conditions of Employment Act);
- collective agreements;
- the common law (rules and principles originating in Roman law 1500 to 2000 years ago, developed further in the Netherlands from the 16th century onwards and exported to South Africa as "Roman-Dutch law" when the Cape was colonised by the Dutch East Indies Company in the 17th century)
- customary (indigenous) law;
- custom (unwritten practices which people adhere to over long periods of time, which may come to be regarded as binding provided, they are not in conflict with legislation or common law); and
- judicial precedent or case law (strictly speaking not a "source" of law because judges interpret legislation and common law and do not have the power to make new law; in practice, however, case law is widely referred to in order to establish the meaning of statutory provisions or common law rules).

The writings of legal experts ("textbooks") may also be consulted to clarify the meaning of the law but are not independent sources of law. In this manual we will focus mainly on South African labour laws. It is important to keep abreast of how the courts have interpreted legislation. This is helpful in considering options available to workers when confronted by workplace problems and disputes.

An overview of South African labour laws

Shortly before and after the 1994 democratic breakthrough, labour legislation in South Africa was overhauled. We also saw the introduction of legislation that specifically promoted equity and affirmative action in the workplace. For purposes of this course, we will focus mainly on the following pieces of legislation, their key provisions and how these have been applied and interpreted. We will however do this within the framework of the labour relations rights provided for in section 23 of the South African Constitution:

The Labour Relations Act 66 of 1995 (LRA)

The purpose of LRA is to *"advance economic development, social justice, labour peace and a democratisation of the workplace*" by fulfilling the primary objectives of the Act, including

- to give effect to the fundamental rights conferred by section 23 of the Constitution;
- to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;
- to provide a framework within which employees and trade unions, employers and employers'

organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest;

- to promote orderly collective bargaining; and
- employee participation in decision making [s1, LRA].

The main functions of the LRA are to regulate collective bargaining and strike law (including the right to form and join trade unions and employers' organisations), unfair dismissal law and unfair labour practices. It does this by creating a single framework for labour relations across all sectors of the economy, including the public service. It also established institutions for dispute resolution and adjudication, namely the CCMA, bargaining councils and the specialist system of labour courts (the Labour Court and Labour Appeal Court - LAC).

The Act also includes a number of Schedules with codes and guidelines for implementing various provisions of which the most important is Schedule 8, dealing with fairness in dismissal on grounds of conduct or capacity.

Only members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence are excluded from its ambit. However, perhaps the most important limitation of the LRA is the fact that the protection it extends to workers is limited to "employees", as defined (s213). This means that workers classified as independent contractors are excluded.

The Basic Conditions of Employment Act 55 of 1998 (BCEA)

The BCEA sets out to give effect specifically to section 23(1) of the Constitution as well as to South Africa's obligations in terms of ILO Conventions. It does this by guaranteeing all employees minimum standards of employment in terms of working time, leave etc., while also creating mechanisms for varying these standards to meet the needs of particular sectors or workplaces. It also gives the Minister of Labour the power to issue determinations containing minimum wages and conditions of employment for sectors where no collective agreement is in force; in practice, hard-to-organise sectors such as the agricultural/farm worker (Sectoral Determination 13 of 2006) sector and the domestic worker sector (Sectoral Determination 7 of 2002).

Much like the LRA, the BCEA applies to all "employees" and employers except for members of the South African National Defence Force, National Intelligence Agency, South African Secret Service, unpaid volunteers working for charitable organisations and persons employed at sea in terms of the Merchant Shipping Act of 1951.

The Employment Equity Act 55 of 1998 (EEA)

The EEA was a response to the inherited system and effects of racial discrimination and inequality as it impacted the labour market. Unlike the LRA and BCEA, it was enacted to give effect not to section 23 of the Constitution but to section 9(4), which prohibits unfair discrimination against "anyone" and provides that "national legislation must be enacted to prevent or prohibit unfair discrimination". The EEA does this in the field of labour relations.

The EEA has two key purposes. The first is to "promote equal opportunity and fair treatment through the prohibition of unfair discrimination against all employees". The second and more controversial objective is to implement affirmative action measures to redress the disadvantages in employment experienced by black people, women and people with disabilities, in order to ensure their equitable representation in all occupational categories and levels in the workforce". [s 2] "Black" is used generically to include African, Coloured and Asian people.

Again, members of the Defence Force and the three national intelligence agencies are excluded from the Act.

Other employment related laws

A few other pieces of legislation are significant in the employment field. Although we will not specifically deal

with these in this manual, they should be noted.

Protected Disclosures Act 26 of 2000

The purpose of the Act is to protect employees ("whistle-blowers") who make disclosures about illegal or irregular activities of their employers or other employees. It protects them by providing avenues for such disclosures and protecting employees against reprisals by making any associated dismissal automatically unfair [s 187, LRA} or any other reprisal an unfair labour practice [s 186(2), LRA].

The Skills Development Act 97 of 1998 (SDA)

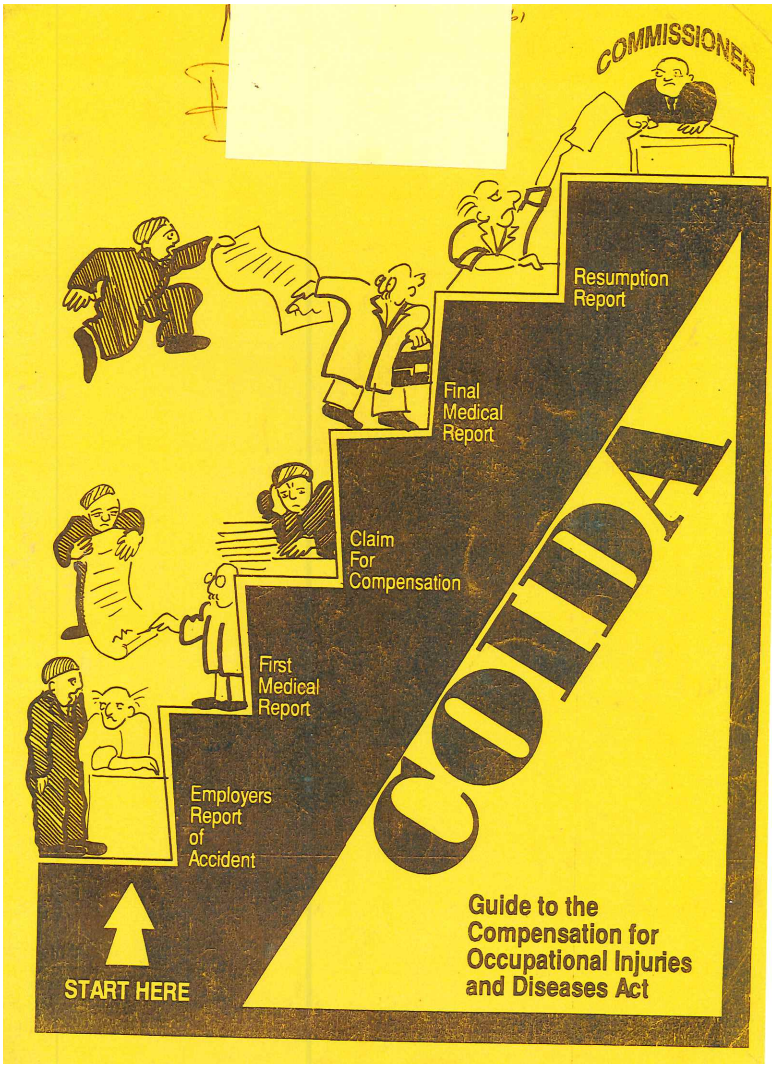
The Act seeks to address the low skills base by creating incentives for the education and training of employees and new entrants into the labour market. It also creates an institutional and financial framework for training and skills development in the workplace. Its importance in the labour relations context relates to affirmative action and the advancement of "suitably qualified" employees from previously disadvantaged groups. With systematic alignment, the SDA could play a major role in providing such employees with the necessary qualifications.

Occupational Health and Safety Act 85 of 1993 (OHSA)

As we have seen, employees have a common law right to a safe working environment. This Act serves to regulate that right and the employer's corresponding duties by creating a framework for ensuring safe and healthy working conditions and providing criminal sanctions for breaches of the Act.

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

This Act replaces the Workmen's Compensation Act 30 of 1941. Its purpose is to provide for compensation for employees in the event of occupational injuries or diseases incurred in the course of their employment. It creates a system of automatic no-fault compensation, meaning that employees are compensated regardless of whether the injury or disease was due to the negligence of the employee, the employer or any other person.



Employers are required to make compulsory contributions to the Compensation Fund. In return, employers are protected against claims from employees based on failure to comply with their common law duty to provide safe working conditions. The courts have recently ruled that domestic workers, who had previously been excluded, must now be covered by COIDA.

Unemployment Insurance Act 63 of 2001 (UIA)

The purpose of the Act is to provide financial benefits for qualifying workers during periods of unemployment, illness or pregnancy or to their dependents in the event of their death.

Certain categories of employees are excluded from claiming benefits, such as those who

resign voluntarily and employees who work for less than 24 hours per month. Both employers and employees are required to contribute to the fund.

National Minimum Wage Act 9 of 2018

The purpose of the Act was to provide for South Africa's first ever national minimum wage (NMW). The wage rate has been set at R20 rand per hour with a minimum of 4 hours prescribed. The rates for domestic workers and farm workers have been set at R18 and R15 per hour respectively. The NMW was promulgated following lengthy negotiations in NEDLAC. Not everyone supports the national minimum wage. SAFTU has expressed strong opposition to the NMW stating that it comes nowhere near a living wage that workers have been fighting for.

Employment Services Act 4 of 2014

The purpose of this Act was to primarily provide for the establishment of schemes to promote the employment of young work seekers and other vulnerable persons and the provision of public employment services. It was also meant to deal with the long-standing call for the regulation of labour brokers.

Codes of Good Practice

There are also several Codes of Good Practice that have been issued by the Minister of Labour under different pieces of labour legislation. These codes have gone through the National Economic Development and Labour Council (NEDLAC), the primary tripartite institution in the country before been issued by the Minister. The codes must be considered by anyone applying or interpreting any employment law:

Labour Relations Act

- Schedule 8: Code of Good Practice for Dismissals
- Handling Sexual Harassment Cases
- Definition of who is an employee?
- Picketing and Strike Ballots

Basic Conditions of Employment Act

- Arrangement of working time
- Pregnancy

Employment Equity Act

- Disability in the workplace
- Employment Equity Plans
- Integration of employment equity into human resources policies and practices
- Key aspects of HIV/Aids and employment
- Key aspects of employment of people with disabilities

Occupational Health and Safety Act

- National Code of Practice for the evaluation of training providers for lifting machine operators

These codes can all be found on the Department of Labour's website at www.labour.gov.za

>>>>>>>>>>>>>>>>>>>>>>>> Activity: Understanding the intention of the LRA <<<<<<<<<<<<<<<<<<<<<<<<

Task: Read the preamble to the Labour Relations Act of 1995.

Preamble to Labour Relations Act, No 66 of 1995

To change the law governing labour relations and, for that purpose-

- to give effect to section 23 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.

Discuss in groups:

1. What do you think the intention of the LRA was?
2. What impact do you think it has had?
3. Who does our labour laws like the LRA favour – employers or employees or is it neutral?

>> End Activity <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

WHAT LAW SHOULD YOU BE USING?

As labour activists you are confronted by many pieces of legislation that you must find your way around. In working out how to deal with particular issues and cases that you are confronted with you need to know what the law says on the issue and how workers and/or their unions can make use of the law as part of their strategy. There might be different laws that you can draw on for the same case so you need to have an understanding of all the laws.

This manual focuses mainly on the Labour Relations Act, but in this section, we will briefly look at the different labour laws and when it would be appropriate to use them.

>>>Activity <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Task: In your groups consider the following problems and discuss which law/s is important for tackling each of the problems.

Problem I: **A worker has been dismissed.**

Problem 2: **A worker is injured at work.**

Problem 3: **Workers are being forced to work longer hours than they agreed to.**

Problem 4: **A woman worker suspects she did not get a job because she is a woman.**

>> End Activity <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

The Constitution and the right to fair labour practices

The Constitution is "the supreme law of the Republic" (s2). This means that "law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled." (s2). This represents a fundamental paradigm shift from the pre-1994 order, which rested on the principle of parliamentary supremacy.

The Constitution applies both vertically, i.e. regulating the affairs of Government in relation to persons (both natural and juristic); and horizontally, i.e. regulating affairs between or among persons (both natural and juristic). This is particularly important with regard to the application of the Bill of Rights as set out in Chapter 2 of the Constitution: ***private persons are obliged to respect the basic rights of other private persons.***

Section 23 of the Constitution deals with labour rights. It provides that:

"(l) 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)."

Sub-sections (5) and (6) above remind us that no right is absolute and that this applies also to labour rights. Section 36 (1) of the Constitution defines the extent to which rights created by section 23 or any other section of the Bill of Rights may be limited. It provides the following:

"Rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

Section 39(2) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Amongst the core values recognised and protected by the Constitution are:

- 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.

This means that all labour legislation, as well the common law and customary law, must be interpreted in a manner that furthers the values of the Constitution or, to put it differently, that will limit the enjoyment of basic rights by one or more persons as little as possible in a way which is in accordance with the purpose of the relevant piece of legislation. An approach referred to in legal terminology as 'purposive' or purpose seeking. This is a shift from the orthodox approach that requires that the words of a law must be given their 'ordinary literal and grammatical meaning' unless this would lead to 'a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.'

The above must be kept in mind when assessing how to respond to workplace challenges and where the use of the law is being considered.

Fair Labour Practice

What constitutes a fair labour practice came before the Constitutional Court in the matter of ***National Education Health and Allied Workers Union v University of Cape Town and Others*** **(2003) 24 ILJ 95 (CC).** This matter concerned workers' dismissals arising from a section 197 transfer.

The court noted that the term fair labour practice was not defined in the Constitution and brings to the fore, a tension between the interests of workers and employers. The determination of whether or not an act constitutes a fair labour labour practice is dependent on the circumstances and ultimately involves a value judgment. The concept, the court, said must be given content by legislation left to the courts to 'gather meaning'. In doing so, the courts give consideration to, amongst others, the old Unfair Labour Practice jurisprudence developed by the Industrial Court, the codification of rights in the 1996 LRA and ILO Conventions.

Fairness it said was not confined to workers only. It applies equally to the employer and the accommodation

of interests was an imperative. In seeking to balance the interests of the employer to pursue a transfer of business with the interest of the employees to job protection. It found in favour of the union in this matter.

Knowing the Labour Relations Act

Introduction

The Labour Relations Act covers many different areas that govern the relationship between employers and workers in the workplace. These areas include:

- Rights of employees
- Trade Union Rights
- Collective Bargaining
- Strikes and lock-outs
- Dispute Resolution
- Dismissals
- Unfair Labour Practices

Remember that with many of these issues it is not possible to only focus on the LRA. You also need to explore the implications of some of the other Acts for the issue you are dealing with. It is important that labour activists are familiar with and know their way around the LRA and other pieces of legislation.

In this manual we are going to focus in particular on three areas covered by the LRA:

- Trade Union Rights
- Dispute resolution mechanisms
- Dismissals
- Collective Bargaining

Just a reminder that a purpose of this manual is to familiarise trade union activists with what is contained in our labour laws and to what extent these laws can be used to win struggles and build effective trade union organisation.

Freedom of Association and the protection of employees and those seeking employment

One of the main aims of the 1995 LRA is to promote voluntary collective bargaining within a broad framework of regulations. It promotes collective bargaining by seeking to encourage organisation amongst workers and employers.

There are two ways in which the LRA aims to support trade union rights for workers:

- by supporting the right of workers to join trade unions and take part in trade union activities; and
- by supporting certain organisational rights for trade unions in the workplace.

Relevant sections of the LRA for trade union rights are:

Chapter 2 (sections 4 – 10) sets out freedom of association rights.

Chapter 3: Part A (sections 11 – 22) covers trade union organisational rights in the workplace

Chapter 3: Part B (sections 25 – 26) covers closed shop and agency shop agreements

Chapter 6 (sections 95 – 111) contains provisions concerning the registration and regulation of trade unions and employer organisations.

Flowing from the labour rights contained in section 23 of the South African Constitution, the LRA at sections 4 and 5 clearly sets out the freedom of association and protection rights of employees.

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 work-place forum;

(ii) not to become a member of a trade union or work-place forum; or

(iii) to give up membership of a trade union or work-place 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 work-place forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a work-place forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or work-place 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.

But many of these rights and protections, are only available to registered trade unions.

Registration is however not compulsory. But, to encourage trade unions to take this step, only registered trade unions may, for example

- enter into agency shop 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 interests or on behalf of its members;
- qualify for the organisational rights provided for in the LRA.

The freedom of association and collective bargaining rights of unregistered unions are, however, protected. This was confirmed in ***Unica Plastic Moulders CC v National Union of South African Workers* (2011) 32 ILJ 443 (LC).** In this case, the issue of whether *unregistered* unions can claim organisational rights was considered. The court found that trade unions register in order to claim the various rights in the LRA that are reserved for registered unions; for example, establishing a bargaining council or concluding collective agreements in terms of sections 23 - 26 of the LRA. However, there is nothing in the LRA that prevents an unregistered trade union from recruiting members or representing its members at disciplinary hearings. Also, nothing prevents an unregistered union from demanding that an employer bargains with it over wages or from participating in a protected strike. On this basis, the court denied the company's application to interdict the unregistered union from recruiting its employees. This is an important point to consider if your worker organisation is strong but is struggling to get registered.

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 in the LRA for all the workplaces that fall under that council.

Again, a point to remember is that dependent on your organisational strength there is nothing preventing an unregistered trade union from making a demand for organisational rights. The key difference between registered and unregistered unions on this matter is that the unregistered union may not refer a dispute regarding organisational rights for arbitration. It would have to be taken up by way of 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.

It is often very difficult to organise workers in the agricultural sector. Trade union organisers who wish to visit farms to recruit workers who reside on the farm and carry out trade union business, may 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.

Claiming 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 resort to industrial action*.

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 have been able to access some or all of the organisational rights in the Act, to do so in combination with others. Rights are furthermore 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'.

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 representivity 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.

The CC, 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 judgement the court stated:

> *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,

> *the 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 endeavor 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.

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 representivity if this is in dispute. The commissioner must follow the guidelines set out in section 21(8) of the LRA. This section says:

- 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 organize 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 contended 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.

Summary of key points

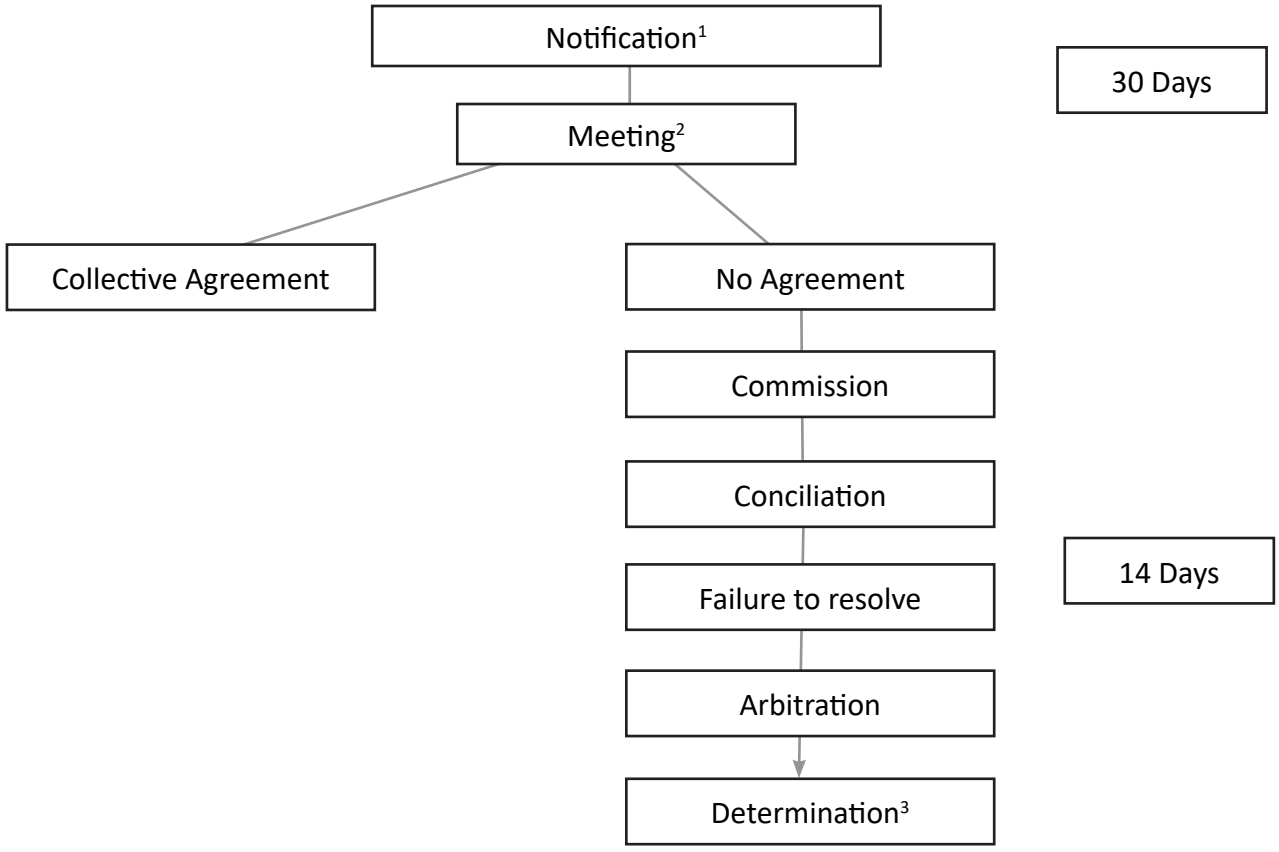
- Organisational rights are covered by sections 11 to 22 of the LRA.
- Flow-diagram 2 (See Box)in the LRA outlines the procedure to follow when there is a dispute about organisational rights
- To obtain basic organisational rights a registered trade union must prove that it is "sufficiently representative". This can be disputed by an employer. It is important that unions strategise and prepare carefully in order to make their claim.

- A union may choose to strike over the following or refer a dispute to arbitration if it concerns section 12 – 15 organisational rights. If a union chooses to strike over these rights, it may not refer the matter to arbitration for a period of 12 months.
- A dispute about disclosure to information must be adjudicated and may not give rise to industrial action.
- It is also useful for unions to consult old arbitration awards from the CCMA in preparing their struggle for organisational rights.
- Unions must first engage with the employer to secure organisational rights (section 21 of LRA) before taking the issue to the CCMA (section 22 of the LRA).
- Although the LRA does not contain a general duty to bargain, it does require employers to negotiate with trade unions about organisational rights. If the employer refuses, this refusal could form the basis of a CCMA referral.

FLOW DIAGRAM 2

ORGANISATIONAL RIGHTS

Chapter III (Section 21)



Footnotes

1. A registered trade union may notify and employer that it intends to exercise organisational rights. The content of the notice is described in s.21(2). For example, if a registered trade union is sufficiently representative, it may notify the employer that it seeks to exercise the rights of access.

2. The object of the meeting is to conclude a collective agreement on the exercise of the organisational right. If there is no agreement, the trade union can elect to exercise a right to strike, or it can the refer the dispute to the commission. If the trade union elects not to strike, it cannot refer a dispute over organisational rights to the Commission for a period of 12 months.

3. The Act contemplates disputes and therefore determinations about the definition of a workplace, the representativeness of a union and the manner in which organisational rights are exercised.

>>>**Activity** <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

1. What problems does your union experience when attempting to access organisational rights?

2. Are smaller/minority unions given enough protection under the LRA?

3. Do you think the following amendments, introduced in 2014, will assist your union securing organisational rights? If yes, explain how:

- In section 8 requiring 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.
- In section 12 allowing 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 introduction of an amendment allowing 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 introduction of what is termed **"significant interest or substantial number"** allowing 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.

>>> **Activity**<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

The Empowerment Workers Union (EWU) is a registered trade union that organizes workers in the retail sector. The Power Tool Hardware Store is owned by Mr Khumalo and employs 20 people. One the employees is the Treasurer of EWU.

The EWU has been trying to recruit members in Power Tool. It has been meeting with workers during their lunch breaks and after work to try to persuade them to join the union. Six workers, all of whom work on the shop floor, have joined EWU. They have signed union membership forms and stop order forms indicating that they would like their employer to deduct the union subscriptions from their wages and transfer these subscriptions to the union each month in a lump sum.

The EWU official writes to Mr Khumalo and informs him that the union wishes to exercise its organisational rights in respect of the Power Tool Hardware Store in terms of section 21 of the Act. The union official explains in the letter that in their view, the union is sufficiently representative of employees at Power Tool for it to obtain access, stop-order and time-off rights for the Treasurer. It also provides copy of the Union Constitution and its registration certificate.

Is EWU entitle to the rights as requested. Provide reasons for your answer.

During the month prior to Mr Khumalo meeting with EWU, the union signs up a further 6 members. By the time it meets, what further rights is it able to request?

>> **End Activity** <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

REGULATING NON-STANDARD EMPLOYMENT

In response to sustained calls (including industrial action) by the union movement for the banning of labour broking, the Government introduced new legislation that rather than banning labour broking outright, provided for greater regulation of labour broking and other forms of non-standard employment. These are fixed term contract workers and part-time workers.

Workers who earn above the BCEA salary threshold of R205 433 per anum are not covered by these amendments.

Labour Broker (TES) Workers

Section 198 of the LRA defined a labour broker (termed in the law as a Temporary Employment Service (TES) as anyone who gets money for supplying workers to a client company and pays the workers' wages. All labour brokers are required to register before they can operate. The worker placed by the labour broker is an employee of that labour broker.

A new section 198A was introduced in January 2015 that labour broking work is:

- Work that is not longer than three months; or
- Work as a replacement(substitute) for a worker of the client who is temporarily away from work; or work for any period as provided for in a bargaining council agreement, a sectoral determination' or a ministerial notice.

In other words, if the work done for the client does not fall within the above description, the worker is a permanent employee of the client from the time he or she starts working for the client. Section 198A is very specific that if a labour broker works for the client for longer than 3 months, that worker becomes an employee of the client. If the worker is given notice after working for more than 3 months, it is taken as a dismissal and can be challenged at the CCMA or bargaining council even if the labour broker says that the worker's contract has ended.

The deeming provisions in respect of TES workers:

In a dispute brought by NUMSA on behalf of TES workers seeking to be made permanent employees of the client, the interpretation of what is known as the "deeming provision" in section 198A(3)(b) became the focus of the dispute. The matter ended up in the Constitutional Court where it was held that:

> *"Section 198 deals with the general position with regard to TESs, while section 198(2) is a deeming provision creating a statutory employment contract between the TES and a temporarily placed employee.*
>
> *Section 198A deals with the application of section 198 to a specific category of workers, being marginal employees employed below the BCEA threshold.*
>
> *Section 198A(3)(a) provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in section 198(2).*
>
> *Section 198A(3)(b)(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.*
>
> *The deeming provisions in sections 198(2) and 198A(3)(b)(i) cannot operate at the same time. When marginal employees are not performing a temporary service as defined, then section 198A(3)(b)(ii) replaces section 198(2) as the operating deeming clause for the purposes of determining the identity of the employer."*

If the client has been deemed to be the employer, additional protections are applicable:

(a) The employee is **employed indefinitely** (unless a valid fixed-term contract exists – see section 198B)

(b) The employee 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 (see section 198D (2)). The right to parity is contained in section 198A (5). Such right may be enforced once the deeming provision finds application – i.e. after 3 months of employment.

Fixed-term Contract Workers

Section 198B states that a fixed term contract (FTC) is one that ends by a definite date:

- Once an agreed event has taken place; or
- Once a particular task has been finished; or
- On a fixed date except for the worker's normal or agreed retirement date.

A fixed term contract MUST be in writing and MUST say when it will end. If these two conditions are not in place, then the worker is a permanent worker of the company. Workers can work on fixed term contracts for no longer than 3 months. Fixed term workers who work for longer than three months, become the permanent employee of the company and must be employed on the same terms as workers doing similar work.

Fixed term contracts or successive fixed term contracts for longer than 3 months can be made if:

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

The LRA states that fixed term contracts will be justified if the worker:

- Is standing in for a worker who is temporarily absent;
- Is employed because of an increase in work that is not expected to last for more than 1 year;
- Is a student or recent graduate who is in training or gaining work experience;
- Is employed to work on a particular project of a definite or limited time;
- Is a non-citizen granted a temporary work permit for a particular length of time;
- Is employed to do seasonal work.
- Works on an official public works programme;
- Is employed in a job which is funded by an outside source for a limited period;
- Has reached the normal retirement age.

This list is not finite.

Certain fixed contracts can however be for longer than 3 months. Employers with fewer than 10 employees can make contracts for longer than 3 month and renew these contracts all the time. Employees with less than 50 employees, during the first 2 years, can do the same.

If a worker has been employed for longer than 24 months on a fixed term contract, they must be paid 1 week's wages for every year they have been employed. The worker will not get this 'benefit' if the employer offers the worker similar work or finds the worker a job with another employer.

In the matter of ***National Union of Metalworkers of South Africa obo Members v Transnet SOC Ltd and others*** **[2018] 5 BLLR 488 (LAC)** Transnet employed several thousand workers on fixed-term contracts which had generally been successively renewed, then announced that it would not be renewing them due to depressed economic and adverse climatic conditions. Prior to this, Transnet had concluded a collective agreement with the recognised and respondent unions (SATAWU and UNTU) regulating terms and conditions of fixed-term contract employees. As an unrecognised union the applicant union (NUMSA) was not a party to

that agreement, but it had been extended to all employees, including NUMSA members. NUMSA contended that it was not bound by the agreement because it had not been extended to them by the Minister of Labour and that its members had become permanent employees in terms of section 198B of the LRA. The Court accepted that there was merit to the NUMSA's contention that if the Transnet Bargaining Council was a bargaining council, its agreement could only be extended by the Minister of Labour under section 32, and not in terms of section 23(1)(d), as Transnet had purported to do.

Part-time Workers

Section 198C defines part-time workers as those paid according to the time they have worked and who work for fewer hours than full-time workers. Employers must treat part-time workers the same as full-time workers who do the same work in the workplace. This includes access to skills development training and the right to apply for full-time posts in the company. Part-time workers can only be treated differently if the employer can show good reason. A good reason can be:

- Seniority, experience or length of service;
- Merit;
- The quality or quantity of the work performed; or
- Any criteria of a similar nature and which is not discriminatory.

The provisions of the LRA regulating non-standard work, while of benefit to certain workers, does not sufficiently cover all workers engaged in non-standard employment. Workers engaged by way of sub-contract arrangements and those who have been classified as independent contractors still face enormous obstacles in their attempt to attain job security.

DISPUTE RESOLUTION

A dispute is any disagreement between 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 [INSERT & REFERENCE] of the LRA contains a number of flow diagrams showing the steps that must be taken for resolving different kinds of disputes.

The definition of a dispute

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 exception to this approach in the area of organisational rights. 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 fall within the realm of 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 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 for conciliation. If conciliation does not work 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 change to 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 social and 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.

Distinguishing between rights and interest 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.

>>>>>>>>>>>>>>>> Activity: Deciding on disputes of interest and disputes of right <<<<<<<<<<<<<<<<

Task: For each of the following cases, decide whether it is a dispute of interest or a dispute or right and what dispute resolution process you would follow:

1. Busi Miya is dismissed for the theft of an apple from the grocery store where she works. She says she did not steal the apple, but picked out of the crate of blemished fruit that was being thrown away.
2. 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 management to recognize the union and the shopstewards. Management refuses to recognize the union or the shopstewards.
3. 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?

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>> End of activity <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Procedures for resolving rights disputes

The LRA contains three main procedures (see definitions box) for resolving rights disputes. These are:

- Conciliation;
- Arbitration; and
- Adjudication

DEFINITIONS	
CONCILIATION	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.
ARBITRATION	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/or 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.
ADJUDICATION	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.

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 and Labour Courts 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
The conciliator cannot force parties to resolve the dispute and even an advisory award is not binding on the parties. 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.	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. 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.

Legal Representation

The issue of representation at CCMA proceedings are dealt with in Rule 25 of the CCMA's rules. The latest rules are published in Government Gazette No 42092, dated 7 December 2018. 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, these workers must 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. It specifically stated 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 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 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.

WHICH FORUM FOR DISMISSAL DISPUTES?

Most disputes referred to conciliation are dismissal disputes, which therefore deserve special attention. In most individual dismissal cases, the dispute will be referred to the CCMA. It should be noted, however, that there are certain instances where the dispute will be referred to another institution for resolution. There are four separate routes which have been provided for in the LRA in terms of which dismissal disputes can be resolved. These are:

- the **CCMA**;
- an accredited **bargaining council**. Where a dispute falls within the jurisdiction of an accredited bargaining council, it should be referred to that council for resolution. A bargaining council will have jurisdiction over such a dispute if the parties to the dispute fall within the registered scope of the bargaining council;
- an **accredited agency**. These are private institutions accredited by the CCMA to perform dispute resolution functions on its behalf or on behalf of a bargaining council;

• NOTE: the accreditation of bargaining councils and other agencies takes place in terms of s 127 of the LRA.

- privately arranged **neutral agencies**. Where privately agreed procedures exist, the parties to the dispute are not required to follow statutory procedures but are permitted to use their own agreed procedures. These are often laid down in collective agreements, in the public sector as well as the private sector.

It must be remembered that an employee can only refer a dispute over a dismissal if s/he has been dismissed. The employee may allege that the dismissal was substantively and/or procedurally unfair. The employee is required firstly to attempt to resolve the matter through conciliation (as outlined above); only if conciliation fails is s/he permitted to refer the matter to arbitration by the CCMA or a bargaining council, or to the Labour Court for adjudication, depending on the nature of the dispute. The party referring the dispute to arbitration or adjudication will be required to produce a certificate of outcome, signed by the conciliating commissioner, to the effect that the dispute was not resolved at conciliation.

TYPE OF DISMISSAL	CCMA / Bargaining Council (Conciliation)	CCMA / Bargaining Council (Arbitration)	LABOUR COURT (Adjudication)
Misconduct	X	X	
Incapacity	X	X	
Operational Requirements	X		X
Automatically unfair	X		X
Constructive dismissal	X	X	
Reason unknown	X	X	

DISMISSALS – DISPUTE RESOLUTION SYSTEM

CONSTITUTIONAL COURT

11 Judges dealing with constitutional matters. A quorum of at least 8 is required

LABOUR APPEAL COURT

3 Judges give majority judgment

LABOUR COURT

Based provincially

1 Judge gives judgment

BARGAINING COUNCIL | **CCMA** | **OTHER**

- Accredited Agency
- Privately arranged neutral agency

DISMISSAL DISPUTE

(30 days to refer dispute)

APPEAL PROCEDURE

DISCIPLINARY HEARING

DISCIPLINARY CHARGE

Understanding dismissals

Section 185 of the LRA says 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)

Section 192 of the Labour Relations Act says that if you are alleging that a dismissal is unfair, you first must prove dismissal. Once you have done this, the employer 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 given 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. 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 the situation.

What all these forms of dismissal have in common is that they amount to termination of employment by the employer. This may take the form of what is termed a summary dismissal (where it is impossible for the employer to retain the worker in their employment e.g. the serious nature of the alleged misconduct) or termination by notice. We deal with the issue of notice in the next section. Voluntary resignation by an employee, in other words, cannot be a 'dismissal'.

Date of Dismissal

Establishing the date of a dismissal is important because the LRA prescribes time periods by which unfair dismissal disputes should be referred to the CCMA or the Bargaining Council. The period is 30 calendar days and all days have to be counted including weekends and public holidays. However, should the 30th day fall on Sunday or a public holiday, the matter may still be referred on the next working day.

Unless a disputing party can give good reasons why the dispute has been referred outside of the 30-day time limit, a commissioner may dismiss the referral without hearing the case.

A late referral must be accompanied by an application for condonation setting out why the matter has been referred late and what the chances of success in overturning the dismissal are.

The date of dismissal is the earlier of:

- The date on which the contract of employment terminated, and
- The date on which the employee stopped working for the employer.

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 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.

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>Activity: Is this a dismissal? <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

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 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.

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>> End Activity <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Automatically unfair dismissals

Section 187 of the LRA covers automatically unfair dismissals. A dismissal is automatically unfair if the *reason* for the dismissal amounts to a violation of employees' basic human rights or of certain basic rights afforded to employees by the LRA (either as individuals or as members of a trade union).

Section 187(1) states that a dismissal is automatically unfair if it took place for any of the following reasons:

- For participating in trade union activities or for being a member of a trade union;
- For participating in a procedural or protected strike;
- For refusing to perform the work of some-one participating in a protected strike (unless the work represents a danger to some-one's health or safety);
- For being pregnant or for any reason related to pregnancy;
- For not accepting an employer's offer in a matter of 'mutual interest' like a wage increase;
- For discriminatory reasons like one's age, gender, sexual orientation, religion, race, etc., except when some-one is obliged to retire at a given age as contained in a contract or collective agreement. It is not always unfair to dismiss an employee on an arbitrary ground if that ground is directly related to the requirements of the job. In the case of a religious institution where the religious practice is closely tied up with the working practice it could be considered a criterion of the job to be of the same religious practice as the institution where one works. A change or loss of faith could therefore be acceptable grounds for dismissal.
- If some-one is dismissed as a result of a transfer of a business in terms of section 197 or 197A of the LRA, or a reason related to such a transfer or if the employee made a protected disclosure in terms of the Protected Disclosures Act of 2000.

A dismissal is also automatically unfair if the reason for the dismissal amounts to an infringement of the fundamental rights of employees and trade unions as set out in section 5 of the LRA. Section 5, which applies to employees as well as persons seeking employment, protects the right to freedom of association, including membership of trade unions and workplace forums.

In **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, that the employee has reached the normal or agreed retirement age.

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>Activity: Types of dismissals <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

In groups, complete the following worksheet. Tick the appropriate block that describes the type of dismissal described.

	Misconduct	Incapacity	Operational Requirements	Automatically Unfair Dismissal
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.				

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>Activity: Types of dismissals <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Task: In groups, read the following scenario and then answer the questions that follow:

Sunshine Clothing has computerized its manual security system. The two guards, who have been operating the security system for many years (25 years for Jabulani and 15 years for Nkosinathi) are expected to learn to operate the new system. They are not sent on any training courses but are taught on an adhoc basis by the IT department of the company. Jabulani manages to learn it slowly over time, and within six months of the new system being introduced is operating it effectively. Nkosinathi, however, struggles to learn the new system. After 8 months he feels he has finally mastered it. One day, however, he makes a mistake and the whole system shuts down. Once it is restarted, he refuses to carry on using it arguing that he hasn't been properly trained, that the system itself is faulty and he wants to carry on using the old manual system.

The company issues him with a written warning. When he continues to refuse to use the system he is dismissed for misconduct.

1. Do you agree that this is dismissal based on misconduct?
2. Do you think the company followed a fair procedure? What should they have done differently?

>>END ACTIVITY <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

What constitutes a fair dismissal?

As stated above, a dismissal must be both substantively and procedurally fair.

An employer must dismiss an employee for a fair reason. This means that **the dismissal is substantively fair**. The employer must also follow a fair procedure in arriving at the decision to dismiss. The dismissal will then be **procedurally fair.**

There are three kinds of fair dismissal scenarios:

- ***Dismissal for misconduct*** if an employee intentionally or carelessly breaks a rule at the workplace;
- ***Dismissal for incapacity*** if an employee cannot perform his/her work duties for any reason such as illness or inability;
- ***Dismissal for operational reasons*** (retrenchment) if an employer seeks to reduce the workforce for matters related to the business.

Schedule 8 of the LRA below provides guidelines as to what constitutes a substantively and procedurally fair dismissal.

Dismissal for misconduct: *Substantive fairness*

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

1. *Did the employee contravene a workplace rule?*
2. *Was the employee aware of the rule or should he/she have been aware of it?*
3. *Is the rule valid or reasonable?*
4. *Has the rule been applied consistently?*
5. *Is dismissal an appropriate sanction for the contravention?*

Question 1: Did the employee contravene a workplace rule?

Workplace rules may be contained in policy manuals, disciplinary codes, collective agreements, letters of appointment, on notice boards, and of course in contracts of employment. This refers to rules relating to the conduct of employees, not performance standards (which may be the subject of disputes of dismissals for incapacity based on poor work performance).

Such rules may not always be in writing. For example, the employer may have no written rule prohibiting theft, but this can be derived from general legal norms and is therefore applicable to all persons, including employees. It is, however, advisable that rules should be in writing because this will avoid any argument about their existence. If it is not in writing, verbal evidence may be needed.

Unlike in a criminal trial, the employer does not have to prove beyond reasonable doubt that the employee contravened the rule. All that is required is proof on a balance of probabilities. This means that the evidence that the employee contravened the rule must be stronger than the evidence that he or she did not.

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

This question will only arise if the rule is not in writing in a document that is brought to employees' attention, e.g., on a notice board. It would be unfair to take disciplinary action against persons who are unaware of the rule which they are alleged to have broken. The crucial question is whether it could reasonably have been expected of the employee to be aware of the rule. If the answer is 'yes', the fact that it is not in writing will be immaterial. But if it is not, the employer will need to inform all employees of the rule and warn them of the consequences of infringing it.

Question 3: Is the rule valid or reasonable?

Case law has made it clear that an employee cannot be disciplined for not adhering to rules that are unlawful, e.g., contrary to the BCEA. An employee also cannot be disciplined if obedience to the rule would be unreasonable, e.g. by exposing her or him to undue risk or harm.

Question 4: Has the rule been applied consistently?

Inconsistency may mean that the rule was applied differently in the past or that it is being applied differently to employees who are charged with the same form of misconduct. If there are no objective factors (such as personal circumstances) justifying differential treatment, inconsistent discipline is likely to mean substantive unfairness.

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

Item 3(5) of the Code of Good Practice recommends that

> *"[w]hen deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself."*

Relevant factors that may indicate the fairness of dismissal include: valid previous warnings for similar contraventions; harm to the safety of others or of the employer's property; the seriousness of the misconduct and the circumstances under which it was committed.

Factors that may indicate that dismissal is inappropriate include the absence of a disciplinary record for the same or similar transgressions; (long) length of service; overall performance; genuine remorse and candidness about the misconduct.

There is no golden rule about how the various factors should be weighed up. The decision regarding sanction is one that depends on the sound judgment of the employer. 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 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 Act 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. The following are the main guidelines:

- 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 also 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 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. 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.

>>>>>>>>>>>>>>>>>>>>>>>>>>>> Activity: Dismissals for misconduct <<<<<<<<<<<<<<<<<<<<<<<<<<<<

In your groups, discuss and answer the following questions:

1. Can an employer discipline a worker in the absence of a disciplinary code? Motivate your answer.
2. Does the Code of Good Practice provide for a right of appeal against disciplinary decisions?
3. What factors could be used in mitigation of a sentence?

   First, identify the types of issues that you could refer to when arguing in mitigation.

   Now read the following case, and identify the specific mitigating factors that you could draw on in order to defend Susan in this case:

   Zanele is employed at Khumba Accessories. Her duties include sorting out the various fashion accessories. Susan is her fellow worker. The two workers dislike each other and have had arguments before and have written warnings on record.

   One day Zanele and Susan have an argument. In the heat of the argument Zanele insults Susan and Susan retaliates by throwing one of accessories at Zanele. Carol who works close by witnessed the incident. This is not the first time that Susan has responded violently to others in the factory. Susan is living with an abusive partner and has three young children.

The following day Susan is charged with assault by her supervisor, Mrs Russell, and asked to attend a Disciplinary Enquiry.

>>END ACTIVITY <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Dismissal for incapacity

Where an employee is not performing or is unable to perform his or her work according to the expected standards, the question of incapacity arises. The Code of Good Practice (the Code) distinguishes between incapacity in the form of *poor work performance* and incapacity as result of *ill health or injury*. In each case the Code sets out guidelines for determining the fairness of the dismissal as well as the procedure to be followed in deciding whether to dismiss.

Dismissal for poor work performance

In practice it may sometimes be difficult to distinguish whether behaviour amounts to misconduct or incapacity. The general rule is that, where poor work performance is deliberate, it should be treated as misconduct. The main distinction between incapacity and misconduct is that the latter is deliberate or due to the fault of the employee, whereas the former implies no fault of the employee. This could include lack of training or lack of physical strength.

Poor work performance arises where the employee does not meet the performance standards or level of competence required by the employer. In this regard, the Code distinguishes between non-probationary and probationary employees. A probationary employee is an employee whose appointment to a particular position will only be confirmed once s/he has satisfactorily completed a “trial” period (for example, based on a fixed-term contract) in that position. A non-probationary employee is one whose appointment is final.

The Code also provides that, when deciding about the fairness of dismissal for poor work performance during or at the end of the probationary period, the reasons for dismissal “may be less compelling than would be the case in dismissals effected after the completion of the probationary period” [item 8(1) (j)].

Dismissal for incapacity due to ill health or injury

Fair procedures for deciding on the dismissal of an employee who is not able to perform his/her functions because of ill health or injury are suggested in the Code [see items 10 and 11]. The following are the main guidelines:

- The employer should establish whether the incapacity is permanent or temporary.
- If it is temporary, the employer should investigate the extent of the injury or incapacity. If the employee is likely to be away from work for an unreasonably long time in the circumstances, the employer is obliged to consider all the possible alternatives short of dismissal.
- The aim of this investigation is to assess to what extent it is possible to accommodate the employee temporarily by adapting her/his work environment. It would clearly be inappropriate to dismiss an employee who is away from work for a short period; dismissal is a last resort only
- Dismissal may be appropriate only if the absence is unreasonably long (or where there are repeated absences of shorter duration), and then only after all possible alternatives have been investigated. In determining when an absence will be unreasonably long, the employer should consider factors such as
    - the nature of the job;
    - the period of absence; and
    - the possibility of securing a temporary replacement
- The employee should be allowed the opportunity to state her or his case in response and to be assisted by a trade union representative or fellow employee.
- In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate.

- If employees are injured at work or incapacitated by work-related illness, there is a greater duty on the employer to accommodate the incapacity of the employee. In the case of permanent incapacity, the employer should investigate the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- In deciding whether dismissal is appropriate, the primary consideration is whether the employee can perform the work required of him/her. Should they not be capable of performing the work, the next consideration would be
- The extent to which the employee can perform the work;
    - the extent to which the employee's work circumstances might be adapted to accommodate the disability, or where this is not possible;
    - the extent to which the employee's duties might be adapted; and
    - the availability of any suitable alternative work.

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 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 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 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. In other words, there must be a primary act of misconduct for the concept of derivative misconduct to be present.

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. In recent times, violence during strikes has also come under the spotlight.

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, particularly in a situation, where workers could not be positively and individually identified within the context of strike violence, has been clarified by the Constitutional Court in ***NUMSA v Dunlop Mixing and Technical Services and Others*** **(CCT202/18)(2019) ZACC 25 (28 June 2019).**

Dunlop employees had engaged in strike action. The strike turned violent as a result of which a number of workers were dismissed. NUMSA referred an unfair dismissal dispute to the CCMA. The commissioner was of the view that the dismissal of workers who were positively identified as committing acts of violence and those who were present when acts of violence took place but who did not participate in these acts was fair. The dismissal of those workers who could not be positively and individually identified was unfair and they were reinstated.

The employer took this award on review. The award was set aside and the dismissal of all the workers was found to be fair.

The Labour Court found that it had to be determined whether an inference could be drawn, from the evidence that was presented, that all of the employees were present during the strike. If so, was there an obligation on the employees to provide an explanation about the misconduct that had taken place. If so, did the employees' deliberate refusal to do so affect the trust relationship?

In regard to the inference, the LC found as follows:-

> *"I am satisfied that the only reasonable and plausible inference that can be drawn from the evidence is that the respondent employees were present during the strike and accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators they would have said so. They, despite the opportunities afforded to them, did not."*

The LC held that the employees' decision to remain silent in the face of evidence adduced by Dunlop was a breach of the trust relationship. This duty arose in circumstances even where they had not been identified as having been present at the strike or the misconduct. As a consequence, the LC found that the Commissioner had misdirected himself and reviewed and set aside the order, replacing it with one where the dismissal of 65 employees was found to be both substantively and procedurally fair.

NUMSA took this judgment on appeal to the LAC where the LC judgment was upheld. Both the LC and LAC were not as to what derivative misconduct entails. NUMSA then approached the Constitutional Court on behalf of the workers who had not been positively and individually identified. The CC, in dealing with the NUMSA appeal, also considered whether derivative misconduct obligations are fiduciary in nature or whether there are contractual good faith obligations between the employer and employee parties.

The CC warned, that:

> *'First, … the possible duty to disclose misconduct of others only arises once that misconduct is established. Second, … it would be wrong to use the duty to disclose as an easier means to dismiss, rather than dismissal for actual individual participation in violent misconduct itself. And third, it may result in the imposition of a harsher sanction on employees who did not take part in the actual primary misconduct.'*

In other words, all other avenues of involvement in the primary act of misconduct, for example as accessory (or accessory after the fact) before invoking the doctrine of derivative misconduct. The CC held that within the *Dunlop* context, the employer had a contractual duty of good faith towards the employees and that "at the very least… the employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves." The dismissal of the 65 workers was set aside and they were re-instated with full pay for the period they had been unemployed.

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>> Activity: Dismissal for incapacity <<<<<<<<<<<<<<<<<<<<<<<<<<<<

Task: Read the following case study and then answer the questions.

Joseph works as a bookkeeper in the accounts department. After an accident, his vision is slightly impaired and he is consequently unable to continue with his duties as a bookkeeper. His company wants to retain him in the queries department as he has a sound knowledge of the products the company produces. Joseph wants his company to buy a computer which costs approximately R30 000.00 which will enable him to continue with his original duties. The Company is not willing to spend this money for Joseph when he has been given an alternative position to accommodate him. Joseph is uncomfortable in the queries department as he sees this job as a demotion. After many consultations with Joseph, he is dismissed.

Discuss the above scenario in groups and present arguments as to whether the dismissal was fair. Consider the Code of Good Practice: Dismissal above in making your case.

>>>>>>>>>>>>>>>>>>>>>>>> Activity: Dismissals for misconduct or incapacity? <<<<<<<<<<<<<<<<<<<<<<<<

In your groups, read the scenarios below and decide whether they are cases of misconduct, incapacity or both?

1. Mary, who is seven months pregnant, has recently not been meeting her deadlines. This is negatively affecting the finalisation of an important project.
2. James and Thandi, both colleagues, were romantically involved with each other. When the relationship turns sour, James continuously sends Thandi suggestive e-mails hoping that she will come back to him. Thandi does not appreciate this.
3. Busi, who is nearly sixty-five, has become increasingly absentminded at work.
4. Fritz refuses to work overtime to finalise a report that is required for a response to a parliamentary portfolio committee which is due in the morning.
5. Sandy, who relies on public transport, is late for work for the fourth time this week. She says this is due to road works that have caused huge traffic jams. Also, that this problem will persist for the next six months.
6. Jan and Thapelo have recently been sent on the same computer literacy course to improve their skills. Thapelo has improved tremendously but Jan is still unable to meet the required performance standard.
7. Hector, the driver, was recently convicted of drunken driving and has had his driver's license suspended for eight months.
8. Neville, an administrative clerk, has been transferred from the personnel to HR. He received excellent work appraisals whilst at personnel, but Zaida, his new manager, who is known to be strict, complains about the quality of his work.
9. Theft in the office has become an increasing problem. Management decides that staff will be randomly searched. Rajiv refuses to be searched.
10. Sizwe's work performance declines because he suffers from depression.
11. Fourie, who is generally a good employee, forgot to lock the stock room on Friday, resulting in a computer being stolen over the weekend.

>>END ACTIVITY <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Dismissal based on operational requirements

Operational requirements dismissals, or retrenchments, are based on the "economic, technological, structural or similar needs of the employer". Economic fluctuations and global competitiveness may require a company to change the manner in which work is done. Dismissal on these grounds is regarded as a 'no fault' dismissal, i.e., the dismissal is motivated by the employer's operational needs rather than any fault 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.

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".

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 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.

The right to strike against proposed retrenchments

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 adjudication. 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.

Section189A 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.

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.

Section 189A (19) laid down a test to guide the Labour Court in deciding whether the reason for dismissal is fair. However, the Labour Relations Amendment Act of 2014 deleted sub-section (19), thus leaving it to the discretion of the court to decide on substantive fairness as in the case of all other retrenchments.

Procedural fairness in dismissals based on operational requirements

The procedural requirements that must be followed in order for a retrenchment to be fair are stipulated in sections 189 and 189A of the LRA. Consultation in good faith between the employer and the trade union representing workers faced with retrenched (or, if there is no union, the workers themselves) is the crux of fair procedure. It is spelled out in section 189 (which also applies to retrenchments in terms of section 189A) and has been interpreted in detail in a host of court decisions.

The following are the main features:

- The parties are expected to engage in a 'meaningful joint consensus seeking process' and must 'attempt to reach consensus' on the issues under discussion (s189 (2)). Union involvement in the process must commence the moment the employer contemplates the possibility of retrenching employees. An employer that starts the consultation process with a pre-determined plan for retrenchments is in breach of s189.
- Trade union representatives are expected to actively participate in the process and a failure to do so has been held by the Labour Court to constitute a waiver of the employees' rights where genuine attempts by the employer to engage the union representatives in the consultation process were rejected.
- Delaying tactics on the part of the Union has been regarded as bad faith.
- The process is set in motion by the employer issuing a written notice in terms of s189(3) of the LRA disclosing all relevant information regarding the proposed retrenchments, including but not limited to:
    - the reason for the dismissal,
    - alternatives considered and reasons for rejecting them,
    - the number of employees likely to be affected and their job categories,
    - the proposed method for selecting which employees to dismiss;
    - the proposed timeframes;
    - the severance packages offered;

    - any assistance the employer proposes to offer employees likely to be dismissed;
    - the possibility of future re-employment; and
    - the number of employees the employer has dismissed in the preceding 12 months.
- The consultation process must be sufficiently long to enable the parties to properly engage in joint problem-solving process. No timeframes are stipulated in section 189(6) as it will also depend on the urgency of the workplace circumstances.
- The consultation process should consider ways to
    - avoid retrenchments;
    - minimise the number of dismissals;
    - change the timing of dismissals;
    - mitigate the adverse effects of the dismissals;
    - reach consensus on the method for selecting the employees to be dismissed; and
    - and *severance pay* for dismissed employees.
- The union may request the disclosure of relevant information. The unions may be required to view such information at the premises of the employer and accept conditions of privacy and confidentiality. The onus rests on the employer to prove that any information that it has refused to disclose is not relevant.
- The employer must consider and respond to the representations made and state the reasons for disagreement with the other party. Written representations must be responded to in writing.
- If the consultation process fails the employer is entitled to proceed with the retrenchments and the union may refer the matter to the CCMA for conciliation within a period of 30 days from the dismissals. If conciliation fails, the matter may be referred to the Labour Court within 90 days.
- The employer is required to select employees for dismissal in accordance with the agreed selection criteria. In the absence of agreed selection criteria, the criteria must be fair and objective.

Fair procedure in terms of section 189A

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."*

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.

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 dismissed employees or order compensation.

In the next section we look at what steps an internal disciplinary enquiry should take and should be considered in conjunction with what is contained in the Code of Good Practice: Dismissal.

How to conduct a disciplinary hearing

The employer must follow the workplace collective agreement, or the Bargaining Council agreed procedures, unless this agreement is in conflict with a procedurally fair process. In that case, the procedure must at least comply with what is set out in the Code of Good Practice.

This is how a typical Disciplinary Enquiry might unfold:

Opening	• Chairperson introduces him/herself and asks everyone present to introduce themselves • The chairperson establishes whether there is a need for interpretation • The chairperson advises the accused of his/her rights, whether there was sufficient time to prepare, understands the charges and has the right of representation
Employee asked to plead	• The charge is put to the accused employee and s/he is asked to plead guilty or not-guilty • If the worker pleads not guilty, the enquiry will proceed directly to determining a sanction without hearing evidence of the charge • If the worker pleads not guilty, the enquiry will proceed with the employer's representative (initiator) having to prove the employee's guilt
Opening statements	Both parties give an outline of their cases. The employer has to start.
Employer's case	**Examination (Examination-in-chief)** • Witnesses are called and answer questions put to them by the initiator • The shop steward will cross-examine the witnesses • The initiator may re-examine the witness to clarify any new issue that has arisen in cross-examination • The chairperson may ask questions at any time • After all the employer's witnesses have been called, the employer's case is closed
Employee's case	**Cross-examination** • Witnesses are called and answer questions put to them by the shop steward • The initiator will cross-examine the witnesses
Employer's case	**Re-examination** • The shop steward may re-examine the witness to clarify any new issue that has arisen in cross-examination • The chairperson may ask questions at any time • After all the shop steward's witnesses have been called, the member's case is closed
Closing statements	Both parties, beginning with the initiator, summarise their cases and try to convince the chairperson to find in their favour
Finding	The chairperson will give a finding on all the charges of innocent or guilty and will then ask for argument in aggravation or mitigation on any of the finding of guilty s/he has come to. Once arguments have been heard, the chairperson may either provide a sanction immediately or adjourn the hearing and provide the sanction at a later date. Together with the imposed sanction, the chairperson should advise the accused member of what steps s/he is entitled to take to challenge the finding of the Disciplinary Enquiry.

Examination (Examination-in-chief)

The purpose of examination is to give the parties an opportunity to state their cases by presenting facts and arguments through the calling of witnesses or presenting other evidence such as documents, audio or video footage. Witnesses are able to present their view of events. Leading questions (questions that suggest an answer) may not be asked during examination.

Cross-examination

The purpose of cross-examination is to test the evidence given by a witness during examination-in-chief. Alternative facts or views should be put to a witness at this stage.

Re-examination

The purpose of re-examination is to give the party that called the witness another opportunity to ask further questions to clarify a matter that arose during cross-examination. New issues may not be raised during re-examination.

Mitigating factors

Mitigating factors can be presented once the worker has been found guilty and in order to avoid dismissal. Typical mitigating factors can be:

- Long service
- A good disciplinary record
- Difficult personal circumstances such as being the sole breadwinner, having many dependents or going through a divorce.
- Circumstances of the offence such as provocation where a member may have sworn at or assaulted a fellow worker or supervisor.

Aggravating factors that makes the case of the worker difficult to defend are typically:

- Short service
- A poor disciplinary record with repeat offences
- Where the relationship of honesty and trust have been undermined
- Circumstances of the offence such as using a weapon to assault some-one.
- Deliberate disregard of the employer's rules that may cause serious damage to the employer's machines or risk the health and safety of fellow workers.

>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>>Actvity – Appropriate Sanction <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

Set out below are several infringements. Indicate in the columns provided at what level of discipline you believe the conduct described should be dealt with.

Infringement	Informal Advice	Counselling	Verbal Warning	Written Warning	Final Written Warning	Dismissal
Theft						
Inappropriate dress standards (first time)						
Educator not keeping up with curriculum						
Late coming (third time)						
Insubordination						
Bad attitude						
Negligence						
Smelling of alcohol						
Repeatedly comes to work drunk and refuses to						
accept assistance						
Absenteeism						
Assault						
Untidiness						
Sexual harassment						
Smoking in no smoking area						
Refusal to obey an instruction						
Unauthorised possession of company property						

>>END ACTIVITY <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<

STRIKES

Section 23 of 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. One of the primary objectives of the LRA is 'to give effect to and regulate the fundamental rights' conferred by the Constitution and to 'give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation. Like any other right, however, the right to strike is not absolute and is subject to certain procedural and substantive limitations. The former refers to procedures that must be followed in order for the strike to be 'protected'; the latter refer to the prohibition of strikes in certain circumstances.

The entrenchment of the right to strike in the South African Constitution was the subject of much debate at the time that the new Constitution was being negotiated. These debates occurred in a context where certain parties wanted to equate the right to strike with a corresponding right for employers to invoke a lock-out. The Constitutional Court, when it was called upon to certify the 'New Text' ('NT') of the Constitution in 1996, took a different view. It is worth quoting its interpretation of the right to strike in detail, since this is binding on all our courts:

> *"A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.*
>
> *It was also argued that the inclusion of the right to strike necessarily implies that legislation protecting the right to lock out, such as the LRA, would be unconstitutional. The objectors argued that such a result would be in breach of CP [Constitutional Principle] XXVIII. The argument is based on a false premise. The fact that the NT expressly protects the right to strike does not mean that a legislative provision permitting a lockout is necessarily unconstitutional, or indeed that the provisions of the LRA permitting lockouts are unconstitutional. The effect of NT 23 will be that the right of employers to use economic sanctions against workers will be regulated by legislation within a constitutional framework. The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT 23 are honoured."*

These principles were reinforced in ***National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*** **(2003) 24 ILJ 305 (CC**) where it was held, at para 13, as follows:

> *"In s 23, the Constitution recognizes the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organizations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between*

employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change."

The Constitutional Court in this matter also 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 to protect the strike; and some relevant the case law.

Strikes and lockouts

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 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 constituted 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 or not industrial action falls within the definition of a strike or lock-out is important for two reasons. Only strikes and lockouts, as defined, are subject to the procedural and substantive limitations stipulated in the LRA, and industrial action must amount to a strike or lock-out, as defined, in order 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 LC 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 the 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. The application was dismissed with costs.

'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).** 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.'*

It may be questioned whether this limitation of the right of 'every worker' to strike is legally justified and it has been argued that 'in common law terms, there is no basis for distinguishing between one employee or several employees withholding their labour in support of a bargaining demand; it amounts to breach of contract in all cases. The inability of most workers to do so effectively as individuals offers no ground for denying statutory protection to all workers in these circumstances.

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 judgement 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 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, doing 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 it 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 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 LC 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 within the scope of the term 'matters of mutual interest' and the workers could take protected strike action. This was decision was confirmed by the LAC in ***Pikitup (Soc) Ltd v SAMWU obo members*** **(2014) 3 BLLR 217 (LAC)** 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 respondents 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 judgement.

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 separate notice. 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 LC claiming that the dismissals had been automatically unfair. The LC 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 LC 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 be relied on to preclude NUMSA from striking. Further that 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

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 to 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 referred 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.

We will deal in more detail with section 65 (1) (d), the limitation of the right to strike in respect of employees engaged in essential and maintenance services below.

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 NCBAWU*** **(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 judgements 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.

More recent decisions by the courts in ***SATAWU & others v Moloto NO and others*** **[2012] 12 BLLR 1193 (CC)** [SATAWU v Equity Aviation], ***Plastic Convertors Association of SA v Association of Electric Cable Manufacturers of SA and others*** **(2011) 11 BLLR 1095 (LC);** ***Edelweiss Glass and Aluminium (Pty) Ltd v National Union of Metalworkers of South Africa and Others*** **(2012) 1 BLLR 10 (LAC)** it could be argued that the courts have taken a more positive stance regarding the right to strike.

The most recent 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, they undoubtably 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 of 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.

TRANSFORMING THE WORKPLACE – THE EMPLOYMENT EQUITY ACT

During the 1990s it became clear that employers, concerned about the impact the changes in our country were having on the workplace, were implementing practices that were damaging to the cause of transformation. Worried that the government would impose quotas, organisations found themselves scrambling around to appoint black people and women, very often without any forethought and sometimes appointing people who were not necessarily the best candidates for their posts. This trend, which entrenched tokenism, was noted by the Department of Labour (DOL) and the then Minister of Labour Tito Mboweni who felt that companies should be given some guidance on how to navigate transformation in the workplace.

These sentiments were echoed in the 1996 Green Paper on Employment and Occupational Equity:

> *3.1 Measures to ensure that employment equity forms part of an overall strategy to overcome disadvantage are also explored. The proposals put forward examine factors that contribute to discrimination and disadvantage in employment and how the situation could be rectified.*
>
> *3.2 The approach taken, combines anti-discrimination measures to protect individuals with measures to encourage institutional and cultural change by employing organisations.*
>
> *3.3 Given this deeper transformation, accelerated training and promotion for individuals from historically disadvantaged groups can achieve success.*
>
> *3.4 In short, policies aimed at fostering equity in employment could form part of a much broader effort to reduce inequalities while fostering greater productivity and economic growth. In that context, employment equity will centre on:*
>
> > *3.4.1 procedures to eliminate lingering discrimination in decision-making about employees' careers, pay and benefits,*
> >
> > *3.4.2 restructuring of work organisation to promote diversity,*
> >
> > *3.4.3 reducing the barriers to historically disadvantaged groups,*
> >
> > *3.4.4 the transformation of workplace culture and procedures, through measures, in order to accelerate the training and promotion of people from historically disadvantaged groups.*

Not only did the DOL recognize that transformation should be a broad strategy for companies, the final **Constitution** which took effect in 1997 prohibited unfair discrimination and made provision for affirmative action measures to address inequality at every level of society, including the workplace. In that same year South Africa also ratified **Convention 111** concerning discrimination in respect of employment and occupation of the International Labour Organisation (ILO.) This convention prohibits discrimination against workers and also allows affirmative action. The vehicle for implementing these duties arising from the Constitution and international law was the **Employment Equity Act 55 of 1998** (EEA).

In this section of the manual we:

- Cover the relevant sections of the EEA and the impact it has had on transforming the workplace;
- Examine how the provisions of the EEA on unfair discrimination have played themselves out in the workplace by looking at the case law; and

The Employment Equity Act (EEA)

The objectives of the Employment Equity Act are to promote:

- The right of equality and the exercise of true democracy.
- Equal opportunity and fair treatment in employment by eliminating unfair discrimination.
- Redress of the effects of past discrimination.
- Achievement of a diverse workforce broadly representative of our people.

- Achievement of economic development and efficiency in the workforce.
- Affirmative Action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

The Act has two main purposes:

- 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.

Unfair Discrimination

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

5. *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 anyone, 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. The Act says 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". (Section 6(2))

The concept of discrimination first found its way into South African labour law in the 1980s under the unfair labour practice provisions. In 1988 the legislation was amended to speak of 'unfair discrimination.' This was made necessary by the logic of apartheid which the government of the day wanted to defend against claims of discrimination. This was changed back to 'discrimination' in the early 90s but the concept of 'unfair discrimination' reappeared in 1993 when the interim Constitution required all laws to conform to the Bill of Rights contained in the Constitution.

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 women. This can be challenged as a discriminatory practise. The Act also distinguishes between **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 in 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.

In order to succeed with a claim under the EEA the complainant/s must established that that they employee subjected to direct or indirect unfair discrimination.

The starting point in establishing whether an employee has been unfairly discriminated against is to determine whether there was different treatment or differentiation. Differentiation amounts to 'discrimination' when an employee is treated differently on one of the grounds listed in section 6 of the EEA, or on an analogous ground (in terms of the 2014 amendments, reference is made specifically to "any other arbitrary ground").

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.

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 a case of unfair discrimination based on race. She had twice applied for a 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 court 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.

Implementing affirmative action measures

The Employment Equity Act specifically allows for affirmative action and sets out the 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 dealing with affirmative action only applies to what is termed designated employers. A designated employer means:

- An employer who employs 50 or more employees;
- An employer who employs fewer than 50 employees but has an annual turnover that is equal to or above the annual turnover of a small business in terms of Schedule 4 of the EEA;
- 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 suitably qualified people from designated groups, who are also citizens of South Africa.

The designated group consists of:

- Black people (defined to include Africans, Coloureds and Indians and those of Chinese descent)
- Women
- Persons with disabilities (defined as "people who have a long-term physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment")

'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 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 adhoc.
>
> **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 positions
- 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.

What is an Employment Equity Plan (EEP)?

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, appropriate education and training.
- A procedure to monitor and evaluate the implementation of the plan and an internal procedure to resolve disputes.

>>>>>>>>>>>>>> Activity: Employment Equity and Affirmative Action in your workplace<<<<<<<<<<<<

Task: In groups, answer the following questions:

1. Do you know if your workplace has an employment equity plan?
2. Do you know of any cases were affirmative action policies have been applied? Give details.
3. How effective was the affirmative action 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.

>>>>>>>>>>>>>>>>>>>>>>>>Activity: Identifying fair and unfair discrimination <<<<<<<<<<<<<<<<<<<<<<

Consider the following scenarios and decide whether they constitute unfair discrimination.

1. Mary 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. RTU 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 license 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.

>>END ACTIVITY <<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<<