Tutorial Letter 102/3/2025

LABOUR LAW
MRL3702

Semesters 1 and 2

Department of Mercantile Law

This tutorial letter contains important information about your module.

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A. GENERAL INFORMATION

Dear Student

1. INTRODUCTION

Welcome to the Labour Law module (**MRL3702**). We hope that you will find studying the module interesting and rewarding. We will do our best to help you complete this module successfully. Please note that this learning material only provides guidance (a summary) to assist you in going through and understanding the prescribed book. You must therefore have a copy of the prescribed book and study it.

2. THE PRESCRIBED BOOK

The prescribed book for this module is:

Garbers C et al *The Essential Labour Law Handbook* 8th edition (2024)

You must purchase the prescribed book and work through it with the help of this Study Guide.

Please take note that only the following chapters of the prescribed book are prescribed for this module: chapters 1 (read only); 2; 3; 4; 5; 6; 7; 8; 9; 11; 12; 13 (read only); 14; 15; 16; 17; 18; 19; 20 and 21.

3. OVERVIEW OF THE PRESCRIBED BOOK

The prescribed book consists of four parts:

PART 1: INTRODUCTION
PART 2: THE INDIVIDUAL EMPLOYMENT RELATIONSHIP
PART 3: EMPLOYMENT EQUITY AND AFFIRMATIVE ACTION
PART 4: COLLECTIVE LABOUR LAW
PART 5: DISPUTE RESOLUTION

B. STUDY UNITS

STUDY UNIT 1
INTRODUCTION TO LABOUR LAW

OUTCOMES:

At the end of this chapter, you should be able to

- Have the general overview of what the South African labour law entails; relevant stakeholders, roles and responsibilities of different characters in the employment relationship.

  CHAPTER 1 IS ONLY FOR READING PURPOSES.

STUDY UNIT 2
THE CONTRACT OF EMPLOYMENT AND ITS RELATIONSHIP WITH LABOUR LEGISLATION

OUTCOMES

After you have completed this Chapter, you should be able to

- explain how an employment contract is constituted and by who;
- understand the role and effect of the Constitution and other labour laws in the employment contract;
- list and explain the duties of the employee;
- list and explain the duties of the employer;
- explain what are the terms and conditions of employment;
- understand the extent of the freedom enjoyed by the parties in the conclusion of employment contract;
- explain a restraint of trade clause in an employment agreement;
- explain the doctrine of vicarious liability and apply the relevant principles in a practical situation;
- explain different forms of breach of contract and the available remedies; and
- explain the common law and statutory ways in which an employment contract may be terminated

2.1 PRESCRIBED MATERIAL

- Chapter 2 of The Essential Labour Law

2.2 GENERAL INTRODUCTION

A contract of employment, just like any other type of contract, is regulated by common law. Note that in cases where a specific labour matter is not covered by the LRA or any other labour legislation, common law will apply. In order for a contract of employment to be valid, the parties to the contract must have satisfied all of common law requirements for the conclusion of a valid contract. There are also common law duties which parties must comply with during the employment relationship.

These are in line with African values of humaneness and fairness which require parties to adhere to certain rules in order for their acts to be approved and that if a party has a duty to do something he or she must do it in line with what was agreed upon, and failure to do so will be a breach which has consequences.

2.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with the contract of employment and its relationship with labour legislation.

2.3.1 Development of the employment contract

Study par 2.1.1 of the prescribed book.

In Roman law, a distinction was made between letting and hiring of some physical object or thing (the *locatio conductio rei)* and two other forms of letting and hiring. The *locatio conductio operis* related to the letting and hiring of a specific piece of work, for example, the contract for an independent contractor engaged to do a specific piece of work. The *locatio conductio operarum* related to the letting and hiring of someone's personal services in exchange for remuneration, for example a contract of employment.

2.3.2 The continued importance of the employment contract

Study par 2.1.2 of the prescribed book.

The contract of employment links the employer and the employee in an employment relationship. Take note that if there is no employment relationship between the parties, the rules of labour law do not apply to that relationship. The contract of employment is important for the following reasons:

- Firstly, if a contract of employment exists, the person who renders service to the employer in terms of that agreement will be an 'employee', not only in contractual terms, but also for purposes of the application of labour legislation.
- Secondly, the contract of employment is an important source of the terms and conditions of employment of any employee.
- Thirdly, in cases where a statutory right coincides with an employee's contractual right the employee will usually be entitled to elect to enforce either the statutory right or the contractual right.

2.4 Definition of the employment contract

2.4.1 Essential elements

Study par 2.2.1 of the prescribed book.

The contract of employment can be defined as 'an agreement between two parties in terms of which one party (the employee) works for another (the employer) in exchange for remuneration'.

The key elements in a contract of employment are therefore the following: voluntary agreement; to work; for remuneration. The contract of employment is therefore reciprocal in nature. The employee works in exchange for remuneration and the employer remunerates the employee in exchange for the employee offering to place his/her labour potential at the disposal and under the control of the employer.

2.4.2 The element of control

Study par 2.2.2 of the prescribed book.

With regard to control, it is not necessary for there to be actual control on a day-to-day and hour-to- hour basis. It is sufficient, for the purposes of the employment contract, that the employer merely has the right to exercise control over the activities of the employee.

2.5 Concluding employment contracts

2.5.1 Requirements for a valid employment contract

Study par 2.3.1 of the prescribed book.

All contracts in our law, including employment contracts, must comply with the following requirements before the law recognises the contract as legally binding:

- There must be consensus between the parties;
- Parties must have legal capacity to act;
- Performance must be legally possible;
- Performance must be physically possible; and
- If there are formalities, they must be complied with.

2.5.2 Negotiation and formalities

Study par 2.3.2 of the prescribed book.

Take note that under common law the contract of employment does not recognise the imbalance of power between the employer and employees. In terms of common law both the employer and the employee have a freedom to contract as they can agree to terms and conditions of employment that suit them both. However, in reality the employer will usually hand the employee a written contract of employment, carefully drafted by its legal representatives, and there will be little choice for an employee other than to sign. It is important to note that it is not a requirement that an employment contract be reduced to writing. However, in a few cases, statutes require that the employment contract must be in writing (e.g. the contracts of merchant seamen and learnership agreements).

2.5.3 The common law contractual duties of the parties

Study par 2.4.1 of the prescribed book.

Take note that there are duties implied into the contract of employment by common law principles, unless otherwise specifically agreed between the parties, however, other duties are imposed by labour legislation upon the parties.

The employee has the following duties:

- To tender his/her services
- To work competently and diligently
- To obey lawful and reasonable instructions of the employer
- To serve the employer’s interests and act in good faith

2.5.4 The contractual duties of the employer

Study par 2.4.2 of the prescribed book.

The employer has the following duties:

- To remunerate the employee
- To provide work
- To provide safe working conditions
- To deal fairly with employees

2.6 Other terms and conditions of employment

2.6.1 Freedom to contract and basic conditions of employment

Study par 2.5.1 of the prescribed book.

The National Minimum Wage Act 9 of 2018 (NMWA) and the BCEA influence the parties' freedom to contract about terms and conditions of employment. The NMWA provides for a general minimum wage that all workers are entitled to, while the BCEA provides a number of other minimum standards to protect employees. Terms and conditions of employment may also be negotiated upon during the collective bargaining process. Collective agreements concluded through this process may vary individual contracts of employment.

Do you think the BCEA and NMWU infringe parties' freedom to contract? If it does, do you think the infringement is fair?

2.6.2 What are terms and conditions of employment?

Study par 2.5.2 of the prescribed book.

The terms and conditions of employment of an employee are derived from different sources: the terms agreed to by the parties (either verbally, in writing or through their conduct); common law implied terms; a statute; or a collective agreement. Terms and conditions of employment include issues such as the employee's job description, working hours, leave, sick leave, the length of notice of termination, remuneration, how and when the remuneration is to be paid and other duties of the employer and employee. Terms and conditions agreed to in the contract of employment may be changed in a limited number of ways such as an individual agreement with an employee; collective agreement; operation of law, for example, if the Minister of Labour issues a sectoral determination in terms of section 50 of the BCEA.

2.6.3 Restraint of trade

Study par 2.5.3 of the prescribed book.

A clause in restraint of trade is one that prevents an employee, in various ways, from exercising his/her trade, profession or calling, or engaging in the same business venture as the employer, for a specified period and within a specified area after leaving employment. The restraint of trade clause must be judged by the criterion of public policy. In establishing whether or not a restraint of trade amounts to an unreasonable limitation on a person's freedom to trade the various factors a court should take into consideration include the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests. A restraint will only be enforced if, as a point of departure, it serves to protect an interest which, according to the law, deserves protection – typically (but not exclusively) 'confidential information' and 'trade secrets or connections'. The effect of a restraint of trade clause continues even after the contract of employment has been terminated, regardless of the reason for that termination.

Do you think such a clause is necessary in an employment contract? Is it not unfair to the employee?

ACTIVITY 1

Adri is employed by Beauty Salon as a hair stylist. In terms of her contract of employment, if she resigns, she will not be allowed to start a similar business within a distance of 50 km radius from Beauty Salon for a period of two years. Discuss whether this will qualify as a restraint of tradeagreement.

FEEDBACK 1

Yes, this will qualify as a restraint of trade agreement. The purpose of a restraint of trade agreement is to protect the employer's trade secrets, goodwill and business connections. A restraint of trade agreement usually lasts for a certain period and covers a certain geographical area. Andri may still make business after two years.

2.6.4 Vicarious liability

Study par 2.5.4 of the prescribed book.

Vicarious liability means that the employer may be held legally liable for the wrongful acts (delicts) of its employees committed in the course and scope of their duties. In order for vicarious liability to apply, the following requirements must exist:

- There must be an employment relationship;
- The act must have happened in the scope and course of employment;
- The act must amount to a delict

Vicarious liability links well with ubuntu and with African norms that are encapsulated in the following proverb: Kgomo e wetswa ke namane ko bodibeng. This essentially means that if a child from household A has caused damage to household B, his or her parents should be held liable. In the employment context, an employee would take up the position of the child and an employer the position of the parent, simply because employers have control over their employees. Also of importance is the fact that employees are typically under-resourced and may not be able to pay damages to third parties when such is due. Therefore, employers would, in terms of vicarious liability, be called in to pay damages and would use the inherent disciplinary power they have over employees to get recourse from those employees who were wrongdoers. This is fair to all parties and resonates with the culture of humaneness, human dignity and respect for others.

Do you think it is fair to hold employers vicariously liable for the wrongdoings of their employees?

ACTIVITY 2

Thando is a porter at Bophelo Hospital in Tembisa. Rhoda is admitted to the hospital due to an injury on her left leg. Rhoda falls and injures her right leg while Thando tries to help her into a wheelchair.

Discuss whether Bophelo Hospital will be held vicariously liable for Rhoda's injuries.

FEEDBACK 2

The doctrine of vicarious liability is based on the principle that an employer has to compensate those who suffer damages as a result of the wrongful conduct of its employees. Vicarious liability protects third parties. Yes, Bophelo Hospital will be held liable for Rhoda's injuries.

2.7 Breach of the employment contract

Study par 2.6 of the prescribed book.

If a party to a contract of employment fails to carry out his/her obligations in terms of the contract, that party is guilty of a breach of contract. Innocent parties (the party who is the victim of the breach) have a number of remedies at their disposal.

2.7.1 Forms of breach

Study par 2.6.1 of the prescribed book.

A breach of the employment contract may be serious or less serious. A serious breach is also calleda fundamental breach or a breach of a material term of the contract. A distinction between the two types of breach of the employment contract is important for purposes of determining the contractual remedies to which the innocent party is entitled.

2.7.2 Contractual remedies

Study par 2.6.2 of the prescribed book.

If the employer's (or employee's) breach of contract is serious enough, the employee (or employer) has an initial choice of either accepting the employer's (or employee's) repudiation of the employment contract and terminating (cancelling) the contract immediately (summarily) or seeking to enforce the contract (also called specific performance). Take note that irrespective of the innocent party's initial choice between either termination (cancellation) or specific performance, the innocent party may claim damages suffered as a result of the other party's breach of contract.

2.8 Termination of the employment contract

2.8.1 Forms of termination

Study par 2.7.1 of the prescribed book.

The employment contract may be lawfully terminated in the following ways:

- Completion of the contract
- Termination by agreement
- Termination on insolvency
- Termination as a result of breach of contract
- Termination on notice

2.8.2 Summary: lawful termination of the employment contract and its relationship with 'unfair dismissal'

Study par 2.7.2 of the prescribed book.

A lawful termination of the employment contract means that the provisions of the contract relating to the giving of notice of termination have been complied with, or that a party has summarily terminated the agreement. Because that termination is in accordance with the contract it is described as being lawful. However, take note that in terms of common law principles, it is not necessary for a party to be able to justify why it is giving notice of termination of employment, for as long as the required period of notice has been given. Fairness in the context of termination of employment is regulated in the LRA, which requires that all dismissals must be fair (the dismissal must comply with certain substantive and procedural requirements).

What makes a fair dismissal?

SELF–TEST QUESTIONS
1. Discuss an employer's duty to provide an employee with work.
2. What are the remedies for breach of contract?
3. Will Mpho be able to enforce a contract she concluded with Sarah to murder Sarah's business

STUDY UNIT 3
THE MEANING OF EMPLOYEE

OUTCOMES

After you have completed this study unit, you should be able to

- Define employee;
- Distinguish between an employee and an independent contractor;
- Make use of the common law test and statutory guidelines to determine whether a person is an employee or certain arrangements qualifies as an employment relationship;
- Know different categories of employment; and
- Make a determination of who the employer is.

3.1 PRESCRIBED MATERIAL

- Chapter 3 of The Essential Labour Law

3.2 GENERAL INTRODUCTION

It is important to be able to identify who is an employee. It is also important to draw a distinction between employees and other workers, for example independent contractors. You should also understand that only an employment relationship falls under the protective scope of labour laws. Others who do not fall under the definition of employee (for example independent contractors) will however still be protected by the Constitution and the law of contract.

3.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with who an employee is and differentiates an employee from an independent contractor and explains different categories of employees.

3.3.1 Introduction

Take note that labour legislation and rights contained therein are only available to 'employees' and not to independent contractors. Although a person who works in terms of an employment contract is an 'employee' it is often not easy to identify an employee. First, it is difficult to distinguish between employees and independent contractors as both categories perform work in exchange for payment. Second, work is often not performed by employees working in terms of what is still regarded as the standard form of employment. Third, there are significant differences between the protection of senior and junior employees in terms of labour legislation.

3.3.2 The definition of 'employee'

3.3.2.1 The statutory definition

Study par 3.2.1 of the prescribed book.

The LRA and BCEA define an employee as 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer'. Take not that the definition provided by the EEA is slightly different. Note that in contrast to the LRA, the BCEA and the EEA, the NMWA uses the definition of a 'worker' as opposed to 'employee'.

The first thing to note regarding part (a) of the definition is its wide coverage. The LRA now covers domestic workers and farm workers who were excluded from the ambit of general labour legislation. Second is that it does not expressly require the existence of a valid contract of employment to acquirethe status of 'employee' for purposes of labour legislation. Third, is its specific exclusion of 'independent contractors'.

Part (b) of the definition appears very wide as it refers to a person who 'in any manner assists incarrying on or conducting' the employer's business.

Exclusions: Take note that section 2 of the LRA excludes members of the National Defence Force and the State Security Agency from its scope. Section 3 of the BCEA excludes members of the State Security Agency and unpaid volunteers working for an organisation serving a charitable purpose from its scope. Section 4 of the EEA excludes members of the National Defence Force, the National Intelligence Agency, the South African Secret Service or the South African National Academy of Intelligence or the directors and staff of Comsec.

Inclusions: Take note of section 83(1) of the BCEA which provides that the Minister of Employment and Labour may deem any category of persons to be employees for the purpose of the whole or any part of the BCEA, any other employment law or for the purposes of any sectoral determination made by the Minister in terms of the BCEA. The EEA expressly includes applicants for employment under its protection against unfair discrimination.

3.3.2.2 The distinction between employees and independent contractors — the tests developed by the courts and the legislative presumption as to who is an employee

Study par 3.2.2 of the prescribed book.

Over the years, our courts have formulated a number of tests for drawing this distinction:

- The control test: control is an essential feature of a contract of employment. The right to control is more extensive in the employment contract than in other types of contract, such as the contract of an independent contractor or an agency contract.
- The organisation (integration) test: this test depends of a determination of whether a person is part and parcel of the organisation
- The multiple or dominant impression test: It is often seen as the standard test currently used by our courts and it relies on various indicators to determine whether or not the relationship in question is one of employment. The factors, or indications, that the court would take into consideration toobtain a dominant impression, include the following –
    - The right of supervision, in other words, whether the employer has the right to supervise the other person, (ie 'the worker').

- The extent to which the worker depends on the employer in the performance of duties.
- Whether the worker is allowed to work for another. Normally, someone who is an employee in terms ofan employment contract is not allowed to work for anyone else.
- Whether the worker is required to devote a specific time to his/her work.
- Whether the worker is obliged to perform his/her duties personally. Usually, someone working for another in terms of an employment contract is obliged to render the services personally. In the case of an independent contractor, it does not really matter who does the work as long as the job gets done.
- Whether the worker is paid according to a fixed rate or by commission.
- Whether the worker provides his/her own tools and equipment.
- Whether the employer has the right to discipline the worker. The existence of this right would normally indicate control, which, in turn, would be indicative of an employment contract.

All the factors together create what is called a 'dominant impression'.

- The courts in certain instances used a 'productive capacity' test.

In 2002, a new presumption was added to the LRA (section 200A) and the BCEA (section 83A) which provide guidelines to be utilised in ascertaining whether someone (for instance, an applicantin a CCMA or court case) is an employee. If one or more of the list of factors mentioned in the section is present, the person is presumed to be an employee. The factors are as follows:

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

3.4 Non-standard employment

3.4.1 Introduction

Study par 3.3.1 of the prescribed book.

A permanent employee is someone who is employed with the intention of an ongoing employment relationship coming into existence. The contract is usually for an indefinite period, unless terminated by agreement or dismissal. However, there are other forms of employment such as non-standard employment, examples of which are fixed-term employment and part-time employment. Furthermore, employers often make use of temporary employment services (also called labour brokers).

3.4.2 Fixed-term employees

Study par 3.3.2 of the prescribed book.

Fixed-term contract employees are employed either for a specified period of time, or until the completion of a specific project or the occurrence of a future specified event. Seasonal workers, replacement workers or employees engaged for a specific operational requirement would be included in this group of temporary employees. Casual workers (usually employed on a daily basis) are also usually regarded as fixed-term employees. Fixed-term employees are 'employees' as defined and are entitled to all the protection afforded by labour legislations, however, they are often exposed to exploitation in the workplace.

3.4.3 Part-time employees

Study par 3.3.3 of the prescribed book.

A part-time employee may work fewer days in a week than a full-time employee or work shorter daily hours than a full-time employee. Take note that the fact that an employee is a part-time employee does not change that employee's status - he/she is still an employee as defined in labour legislation and still enjoys protection against unfair dismissal. However, these employees are often exploited.

3.4.4 Temporary employment services

Study par 3.3.4 of the prescribed book.

Section 198 of the LRA describes a temporary employment service (TES), also called a labour broker, as 'any person who, for reward, procures for or provides to a client other person who perform work for the client and who are remunerated by the temporary employment service.' Such employees are often used to provide persons to perform non-core functions, or, in times of need, persons who perform core functions.

The use of TES gives rise to a triangular relationship - the TES and the client conclude a service agreement in terms of which the TES will provide persons to the client to perform work and for which the client pays the TES an agreed fee.

In terms of subsections 198(2)-(4) -

- A person whose services have been procured for, or provided to, a client by a TES is deemed to be the employee of the TES, and the TES is that person's employer.
- A person who is an independent contractor is not an employee of a TES, nor is the TES the employer ofthat person.
- A TES and the client are jointly and severally liable if the TES, in respect of any of its employees, contravenes -
  - (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
  - (b) a binding arbitration award that regulates terms and conditions of employment;
  - (c) the BCEA; or
  - (d) a sectoral determination made in terms of the BCEA.

What this means is that persons on the 'books' of the TES are the employees of the TES, not of the client.

3.5 Other categories of employees

Study par 3.4 of the prescribed book.

Probationary employees: during the probation period skills and abilities of an employee are assessed. The employer determines how compatible the worker is with fellow employees, clients, management, and the workplace in general. At the end of the probationary period one of three things may happen - the employee's permanent employment may be confirmed, the probation period may be extended subject to further conditions, or the employee's performance may be unsatisfactory, and his/her services terminated due to poor performance.

Senior and junior employees: Because of the functions exercised by senior managers one may think that that they are not employees. A manager may, for example, have the power to both appoint and dismiss people, however he/she is still an employee for purposes of the application of labour legislation. Labour legislation extends important protections to employees earning below the BCEA threshold amount (these employees are often referred to as vulnerable employees).

Public servants and private employees: Public servants have access to, and may rely on, the same labour legislation as other employees. This is in addition to legislation specifically applicable to the employment of public servants in general (such as the Public Service Act of 1994 and the regulations issued in terms of that Act) as well as legislation that might apply to the employment of specific types of public servants (such as the South African Police Service Act 68 of 1995 or the Employment of Educators Act 76 of 1998).

3.6 Identity of the employer

Study par 3.5 of the prescribed book.

If an employee feels his/her rights have been infringed, the correct employer (legal entity) must be identified as the respondent in the employee's case. Of all employers, the State is the largest single employer.

SELF-TEST QUESTIONS

1. Which tests have been developed by the courts to assist in determining whether a person is an employee or not?
2. Draw a distinction between a fixed-term employee; part-time employee and a temporary employee.
3. What is the purpose of probation?

STUDY UNIT 4
MINIMUM STANDARDS LEGISLATION AND OTHER SOURCES OF TERMS AND CONDITIONS OF EMPLOYMENT

OUTCOMES

After you have completed this study unit, you should be able to

- understand basic conditions of employment as set out by the NMWA and the BCEA;
- understand the application and scope of terms and conditions set out in terms of both Acts;
- understand the interaction between NMWA and BCEA;
- know how terms and conditions may be changed;
- know how terms and conditions may be enforced; and
- apply your knowledge to solve legal problems.

4.1 PRESCRIBED MATERIAL

- Chapter 4 of The Essential Labour Law

4.2 GENERAL INTRODUCTION

The Basic Conditions of Employment Act, 1997 (BCEA) sets minimum terms and conditions of employment for employees. An employer must give an employee at least these minimum entitlements. You must know the various provisions regarding all the minimum working conditions. These provisions are set out in detail in the prescribed book. Remember that an employer can always provide terms and conditions that are more beneficial, but not less favourable than those in the BCEA. The BCEA establishes obligatory basic/minimum conditions of employment. It regulates the variation of such conditions by means of different mechanisms (within the parameters of a policy of "regulated flexibility" – a framework within which a balance can be struck between the interests of employers and employees in relation to work security). The minimum terms and conditions of employment that the Act sets constitute terms of employment contracts. In general, employers and employees may deviate from these minimum conditions to improve conditions for employees, but not to provide less beneficial conditions. Because the BCEA has a broad scope of application, it protects employees who have little bargaining power as individuals. Nonetheless, the BCEA provides for the variation of conditions of employment.

In general, the BCEA promotes Ubuntu values of humanness, justice and fairness. It ensures that workers are treated with dignity and fairly as human beings and that their terms and conditions of employment are not below the minimum terms.

4.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with minimum terms and conditions of employment and how they can be varied.

4.3.1 Introduction – the different sources of terms and conditions of employment
Study par 4.1 of the prescribed book.

Labour legislation is aimed to promote fair terms and conditions of employment. It does this through the adoption of minimum standards legislation, which lays down minimum standards of employment and prohibits any downward deviation from these standards in, for example, a contract of employment. The two most important pieces of minimum standards legislation currently in force are the National Minimum Wage Act 9 of 2018 (NMWA) which regulates the level of minimum pay workers are entitled to, and BCEA which regulates minimum terms and conditions of employment other than minimum pay. 'Ministerial determinations' and 'sectoral determinations' issued in terms of the BCEA may also be issued to provide for specific minimum standards of employment for certain categories of employees or employers, or a certain sector of the economy. Labour legislation also promotes fair terms and conditions of employment indirectly for example through the Labour Relations Act 66 of 1995 (LRA) which is aimed to promote collective bargaining through which trade unions try to conclude collective agreements with employers regulating terms and conditions of employment of their members.

4.3.2 The National Minimum Wage Act 9 of 2018 and the regulation of an employee's level of pay

4.3.2.1 The goals of the NMWA

Study par 4.2.1 of the prescribed book.

The NMWA came into operation on 1 January 2019 with, among other things, the goals of 'improving the wages of the lowest paid workers' and 'protecting workers from unreasonably low wages' (section 2). It seeks to achieve this through a combination of the following:

- prescribing a national minimum wage (NMW);
- prohibiting employers from taking steps (such as a reduction of working hours) to undermine the effectiveness of the minimum wage;
- providing, in general, for the overriding effect of the NMWA in relation to a contract of employment, collective agreement, or sectoral determination;
- providing for very limited exemptions to employers from the obligation to pay the minimum wage; and
- establishing a National Minimum Wage Commission (NMW Commission) whose responsibilities include annual reviews of the level of the NMW and recommendations to the Minister of Labour about adjustments to it (see chapter 3 of the NMWA read with sections 6 and 7). The NMW Commission also has important responsibilities in terms of the BCEA, notably to investigate and make recommendations to the Minster of Labour about the promulgation of sectoral determinations in terms of that Act.

4.3.2.2 The scope of the NMWA

Study par 4.2.2 of the prescribed book.

4.3.2.3 The provisions of the NMWA

Study par 4.2.3 of the prescribed book.

In terms of section 4(1) of the NMWA read with item 1 of Schedule 1 to the Act, the NMW has been set at R27.58 per hour as of 1 March 2024. This means that a person who works eight hours a day on five days of the week, will earn a monthly wage of just under R4.353.00. Study the applicable exceptions in your book.

Sections 4(4) to 4(7) of the NMWA provide the following rights and obligations on workers and employers relating to payment of the NMW -

- Every worker is entitled to a wage no less than the NMW, subject to the exceptions mentioned in the previous paragraph.
- Every employer must pay wages to its workers that are not less than the NMW, again subject to the exceptions in the previous paragraph.
- The payment of the NMW cannot be waived; i.e. an employee cannot lawfully agree to accept a wage lower than the minimum wage in order to secure employment.
- The NMW takes precedence over any contrary provision in a contract, collective agreement, sectoral determination or law, subject to the exceptions mentioned above.
- The NMW must constitute a term of the worker's contract – unless the contract, an applicable collectiveagreement, or applicable sectoral determination is more favourable to the worker; in which case effect is given to the more favourable wage provided for in the contract, collective agreement or sectoral determination.

Section 5 of the NMWA regulates the obligation to pay the minimum wage in more detail. Study this in your prescribed book.

The NMW Commission is tasked to conduct an annual review of the minimum wage and to recommend adjustments.

4.3.2.4 The interaction between the NMWA and other sources of terms and conditions of employment in relation to the level of wages

Study par 4.2.4 in your prescribed book.

4.3.2.5 Enforcement of the NMW

Study par 4.2.5 of the prescribed book.

All of the provisions relating to enforcement of the NMWA are contained in the BCEA, which provides for both a system of administrative enforcement through the inspectorate of the Department of Employment and Labour or through legal proceedings initiated by the worker him/herself. Section73A of the BCEA allows workers to institute a claim at the CCMA for the employer's failure to paythat worker any amount owing to him/her in terms of the NMWA. The CCMA will attempt toresolve the dispute through conciliation, failing which the matter may be arbitrated.

4.4 The Basic Conditions of Employment Act and the regulation of other terms and conditions of employment

4.4.1 The goals of the BCEA

Study par 4.3.1 of the prescribed book.

The primary goal of the BCEA is to give effect to section 23(1) of the Constitution (the right to fair labour practices) by establishing and enforcing basic conditions of employment.

4.4.2 The application of the BCEA

Study par 4.3.2 of the prescribed book.

Apart from the general exclusions from the BCEA mentioned in the previous Study Unit, there are certain partial exclusions. The best example of a partial exclusion is found in section 6 of the Act where it is provided that chapter two of the Act, which regulates working hours, does not apply to certain employees (see 4.3.3 below); nor do most of the provisions regulating working hours apply to persons earning in excess of a statutory threshold determined by the Minister of Labour in termsof section 6(3). The provisions of chapters two to five of the Act also do not apply to employees working less than 24 hours per month for an employer. Another example of a partial exclusion is section 27(1), which provides that only employees who have been in employment with an employer for longer than four months and who work for at least four days a week for that employer are entitled to family responsibility leave in terms of the Act.

4.4.3 Regulation of working time

Study par 4.3.3 of the prescribed book.

Chapter two of the BCEA regulates the working hours of employees. The following employees are excluded by section 6 from the provisions of chapter two and their working hours are thus not governed by the BCEA —

- senior managerial employees;
- employees engaged as sales staff who travel to the premises of customers and who regulate their own hours of work; and
- employees who work less than 24 hours a month for an employer.

Working hours: According to section 9 of the Act, maximum ordinary working hours are 45 hours per week and nine hours per day if the employee works for five days a week. The maximum ordinary working hours of employees who work more than five days a week is eight hours a day.

Overtime work: Section 10 provides that employees may only be required to work overtime in accordance with an agreement between employees and their employer, and that employees may not work more than ten hours' overtime a week. A collective agreement may increase the maximum permitted overtime to 15 hours a week, but this type of collective agreement may not apply for more than two months in any 12-month period. Overtime work is remunerated at one-and-a-half times the employee's normal remuneration, alternatively the employer may grant equivalent paid time off (time-and-a-half).

Meal intervals and rest periods: Section 14 of the BCEA states that, if an employee works continuously for more than five hours, the employer must give the employee a meal interval of at least one continuous hour. During the meal interval the employee may be asked to perform only the duties that cannot be left unattended and cannot be performed by another employee. An employee must, however, be remunerated for a meal interval in which the employee is required to work or if the employee is required to be available for work. In terms of section 15 of the BCEA, an employer must allow an employee a daily rest period of at least 12 consecutive hours between ending and recommencing work. The employer must also grant the employee a weekly rest period of at least 36 consecutive hours that, unless otherwise agreed, must include a Sunday.

Sundays, public holidays and night work: If an employee does not normally work on a Sunday and the employer requires the employee to work on a Sunday, the employee must be paid double his/her hourly wage. If the employee normally works on a Sunday, the employer must pay — one and one-half times the employee's wage for each hour worked (section 16). Alternatively, the employer may grant the employee equivalent paid time off. An employer may not require an employee to work on a public holiday, unless the parties have agreed otherwise. If the employee does not work, he/she is entitled to his/ her ordinary remuneration for that day. But if the employee does work on a public holiday, the employer must pay — at least double the employee's ordinary wage for every hourworked (section 18). 'Night work' is regulated in section 17, which defines it as any work done after 18:00 and before 06:00 the next day – it does not matter that the bulk of the employee's work is not night work, nor that the employee only occasionally works after 18:00. An employer may only require or permit an employee to work at night if there is an agreement to this effect and if theemployee is compensated by the payment of an allowance (a shift allowance) or by a reduction ofworking hours. An employee may only work at night if transportation is available between the employee's home (or at least its close vicinity) and the workplace at both the beginning and the endof the employee's shift.

4.4.4 Leave

Study par 4.3.4 of the prescribed book.

Chapter three of the BCEA, which provides for various forms of leave, does not apply to an employee who works less than 24 hours a month for an employer.

Annual leave: In respect of each annual leave cycle (a period of 12 months' employment with the same employer) an employee is entitled to at least 21 consecutive days' annual leave on full remuneration. It appears that the Act provides for three weeks' leave and the reference to 21 days isto calendar days and not working days. Annual leave must be granted not later than six months after the end of the annual leave cycle. Section 40 states that, on termination of employment, an employer must pay an employee remuneration for any leave due that the employee has not yet taken. An employer may not require the employee to take annual leave during other types of leave.

Sick leave: For the purposes of sick leave (regulated in section 22 of the BCEA), the sick leave cycle is a period of 36 months' employment with the same employer. During every sick leave cycle, anemployee is entitled to six weeks' paid sick leave. During the first six months of employment, anemployee is entitled to one day's paid sick leave for every 26 days worked. If the employee is on sick leave, the employee is entitled to the wage normally payable for work on that day. In terms of section 23(1) of the BCEA, an employer is not required to pay an employee if the employee has been absentfrom work for more than two consecutive days or on more than two occasions during an eight-week period if the employee does not (at the request of the employer) produce a medical certificate statingthe employee was unable to work for the duration of the employee's absence on account of illnessor injury.

Maternity and family responsibility leave: In terms of section 25 of the BCEA, an employee is entitled to at least four consecutive months' maternity leave. The BCEA does not provide that maternity leave should be paid leave. However, payment in respect of maternity leave is regulated in the Unemployment Insurance Act. An employee must notify an employer in writing, unless the employee is unable to do so, of the date on which she intends to commence her maternity leave and when she intends to return to work after maternity leave. Maternity leave may commence at any time after four weeks prior to the expected date of birth (unless otherwise agreed) or on a date necessary in light of the employee's or baby's health as certified by a doctor or midwife. Section 25(3) states that no employee may return to work until six weeks after birth (unless certified fit to do so by a doctor or midwife). The Act also makes provision for women who suffer a miscarriage or give birth to a stillborn child during the third trimester and entitles these employees to six weeks' leave after the miscarriage or stillbirth. The protection of pregnant women is further emphasized by the BCEA's Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child (GN R 1441 of 13 November 1998). This code deals with a host of related issues including steps the employer should take to identify physical, ergonomical, chemical and biological hazards and the aspects of pregnancy that may affect work.

Section 27 of the BCEA provides for three days' paid family responsibility leave during each annual leave cycle. The employee is entitled to take this leave on: the birth, illness or death of a child or the death of the employee's spouse or life partner, parent, and other immediate family members.

Parental, adoption and commissioning parental leave: The 2018 amendments to the BCEA introduced provisions dealing with parental leave, adoption leave and commissioning parental leave. Section 25A provides for unpaid parental leave of at least 10 consecutive days for an employee who is a parent of a child, to be taken from the date of birth or, in case of adoption, from the day on which the adoption order is granted by the court or from the day the child is placed with the adoptive parent pending a court order (whichever day comes first). Section 25B provides that an adoptive parent of a child under the age of two is entitled to unpaid adoption leave of ten consecutive weeks or to the parental leave provided for in section 25A. The two adoptive parents are not both entitled to adoption leave – one may claim the adoption leave, but then the other is only entitled to section 25A parental leave. Section 25C provides that a commissioning parent in a surrogate motherhood agreement is entitled to either unpaid commissioning parental leave of at least ten consecutive weeks or to ordinary parental leave from the date on which the child is born. If there are two commissioning parents, only one may take commissioning parental leave and the other may take ordinary section 25A parental leave. In respect of all three types of leave – parental, adoption or commissioning parental – payment during leave is to be regulated by the Unemployment Insurance Act and in all three instances the employee has to notify the employer in writing one month in advance that this leave will be taken.

Why do you think it is important to have basic conditions of employment for employees?

4.4.5 Particulars of employment and remuneration

Study par 4.3.5 in the prescribed book.

Section 29 of the BCEA provides that the employer must provide the employee, in writing, with certain particulars. The BCEA does not prescribe a minimum wage – this is now done by the NMWA in conjunction with the different sectoral determinations and applicable bargaining council collective agreements.

Section 34A(1) provides that if the employer deducts from an employee's remuneration any amount for payment to a benefit fund, defined as a pension, provident, medical aid or similar fund, the employer must pay the amount to the fund within seven days of the deduction being made. Section 35 of the BCEA relates to the calculation of remuneration and wages. An employee's wage iscalculated by reference to the number of hours an employee normally works. An employee's monthly remuneration or wage is four and one-third times the employee's weekly remuneration orwage, respectively.

4.4.6 Termination of employment

Study par 4.3.6 of the prescribed book.

Section 37 of the BCEA provides for minimum notice periods. This means that the employee and employer may agree to longer notice periods. If the employee has worked for six months or less, he/she is, as a minimum, entitled to only one week's notice of termination of employment. If the employee has worked for longer than six months but for less than a year, the minimum notice period is two weeks. Four weeks' notice of termination is the statutory minimum in the case of employees who have worked for an employer for longer than a year and also for farm workers and domestic workers who have been employed for more than six months. Notice of termination must be given in writing, except when it is given by an illiterate employee. An illiterate employee receiving notice is entitled to an explanation by or on behalf of the employer.

Section 38 of the BCEA permits the payment of remuneration instead of notice. An employer may pay that employee salary or wages in lieu of notice. Section 38 furthermore provides that if an employee gives notice of termination of employment and the employer waives any part of the notice period, the employer must pay the employee the remuneration the employee would have received for the notice period, unless the employer and employee agree otherwise. Note that section 39 provides that where an employee resides in the accommodation on the employer's premises or provided by the employer and the employer terminates the contract through payment in lieu of notice in terms of section 38, the employer is obliged to provide accommodation for at least a month, or the longer notice period agreed upon by the parties. If the employee elects to stay in the accommodation, the payment owed to the employee in terms of section 38 is reduced by the agreed value of the accommodation.

Section 40 provides that, on termination of employment, an employer must pay to an employee: money owing in respect of any time off for overtime worked or for work on Sundays; remuneration in respect of annual leave accrued but not taken.

In terms of section 41 of the BCEA, if an employer dismisses an employee for operational reasons, the employer must pay an employee severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer.

Section 42 of the BCEA provides that on termination of employment an employee is entitled to a certificate of service stating a number of employment particulars.

4.4.7 Variation of the provisions of the BCEA

Study par 4.3.7 of the prescribed book.

Basic conditions may be changed firstly by means of a collective agreement concluded in a bargaining council. Secondly, basic conditions of employment may be changed by means of a collective agreement concluded outside a bargaining council by an employer and a trade union. Thirdly, basic conditions of employment may be changed (to something less favourable) by the employer and the employee by means of an agreement. The fourth manner in which a basic condition may be variedis by the Minister of Labour. The Minister's powers to make ministerial and sectoral determinations are discussed in 4.3.8.

4.4.8 Ministerial and sectoral determinations

Study par 4.3.8 of the prescribed book.

The Minister has the power to make a determination to replace or exclude any of the minimum standards provided for in the BCEA in respect of any category of employees or any categories of employers (section 50). An employer or employers' organisation may also apply for a Ministerial determination. The BCEA also provides for sectoral determinations. A sectoral determination establishes basic conditions of employment for employees in a sector ('sector' is defined in section 1 of the Act as being 'an industry or a service or a part of an industry or a service') and an area (which includes, according to section 1, 'any number of areas, whether or not contiguous'). A sectoral determination may set minimum terms and conditions of employment, including minimum rates of remuneration as well as minimum increases.

4.4.9 The BCEA (or a sectoral determination), contracts of employment and collective agreements

Study par 4.3.9 of the prescribed book.

The interaction between the BCEA, the contract of employment and collective agreements may present practical problems. It may be difficult to ascertain whether an employee's terms and conditions of employment are governed by the BCEA or the contract of employment or a collective agreement or by both the contract and a collective agreement. There are some guidelines to determine which source of terms and conditions applies. The first step is to ascertain whether the BCEA (or any part of it) applies to the employee in question. It is also necessary to consider whether the BCEA regulates the specific issue under consideration. The next step is to consider the BCEA's position in respect of employment contracts. A minimum standard of employment contained in the BCEA will constitute a term and condition of employment unless another law or the contract of employment is more favourable to the employee than the minimum standard. An employer and an employee cannot contract out of the BCEA.

Section 23(3) of the LRA provides that a collective agreement varies or changes the employee's contract of employment automatically (if it applies). The fact that employers and employees cannot contract out of the BCEA does not mean that they cannot vary or 'escape' the minimum standards of employment as laid down in the BCEA through either a contract of employment or a collective agreement.

4.4.10 Enforcement of the BCEA

Study par 4.3.10 of the prescribed book.

The BCEA provides for two types of enforcement of its provisions – administrative enforcement by the Department of Employment and Labour and through the institution of legal proceedings by or on behalf of the employee. As far as administrative enforcement is concerned, provision is made for the appointment of labour inspectors to promote, monitor and enforce compliance with the BCEA and other labour legislation. As far as the use of legal proceedings by or on behalf of the aggrieved employee is concerned, the point of departure is section 77(1) which provides that, subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where the BCEA provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of the BCEA.

SELF-TEST QUESTIONS

1. What is the aim of the NMWA?
2. Which provisions of the BCEA may not be varied?
3. How can terms and conditions of employment be varied?

STUDY UNIT 5
THE MEANING OF DISMISSAL

OUTCOMES

After you have completed this study unit, you should be able to

- Understand the international law impact in the development on the law relating to the termination of employment;
- Define dismissal;
- Understand that termination of employment may be effected through common law or statutory law;
- Understand different forms of dismissal in terms of the LRA; and
- Understand that all dismissals must be fair and to establish when dismissal is not fair.

5.1 PRESCRIBED MATERIAL

- Chapter 5 of The Essential Labour Law

5.2 GENERAL INTRODUCTION

Employment relationships do not last forever. At some stage, they must end. Some terminations are planned, whereas others are not. This part of labour law is important and you will come across it in your daily life, either as an employer or as an employee. Various ways of terminating a contract of employment are explained in the prescribed book. Termination may be either voluntary or involuntary. It is important that you know and understand the various ways in which an employment contract can be terminated. An employment contract can also be terminated through a dismissal.This is a more drastic way of terminating an employment relationship. Make sure that you know the different types of dismissal contained in the definition of dismissal and that you can differentiate between them. The requirements that employers must comply with before they dismiss employees are divided into two categories, namely, requirements for procedural fairness and requirements for the substantive fairness of a dismissal. You must understand these requirements since the fairness of any dismissal depends on them.

This is in line with values of Ubuntu relating to fairness and justice. An employee cannot just be dismissed without a reason and even when there is a reason, that reason must be fair. In addition to that the procedure to be followed must also be a fair one.

5.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with the meaning of dismissal.

5.3.1 The importance of unfair dismissal law

5.3.1.1 Protection of development of employment law

Study par 5.1.1 of the prescribed book

In the previous chapter, we learnt how employment contract is created, the matrix of the employment relationship in particular, the terms and conditions of the employment relationship as set out in legislations and how they can be varied. Now, this chapter will focus on how and to what extent the employee is protected against unfair dismissal. Remember, only the employer has the right to dismiss – that is, an employee cannot dismiss the employer. It is important to note that under common law employees were not protected against unfair dismissal. The law was only interested with the reason for the dismissal – that is, if the reason is found to be lawful an employer could dismiss an employee any time without a need to give a prior hearing to the employee so dismissed.

5.3.1.2 The development of the current law of unfair dismissal
Study par 5.1.2 of the prescribed book.

Now you know that only the employer has the right to dismiss. You will further learn that the law of dismissal has international law influence, which requires the employer to exercise the right to dismiss in a fair manner. South Africa is a member of the International Labour Organisation (ILO). This organisation sets out labour standards that are contained in conventions and all member states must comply with them. An example of ILO conventions dealing with dismissals is the Termination of Employment Convention 158 of 1982. Not only does this convention provide pre-dismissal procedural guidelines but also, it sets out three grounds upon which an employer may rely to dismiss an employee. These grounds are misconduct, incapacity and operational requirements. That is, dismissal will only be fair if the reason to dismiss is one of the three grounds indicated above and the employer had complied with the pre-dismissal procedure. In essence, an employee must be given an opportunity to be heard before dismissal. This principle is contained in the *audi alteram partem* rule, which requires that the other side be heard.

5.3.1.3 Unfair dismissal in terms of the LRA

A direct influence of the international law is evidently clear in a number of provisions of the LRA. However, for the current purpose only section 185 of the LRA is important. This section provides without distinction the right of every employee not to be unfairly dismissed. Remember, what we said about who can be subjected to the application of labour laws and who can be dismissed.

The table below illustrates relevant questions to be asked where there is an allegation of dismissal:

WAS THERE A DISMISSAL?				
YES		NO		
WHAT WAS THE REASON? OR				
Discrimination		Non-discrimination		
Yes	Automatically unfair dismissal	Misconduct	Incapacity	Operational reasons
		Substantively fair AND procedurally fair		
		Yes	No	Unfair dismissal
		No	Yes	Unfair dismissal
		No	No	Unfair dismissal
		Yes	Yes	FAIR DISMISSAL

5.4 The statutory definition of dismissal and onus

Study par 5.2 of the prescribed book

It is not always easy to establish whether dismissal has taken place. Where dismissal exits, the employer must prove that, it is fair. Remember, the fairness of a dismissal is dependable on the existence of two things namely; a valid reason and the compliance with a pre-dismissal procedure.

5.4.1 Definition of dismissal in the LRA

In terms of the LRA, dismissal may take place in more than one way. Section 186 of the LRA defines dismissal as follows –

(a) termination of employment with or without notice,
(b) when an employee employed on a fixed term contract reasonably expected employer to renew the employment contract on the same or similar terms or retain the employee on an indefinite basis but the employer offered to renew it on less favourable terms or not renew it at all, or not to retain the employee indefinitely,
(c) an employer refused an employee to resume work after she took maternity leave in terms of any law, collective agreement or contract of employment,
(d) an employer who dismissed employees for the same or similar reasons offered to re-employ one or more of them but has refused to re-employ another,
(e) constructive dismissal or,
(f) the new employer offered substantially less favourable terms to employees after the transfer in terms of section 197 of the LRA.

Note that each of these types of dismissals is discussed in detail from 5.2.2 - 5.2.7 in your textbook.

Can you make distinction between different conducts by the employer that constitutes a dismissal in terms of the LRA?

Guniwine never stopped reporting to work late despite the countless warnings against him for that. So infuriated, the employer told him to leave his premises immediately and look for a job elsewhere because his late coming escapades just cost the employer a major contract. The client withdrew from the contract because of non-delivery. Internal investigations point to Guniwine who was not on timeto pack the client's order.

Assume that Guniwine resigned because the employer frustrated all his efforts to claim unpaid five months salaries from the employer. Does Guniwine's resignation amounts to a dismissal – why?

SELF-TEST QUESTIONS

1. Define dismissal.
2. Explain the concept "*audi alteram partem* rule".
3. What constitutes a fair dismissal.

STUDY UNIT 6
AUTOMATICALLY UNFAIR DISMISSAL

OUTCOMES

After you have completed this study unit, you should be able to

- define the concept "automatically unfair dismissal";
- explain the origin of this form of dismissal;
- apply guidelines developed by the courts to establish the real reason for dismissal to the facts; and
- define the term "occupational detriment".

6.1 PRESCRIBED MATERIAL

- Chapter 6 of The Essential Labour Law

6.2 GENERAL INTRODUCTION

An automatically unfair dismissal is a type of dismissal which is automatically unfair. In other words, with this type of dismissal the employer cannot defend the dismissal, except in two cases which are: inherent requirements of a job and retirement age.
Employees are therefore protected and cannot be dismissed based on any of the reasons listed in the section. The protection in this regard relates to some of the fundamental rights protected by the Constitution.
This provision of the LRA therefore protects constitutional values and Ubuntu principles relating to human dignity and fairness.

6.3 IMPORTANT MATTERS TO UNDERSTAND

This Study Unit deals with automatically unfair dismissals.

6.3.1 The concept of automatically unfair dismissals
6.3.1.1 International labour standards
Study par 6.1.1 of the prescribed book

In the previous chapter, you learnt that employees' protection against unfair dismissals goes beyond South African boarders to include ILO conventions or international law, which is part of our law. The ILO convention 158 of 1982 does not only protect and promote employees' rights and freedoms but regard the dismissal of an employee for exercising any of his /her rights or freedoms, an automatically unfair dismissal. The concept 'automatically unfair dismissal' is now adopted by the LRA where it also enjoys an express provision.

Can you identify types of dismissals, which are automatically unfair in terms of the ILO convention 158 of 1982?

6.3.1.2 The Constitution
Study par 6.1.2 of the prescribed book

The Constitution of South Africa is a guardian of number of fundamental human rights and freedoms, which include labour rights. It makes provision for everyone to a fair labour practice. This right read with section 9 is coached generously to ensure that all employees enjoy the equal benefit and protection of the law without being discriminated against directly or indirectly. These rights ensure that the dignity of employee is promoted and protected. However, the employer may in certain instances be allowed to discriminate in order to achieve a legitimate constitutional objective. For example, the use of affirmative action in order to correct the imbalance of the past as one of the goals highlighted in the preamble of the Constitution. In this regard, the discrimination is fair.

6.4 Automatically unfair dismissal

Study par 6.2 of the prescribed book

This dismissal is regulated in terms of section 187 of the LRA. The LRA defines an automatically unfair dismissal as where the reason for dismissal is –

(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
(b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
(c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
(d) that the employee took action, or indicated an intention to take action, against the employer by—
   (i) exercising any right conferred by this Act; or
   (ii) participating in any proceedings in terms of this Act;
(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
(g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

Despite subsection (1)(f)—

(i) a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job;
(ii) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

6.4.1 Onus in an automatically unfair dismissal

Study par 6.2.1 of the prescribed book

Where an employee alleges to have been automatically and unfairly dismissed, the employer may rebut such allegation by proving that the dismissal is not an automatically unfair dismissal but rather a dismissal for misconduct, operational requirements or incapacity and that, it was fair. In other words, the employer cannot argue that an automatically unfair dismissal was fair except where section 187(2)(a) of the LRA above is applicable. That is, if the dismissal is based on inherent requirement of the job or an employee has reached retirement age; the employer may defend that by arguing that itis a fair dismissal.

6.4.2 Dominant or proximate cause

Study par 6.2.2 of the prescribed book

Where there appears to have been more than one reason and thus difficult to establish which of those reasons the employer had relied on to dismiss an employee; the courts had developed a twofold inquiry to determine the real reason. The inquiry consists of a factual and legal cause. Eventually, the court will regard the most dominant reason as the cause of dismissal.

6.5 Infringement of freedom of association

Study par 6.3 of the prescribed book

The right to freedom of association is quite a packaged right. It is protected in terms of the LRA, the Constitution and international law. Study how the LRA covers this in your prescribed book.

6.5.1 Protection of freedom of association

Study par 6.3.1 of the prescribed book

By now, you must have noticed that the right to freedom of association is protected in more than just one law; and, that, its application extends to job seekers. This is an exception to the rule that, labour laws only apply to people in the employment relationship. The protection of the right tofreedom of association means the employer may not in any way penalise or dismiss employees for exercising this right otherwise, the dismissal will constitute an automatically unfair dismissal.

6.5.2 Managers and freedom of association

Study par 6.3.2 of the prescribed book

Note that managers too are entitled to the right to freedom of association. However, given their position and roles in the organisation; their exercise of this right requires a ‘balancing act’. Their proximity to the organisations’ secrets and privileged information may result in them being conflicted when it comes to bargaining with the employer. Despite all these risks, the law does not prohibit managers to take up trade union leadership position in exercising their right to freedom of association. If a manager fails to balance his/her trade union activities with his/her managerial tasks then the employer retains the right to discipline such an employee.

6.6 Participation in protected strike or protest action

Study par 6.4 of the prescribed book

Whereas employees are protected against dismissal when exercising the right to freedom of association, which include their participation in a strike or protest action, this protection is restricted to what is called protected strike or protest action. In other words, employees are not protected if they engage in an unprotected strike or protest action or any criminal conduct during strike because such action is unlawful. That is, the dismissal of employees for participating in a protected strike will generally amount to an automatically unfair dismissal. However, there are exception to the rule that the employer may not dismiss employees during the strike. In fact, the employer may dismiss employees during the protected strike for any of the following two reasons –

- operational reasons
- misconduct

You will learn more about protected and unprotected strikes later when you deal with strikes and other industrial actions.

6.7 Replacement labour

Study par 6.5 of the prescribed book

Ordinarily, the employer's production line is put to a halt during the strike, which means the longer the strike takes the more the employer loses production and business opportunities. In a bid to avoid huge losses during strikes, employers were seen resorting to what is called replacement labourers, which may be people within or outside the organisation. Replacement labourers are also called 'amagundwane' in our daily parlance. They do the work usually done by employees on strike. But replacement labour may also be used where a complete stoppage of organisational operations may endanger lives, personal safety or health and that of the other. It is regulated in terms of section 76 of the LRA. Co- employees of those engaged in a strike may not be dismissed for refusing to do the work usually done by those on strike otherwise; the dismissal will constitute an automatically unfair dismissal.

6.8 The employees' refusal to accept a demand in respect of any matter of mutual interest

Study par 6.6 of the prescribed book

You will recall that, from inception a contract of employment is founded on the agreement between the employer and the employee. This means that, in principle, none of the parties is allowed to unilaterally change the terms of the employment contract. But, the LRA allows the employer or employees to use strike or lock-out respectively to compel their demands on each other. Provided that the required procedure for the strike is complied with, an employer will generally not dismiss employees for compelling a demand on him/her by means of the strike. Dismissing employees because they are engaged in a strike will constitute an automatically unfair dismissal.

6.9 Exercise of rights

Study par 6.7 of the prescribed book

During the employment relationship just like any other relationship, parties are prone to conflicts, which may require relevant authorities such as the CCMA and courts to resolve. The employer may not dismiss an employee because the latter has referred the matter to the CCMA or the court. Such a dismissal will amount to an automatically unfair dismissal.

6.10 Pregnancy

Study par 6.8 of the prescribed book

It is likely that some of the female staff members will fall pregnant during their tenure as employees. Labour laws are also enacted to protect pregnant employees – for instance, they are entitled to a maternity leave and their workspaces must be adjusted to suit their status. Therefore, an employer may not refuse to take employees back from maternity leave or for falling pregnant or intending to be pregnant. A dismissal resulting from the employee's pregnancy will be regarded as an automatically unfair dismissal.

6.11 Discrimination

6.11.1 Unfair discrimination and onus

Study par 6.9.1 of the prescribed book

Employees are protected against any form of unfair discrimination based on arbitrary grounds stipulated in section 9 of the Constitution, section 6 of the Employment Equity Act (EEA) and section 187 (1)(f) of the LRA. Section 187(1)(f) of the LRA went further to regard dismissal on the basis of any of the arbitrary grounds as an automatically unfair dismissal unless the discrimination is based on the inherent job requirements, or that an employee concerned had reached the normal age of retirement.

6.11.2 Specific instances of discrimination

Study par 6.9.2 of the prescribed book

As mentioned above, there are different forms or categories of discrimination, which an employer may base its discriminatory practice or conduct on. Examples of discriminations are –

- Racial discrimination
- Discrimination on the basis of gender
- Discrimination on the basis of sex
- Discrimination on the basis of religious belief
- Age discrimination
- Discrimination on the grounds of disability

6.11.3 Arbitrary ground

Study par 6.9.3 of the prescribed book

The fact that the LRA has identified only sixteen arbitrary grounds through which an employer may discriminate does not mean that, the list is complete. Employees may still be subjected to other grounds of discrimination beyond and outside the listed sixteen above. Grounds outside the list must be such that they have potential to impair the fundamental dignity of the person or affect him/her in a comparably serious manner to qualify to be put under an automatically unfair dismissal band.

6.11.4 Exceptions – escape clause

Study par 6.9.4 of the prescribed book

Take a reflection on what we have studied in this chapter, you will realise that where there is a general rule, there is also an exception(s) to that rule. In this chapter we mentioned the inherent job requirement and normal retirement age as exceptions to the allegations that an automatically unfair dismissal is committed.

6.12 Transfer of employment contracts
Study par 6.10 of the prescribed book

An employee who is transferred to another employer should in all fairness keep the terms and conditions of the old employer or if any change, it must be favourable one. In other words, terms and conditions should not be reduced or be less favourable upon the transfer of the contract. The employer who dares dismiss employees who are not happy with reduced terms and conditions will be accused of committing an automatically unfair dismissal. Where an employee resigns because the employment terms and conditions are reduced then, this becomes a form of dismissal referred to as constructive dismissal. In other words, the employee was simply forced to resign by the employer.

6.13 Protected disclosure
Study par 6.11 of the prescribed book

The protected disclosure is regulated in terms of the Protected Disclosure Act 26 of 2000 (PDA). This Act encourages employees to report any suspicious or actual criminal activity by the employer whether in the private or public sector while it guarantees the employee (whistle-blower) protection against any form of victimisation or dismissal. An employee (whistle-blower) who is subjected to any form of victimisation or dismissal is protected in terms of the law of automatically unfair dismissal. Note that there are special people to whom disclosure can be made in order to enjoy the protection of the PDA provisions. Disclosure in this regard, is different from corridor talks or gossiping – these are not protected under the PDA.

You will also learn of a number of cases where employers disguised the real reason for dismissing employees and how the courts have been dealing with such cases.

Ngwanyana fell pregnant while working as a teller in Saab bank. When the bank manager learns of her status, she got infuriated and told her how much she is an idiot. Later on, the same day Ngwanyana was called to an urgent meeting where the bank allegedly advised her that she was failing to carry out her duties and dismissed her a week later.

Assume that the bank has a policy that says, “employees intending to fall pregnant should advise the bank two months in advance to enable the bank to plan and prepare itself for an eventuality of running its business without such an employee”.

What do you think about such a policy and why?

SELF-TEST QUESTIONS
1. Define the concept automatically unfair dismissal.
2. What are the exceptions to claims of automatically unfair?
3. What is the international labour standards which developed the concept automatically unfair dismissal?

STUDY UNIT 7
DISCIPLINE IN THE WORKPLACE AND DISMISSAL FOR MISCONDUCT

OUTCOMES

After you have completed this study unit, you should be able to

- Understand the role of discipline in the workplace;
- Different forms of discipline;
- Explain progressive discipline;
- Apply guidelines developed by the courts to establish the real reason for a dismissal to the facts;
- Understand the substantive fairness of dismissal based on misconduct and apply the principles in a practical situation; and
- Understand the procedural fairness of a dismissal based on misconduct and apply the principles in a practical situation.

7.1 PRESCRIBED MATERIAL

- Chapter 7 of The Essential Law

7.2 GENERAL INTRODUCTION

The constitutional right of everyone to fair labour practices contained in section 23 of the Constitution means that an employee has a fundamental right not to be unfairly treated, including not to be unfairly dismissed. The LRA provides for grounds on which an employee may be dismissed and one such ground is misconduct. However, an employee may not be dismissed unless both substantive and procedural requirements have been met. This is to ensure that there is fairness and respect for human dignity, which are in line with both the Constitution and the ethos of ubuntu. According to ubuntu, no one should be penalised before his or her side is heard, which corresponds with the *audi alteram partem* rule. This rule originates from the natural desire of humans to be fair to their fellow human beings. If the rule is observed diligently and in all spheres of life, it leads to a just andfair society. This principle is similar to the principle found in traditional African societies, where there is a strong emphasis on the due observance of procedure. All members of the community must be allowed to voice their opinions when their interests are affected. It can therefore be argued that ubuntu and labour law converge in their common quest for social justice and fairness. Inherent in procedural fairness is the requirement that an employee must know what he or she is accused of, be afforded the opportunity to prepare and to present his or her side of the story and be given the opportunity to cross-examine witnesses.

7.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with discipline in the workplace and dismissal for misconduct, including the substantive fairness and procedural fairness of such dismissal.

7.3.1 Discipline in the workplace

7.3.1.1 The common law and the origin of the employer's right to discipline.

Study par 7.1.1 of the prescribed book

The employment relationship is based on mutual respect and trust between the parties. Parties have duties and responsibilities, which makes this relationship work. Generally, the breach of one or more of the duties of employment may result in the employer instituting disciplinary action against the employee mainly to try to correct the wrong that might have happened. The employer's power to discipline include dismissing employee where necessary. That is, the end result of disciplinary process is not necessarily to dismiss. There are different forms of discipline less of a dismissal, which an employer may take depending on the gravity and nature of the issue in dispute.

Imagine a new graduate appointed as a newsreader, Thandeka who spilled a cup of coffee on a table while reading news on TV and a seasoned municipal manager who dished out a stationery tender to her boyfriend.

Take note that the disciplinary power rests on the employers and not employees – employees do not have powers to discipline employers. Can you explain why?

7.3.1.2 The LRA and code of good practice - dismissal

Study par 7.1.2 of the prescribed book

Not only does the law vests disciplinary power to the employer; it also put a relative responsibility on employers to develop disciplinary code and make such available to employees. In other words, the employees must be aware of the standards and behaviour expected of them. Equally, the LRA contains a Code of Good Practice which guides employers in their exercise of the power to discipline and to avoid possible abuse of the disciplinary power. In chapter 5 you have learnt that the power to dismiss must be fair. The same principle applies when the employer exercises the disciplinary power. Generally, the employer must adhere to the code when exercising discipline, however, a deviation by the employer from the rules in the code does not automatically renders the discipline unfair or unlawful. The process followed must have been fair. That is, while the employer enjoys an element of flexibility when disciplining employees, it is required that he/she be consistent in the exercise of disciplinary power. Remember, the Code does not necessarily have to cover all kinds of infringements – some infringements are so obvious and common and requires no mention in the code. Most importantly, the courts endorse where necessary a progressive discipline approach which may include the following –

- Suspension without pay
- Verbal warnings
- Written warnings
- Demotion, and
- Transfer

Whilst dismissal is reserved for gross dishonesty, wilful damage to company property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

7.4 An overview of the disciplinary process

Study par 7.2 of the prescribed book

Before the employer can discipline the employee, there must firstly be, a reason to discipline. Once this is established, usually where a contravention of the Code of Practice is committed (but employees may also be disciplined for other things not contained in the Code) the employer may depending on the gravity and nature of the wrong committed, begin with the second aspect, which is the procedural aspect of discipline. Remember, that there are breaches that the employer need not put in the disciplinary code yet are punishable in terms of common law, e.g, stealing and other forms of misconduct even outside and unrelated to work.

That is, two things must happen for a disciplinary action to be pronounced fair namely, there must be a breach of a code or rule, which calls for discipline and the correct procedure must be followed. Remember, not all wrongs warrant disciplinary action and dismissal as a sanction.

Take further note that provisions in the disciplinary code or rules are not cast in stone – employers may deviate from the code where exceptional circumstances compel such a move.

The employer may in certain instances, suspend employees as a precautionary measure or punitively depending on the nature and gravity of the contravention instead of dismissal hence precautionary and punitive suspensions. You must also note that courts support corrective or progressive discipline. Can you provide examples of corrective discipline?

7.5 Often encountered types of misconduct
Study par 7.3 of the prescribed book

7.5.1 Misconduct related to poor timekeeping and absence from work
Study par 7.3.1 of the prescribed book

This is one of the most prevalent and repeatedly committed form of misconduct and likely overlaps with some other forms of misconduct. For instance, an employee with absenteeism problem also breaches his/her common law duty to render service to the employer and effectively this is a breach of contract and may also means that, the absent employee is a fraudster as he/she will be remunerated for hours he/she did not work for.

7.5.2 Types of misconduct showing a poor or unacceptable attitude to the performance of work
Study par 7.3.2 of the prescribed book

There are some overlaps too in this form of misconduct. The employee had by virtue of him/her agreeing to the terms and conditions of employment committed to honouring every letter of the contract. A failure to perform as per the terms and conditions of contract amount to a breach of conduct, which subject to the necessary procedure being followed warrant disciplinary action or even dismissal. But it also means that the employee is incapable of performing his/her work and that principles of incapacity applies.

7.5.3 Insolence and insubordination
Study par 7.3.3 of the prescribed book

What is common about these forms of misconduct is the negative conducts displayed by employees towards their managers. In one word, employees are disrespectful of their managers. As a result, employees deliberately fail to carry out their responsibilities and thus committing a breach to their common law duty to carry out lawful and reasonable instructions. Never mind the terminology; these two forms of misconducts seem generally the same.

7.5.4 Dishonesty and related types of misconducts
Study par 7.3.4 of the prescribed book

This form of misconduct involves an employee who acts deceitfully towards the employer in order to earn him/herself undue benefits. This kind of conduct goes into the very core of the employment relationship and seriously threatens its continuity. It breaches the common law duty to act in good faith – breaks trust between the employer and the employee. Dishonesty is so serious an offence and its commission warrants a sanction of dismissal. It is the broadest of all forms of misconduct. Examples of regular dishonest conducts in the employment space are fraudulent qualifications, misuse of employer property for personal gain, non-disclosure of criminal record where necessary, taking bribes, corruption and so on.

7.5.5 Other types of misconduct constituting a breach of the duty to act in good faith and promote the interests of the employer
Study par 7.3.5 of the prescribed book

Also falling under dishonesty is an employee who for whatever reason fails to provide the employer with the information that will assist the employer to identify troublemakers' in-group conduct. The employee's failure breaches his/her common law duty to act in good faith and promote the employer's interests. Ideally, employees are required to be on the side of the employer and report troublemakers when they see one. If they fail to do so then they may be found guilty under derivative misconduct.

7.5.6 Violence and related types of misconduct
Study par 7.3.6 of the prescribed book

Safety at the workplace is as important for one employee as is for another – that is, no employee must harm or threaten the safety of another. An employee found to have threatened the safety of another will be subjected to a disciplinary process with a possible sanction of dismissal depending on the nature and gravity of behaviour complained of. Although violence by its very nature involves the application of physical force; it may in certain instances be justified, e.g, where an employee acts in self-defence.

7.5.7 Misconduct infringing on the dignity of other employees/persons
Study par 7.3.7 of the prescribed book

Employees are generally expected to treat or address each other with mutual respect and at all times avoid foul language. The use of foul language at the workplace like a double-edged sword may have serious consequences to both the person who uses it and the person it is directed to. That is, the person using foul language may face disciplinary action from the employer whilst the person receiving suffers abuse, which include loss of dignity.

7.5.8 The abuse of alcohol and drugs
Study par 7.3.8 of the prescribed book

Generally, the public use or even possession of drugs is not allowed and the same holds in the workplace. Employees who use alcohol or drugs while doing the employer's work commits a breach of the common law duty to work with diligence because, drugs and alcohol have the effect of reducing a person' s physical and mental faculties. In other words, a drunk employee will generally not only be inefficient but will also put his/her life and that of others in the workplace at risk.

7.6 Substantive fairness of dismissal for misconduct

Study par 7.4 of the prescribed book

The substantive fairness component of dismissal refers to the availability of a valid reason for the dismissal. That is, there must have been a contravention of an existing rule or common law, which calls for the dismissal. The employer cannot arbitrarily dismiss an employee – there must be a valid reason. Where the employer dismisses an employee without a valid reason then the dismissal becomes a substantively unfair dismissal. As mentioned elsewhere, employers are required to develop a Code of Good Practice containing rules and guidelines, which must be followed for a dismissal of an employee accused of misconduct.

Whether or not the dismissal was fair the code provides the following guidelines –

- did the employee contravene a rule or standard regulating conduct in or of relevance to the workplace?
- If a rule or standard was contravened, whether or not
  - the rule was a valid or reasonable rule or standard
  - the employee was aware, or could reasonably be expected to have been aware, of the rule or standard,
  - the rule or standard has been consistently applied by the employer
  - dismissal was an appropriate sanction for the contravention of the rule or standard

7.7 Procedural fairness of dismissal for misconduct

Study par 7.5 of the prescribed book

It is not all and done after it is established that there is a valid reason to dismiss an employee. The employee to be dismissed must also be given a fair hearing before dismissal and once that is done then the dismissal becomes fair. Do you still remember the *audi alteram partem* rule? In other words, a dismissal is fair if it is substantively and procedurally fair. The procedural component of dismissal is loaded as shall be clearer to you below.

7.7.1 The elements of procedural fairness

Study par 7.5.1 of the prescribed book

The procedural component of dismissal based on misconduct contains the following –

- the employer must conduct an investigation.
- the employer must notify the employee concerned of the charge and investigation against him/her
- the employee must be given a reasonable time to prepare for the charge against him/her.
- the employee must be given an opportunity to state his/her case.

- the employee must be assisted during the hearing by a co-employee or a trade union representative.
- the employee must be informed of the verdict – that is, whether he/she is guilty or not of the charge against him/her.
- the employee must be advised of his/her right to refer the matter to the CCMA or the court if not satisfied with the decision of the hearing.

7.7.1.1 Agreement to an enquiry by an arbitrator
Study par 7.5.2 of the prescribed book

The employer and employees (trade union) may agree to refer their issues to arbitration instead of using internal disciplinary hearing.

SELF-TEST QUESTIONS

1. Who wields the power to discipline?
2. Explain progressive discipline.
3. What is the international labour standards which developed the concept of ‘automatically unfair dismissal?

CHAPTER 8
DISMISSAL FOR INCAPACITY

OUTCOMES

After you have completed this study unit, you should be able to

- explain incapacity as a ground of dismissal;
- discuss the different forms of incapacity;
- discuss the substantive fairness requirements for dismissal based on incapacity and apply relevant principles in a practical situation;;
- discuss the procedural fairness requirements for dismissal based on incapacity and apply relevant principles in a practical situation; and
- differentiate between the dismissal based on incapacity and disability.

8.1 PRESCRIBED MATERIAL

- Chapter 8 of The Essential Labour Law

8.2 GENERAL INTRODUCTION

Again, the constitutional right of everyone to fair labour practices contained in section 23 of the Constitution means that an employee has a fundamental right not to be unfairly treated, including not to be unfairly dismissed. The LRA provides for grounds on which an employee may be dismissed and one such ground is incapacity. However, an employee may not be dismissed unless both substantive and procedural requirements have been met. This is to ensure fairness and respect for human dignity, which are in line with both the Constitution and the ethos of ubuntu.

8.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with incapacity as a ground for dismissal.

8.3.1 Incapacity as a ground of dismissal
Study par 8.1 of the prescribed book

The LRA recognises three grounds of dismissal namely, misconduct, operational requirements and incapacity. In other words, these are the reasons upon which the employer may rely to dismiss the employee in terms of the LRA. Incapacity is also recognised in terms of the International Labour Organisations convention 158 of 1982 (ILO). It is generally, an inability on the part of the employee to perform in accordance with the standard set by the employer.

The inability is due to no fault of the employee. Incapacity provides an employer with a valid reason to dismiss. Remember, what we said about the principle of fair dismissal (based on ethos of ubuntu) discussed in chapter 5 – it applies to all forms of dismissals. That is, each form of dismissal is accompanied with a relative procedure. In case of dismissal based on incapacity, the law requires employers to assist employees likely to be affected by the dismissal subject to what is called ‘unjustified hardship principle’ with reasonable ways and technical support that would enable employees to meet the performance standard expected before effecting dismissal.

8.3.1.1 Distinguishing between incapacity, misconduct and operational requirements

Study par 8.1.1 of the prescribed book

The difference between these grounds of dismissal is that, misconduct involves a contravention of the rule by the employee whereas with operational requirements and incapacity no rule is contravened. In the latter instances, employees are ready and available to offer their services but the employer's business focus or employee's capacity demand that they be dismissed. The processes to dismiss are also different in a sense that, for incapacity the law requires the employer to provide counselling and guidance before dismissing the employee concerned; dismissal for operational requirements requires the employer to have a prior consultation with employees likely to be dismissed in order to find ways to avoid or mitigate the effect of the possible dismissal and the dismissal for misconduct requires that employee be subjected to a disciplinary hearing because, he/she breached the rule.

8.3.1.2 The overlap between substantive and procedural fairness in case of dismissal for incapacity

Study par 8.1.2 of the prescribed book

Remember, all forms of dismissals must be substantively and procedurally fair. That is, there must have been a valid reason (in this case incapacity) followed by a correct procedure (counselling, and reasonable guidance) meant to assist the employee into understanding the standard of performance required from him/her.

8.4 Poor work performance

Study par 8.2 of the prescribed book

Poor work performance simply means the employee lacks necessary skill or ability to do the job – it Is, however, not the employees' fault; even though, the employer may have to dismiss the employee.

8.4.1 Substantive fairness

Study par 8.2.1 of the prescribed book

As indicated above, substantive fairness speaks to the reason for the dismissal. Poor work performance falls under incapacity. Obviously, it is only an employer who has a set standard of performance who can be able to make valid accusations of poor work performance because, standards are there to compare. When determining whether or not dismissal on poor work performance is fair, the following guidelines should be considered –

- Whether or not the employee failed to meet a performance standard
- If the employee did not meet a required performance standard whether or not –
    - The employee was aware, or could reasonably be expected to have been aware of the required performance standard
    - The employee was given a fair opportunity to meet the required performance standard and
    - Dismissal was an appropriate sanction for not meeting the required performance standard

8.4.2 Procedural fairness

Study par 8.2.2 of the prescribed book

The dismissal based on poor performance is not complete and fair without a proper procedure. In terms of the code, an employee should not be dismissed for unsatisfactory performance unless the employer has done the following –

- has given appropriate evaluation, instruction, training, guidance, or counselling and
- after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily
- the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal to remedy the matter
- in the process, the employee should have the right to be heard and to be assisted by a trade union representative or fellow employee

8.4.3 Employees on probation

Study par 8.2.3 of the prescribed book

Probation provides an employer with a chance to evaluate the employee's performance and suitability for continued employment before confirming the appointment. Take note that the employer is not compelled to confirm an appointment after probation. The employer must be satisfied with the suitability of the employee in the organisation, where there is an element of under-performance; the employer must provide guidance and support in a bid to assist the employee to improve. In this regard, the employer must allow an employee reasonable time to improve. Any abuse of probation by the employer may amount to unfair labour practice.

8.4.4 Senior managers and highly skilled employees

Study par 8.2.4 of the prescribed book

However, the rules of probation are a bit relaxed where the employee involved is a senior manager or highly skilled employee – that is, the amount of counselling and guidance provided to the affected employee is dependable on the position and skills that a person holds. Less skilled (junior) employee requires more attention than the highly skilled and senior managers occupying higher offices do.

8.5 Ill health or injury

Study par 8.3 of the prescribed book

Illness or injury may affect the capacity of the employee to do the work employed to do and thus, provide an employer with a valid reason to dismiss based on incapacity. The code provides number of guidelines, which the employer must follow in case of incapacity arising from illness or injury. The guidelines include an investigation to establish the extent of incapacity (this will inform the employer about the type of intervention to employ) and the employee should be represented by a trade union representative or a co-employee. Note that, special attention must be paid where employees illness or injury is work related because the employer is required to do adjustment at work to accommodate such employees.

8.5.1 Substantive fairness

Study par 8.3.1 of the prescribed book

As with other grounds of dismissal, dismissal on incapacity arising from illness or injury must be substantively and procedurally fair. Substantively, the employer must have done necessary assessments of the illness or injury and implemented ways to help the situation.

8.5.2 Procedural fairness

Study par 8.3.2 of the prescribed book

In terms of the code of good practice, the employer must investigate the illness or injury of the employee and consult with the employee concerned.

8.5.3 The interaction between incapacity and disability

Study par 8.3.3 of the prescribed book

You should also note the difference between the dismissal based on incapacity and the one based on the employee's disability. The latter constitutes an automatically unfair dismissal as discussed in chapter 6. Although the two differ in principle, there are some overlaps especially where incapacity is due to employees' illness or physical injury, which makes performance of duties impossible – thus, a reason enough to dismiss. In the circumstances, the employer may eventually dismiss an employee on the basis of incapacity occasioned by the employee's disability if after reasonable adjustments or accommodations made; an employee is still not able to perform the job in accordance with the set standards. Here you should be thinking of the discussion we had earlier regarding the concept of 'inherent requirement of the job' – do you?

8.5.4 Medical boarding or application for ill health retirement benefits

Study par 8.3.4 of the prescribed book

Employees who suffer permanent disabilities such that they are unable to continue doing their work are usually medically boarded. This position is regulated in terms of the retirement funds rules or an insurance company, which pays benefits to the affected employee.

8.5.5 Medical certificate

Study par 8.3.5 of the prescribed book

In terms of the BCEA an employee, who has been absent from work for more than two consecutive days must on his/her return produce the doctor's note justifying his/her absence from work. In this regard, the doctor's note includes a doctor registered with a professional council or traditional healer so registered in terms of the relative professional body as required by the Act of Parliament.

8.5.6 Enquiry into conduct or capacity

Study par 8.3.6 of the prescribed book

Remember that the employer is required by the law to investigate any case of incapacity due to illness, injurywhich result in poor work performance.

8.6 Other forms of incapacity

Study par 8.4 of the prescribed book

Elsewhere above, it was pointed out that illness or injury may lead to an employee affected being incapable of performing his/her work and as a result, being dismissed for incapacity. However, dismissing an employee mainly for his/her disability amounts to an automatically unfair dismissal. This explains why, it is important for a dismissal based on incapacity to be preceded by a prior investigation to establish the extent and nature of the incapacity.

8.6.1 Incompatibility
Study par 8.4.1 of the prescribed book

Incompatibility is generally an inability of an employee to reasonably work in harmony with other employees. This constitutes a ground for dismissal relating to either incapacity or operational requirements. Debate is still raging over under which between the two, does incompatibility fall as a ground of dismissal.

8.6.2 Dismissal at the request of a third party
Study par 8.4.2 of the prescribed book

Also, and arguably strange, is the dismissal of an employee at the behest of third party or other employees. That is, third party may force employer's hand on an employee. However, this is not aseasy as it sounds. There is lot to consider namely –

- the demand to dismiss must have sufficient foundation.
- the threat by a third party if the demand is not met must be real or serious.
- the employer must have no other reasonable option but to dismiss.
- the employer must make a reasonable effort to dissuade the third party from carrying out a threat.
- the employer should investigate and consider alternatives to dismissal and consult with the employee.
- the extent of injustice to the employee must be considered.
- the blameworthiness of the employee should be taken into account.

8.6.3 Supervening impossibility of performance
Study par 8.4.3 of the prescribed book

This relates to the change of circumstances resulting in the impossibility of performance. A classic example will be where an employee is imprisoned before he/she can do the job.

SELF-TEST QUESTIONS

1. Can you explain the concept 'incompatibility' as a form of incapacity?
2. How can employers justify the dismissal on incapacity due to disability?
3. Can you distinguish between incapacity and disability?

STUDY UNIT 9
DISMISSAL FOR OPERATIONAL REQUIREMENTS

OUTCOMES

After you have completed this study unit, you should be able to

- define operational requirements as a ground of dismissal;
- discuss the different elements of operational requirements;
- discuss the procedural requirements for dismissal on operational requirements;
- distinguish between large and small-scale retrenchments; and
- understand incompatibility as a form of operational requirements.

9.1 PRESCRIBED MATERIAL

- Chapter 9 of the prescribed book

9.2 GENERAL INTRODUCTION

Again, the constitutional right of everyone to fair labour practices contained in section 23 of the Constitution means that an employee has a fundamental right not to be unfairly treated, including not to be unfairly dismissed. The LRA provides for grounds on which an employee may be dismissed and one such ground is operational requirements. However, an employee may not be dismissed unless both substantive and procedural requirements have been met. This is to ensure fairness and respect for human dignity, which are in line with both the Constitution and the ethos of ubuntu.

9.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with dismissal based on operational requirements.

9.3.1 The concept of 'operational requirements'

Study par 9.1 of the prescribed book

Thus far, we have discussed only two of the three grounds of dismissal (misconduct and incapacity) recognised in terms of the LRA, now the focus will be on dismissal based on operational requirements. The concept 'operational requirements' is defined and characterised in four elements, which are, the economic, structural, technological and similar requirements. This ground of dismissal is categorised as a non-fault dismissal together with incapacity. This is so because; the termination of employment is not the result of the actions or fault on the part of the employee. In fact, this form of dismissal is informed by the employer's business needs. Remember, employers run businesses for profit and may in pursuit of that, take decisions that may socially and economically not be friendly yet legal and commercially sound. This explains why even courts are reluctant to interfere with commercial decisions made by the employers to drive business needs – courts cannot run businesses on behalf of the employers. But, what the courts can do is to ensure that employersfairly treat employees when they run their businesses. Retrenchment for operational reasons is broad and therefore susceptible to abuse by the employers. As you study this dismissal, you will realise that in some cases employers were found guilty for disguising an operational requirement as the reason for dismissal while the real reason is quite different or even personal.

9.3.2 Distinction between small scale and large-scale retrenchments

Study par 9.2 of the prescribed book

The LRA does not only recognises the retrenchment of employees; it also distinguishes retrenchments into small- and large-scale retrenchments. Make sure you understand what constitutes small and large scales of retrenchment. However, whether it is a small or large-scale retrenchment, the results are virtually the same as the jobs are lost; the only difference is the extent of such loss and slightly, the procedures to follow in effecting retrenchment. Each scale of the retrenchment adopts a different procedure. Generally, the procedure to effect retrenchment is set out in terms of section 189 of the LRA. At the core of the procedural requirements set out in terms of this section is, once again,fairness when effecting retrenchment. That is, the *audi alterum partem* rule applies. Remember what it means?

9.3.4 Substantive fairness

Study par 9.3 of the prescribed book

Now you are aware that fairness is at the heart of every step undertaken in the employment relationship and retrenchment process is not an exception to that. Whether or not a dismissal for an operational requirement was fair is the question to be determined by the court after considering facts of the case. There is no one-size-fits-all type of a definition of substantive fairness.

9.3.5 The dismissal was to give effect to the employer's operational requirements

Study par 9.3.1 of the prescribed book

The employer who contemplates dismissing on operational requirements must prove the same. That is, the dismissal on operational requirement cannot be accepted as it comes from the employer's mouth. Its veracity must be tested, otherwise there is potential for abuse.

9.3.6 The operational reason given was the real reason for the retrenchment

Study par 9.3.2 of the prescribed book

The employer must show that the reason for dismissal is not a cover-up for another reason. This also speaks to the fairness principle discussed above.

9.3.7 A dismissal to increase profits

Study par 9.3.3 of the prescribed book

Unfortunately, the employer may retrench employees based on the business needs to maximise profit.

9.3.8 Assessing the employer's operational requirements

Study par 9.3.4 of the prescribed book

Note that the courts are facing a difficult task of establishing the true reason for retrenchment based on operational reasons. This is so because, courts do not have expertise in the running of businesses and will therefore largely depend of the information from the same managers of businesses who are contemplating retrenchment. Interesting, is it not!

9.4 Procedural fairness

Study par 9.4 of the prescribed book

The LRA requires the employer contemplating retrenchment to consult with the employees or their trade union about the possible retrenchment and the circumstances that precipitates it. As alluded to above, there is a procedure for small and for large-scale retrenchments. Note that, this process is not completed by mere compliance with the provided list of what needs to be done. It is not about the ticking of boxes. Parties must engage robustly to establish the true state of affairs. The courts warned against parties just going through motions.

9.4.1 The consultation process

Study par 9.4.1 of the prescribed book

This process must be initiated by the employer, who must invite affected employees or their trade union in writing. Note that, at this point no decision is made regarding retrenchments. Consultation invite must contain amongst others the following –

- notice of consultation
- who must be given notice and be consulted
- the nature of consultation
- timing of consultation
- duration of consultation

9.4.2 Consultation topic

Study par 9.4.2 of the prescribed book

The idea of consultation is to afford consulting parties opportunity to find ways to avert the circumstances likely to cause the employer to retrench and if retrenchment is unavoidable, then ways to minimise the effect of retrenchments, methods to be used for selecting employees to be retrenched, and severance packages. In the main, section 189(2) makes provision for the following topics as the focus of the consultation process –

- to avoid the dismissal
- to minimise the number of dismissals
- to change the timing of the dismissals
- to mitigate the adverse effects of the dismissals
- to agree on the selection criteria
- severance pay

9.4.3 Written disclosure of information

Study par 9.4.3 of the prescribed book

Remember, the consultation process is not a briefing session. Parties engage openly, seriously and in good faith with the aim of avoiding retrenchment. It is therefore important that all parties are familiar with the facts and relevant information in order to engage effectively. Therefore, all the necessary and relevant information must be made available in writing. Study further about this in your prescribed book. Each side is given an opportunity to present its own views, have them scrutinised and where there is disagreement, reasons are provided for dissenting views. It is a meaningful joint consensus seeking session.

9.5 Selection criteria

Study par 9.5 of the prescribed book

In the spirit of fairness, the decision on how employees to be retrenched are going to be selected must emanate from the agreement between the parties. However, where parties cannot agree the employer may still make selection and retrench accordingly. This does not automatically become unfair selection. It will be assessed too and if found to be fair and objective then the retrenchment of those selected will too be fair. Commonly used criteria are –

- LIFO
- Employees' conduct, skills, efficiency, capacity, experience, attitude to work and productivity
- Bumping
- FIFO

Make sure you understand what each of this means in the practical sense.

9.6 Severance pay

Study par 9.6 of the prescribed book

When employers and employees part ways due to reasons relating to the operational requirements, employers are required by the law to pay a severance pay. It is usually an equivalent of at least one-week's remuneration for each year completed under the employer's employ. This cannot be paid if the employee was given an alternative work/position but refused without a valid reason.

9.7 Procedural fairness in the case of large-scale retrenchment by a big employer

Study par 9.7 of the prescribed book

For this scale of retrenchment, the law allows the employer or the other consulting party to ask the CCMA to appoint a facilitator to assist them during the consultation. Once the facilitator is appointed, the law prohibits the employer from effecting dismissals until the expiry of sixty days (60) unless as per agreement between the consulting parties. Effectively, facilitation is meant to run for sixty days (60).

9.8 Resolution of disputes

Study par 9.8 of the prescribed book

Where the employee(s) or trade union is dissatisfied with the manner in which the retrenchment took place, the dissatisfied party may refer the matter to the CCMA, a bargaining council for arbitration, or Labour Court.

Scumba Leathering CC is an employer to three hundred (300) employees and is in financial distress. Its financial status is such that it will not be able to pay employees' salaries in the next 12 months if its current situation is not changed. After lengthy deliberations amongst themselves, managers resolved that the only way to keep the business operation is to retrench at least twenty-eight (28) of its employees.

Advise on the legality of Scumba Leathering CC's intended move and remedies if any, available for the affected employees if dissatisfied by the move? Which scale of retrenchment is intended above?

Will your answer be different if only eight (8) employees were to be retrenched?

SELF-TEST QUESTIONS

1. Can you explain the concept of 'operational requirement'?
2. Discuss 'consultation' in the context of dismissal based on operational requirements?
3. What is the court's role in dismissal on the basis of operational requirements?

STUDY UNIT 10
TRANSFER OF EMLOYMENT CONTRACTS

THE CHAPTER IS NOT PRESCRIBED

STUDY UNIT 11
UNFAIR LABOUR PRACTICES

OUTCOMES

After you have completed this study unit, you should be able to

- define the term "unfair labour practice";
- explain each of the forms of unfair labour practices;
- distinguish between "precautionary suspension" and "punitive suspension"; and
- define the term "occupational detriment".

11.1 PRESCRIBED MATERIAL

- Chapter 11 of Essential Labour Law

11.2 GENERAL INTRODUCTION

Note that an employee cannot commit an unfair labour practice against the employer. Unfair labour practices are discussed separately from dismissals because, unlike with dismissal, they occur during actual employment. Employees are afforded legal protection against unfair labour practices that might occur. Unfair labour practices can relate to promotion, demotion, probation, training, the provision of benefits, suspension, refusal to reinstate or re-employ an employee in terms of any agreement and unfair conduct of the employer that causes an employee to suffer an occupational detriment on account ofa protected disclosure. The Constitution, together with the LRA, affords employees protection against unfair labour practices perpetrated by employers against employees. It is important to note that the right to protection against unfair labour practices in terms of the Constitution is wide, while protection against unfair labour practices in terms of the LRA is capped. This means that the LRA provides a limited list of actions that are included in the definition of an unfair labour practice.

Fairness is an essential element of ubuntu, the Constitution and labour law. By protecting employees against unfair practices by employers, both the Constitution and the LRA give effect to the principles of fairness. Traditional African values support the principle that no one should be treated unfairly, and should such treatment take place, the wronged person should get the opportunity to speak to the wrongdoer so that they may work towards a solution together. In the context of unfair labour practices, ubuntu presupposes that the employer ought to treat all employees with respect, acknowledging their human dignity as protected by the Constitution. Protection against unfair labour practices rests on the principles of fairness.

11.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with unfair labour practices by the employer against employees.

11.3.1 The relevance of the unfair labour practice

Study par 11.1 of the prescribed book.

The Constitution includes (in section 23(1)) provides for the broad right to fair labour practices and extends this right to 'everyone'. There is therefore a need to protect employees against possible unfair conduct by the employer during employment. The discussion in this Study Unit is mainly on how the LRA regulates the concept of an 'unfair labour practice'.

11.3.2 The definition of unfair labour practices in the LRA

Study par 11.2 of the prescribed book.

Section 185(b) of the LRA extends the right to every employee not to be subjected to an unfair labour practice. Against this background, the LRA defines an unfair labour practice as follows —

Any unfair act or omission that arises between an employer and employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement;
(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

11.3.3 Who is protected?

Study par 11.2.1 of the prescribed book.

Take note that in terms of the LRA, only employees enjoy protection against unfair labour practices. This is despite the wording of section 23(1) of the Constitution, which extends the right to fair labour practices to 'everyone'. Unfair labour practices are actions of the employer against an employee. The LRA definition of the unfair labour practice may also cover ex-employees. The definition makes it clear that it covers the situation where an employer refuses or fails to re-employ a former employee in terms of an agreement.

Why do you think protection against unfair labour practices is necessary?

11.3.4 A closed list relating to disputes of right

Study par 11.2.2 of the prescribed book.

The list of unfair labour practices contained in section 186(2) is exhaustive or a closed list. The use of the word 'involving' prior to the actual types of conduct listed in section 186(2), indicates that unfair labour practices are limited to those mentioned in the list. This means that unless the conduct of the employer falls within the scope of one of the types of conduct listed in section 186(2), it would not amount to an unfair labour practice and a bargaining council or the CCMA would not have jurisdiction to hear the matter.

11.4 Unfair conduct: promotion and demotion

11.4.1 Basic principles

Section 186(2)(a) protects employees against unfair employer conduct in respect of promotion and demotion.

11.4.2 The meaning of 'promotion'

Study par 11.3.2 of the prescribed book.

Employers usually use different mechanisms to advance employees in the workplace whether by design, focusing on the merits of the individual, or as a result of workplace changes.

For a 'promotion' to exist, there are, essentially, two requirements - The first requirement is that an employment relationship must exist between the employee raising a dispute relating to promotion and his/her employer. Once a connection between an employee and the employer exists, the next step involves comparing the current job held by the employee with the job or the upgraded post aspired to. It does not matter, for example, that the existing employee has to compete with outside applicants (who are not employees) or that we call this process an 'application procedure'. The comparison between posts is necessary to determine whether there was in fact a promotion at stake. In making this determination, one should look at a number of factors such as: differences in remuneration levels, fringe benefits, status, levels of responsibility or authority or power, and even the difference in levels of job security (consider the difference between a casual employee, a part- time employee or a permanent employee).

At times, an employer may expect employees to act in other (higher) positions for a certain period of time, however, this does not entitle him/her to be appointed to the post. Even where the employee has a 'legitimate expectation' of promotion, based on a promise of being permanently appointed to the post in which he/she is acting, this only means that the employee must be heard before the final decision is made and the fact that he/she acted in the higher position is one factor that may be relevant in determining the decision not to promote him/ her. Some employees in acting positions have succeeded in challenging the conduct of the employer as unfair conduct relating to promotion.

11.4.3 The meaning of 'demotion'

Study par 11.3.3 of the prescribed book.

Different to 'promotion', the essence of a 'demotion' lies in a diminution of remuneration levels, fringe benefits, status, levels of responsibility or authority or power, or even a diminution in levels ofjob security. Note that even if an employee's salary level is maintained, a transfer or appointment of the employee to a post of lower status and/or with fewer responsibilities will constitute a demotion.

11.4.4 Unfairness of the employer's conduct relating to promotion and demotion

Study par 11.3.4 of the prescribed book.

Once it is established that the conduct of the employer relates to a 'promotion', attention turns to the question whether the conduct of the employer is fair or not. In this regard both substantive and procedural fairness are required for fair conduct relating to a promotion to exist. Substantive fairness deals with the merits of the decision to promote or not to promote a person and usually involves choosing between one or more candidates. With regard to procedural fairness, a failure to comply with procedures and requirements set by an employer for dealing with promotions could lead to a finding of procedural unfairness. Examples may include failing to advertise a post, promoting a person who did not meet the requirements set for the promotion and the incorrect composition of a selection committee; etc.

Take note that an employer is entitled to take account of affirmative action considerations when deciding whether or not to promote an employee, provided that this decision is taken in accordance with a properly considered and rational affirmative action policy.

Employers must also have good reasons and must follow fair procedures for a demotion to be fair. Demotion will be fair only where it is used as an alternative to dismissal for reasons related to misconduct, incapacity or operational requirements.

11.4.5 Remedies

Study par 11.3.5 of the prescribed book.

The CCMA and our courts have developed a wide range of remedies in relation to promotions and demotions. These include declaratory orders, protective promotions (where the post is already filled by another employee but the applicant is given the salary, benefits and grade of the higher post), compensation awards (limited to a maximum of twelve months) remitting the matter back to the employer for re-consideration, or re-instatement to a previous position (in the case of demotion).

11.5 Unfair conduct: probation

Study par 11.4 of the prescribed book.

In terms of section 186(2)(a) of the LRA, an unfair conduct relating to probation (excluding dismissal) is an unfair labour practice. Remember that the purpose of probation is to put the employer in a position to take an informed decision about the capacity and suitability of an employee to do a certain job. This means that in identifying possible unfair labour practices, guidance may be obtained from the rules which govern the obligations of an employer before a fair decision to dismiss on the grounds of poor performance of a probationer is reached (Item 8 of the Code of Good Practice: Dismissal (Schedule 8 to the LRA). Unfair labour practices by an employer in this context may include the setting of an unreasonably long probationary period, the setting of unreasonable performance standards, the failure to inform the employee properly about required performance standards and, in a procedural sense, the failure by an employer to afford the employee reasonable guidance, evaluation, training, counselling and instruction as required by the Code during probation.

11.6 Unfair conduct related to training

Study par 11.5 of the prescribed book.

An employer’s obligation to provide training may arise from a contract of employment or a collective agreement. Labour legislation also places specific training obligations on employers through the provisions of the EEA and the Skills Development Act 97 of 1998. If the employer does not comply with the obligations it may amount to an unfair labour practice, especially where such training is a prerequisite for advancement in the workplace, or where a legitimate expectation to be provided with such training was created, and it furthermore can be shown that the employer acted ‘inconsistently, arbitrarily or irrationally’ in denying the training.

11.7 Unfair conduct: the provision of benefits

Study par 11.6 of the prescribed book.

An employer may commit an unfair labour practice through unfair conduct relating to the provision of benefits. There are often issues regarding the term 'benefits'. The CCMA has in some decisions attached a wide meaning to the scope of benefits, including the provision of free transport, deductions of amounts from the remuneration of employees and the option given to an employee of a reduction of his/her salary as an alternative to termination of employment.

11.8 Unfair suspension

Study par 11.7 of the prescribed book.

Section 186(2)(b) of the LRA protects employees against unfair suspension. In practice, a distinctionis normally made between —

- The precautionary (sometimes called preventative) suspension: This is where disciplinary charges are being investigated against an employee and the employer wants to suspend the employee pending the outcome of the disciplinary enquiry.
- The punitive suspension: In this case, a suspension is imposed as a disciplinary measure short of dismissal after the disciplinary hearing has been held and the employee found guilty.

11.8.1 Suspensions and the unfair labour practice

Study par 11.7.1 of the prescribed book.

Section 186(2)(b) of the LRA refers to 'the unfair suspension of an employee or any other unfair disciplinary action short of dismissal . . .' The wording implies that the provision only covers punitive suspensions as disciplinary actions short of dismissal. However, the courts and arbitrators have consistently accepted that precautionary suspensions also fall within the ambit of this provision.

11.8.2 Fair suspensions

Study par 11.7.2 of the prescribed book.

With regard to substantive fairness the employer must have a justifiable reason for suspension. This could be where the seriousness of the misconduct may create a state of affairs such as rumours and suspicion, necessitating a suspension of the employee in order for work to carry on smoothly, or where the employer has a reason to fear that the employee in question may interfere with the investigation or the witnesses. It may also be that the employer fears a recurrence of the misconduct or where the seniority and authority of the employee in question has a bearing on the matter.

The question whether a suspension has to be procedurally fair and whether some form of hearing has to be given to an employee prior to a precautionary suspension was answered in the negative by the Constitutional Court. Applicable regulations, collective agreements, and policies sometimes require employers to follow certain procedures prior to a suspension. The failure to follow these procedures may render the suspension procedurally unfair or perhaps even unlawful. As a general rule, the employer must continue remunerating the employee during the suspension. This is dictated by the law of contract in that if the employer were to stop remunerating the employee, it would constitute a breach of the employment contract. While a preventative suspension normally is on full pay, a paid suspension used as a disciplinary penalty instead of a dismissal would hardly seem appropriate and employers normally want to apply the punitive suspension without pay. Suspension without pay is typically only used as a penalty where the contract, disciplinary code or legislation allows for this or where the employee agrees to this as an alternative to dismissal.

11.9 Disciplinary action short of dismissal

Study par 11.8 of the prescribed book.

Reference is also made to 'other unfair disciplinary action short of dismissal' in section 186(2)(b) of the LRA, as an unfair labour practice. This provision refers to action taken by an employer before the employeehas been found guilty and the imposition of a disciplinary sanction. Examples are: a decision to institute a disciplinary enquiry; a decision to transfer an employee pending a disciplinary enquiry; or, the decision to recall a foreign service employee from a foreign posting after being investigated for alleged insubordination. This unfair labour practice is also relevant in the situation where an employer imposes a disciplinary sanction that does not constitute a dismissal, for example the imposition of a final warning and a suspension without pay. An employee is entitled to challenge the substantive and procedural fairness of any sanction that falls short of dismissal on more or less the same grounds that an employee may raise to challenge the fairness of a dismissal for misconduct.

11.9 Failure or refusal to reinstate

Study par 11.9 of the prescribed book.

Section 186(2)(c) of the LRA protects employees against a 'failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement'. This section is most often relied on in the context of re-hiring agreements as part of retrenchment exercises. In terms of such an agreement the employer undertakes to preferentially rehire employees from the pool of retrenched employees should vacancies arise after the retrenchment.

11.11 Protected disclosures

Study par 11.10 of the prescribed book.

Section 186(2)(d) of the LRA provides that any 'occupational detriment' imposed on an employee, other than a dismissal, 'on account of' that employee making a protected disclosure constitutes anunfair labour practice. Study your prescribed book regarding what constitutes 'occupational detriment'.

Study your prescribed book regarding 'protected disclosure'.
In order to become protected, the disclosure has to be made to certain persons and/ or officers under certain conditions. For example, disclosure to a legal adviser with the object of, and in the course of, obtaining legal advice, is a protected disclosure (section 5 of the PDA) or a disclosure to an employerif it is made in good faith and in accordance with prescribed or agreed procedures such as grievance procedures for reporting improprieties, provided the employee was made aware of this procedure (section 6 of the PDA). The Act also protects disclosures to a member of Cabinet or MEC of a province (section 7 of the PDA) or to the Public Protector, the South African Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural,

Religious and Linguistic Minorities, the Public Service Commission, or the Auditor-General (section 8).

According to the PDA, the disclosure must be made in good faith, the employee must reasonably believe that it is substantially true and it must not be made for personal gain. The employee must also have reason to believe that, if disclosure is made to the employer, he/she will suffer an occupational detriment. The disclosure must also be reasonable in all the circumstances of the case. Reasonableness in this context is determined by a number of factors, including the identity of the person to whom the disclosure is made, the seriousness of the conduct, whether the conduct is continuing or might continue, whether the employee breaches a duty of confidentiality, the track record of the employer in dealing with disclosures and the public interest. Note that the intentional disclosure of false information which harms, or has the goal to harm, an affected party is a crime.

11.12 The resolution of unfair labour practice disputes

Study par 11.11 of the prescribed book.

The procedure for resolving unfair labour practice disputes is similar to the dispute resolution procedure for unfair dismissals.

SELF-TEST QUESTIONS

1. Discuss whether an employee can commit an unfair labour practice.
2. Explain the concept "occupational detriment".
3. Discuss unfair conduct of the employer relating to probation as an unfair labour practice.

STUDY UNIT 12
EMPLOYMENT EQUITY

OUTCOMES

After you have completed this study unit, you should be able to

- explain unfair discrimination and to apply the relevant principles in a practical situation;
- distinguish between direct and indirect discrimination;
- name and discuss the sources of law that regulate discrimination in the workplace;
- explain the purpose of the Employment Equity Act 55 of 1998 (EEA);
- know defences against unfair discrimination;
- know the beneficiaries of affirmative action (designated groups);
- know designated employers for purposes of affirmative action; and
- know other forms of discrimination that are prohibited by the EEA, such as harassment and medical testing.

12.1 PRESCRIBED MATERIAL

- Chapter 12 of The Essential Labour Law

12.2 GENERAL INTRODUCTION

The Constitution is founded on different values, which include equality and human dignity (refer to s 1 of the Constitution). Equality is expressly provided for in terms of section 9 of the Constitution and the EEA was enacted to give effect to the constitutional value of equality (refer to the EEA).

The EEA ensures that all people of South Africa benefit from available employment opportunities fairly and equally without unfair discrimination. This is in line with the Constitution, principles of ubuntu and the international obligation that South Africa has by virtue of being a member state of the International Labour Organisation (ILO). Examples of relevant ILO standards are Convention 111 on Discrimination (Employment and Occupation) and Convention 100 (Equal Remuneration).These conventions are against any form of unfair discrimination in employment. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), 2000, discourages other forms of unfair discrimination in all spheres outside the employment environment.

The Constitution provides for the prohibition of unfair discrimination on a number of (non-exhaustive) grounds and authorises affirmative action. It therefore embraces both the notion of formal equality, which prohibits unfair discrimination, and substantive equality, which requires affirmative action. The EEA gives effect to relevant constitutional provisions and is the most important law on equity in the workplace.

12.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with the protection of employees against unfair discrimination and the obligation of the employer to promote affirmative action in employment.

12.3.1 Employment Equality and its Constitutional Context

Study par 12.1 of the prescribed book.

In terms of section 9 of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. This provision also prohibits unfair discrimination against anyone based on any of the listed grounds. The promotion of equality relies on two bases -

- Formal equality, which is also called 'equality in treatment'. This is protected in subsections 9(3) and 9(4) of the Constitution through the prohibition on unfair discrimination; and
- Substantive equality, which is also referred to as 'equality in outcome'. This is promoted through the adoption of positive measures or affirmative action to empower previously disadvantaged groups in society (section 9(2) of the Constitution).

There is also a third dimension to equality often referred to as 'equality of opportunity', which extends the divide between formal equality (which requires equal treatment) and substantive equality (which allows for 'unequal treatment' in certain circumstances). It recognises that there may be hidden barriers to the advancement of protected groups in employment.

The EEA has a twofold purpose, namely, to protect employees against unfair discrimination and to ensure the implementation of affirmative action measures by designated employers for designated employees. Affirmative action is aimed at remedying the injustices of the past that were caused by the apartheid system. It requires that suitably qualified people from the designated groups be given equal employment opportunities and be equitably represented at all levels. This promotes fairness and ubuntu, in that social justice and human dignity are restored to those who were previously disadvantaged.

12.3.2 The prohibition of unfair discrimination

12.3.2.1 Outline of the issues

Study par 12.2.1 of the prescribed book.

Section 6 of the EEA prohibits unfair discrimination against employees in an employment policy or practice on any of the grounds mentioned therein. Section 5 of the EEA places a positive duty on every employer to take steps to promote equal opportunities in the workplace by eliminating unfair discrimination in any employment policy or practice. This duty compels an employer to take measures to reasonably accommodate certain groups of employees. For example, the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (see Government Notice R1298 of 1 December 2000) and the Code of Good Practice on the Employment of People with Disabilities (Government Notice 1085 in Government Gazette No 39383 of 9 November 2015) respectively, provide guidelines as to how HIV/AIDS and disability should be dealt with and accommodated in theworkplace. The Amended Code of Good Practice on the Handling of Sexual Harassment Cases inthe Workplace (see Government Notice 27865 in Government Gazette No 482 of 4 August 2005 places an obligation on employers to be pro-active in preventing and addressing sexual harassment in the workplace.

12.3.2.2 Who is protected against whom?

Study par 12.2.2 of the prescribed book

Section 6 of the EEA protects an 'employee' against unfair discrimination and section 9 extends the protection to applicants for employment. Take note that section 6 provides that 'no person' (and not 'no employer') may unfairly discriminate. This means that other persons such as fellow employees or the employees of contractors working in the workplace may be included.

Do you think it is necessary for applicants for employment to be protected against unfair discrimination and why?

12.3.2.3 The meaning of 'employment policy or practice

Study par 12.2.3 of the prescribed book.

Section 6 of the EEA prohibits unfair discrimination against an employee 'in any employment policy or practice'. Section 1 of the EEA states that employment policy or practice' includes the following: recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal.

12.3.2.4 What is the meaning of 'unfair discrimination'?

Study par 12.2.4 of the prescribed book.

Although the EEA prohibits unfair discrimination, it is silent on the meaning of the concept. This means that it has been left to courts to give meaning to the concept of 'unfair discrimination'. In order to understand the meaning of this concept it is important to be able to distinguish between differentiation, discrimination and unfair discrimination. Differentiation could take the form of the employer including some employees and excluding others (for example, during an appointment procedure), preferring some employees over others (for example, during a promotion or eligibility for training), paying one employee more than another, extending certain benefits to some employees and not to others, etc. Note that differentiation itself is not prohibited by the EEA – it is only when the differentiation is linked to an unacceptable reason (called a ground of discrimination) that the differentiation constitutes discrimination.

Discrimination can in, the first instance, only exist if the listed ground relied on actually applies tothe facts of the case. Once a listed ground of discrimination is identified (and it applies to the facts),or an unlisted ground of discrimination is recognised, the next step is to decide whether the ground actually is or was the cause of the employer's conduct – only then does 'differentiation' become 'discrimination'.

Neither the Constitution nor the EEA prohibits discrimination. Both prohibit 'unfair' discrimination. Accordingly, not all acts of discrimination (i.e. basing decisions on listed or unlisted grounds of discrimination) are unfair. Section 6(2) of the EEA provides two defences to discrimination claims namely, affirmative action and an inherent requirement of a job.

12.3.2.5 Direct and indirect discrimination

Study par 12.2.5 of the prescribed book

Both the Constitution and the EEA draw a distinction between, and prohibit, direct and indirect discrimination. Direct discrimination is relatively easy to recognise and occurs where the differential treatment of employees is clearly and expressly based on one or more of the prohibited grounds of discrimination, be they listed or unlisted (section 6). Indirect discrimination may be harder to identify. Indirect discrimination occurs where an employer applies a policy, a requirement or a condition that appears to be neutral (in the sense that it does not clearly and directly discriminate on one of the grounds of discrimination) equally to all employees. However, the application of that policy, requirement or condition has a disproportionate negative or exclusionary effect on a certain group of employees.

Are you able to think of examples for each of the above two types of discrimination?

12.3.2.6 Justifying discrimination

Study par 12.2.6 of the prescribed book.

An employer may argue that the discrimination is justified because of an inherent requirement of a job. It may argue that the physical requirements of the job make it necessary for employees to have certain physical characteristics. But it is the employer who will have to prove that certain characteristics are indeed an inherent requirement of a job.

Section 6(2) expressly states that affirmative action is 'not unfair discrimination'. Every affirmative action decision is expressly based on (typically) race or sex/gender (i.e. all listed grounds). Put differently, whenever an employer applies affirmative action, there expressly will be differentiation based on race or sex/gender. Take note that there is also a 'general fairness' defence.

Do you think there should be any fair reason for discrimination?

12.4 Harassment as discrimination

Study par 12.3 of the prescribed book.

Section 6(3) of the EEA provides that harassment amounts to 'a form of unfair discrimination' and is also prohibited. The most prevalent forms of harassment encountered in the workplace are sexual harassment, racial harassment, sexual orientation harassment and religious harassment. Of these, sexual harassment, particularly is the most prevalent.

12.4.1 The nature of harassment

Study par 12.3.1 of the prescribed textbook

12.4.2 What conduct constitutes sexual and racial harassment in the legal sense?

Study par 12.3.1 of the prescribed book.

The term 'sexual harassment' refers, in the first instance, to unwelcome conduct of a sexual nature. There are a number of ways in which sexual harassment may be defined. Often, the term is defined or described with reference to the type of conduct involved or the effect of the conduct on the victim. The following types of conduct may amount to sexual harassment:

- physical conduct
- verbal conduct
- non-verbal conduct

The following types of harassment are usually identified —

- Quid pro quo harassment
- Sexual favouritism
- Hostile working environment harassment

In order to become harassment, the conduct must also attain a certain level or degree of unacceptability. However, the question is which test should be applied; whether a subjective or an objective test. A subjective test relies exclusively on the perceptions of the victim. In other words, if the victim experienced conduct as unwelcome or offensive, the conduct would constitute harassment. But the victim may be over-sensitive, and a subjective test may very well cast the net of harassment too wide. A purely subjective test would mean that one would have to take the complaining employee's word even though there is no fault (intention or negligence) on the part of the employer or perpetrator seen in the context of the nature of the conduct and surrounding circumstances. An objective test would look at all the circumstances of the case and the values of society, and, using a standard 'reasonable person' test, try to determine whether the perpetrator foresaw, or should reasonably have foreseen, that his/her conduct would constitute sexual harassment. It must however be noted that reliance on a 'reasonable person' test implies reliance on traditionally male dominated values which runs the constant risk of denying the experience of women in the workplace. The 'reasonable victim' test tries to reach a compromise between these two tests. It takes account of the experiences of the victim, but also the surrounding circumstances and the presence of fault on the part of the perpetrator.

In our law, decided cases are inconsistent as regards the test that should be used, but there is an Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (see Government Notice 27865 in Government Gazette No 482 of 4 August 2005 ('the Code')) which provides guidelines.

Which test do you think should be used and why?

12.4.3 Employer liability for sexual harassment and the importance of a harassment policy

Study par 12.3.3 of the prescribed book.

The following are the requirements to be met for an employer's liability in terms of section 60:

- The sexual harassment conduct complained of was committed by another employee.
- It was sexual harassment constituting unfair discrimination.
- The sexual harassment took place at the workplace.
- The alleged sexual harassment was immediately brought to the attention of the employer.
- The employer was aware of the incident of sexual harassment.
- The employer failed to consult all relevant parties or take the necessary steps to eliminate the conduct [and] otherwise comply with the provisions of the EEA.
- The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

Employees have a choice to either rely on section 60 to hold employers liable or on the common law principles of vicarious liability, or on both in the alternative. Note that it is not possible to hold an employer liable in terms of section 60 where the perpetrator is not an employee, but, for example,a customer. For the employer to be held liable for discrimination by employees in terms of section 60 of the EEA the employer must have been made aware of the conduct and then did nothing or did not do everything that could be expected of a reasonable employer. Employers are required to adopt a sexual harassment policy and to communicate the policy effectively to all employees. The policy should contain clear procedures dealing with instances of sexual harassment in a sensitive (including confidential) efficient and effective way. Once the employer is informed of the harassment, it should consult all relevant parties, take the necessary steps to address the complaint in accordance with the Code and the policy and take the necessary steps to eliminate the sexual harassment. This, in turn, should include providing advice to the complainant about the informal and formal procedures available to deal with the sexual harassment offering the complainant advice, assistance and counselling during the process (including during any disciplinary enquiry that may be instituted) as well as implementing the chosen procedure in a manner that is procedurally and substantively fair. The advice and counselling should be dispensed, as far as is practicable, by a person who is designated by the employer. In terms of the Code either of the two ways may be used to deal with instances of sexual harassment. The first is to try and resolve the problem on an informal basis. The second is that a more formal procedure may be embarked upon. The employer must deal with grievances and inquiries on a confidential basis. The names of the victims must be kept confidential.

Do you think it is necessary to have a sexual harassment policy in the workplace and why?

12.4.4 Other remedies for sexual harassment

Study par 12.3.4 of the prescribed book.

At times victims of sexual harassment choose to resign rather than be subjected to further harassment. The employee who resigns may argue that there was a constructive dismissal. If the employee can prove that there was a constructive dismissal and can show that discrimination in the form of harassment gave rise to that constructive dismissal, the employer's conduct may constitutean automatically unfair (constructive) dismissal. Courts may also order compensation on the basis of an automatically unfair dismissal arising from discrimination. A victim of harassment may also institute a civil claim against the perpetrator based on delict and/or the employer either based on the common law principles of vicarious liability for delict or possibly, arising from a breach of the common law contractual duty to provide a safe (including psychologically safe) working environment.

12.5 Medical and psychological testing

. Study par 12.4 of the prescribed book

Section 7 of the EEA prohibits the medical testing of an employee unless legislation requires or permits the testing, or the testing is justifiable. Testing may however be justifiable in the light of medical facts, employment conditions, social policy, fair distribution of employee benefits or the inherent requirements of a job. Section 8 of the EEA prohibits 'psychological and other similar assessments' of employees unless the test or assessment has been scientifically shown to be valid and reliable, it can be applied fairly to all employees, that the test or assessment is not biased against any employee or group of employees and the test has been certified by the appropriate professional body (note, however, that this last requirement of certification was struck down as irrational in *Associationof Test Publishers of SA v President of the Republic of SA & others* (2017) 38 ILJ 2253 (GP) because of the absence of a regulatory structure for such certification).

Do you think medical testing should be allowed in the workplace? If your answer is "yes", under which circumstances should it be allowed?

Section 6(1) of the EEA lists HIV/AIDS status as one of the grounds on which an employee may not be discriminated against. This means all the general principles of discrimination law apply to conduct by an employer which may constitute discrimination on the basis of the HIV/AIDS status of an employee or prospective employee. Section 7(2) of the Act provides that the testing of an employee to determine that employee's HIV status is prohibited unless the testing is held to be justifiable by the Labour Court.

The Code of Good Practice on HIV and AIDS and the World of Work (published as Government Notice 451 in Government Gazette 35435 of 15 June 2012) provides guidelines to employers and employees on how to deal with HIV/AIDS in general, part of which is the provision of guidelines relating to the testing of employees. However, the Code remains subject to the provisions of the EEA itself.

Take note that an employee who is too sick can be dismissed, not because of HIV/AIDS but because of (medical) incapacity to perform the job. However, employers will have to ensure that they do not dismiss prematurely or on generalised assumptions about the abilities of HIV positive and AIDS infected employees to do their jobs.

12.5 Equal pay

Study par 12.5 of the prescribed book.

Section 6(4) of the EEA states that 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. To give content to section 6(4) of the EEA, the Minister of Employment and Labour issued the Employment Equity Regulations, 2014 (see Government Notice R595 in GovernmentGazette 37873 of 1 August 2014) as well as a Code of Good Practice on Equal Pay/Remunerationfor Work of Equal Value (see Government Notice 448 in Government Gazette 38837 of 1 June2015). The regulations provide for the meaning of the 'same' work, 'substantially' the same work or'work of equal value' and provides for specific defences against these types of claims. Regulation 6 describes how assessments to determine whether different jobs are of equal value should be done. Regulation 7 provides for defences available to employers against 'equal pay' discrimination claims.

12.6 Disputes about discrimination

Study par 12.6 of the prescribed book

Section 10 of the EEA provides that a dispute about unfair discrimination must be referred to the CCMA for conciliation within six months after the alleged discriminatory act or omission. In the reference to the CCMA, the referring party must indicate that it has 'made a reasonable attempt to resolve the dispute'. This may include getting help from a fellow employee, a trade union, or utilising the internal grievance procedure. If conciliation fails, the jurisdiction to hear discrimination disputes is divided between the CCMA and the Labour Court as follows: all cases of unfair discrimination based on the grounds of sexual harassment may be referred to the CCMA; all other cases of unfair discrimination may be referred to the CCMA if the employee earns below the threshold amount determined by the Minster of Labour in terms of the section 6(3) of the BCEA; all cases of unfair discrimination other than sexual harassment where the employee earns more than the threshold amount determined in terms of section 6(3) of the BCEA must be referred to the Labour Court unless all the parties to the dispute consent to arbitration of the dispute).

12.7 Affirmative action

12.7.1 The concept of affirmative action

Study par 12.7.1 of the prescribed book.

Section 9(2) of the Constitution allows for 'legislative and other measures designed to protect oradvance persons, or categories of persons, disadvantaged by unfair discrimination' such as affirmative action. Affirmative action measures have to meet three requirements in order to pass the constitutional muster. Firstly, the measures must target people or categories of people who had been disadvantaged by unfair discrimination. Secondly, the measures must also have been designed to protect or advance these people or categories of people. Thirdly, the measures must promote the achievement of equality. The EEA regulate affirmative action in employment. It gives a description of the goal of affirmative action in employment; it seeks to ensure that affirmative action takes place in a rational manner in that it gives effect to the constitutional requirement that affirmative action must be 'designed to protect or advance' previously disadvantaged persons.

Do you think there is still a need for affirmative action in South Africa and, if so, why?

12.7.2 The goal of affirmative action and the key concepts underlying affirmative action

Study par 12.7.2 of the prescribed book.

In terms of section 2(b) of the EEA, the goal of affirmative action is that 'affirmative action measures' should be taken by 'designated employers' to ensure the 'equitable representation' of 'suitably qualified' persons from the 'designated groups' 'in all occupational levels' in the workplace.

The following people form part of designated groups: 'black people, women and people with disabilities':

- 'black people' is defined to include Africans, Coloureds and Indians;
- 'people with disabilities' are 'people who have a long-term physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment', and
- a 'suitably qualified person' is a person who may be qualified for a job as a result of anyone (or a combination) of that person's formal qualifications, prior learning, relevant experience or his/her capacity to acquire, within a reasonable time, the ability to do the job.

Take note that persons may only be beneficiaries of affirmative action if they are, in fact, South African citizens and that the term 'black people' also includes people of Chinese descent.

Take note that the obligations created by the affirmative action part of the EEA applies only to 'designated employers', which include the following:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees but whose annual turnover in any given year exceeds a certain level (these levels are laid down in Schedule 4 of the EEA);
- municipalities;
- organs of State (defined in section 239 of the Constitution); and
- an employer appointed as a designated employer in terms of a collective agreement.

In terms of section 15 of the EEA designated employers have an obligation to implement affirmative action measures. An affirmative action measure is 'any measure aimed at ensuring equal employment opportunities and equitable representation of suitably qualified persons from designated groups in all occupational levels of the workforce'. This does not only cover preferential appointment of members of designated groups to vacant positions, but includes: preferential promotion; the development and training of employees in order to increase their prospects of advancement; a duty on the employer to inspect employment policies and practices in order to remove any employment barriers; measures to further diversify the workplace; and, a duty on the employer to make 'reasonable accommodation'. 'Reasonable accommodation' means the modification or adjustment of a job or the working environment that will enable a person from a designated group to have access to, or participate or advance in, employment.

12.7.3 The scheme of the Employment Equity Act
Study par 12.7.3 of the prescribed book.

The EEA sets requirements in order to ensure both substantive and procedural rationality. It places an obligation on every 'designated employer' to implement affirmative action measures and sets out which affirmative action measures can and may be taken in order to achieve the goal of equitable representation. The Act also requires designated employers to draw up and implement employment equity plans and to report on progress made while, it provides for various enforcement mechanisms to ensure compliance.

12.7.4 The employment equity plan
Study par 12.7.4 of the prescribed book.

The employment equity plan is the focus in the implementation of affirmative action in the workplace. Note that more detailed guidelines are contained in the Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan (Government Notice 424 in Government Gazette 40840 of 12 May 2017).

The first thing towards an employment equity plan, is for a designated employer to consult with its workforce in terms of section 16 of the EEA. This must be done with a representative trade union representing members at the workplace or directly with the employees or their nominated representatives. The employer must consult on the following topics:

- the conducting of an analysis of its employment policies and practices, procedures and the working environment;
- the preparation and implementation of the employment equity plan; and
- the submission of reports to the Department of Labour.

12.7.5 Enforcement

Study par 12.7.5 of the prescribed book.

The EEA provides for the following methods to enforce compliance with its affirmative action provisions:

- Self-regulation
- Administrative procedures
- Court action
- State contracts

SELF-TEST QUESTIONS

1. What are the defences against unfair discrimination in terms of the EEA?
2. What is the meaning of "inherent requirements of the job"?
3. Distinguish between "differentiation" and "discrimination".

STUDY UNIT 13
A BRIEF NTRODUCTION TO COLLECTIVE LABOUR LAW

OUTCOMES

At the end of this chapter, you should be able to

- Have the general overview of collective labour law.

CHAPTER 13 IS ONLY FOR READING PURPOSES.

STUDY UNIT 14
FREEDOM OF ASSOCIATION

OUTCOMES

After you have completed this study unit, you should be able to

- explain employees' right to freedom of association in terms of the Constitution and the LRA and to apply the relevant principles in a practical situation;
- explain employers' right to freedom of association in terms of the Constitution and the LRA and to apply the relevant principles in a practical situation; and
- explain the process of dispute resolution relating to freedom of association.

14.1 PRESCRIBED MATERIAL

- Chapter 14 of Essential Labour Law

14.2 GENERAL INTRODUCTION

Freedom of association means that people have the right to associate with others in order to defend and protect their common interests. In the workplace, freedom of association entails the right of workers to form and join trade unions of their choice and to participate in trade unions' lawful activities. Employers can also form and join employers' organisations. This is in line with the African idioms ' motho ke motho, ka batho' (you are, because of others), 'bobedi bo bolaya noga' (it is easier for two or more people to conquer the enemy) and 'kopano ke matla' (unity is power). Freedom of association is one of the basic principles of labour law and this is reflected in several ILO conventions, the LRA and the Constitution. The right to freedom of association is clearly protected in terms of sections 18 and 23 of the Constitution. Both employees and people seeking employment have this right, and an employer may not infringe it.

14.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with freedom of association for employees and employers.

14.3.1 Freedom of association and collective bargaining

Study par 14.1 of the prescribed book.

In order for collective bargaining to be effective there must be strong trade unions to represent employees and therefore it is important to protect the right of employees to form, join and participate in the affairs of a union. The protection is also applicable to employers who wish to form, join or participate in the affairs of employers' organisations. Freedom of association is therefore the basis of the collective bargaining process.

The right to freedom of association in the employment context is protected in terms of section 23 of the Constitution. This section protects this right for both employees and employers to form and join associations/organisations and to participate in their activities and programmes. Sections 4 to 10 of the LRA give effect to section 23 of the Constitution by providing for these rights and prohibiting their infringement. For purposes of employees, the protection of this right is first against the State and second against the employer.

14.3.2 Protection of freedom of association of employees

14.3.2.1 The right to form and join a trade union

Study par 14.2.1 of the prescribed book.

As stated above, section 4 of the LRA protects the freedom of an employee to join a trade union, or to take part in the formation of a union, subject to the union's constitution. A union may therefore decide who may become a member and who may not become a member of that union. A trade union's constitution may, however, not have a provision which discriminates against employees based on race or sex as such provision will be invalid and such a trade union would not be registered in terms of the LRA.

14.3.2.2 Rights of trade union members

Study par 14.2.2 of the prescribed book.

In terms of section 4 of the LRA, members of trade unions have the following rights:

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

Take note that 'trade union representatives' are commonly referred to as 'shop stewards'.

14.3.2.3 Protection of freedom of association

Study par 14.2.3 of the prescribed book.

In terms of section 5 of the LRA, no person may discriminate against an employee for exercising any right conferred by the Act. Section 5(2)(a) provides that no person may require an employee or a person seeking employment:

- not to be a member of a trade union;
- not to become a member of a trade union; or
- to give up membership of a trade union.

The above provisions also apply to people seeking employment. The employer may not demand of a person seeking employment not be or become a member of a trade union or to give up union membership as a precondition for being employed. Furthermore, section 5(2)(c) of the LRA provides that employees or people seeking employment may not be prejudiced because –

- of their trade union membership;

- of their participation in the forming a trade union;
- of their participation in the lawful activities of a trade union;
- of their failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
- of their disclosure of information that they are entitled or required to disclose; or
- they exercised any rights conferred by the Act.

Take note that if the discrimination or prejudice results in a dismissal, such a dismissal will be regarded as automatically unfair in terms of section 187 of the LRA. Section 5(3) of the LRA further provides that no person may advantage or promise an advantage to an employee or person seeking employment in exchange for that person not exercising any right conferred by the LRA.

Do you think people seeking employment should also have their right to freedom of association protected?

12.3.2.4 Freedom of association and senior managers

Study par 14.2.4 of the prescribed book.

It is important to note that as employees, senior managerial employees are also protected by section 4 of the LRA. However, this often causes problems where a senior manager who is involved in the formulation of an employer's approach to the annual wage negotiations, is also a member of the union which is bargaining with the employer. Such employees are therefore required to tread carefully when involved in union business to ensure that they do not disclose confidential information.

Do you think senior managers should also have the right to freedom of association?

14.3.3 Freedom of association for employers

Study par 14.3 of the prescribed book.

Sections 6 and 7 of the LRA protect employers' rights to freedom of association. Employers also have the right to form, join, and participate in the activities of employers' organisations. The term 'employer' is not defined in the LRA, but an employers' organisation is defined under section 213 as 'any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions'. An employers' organization is an association of employers whereas a trade union is an association of employees.

Do you think it is important for employers also to have the right to freedom of association and why?

14.3.4 Rights of unions and employers' organisations

Study par 14.4 of the prescribed book.

In terms of section 8 of the LRA, trade unions and employers' organisations have the following rights:

- subject to provisions of Chapter VI: to determine their own constitutions and rules and to hold elections for office-bearers, officials and representatives.

- to plan and organise their own administration and lawful activities,
- to participate in forming federations or to join federations of trade unions or federations of employers' organisations.
- to affiliate with, and participate in, the affairs of international workers' organisations or international employers' organisations, as well as participate in the activities of the ILO and to contribute or receive financial assistance from these international organisations.

This section protects the autonomy and independence of these organisations so that employers, for example should not interfere with trade unions or establish 'sweetheart' trade unions.

14.3.5 Freedom not to associate and freedom to disassociate

Study par 14.5 of the prescribed book.

It is important to note that the right to freedom of association is not only a positive right, but also has a negative side. In as much as there is freedom of association there is also freedom of non-association in that no person may force an employee to belong to a union or to belong to a union other than the union of the employee's choice.

14.3.6 Resolution of disputes about freedom of association

Study par 14.6 of the prescribed book.

The dispute resolution procedure contained in section 9 of the LRA applies if a person alleges that one of the rights relating to freedom of association has been infringed.

SELF-TEST QUESTIONS
1. Which rights do members of trade unions have in terms of section 4 of the LRA?
2. Discuss whether senior managers have the right to freedom of association.
3. Explain how the right to freedom of association has a negative side.

STUDY UNIT 15
ORGANISATIONAL RIGHTS

OUTCOMES

After you have completed this study unit, you should be able to

- list and explain organisational rights available to trade unions;
- indicate the level of representation required for a trade union to acquire organisational rights;
- list and explain different methods of acquiring organisational rights;
- apply the relevant principles relating to organisational rights in a practical situation; and
- explain the process of dispute resolution relating to organisational rights.

15.1 PRESCRIBED MATERIAL

- Chapter 15 of Essential Labour Law

15.2 GENERAL INTRODUCTION

In order to strengthen the right to freedom of association for employees and their trade unions, the LRA provides for five organisational rights that representative trade unions may acquire from employers. It stipulates the following:

- the rights which a representative union may acquire;
- the level of representation needed to obtain these rights; and
- the methods/processes available for obtaining these rights

15.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with organizational rights as provided for in the LRA.

15.3.1 The importance of organisational rights
Study par 15.1 of the prescribed book.

A trade union represents its members through its interaction with the employer, generally through collective bargaining. It must however be noted that under the LRA, there is no duty to bargain, instead parties are encouraged to engage in bargaining through amongst others the granting of organizational rights to trade unions. The purpose or organizational rights is to help a trade union to build its presence in the workplace and build a relationship with the employer for collective bargaining purposes.

15.3.2 Types of organisational rights in terms of the LRA
Study par 15.2 of the prescribed book.

The following five organisational rights are provided for in terms of the LRA:

- access to the workplace;

- the deduction of trade union subscriptions from the salaries of employees;
- election/recognition of trade union representatives;
- leave to these trade union representatives for certain purposes; and
- access to certain information held by the employer.

Why do you think it is important for trade unions to have the above rights?

15.3.2.1 Trade union access to the workplace

Study par 15.3.3 of the prescribed book.

A representative trade union's official, or office-bearer may acquire the right to gain access to an employer's workplace, for the purpose of recruiting new members, to communicate with existing members, and to serve the interests of members. A trade union may also be entitled to hold meetings with employees at the employer's workplace, but outside working hours. Members of a registered union may be entitled to vote in an election or ballot contemplated in that union's constitution at theworkplace. It must however be noted that this right may be limited as it may be subject to any condition as regards the time and place of the access as is reasonable and necessary to protect life and property or to prevent the undue disruption of work.

15.3.2.2 Deduction of trade union subscriptions or levies

Study par 15.3.3 of the prescribed book.

The task of collecting membership fees from members can be a difficult one, hence the use of 'stop- order facilities', in terms of which an employer will deduct membership fees from union members' wages and pay them over to the union on a regular lump sum basis, is therefore important for trade unions. In terms of this right, members of trade may authorize the employer in writing to deduct membership fees from their wages. The employer must make the deduction and pay it to the trade union on or before the 15th day of the following month.

15.3.2.3 Trade union representatives

Study par 15.3.3 of the prescribed book.

Trade union representatives remain employees of the employer, even though they represent the interests of a trade union and its members in the workplace. Members of a trade union may elect representatives and the number of representatives to be elected is determined based on the number of trade union members in a specific workplace. The functions of trade union representatives include the following:

- at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;
- to monitor the employer's compliance with the workplace-related provisions of [the Labour Relations Act], any law regulating terms and conditions of employment and any collective agreement binding on the employer;
- to report any alleged contravention of the workplace-related provisions of [the Labour Relations Act], any law regulating terms and conditions of employment and any collective agreement binding on the employer to -

i the employer; the representative trade union; and

ii any responsible authority or agency

- to perform any other function agreed to between the representative trade union and the employer.

15.3.2.4 Leave for office-bearers for union activities

Study par 15.3.3 of the prescribed book.

A member of a trade union who is an office-bearer may require leave for the performance of his/her duties such as attendance at union conferences and meetings. Such an office-bearer is entitled to take reasonable leave during working hours for the purpose of performing the functions of his/her office. The union and the employer may agree on the number of days of leave, the number of days of paid leave and the conditions attached to any leave for this purpose.

15.3.2.5 Disclosure of information

Study par 15.3.3 of the prescribed book.

Trade unions and their representatives need information from the employer in order to perform their functions effectively. Information is also important for purposes of engaging in consultation or collective bargaining with the employer. The information which must be disclosed must be relevant and necessary for the trade union representative to perform his or her functions properly. Notwithstanding the necessity of the disclosure of information by the employer, the following information need not be disclosed:

- legally privileged information (e.g. communication between a legal representative and a client);
- information which an employer is prohibited from disclosing by any law or court order;
- information of a confidential nature, the disclosure of which will cause substantial harm to an employee or to the employer (the employee in question may, however, consent to the disclosure); and,
- private personal information relating to an employee unless the employee consents to the disclosure.

15.3.3 The acquisition of organisational rights

Study par 15.3 (15.3.1-15.3.3) of the prescribed book regarding methods of acquiring organistional rights.

Trade unions acquire organisational rights in the following ways:

Method	Notes
Collective agreement	A registered trade union and an employer or an employers' organisation can conclude a collective agreement that regulates organisational rights.
Membership of a bargaining council	Any registered trade union that is a party to a bargaining council automatically acquires the right to access the workplace (s 12) and the deduction of trade union subscriptions (s 13) in respect of all workplaces that fall within the jurisdiction of the bargaining council.

Strike action	A minority trade union may strike in support of a demand for organisational rights.
Section 21 procedure	A registered trade union that is sufficiently representative may acquire organisational rights through the procedure outlined in section 21 (refer to par 15.3.3 of chapter 15 of the prescribed book).

15.3.4 The section 21 procedure
Study par 15.4 of the prescribed book.

15.3.4.1 Arbitration
Study par 15.4.1 of the prescribed book

- The workplace

The determination of the representation of a trade union is made with reference to the employer's workplace. For purposes of the private sector, the LRA defines workplace in its section 213 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 workplace for that operation'. In the public sector, the workplace would be a national department, a provincial administration, a provincial department or organisational component as contemplated in the Public Service Act (promulgation 103 of 1994), or any other part of the public service as demarcated by the Minister for Public Service and Administration.

In cases where the employer operates a business at one place, the definition does not usually cause problems in application, unlike where there is more than one operation, in different geographical locations.

- Representivity

For a trade union to acquire organizational rights it must either be sufficiently representative or have majority representation in the workplace. The rights of access to the workplace; deduction of membership fees and leave for trade union representatives require sufficient representation, while election of trade union representative and disclosure of information require majority representation. The LRA does not define sufficient representation, however, section 21 provides certain guidelines in this regard.

It is important to note that, when considering the representativeness of a union, all employees in the workplace must be taken into account, including managerial and temporary workers.

15.3.5 Withdrawal of organisational rights
Study par 15.4.1 of the prescribed book.

In terms of the LRA, the employer may refer the matter to the CCMA, if it is of the opinion that a trade union is no longer representative. The matter will be conciliated, however, if agreement cannot be reached the commissioner will arbitrate the dispute to determine whether or not organisational rights should be withdrawn (this applies only if organizational rights were granted in terms of an award of a commissioner in terms of section 21 of the LRA).

15.3.6 Organisational rights and strikes

Study par 15.5 of the prescribed book.

Take note that the LRA allows a union, that would otherwise have the right to refer a dispute about organisational rights to arbitration in terms of section 21, to embark on strike action in an attempt to force an employer to grant these rights. A union which chooses to utilize a strike and is not successful, loses the right to use the section 21 procedure for a period of one year.

15.3.7 Organisational rights for domestic workers

Study par 15.5 of the prescribed book.

For purposes of domestic workers and organizational rights take note that the right of a trade union to gain access to the employer's premises does not include the right to enter the employer's home unless the employer agrees, further that the right to disclosure of information does not apply in the domestic sector.

SELF-TEST QUESTIONS

1. Mention five organisational rights available to trade unions in terms of the LRA.
2. Which of the organisational rights are available only to majority trade unions?
3. What are the methods which a trade union may use to acquire organisational rights?

STUDY UNIT 16
COLLECTIVE BARGAINING AND THE LAW

OUTCOMES

After you have completed this study unit, you should be able to

- explain the process of collective bargaining and levels of collective bargaining;
- explain whether or not there is a duty to bargain in South African labour law;
- define the term "collective agreement";
- explain the binding effect of collective agreements in general and those concluded in a bargaining council and to apply the relevant principles in a practical situation; and
- distinguish between closed shop agreements and agency shop agreements and to apply the relevant principles in a practical situation.

16.1 PRESCRIBED MATERIAL

- Chapter 16 of Essential Labour Law

16.2 GENERAL INTRODUCTION

In collective bargaining the parties must not only be willing to but must consider representations of the other party and abandon fixed positions, where possible, in order to find common ground. Through collective bargaining, parties (trade unions and employers/employers' organisations) with different views and desires are able to reach agreement on a variety of issues. It is called collective bargaining because employees (collectively) represented by a trade union (and not as individuals) negotiate with the employer or employers' organisation.

Labour law and Africanisation both encourage a sound relationship tailored on accommodating opposing views and conciliating competing interests. They are both based on an inclusive approachaccording to which negotiations take place and a decision is reached on a matter. This promotes ahorizontal approach, which means that decisions are not only made from the top. Collective bargaining is rooted in freedom of association, which is an important principle of ubuntu. When people practise ubuntu, they work together, making them and their voices stronger. This principleis at work in collective bargaining, where both parties are represented by their organisations (trade unions and employers' organisations) to make representations. A trade union representing employees presents employees' demands, and the employer (at times represented by an employers'organisation) responds to employees' demands.
The main goal of collective bargaining between an employer and a trade union is to reach consensus about terms and conditions of employment and to formalise this consensus by means of a collective agreement. A collective agreement regulates the rights and duties agreed upon by the parties. This promotes peace and reduces conflict in the workplace because when an agreement is reached, it must be adhered to for as long as it is valid.

16.3 IMPORTANT MATTERS TO UNDERSTAND

In this study unit, we discuss the right to bargain, levels of bargaining, collective agreements and their binding nature, and closed shop agreements and agency shop agreements.

16.3.1 Collective bargaining: an introduction

Study par 16.1 of *Essential Labour Law*

The right to freedom of association and organisational rights discussed in the previous two chapters are all important to the process of collective bargaining as they make collective bargaining possible.

16.3.2 A duty to bargain?

Study par 16.2 of the prescribed book.

Under South African labour law there is no duty to bargain and therefore a trade union cannot approach the Labour Court in order to compel the employer to bargain with it. However, the LRA encourages collective bargaining through the following:

- providing effective protection of the right of employees to form, join and participate in the activities of trade unions;
- enabling trade unions to obtain organisational rights which enhance their position in the workplace, thereby making it easier for trade unions to persuade or force an employer to bargain collectively with it;
- permitting employees to strike in an attempt to force an employer to bargain collectively with it;
- regulating the legal status and enforceability of the product of collective bargaining, namely collective agreements, thus making collective bargaining more effective.

Do you think there must be a duty to bargain in South Africa or not and why?

16.3.3 Collective bargaining and the Constitution

Study par 16.3 of the prescribed book.

In terms of the Constitution every trade union, employers' organisation and employer has the right to engage in collective bargaining. This however does not impose a judicially enforceable obligation on employers to bargain.

16.3.4 What is collective bargaining?

Study par 16.4 of the prescribed book.

The Code of Good Practice: Collective bargaining, industrial action and picketing describes collective bargaining as 'a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to determine wages, terms and conditions of employment or other matters of mutual interest. The collective bargaining process may be established institutionally, by agreement or in practice.'

Take note that a single employee cannot engage in collective bargaining as this can only be done through a trade union, however, a single employer may do so. A successful bargaining result in the conclusion of a collective agreement and an unsuccessful one may result in a strike on the side of employees or lock-out on the employer' side.

Why do you think collective bargaining is important for employees?

16.3.5 Levels of collective bargaining

Study par 16.5 of the prescribed book.

Collective bargaining can take place at the following levels:

Bargaining level	Explanation
Plant level	Bargaining takes place between the employees and the employer at a specific plant or factory.
Enterprise level	Bargaining takes place at the level of all the factories or branches of a single employer
Industry or Sector level	Bargaining that takes place in a specific sector of the economy and is linked to a specific geographical area. Bargaining takes place for a whole industry, for example the mining industry (it can take place within bargaining councils).
More than one level	Bargaining takes place at more than one level: for example, terms and conditions are negotiated at sectoral level through a bargaining council, but certain issues are bargained at enterprise level

16.3.6 Collective agreements and the law

16.3.6.1 The definition of a collective agreement

Study par 16.6.1 of the prescribed book.

Section 213 of the LRA defines a 'collective agreement' as 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-one or more employers; one or more registered employers' organization or; one or more employers and one or more employers' organisations'.

Firstly, a collective agreement need not be signed by the parties to the agreement to be valid. All that is required is that the agreement must be in writing. Secondly, only registered unions can be parties to a collective agreement as defined in the LRA. Thirdly, it must deal with terms and conditions of employment, or any other matter of mutual interest between the parties. Terms and conditions of employment are those substantive provisions of the employment relationship, such as working hours, remuneration and leave. The concept of a 'matter of mutual interest' is a wider concept.

16.3.6.2 Recognition agreements

Study par 16.6.2 of the prescribed book.

This is an agreement in terms of which the employer and a trade union agree that the union will be recognised as a representative of a certain group of employees for different purposes, including collective bargaining. The recognition will usually also enable the union to acquire organizational rights from the employer.

16.3.7 Bargaining councils

Study par 16.6.3 of the prescribed book.

A bargaining council can be established by one or more registered trade unions and one or more registered employers' organisations for a sector and an area (for example the restaurant industry in the North-West Province). Parties to a council may conclude collective agreements for the whole of the sector and area over which a bargaining council has jurisdiction. These collective agreements can, in certain circumstances, bind all employers, large and small (and their employees) within the sector and area over which the bargaining council has jurisdiction.

Do you think bargaining councils are necessary and why?

16.3.8 The binding effect of collective agreements

Study par 16.6.4 of the prescribed book.

In terms of section 23 of the LRA a collective agreement binds the following:

- The parties to the agreement;
- A party to the agreement and the members of another party;
- Trade union members and members of employers' organisations; and
- It may also be extended to employees who are not union members.

Where applicable, a collective agreement varies any contract of employment between an employer and an employee who are both bound by the collective agreement. If an employer and employee are bound by a collective agreement, and if the collective agreement contains terms and conditions of employment that differ from those in the contract of employment between them, the provisions of the collective agreement will be incorporated into the contract of employment and the contract of employment will be amended accordingly.

16.3.9 Disputes about collective agreements

Study par 16.6.4 (page 494) of the prescribed book.

Every collective agreement (excluding closed shop and agency shop agreements) must contain a procedure for the resolution of disputes about the interpretation or the application of the collective agreement. However, the procedure must first require the parties to attempt to resolve the dispute through conciliation and, if that fails, to have the dispute resolved by means of arbitration. If there is no such procedure a dispute may be referred to the CCMA for conciliation and if it fails, it must be referred to arbitration.

16.3.10 Agency shop and closed shop agreements

16.3.10.1 The nature of agency shop and closed shop agreements

Study par 16.7.1 of the prescribed book.

Agency shop agreements and closed shop agreements are two special types of collective agreement referred to as 'trade union security arrangements'. An agency shop agreement is explained by the LRA as follows — 'A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof'. In terms of this agreement, the employer agrees to deduct an agency fee from the wages of employees who are not members of the trade union that entered into the agency shop agreement, but who are eligible for membership of this union.

A closed shop agreement is explained by the LRA as follows — 'A representative trade union and an employer or employers' organisation may conclude a collective agreement, to be known as a closed shop agreement, requiring all employees covered by the agreement to be members of the trade union'. In terms of this agreement all employees who are covered by the agreement are required to be members of the trade union. In the agency shop agreement, employees are not compelled to be or to become members of the trade union, but an agency fee is deducted from their wages, however in the case of a closed shop agreement, all employees who are covered by the agreement must be, or must become, members of the trade union.

These agreements serve to address the issue of 'free riders'. Free riders are employees who are not members of a union but who derive benefits from the work which is done by the union. They do not pay union subscriptions, but still obtain the benefits of the union's bargaining.

Disputes about the interpretation or application of these agreements must be referred to the CCMA for conciliation. If conciliation fails, any party to the dispute may refer the matter to arbitration.

- Agency shop agreements

Study par 16.7.2 of the prescribed book.

Only a registered representative trade union may conclude an agency shop agreement. Representativeness in this context means that the union (or two or more unions acting together) must have as members the majority of employees in the employer's workplace, or, must have as members the majority of employees employed by members of an employers' organisation in a sector and area in respect of which the agency shop agreement will apply.

In terms of section 25(3) of the LRA an agency shop agreement will only be binding if it provides –

- that it will not apply to employees who do not qualify for membership of the union(s) party to the agreement;
- that the agency fee is less than, or equivalent to, the amount of subscription payable by the members of the trade union(s) that is/are party to the agreement;
- that the agency fee must be paid into a separate account administered by the union that is party to the agreement; and,
- that the agency fee may not be used for political purposes or for expenditure that does not advance or protect the socio-economic interest of workers.

Although section 34 of the BCEA, prohibits deductions from employees' remuneration without their written authorisation, this provision does not apply to the deduction of agency fees. A conscientious objector may request the employer to pay the agency fee into a special fund administered by the Department of Employment and Labour. A conscientious objector is usually an employee who objects on moral, religious or political grounds to the policies of a trade union.

- Closed shops

Study par 16.7.3 of the prescribed book.

Closed shop agreements may be concluded by a single union or two or more unions acting together. As is the case with an agency shop, the union(s) party to the closed shop agreement must represent the majority of employees in the workplace or the majority of employees employed by the members of an employers' organisation. A ballot must be held of the employees who will be covered by the envisaged closed shop and two thirds of the employees who voted must vote in favour of the agreement for it to be valid. The LRA provides only for a post-entry closed shop, which means that an employee need not be a member of the union or unions on commencing employment. Membership can only be acquired after commencing employment. A closed shop agreement must stipulate that no union subscriptions (remember that in a closed shop all employees pay subscriptions because they are all members of the union) may be used for any purpose that does not advance or protect the socio-economic interests of employees. Nor may these subscriptions be used for political purposes. If an employee is refused membership of a union that is party to a closed shop (even though the employee is eligible for membership) or the employee loses membership of this union for some reason, the employee faces the possibility of losing his/her job. Therefore, the LRA provides that no union that is party to a closed shop agreement may refuse membership to a person, or expel a member, unless the union acts in terms of its own constitution and the reason for the refusal of membership, or for the expulsion of the member, is fair. An employee who is already employed by an employer at the time the closed shop agreement comes into effect, and who then refuses to become a member of the union, may not, in terms of section 26(7), be dismissed; nor maya conscientious objector be dismissed for refusing to join the trade union. However, he/she may be required to pay an agency fee.

- *Agency shops, closed shops and freedom of association*

Study par 16.7.4 of the prescribed book.

These two agreements seem to be infringing employees' right to freedom of association, however it must be noted that section 23(6) of the Constitution provides for union security arrangements. Agency shop and closed shop agreements are thus not automatically unconstitutional. However, the limitation by these agreements on freedom of association must still comply with the requirements of section 36 of the Constitution. Furthermore, in order to limit the possibility of agency shop and closed shop agreements being unconstitutional on the basis that they infringe freedom of association sections 25 and 26 of the LRA provide certain pre-requisites for concluding valid agency shop or closed shop agreements.

The purpose of these agreements are to enhance collective bargaining by the development of strong and powerful trade unions and stable bargaining relationships.

SELF-TEST QUESTIONS

1. How does the LRA encourage and promote collective bargaining?
2. Describe the binding nature of a collective agreement.
3. What is the difference between a closed shop agreement and an agency shop agreement?

STUDY UNIT 17
STATUTORY BARGAINING FORUMS

OUTCOMES

After you have completed this study unit, you should be able to

- explain the process of establishing a bargaining council and a statutory council and parties to a bargaining council and a statutory council;
- explain the jurisdiction of a bargaining council;
- mention the functions of bargaining councils and statutory councils; and
- explain the binding effect of collective agreements concluded in bargaining councils

17.1 PRESCRIBED MATERIAL

- Chapter 17 of Essential Labour Law

17.2 GENERAL INTRODUCTION

The LRA provides for the establishment of collective bargaining structures called bargaining councils and statutory councils. These serve to encourage collective bargaining at the sectoral level. The institutions help to encourage unity and the spirit of working together which are values of ubuntu. When parties have negotiated and agreed, they conclude a collective agreement, which will be binding in the sector. Collective agreements will therefore promote uniformity and fairness in the sector to ensure that ubuntu is promoted as employees will be treated the same.

17.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with bargaining councils and statutory councils.

17.3.1 Bargaining councils

Study par 17.1 of the prescribed book.

Bargaining councils and statutory councils; are called statutory forums because their establishment, composition, powers and functions are regulated in detail in the LRA. Bargaining councils are the most important of these two statutory institutions and therefore covered in detail in the study unit.

17.3.1.1 The establishment of a bargaining council

Study par 17.1.1 of the prescribed book.

The LRA provides that one or more registered trade union(s) and one or more registered employers' organisation(s) may establish a bargaining council by adopting a constitution for the council that complies with certain requirements and then having the council registered. The first step is for the prospective parties active in a specific sector to agree to form a council and negotiate the terms of the constitution for that council. It is only trade unions and employers' organisations which are registered in terms of the LRA that may form a council. The parties should also agree on the sector and area over which the council will have jurisdiction. Study your prescribed book for matters which should be addressed in the constitution of a council.

When parties have agreed on the establishment of a council and have agreed on the constitution, they may apply to the Registrar of Labour Relations for the registration of the council. Once registered, a council acquires legal personality - it can own property, enter into contracts in its own right and sue and be sued in its own name.

17.3.1.2 The functions of a bargaining council

Study par 17.1.2 of the prescribed book.

A bargaining council can conclude collective agreements which bind employers and employees engaged within the sector and area in respect of which it has been registered (its jurisdiction). A bargaining council may also perform dispute resolution functions within this jurisdiction.

17.3.1.3 Parties to and representatives on the council

Study par 17.1.3 of the prescribed book.

Parties to a bargaining council are the trade unions and employers' organisations that were involved in the original establishment of the bargaining council, or who were admitted to the council at a later stage. The parties are represented by their representatives on the council. Half the representatives on the council must be appointed by the trade unions and the other half by the employers' organisations that are party to the council.

17.3.1.4 The functions of bargaining councils

Study par 17.1.4 of the prescribed book.

The following are the functions of a bargaining council:

- The collective bargaining function of a bargaining council
- The dispute resolution function of a bargaining council
- Other functions of a bargaining council:
    - A council may establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training funds or any similar schemes or funds for the benefit of one or more parties to the council or their members.
    - Bargaining councils may develop proposals for submission to NEDLAC, or to any other appropriate forum dealing with policy and legislation, that may affect the sector and area for which the council has been registered.
    - Finally, a bargaining council may confer on workplace forums additional matters for consultation.

17.3.1.5 Who is bound by a bargaining council agreement?

Study par 17.1.5 of the prescribed book.

The following are bound by a collective agreement concluded at the council:

- parties to the agreement;
- each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

- the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates -
    - terms and conditions of employment; or
    - the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.'

The LRA provides for the extension, by the Minister of Employment and Labour, of bargaining council collective agreements to non-parties. Study your prescribed book for the requirements relating to the extension of bargaining council collective agreements.

The extension of a bargaining council agreement is important because it establishes standards for employees and employers that do not bargain collectively, especially in the case of small employers where there are few union members; it prevents employers within a sector from competing with each other on the basis of the terms and conditions of employment that they offer their employees - these matters are taken out of competition.

Do you think collective agreements concluded at bargaining councils should be extended to non- parties?

17.3.1.6 Bargaining councils in the public service
Study par 17.1.6 of the prescribed book.

The LRA makes provision for the establishment of a bargaining council called the Public Service Co-ordinating Bargaining Council ('PSCBC') for the Public Service as a whole. The State and various trade unions are represented on the PSCBC. The PSCBC plays a co-ordinating role and terms and conditions of employment for the Public Service as a whole are negotiated within the PSCBC.

17.4 Statutory councils

Study par 17.2 of the prescribed book.

The LRA provides that a representative trade union or a representative employers' organisation may apply to the Registrar of Labour Relations for the establishment of a statutory council. This may only be done if there is no registered bargaining council for that sector and area. A lesser degree of representativeness applies in the context of the establishment of statutory councils. A 'representative trade union' for this purpose is a registered union, or two or more registered unions acting together, that represent at least 30% of the employees in a sector or area. A 'representative employers' organisation' is a registered employers' organisation, or two or more employers' organisations acting together, whose members employ at least 30% of all employees in a sector and an area. The registration procedure for a statutory council is similar to that of a bargaining council.

Statutory councils have the following powers and functions:

- to resolve disputes;
- to promote and to establish education and training schemes;
- to establish and to administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any other similar schemes or funds; and

- to conclude collective agreements with regard to the above matters.

It must however be noted that the LRA does not clothe statutory councils with powers as wide as those of bargaining councils. Nevertheless, a statutory council may, in its constitution, agree to include any of the other functions of a bargaining council.

Do you think it was necessary to also introduce statutory councils in addition to bargaining councils?

SELF-TEST QUESTIONS

1. Mention four functions of a bargaining council.
2. Describe the binding nature of a collective agreement concluded at a bargaining council.
3. What is the name of the public service bargaining council?

STUDY UNIT 18
STRIKES AND LOCK-OUTS

OUTCOMES

After you have completed this study unit, you should be able to

- define a strike;
- define a lock-out;
- define a secondary strike;
- define a picket;
- mention and explain procedural requirements for a protected strike and lock-out and to apply them in a practical situation;
- explain what matters of mutual interest are;
- mention and explain the limitations/prohibitions on strikes and lock-outs and to apply them in a practical situation;
- mention and explain procedural requirements for a protected secondary strike and to apply them in a practical situation;
- explain the legal consequences of a protected strike and to apply them in a practical situation;
- explain the legal consequences of an unprotected strike and to apply them in a practical situation;
- mention and explain procedural requirements for a protected picket; and
- explain the legal consequences of a protected and unprotected picket.

18.1 PRESCRIBED MATERIAL

- Chapter 18 of Essential Labour Law

18.2 GENERAL INTRODUCTION

At the end of a collective bargaining process, the parties may either reach agreement or fail to do so.If agreement is reached, a collective agreement is concluded. If no agreement is reached, the parties may agree on mediation or arbitration, or a party may decide to put pressure on the other party through industrial action. This study unit deals with industrial action. In the case of employees, industrial action can take the form of strikes and secondary strikes, while employers have recourse to lock-outs. The use of power sounds inhumane; however, before any form of industrial action may take place, certain procedural requirements must be met in order to ensure fairness and justice. If these requirements are not met, then the action will not be protected and there will be negative consequences.

Both strikes, and lock-outs are essential elements of collective bargaining. However, strikes and lock-outs should be used as measures of last resort. A strike is used by employees to support their demands and to promote and defend their employment-related interests; a lock-out is used by anemployer to support its employment-related demands.

In South Africa, the right to strike is protected by the Constitution, which guarantees every worker the right to strike. The Constitution, however, does not grant employers the right to lock out employees. The right of employers to lock out employees is implied in the express protection of the right to bargain collectively. Section 64(1) of the LRA provides that every employee has the right to strike, and every employer has recourse to lock-out.

It is important to distinguish between the different types of industrial action and to know when such action will be protected in terms of the LRA.

18.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with strikes and lock-outs. It also covers the limitations on the right to strike and recourse to lock-out. The legal consequences of protected and unprotected strikes and lock-outs are also discussed.

18.3.1 The collective bargaining context
Study par 18.1 of the prescribed book.

Parties to collective bargaining need power to back up the demands they make in the collective bargaining process. For trade unions the ability to engage in a strike is a way of backing up their collective bargaining demands and for employers a lock-out is a way of backing their demands. Through a strike, employees inflict economic harm on their employer so that the latter can accede to their demands and through a lock-out the employer denies the locked-out employees the opportunity to earn their wages, thereby causing them financial harm, in the hope that they will agree to the employer's demands than continue to be subjected to the lock-out and to lose more wages.

Do you think it is necessary to have industrial action to support collective bargaining?

18.3.2 The Constitution and international labour standards

Study par 18.2 of the prescribed book.

In terms of section 23(2)(c) of the Constitution every worker has a right to strike. This right is further protected and given effect by section 64 of the LRA. The right to lock-out is, however, not included in the Constitution. There are two International Labour Organisation (ILO) Conventions which are relevant in the context of strikes and lock-outs. The first is the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the second is the Right to Organise and Collective Bargaining Convention 98 of 1949. South Africa has ratified these conventions and is therefore bound to comply with their provisions. It must be noted that neither of these ILO conventions refer to a right to strike directly, however, the ILO's Freedom of Association Committee has interpreted Article 3 of Convention 87 to include the right to strike.

18.3.3 The LRA's approach to strikes and lock-outs Study

par 18.3 of the prescribed book.

In line with the Constitution, the LRA accepts the right to strike and further recognizes the employer's recourse to a lock-out. It further provides that these rights are limited in the interests of employees, employers and the public. In doing this, it amongst others provides for protected and unprotected strikes and lock-outs. It also affirms employees' rights to picketing and to participate in protest action to defend their socio-economic interests (these will be discussed later).

A strike or lock-out must comply with the definition provided by the LRA in order to qualify as such. A strike or lock-out will be protected if specified procedures set out in section 64 of the LRA have been met. Furthermore, section 65 prohibits/limits strikes and lock-outs in certain circumstances. For example, employers and employees involved in the provision of essential services may not participate in a protected strike or lock-out; etc.

A strike or lock-out will be protected on condition it has met the prescribed requirements. The parties engaging in a protected strike or lock-out will also be protected against certain legal consequences which could normally result from such an action. On the one hand the employer cannot, for example, claim damages from the employees or the trade union for losses incurred as a result of the strike. The employer cannot obtain an interdict to prevent the strike and the employer cannot dismiss employees on the ground that participation in a strike is a breach of the contract of employment. If the strike does not comply with the requirements, on the other hand, the strike will be unprotected, and the employer would be able to claim damages or compensation. The employer can obtain an interdict to stop the strike and the employer may be able to dismiss employees on the basis of misconduct. On the other hand, if a lock-out is protected the employer will be protected against being sued for damages and the employees will not be able to interdict the lock-out.

18.3.4 Statutory definitions of strikes and lock-outs

18.3.4.1 The definition of a strike

Study par 18.4.1 of the prescribed book.

The LRA defines a strike in its section 213 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 it is voluntary or compulsory'.Study your prescribed book for key elements of a strike.

18.3.4.2 The definition of a lock-out
Study par 18.4.2 of the prescribed book.

The LRA defines a lock-out as 'the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.' Study your prescribed book for key elements of a lock-out.

18.3.4.3 Prohibitions/limitations on strikes and lock-outs

Study par 18.5 (18.5.1-18.5.7) of the prescribed book.

It is important to note that although the right to strike is protected by both the Constitution and the LRA, it is not absolute as it can be limited. While section 64 of the LRA provides for procedural requirements for protection of a strike and lock-out, section 65 provides for limitations/prohibitions which if they exist a strike or lock-out will not be protected even if it complies with procedural requirements. Section 65 provides for the following limitations:

- Prohibition in a collective agreement;
- Arbitration is prescribed in terms of an agreement;
- Disputes that must be referred to arbitration or the Labour Court;
- Essential and maintenance services;
- An award or a collective agreement regulates the issue in dispute;
- The issue in dispute is regulated by a determination; and
- The existence of a dispute

Do you think the above limitations are necessary and why?

18.3.4.4 Procedural requirements

Study par 18.6 of the prescribed book.

As stated above, before a strike or a lock-out can be protected it must meet two basic procedural requirements; namely that the dispute must be referred to conciliation and the required notice of the intended action must be given. Note that in the case of secondary strikes and strikes over a 'refusal to bargain' additional requirements are set.

18.3.4.4.1 Referral of the dispute to conciliation

Study par 18.6.1 of the prescribed book.

The issue in dispute must be referred to a bargaining or statutory council with jurisdiction over the sector and area in which the dispute arose, for conciliation. If there is no council, the dispute must be referred to the CCMA for conciliation. Conciliation will take place within 30 days of the referral of the dispute to the council or CCMA. If conciliation is successful the dispute falls away, but if it fails the conciliator will issue a certificate to this effect. Thereafter notice of the proposed strike action or lock-out may be given.

18.3.4.4.2 Prior notice

Study par 18.6.2 of the prescribed book.

Once conciliation has failed, or 30 days has lapsed since receipt of the referral, at least 48 hours' written notice should be given of the commencement of the strike or lock-out. Where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out must begiven. The giving of notice makes it possible for the employer and employees to prepare for the impending strike or lock-out. In the case of a proposed strike, notice must be given to the employer concerned unless the dispute relates to a collective agreement to be concluded in a bargaining council or a statutory council. In this case notice must be given to that council. If the employer is a member of an employers' organisation that is party to the dispute, notice must be given to the employers' organisation.

In the case of a proposed lock-out, notice must be given to any trade union that is party to the dispute, or, the employees concerned. If the issue in dispute relates to a collective agreement to be concluded in a bargaining council or statutory council, notice must be given to the council. The LRA does not stipulate what information must be contained in the notice of commencement of the strikeor lock-out, it only states that the notice must be in writing.

18.3.4.4.3 Refusal to bargain disputes
Study par 18.6.3 of the prescribed book.

An additional procedural requirement is set for 'refusal to bargain' disputes. A refusal to bargain includes –

- a refusal to recognise a trade union as a collective bargaining agent;
- a refusal to agree to establish a bargaining council;
- the withdrawal of recognition of a collective bargaining agent;
- a resignation of a party from a bargaining council; or
- a dispute about appropriate bargaining units, appropriate bargaining levels, or appropriate bargaining subjects.

If the dispute concerns a refusal to bargain, it must first be referred to conciliation. Should conciliation prove to be unsuccessful, the dispute must be referred to advisory arbitration.

18.3.4.4.4 Strikes and operational requirements dismissals
Study par 18.6.4 of the prescribed book.

Disputes concerning the dismissal of employees are not appropriate for strike action. They must either be referred to arbitration or to adjudication before the Labour Court. However, section 189A of the LRA gives employees an option of either embarking on strike action in connection with operational requirement dismissal disputes or of referring them to adjudication. This only applies if the employer concerned employs more than 50 employees and the employer is contemplating dismissing more than a certain number of employees. The strike in this regard can only challenge the substantive fairness of operational requirement dismissals. It should be noted that different procedural requirements must be met.

18.3.4.4.5 When the section 64 procedures need not be complied with
Study par 18.6.5 of the prescribed book.

Parties to a dispute need not comply with the prescribed conciliation and notice requirements laid down in section 64(1) of the LRA under the following circumstances:

- if the parties to the dispute are members of a council and the dispute has been dealt with by that council in accordance with its constitution.
- if parties entered into a collective agreement in terms of which they agree that certain dispute resolution procedures have to be followed prior to a strike or lock-out being called.
- if an employer embarks on a lock-out that is not protected in terms of the LRA, its employees will be able to strike in response to that unprotected lock-out without complying with the procedures set out in section 64. By the same token, if employees embark on an unprotected strike, an employer will also be able to respond by means of an automatically protected lock-out, despite the fact that the employer has not complied with the provisions of section 64 of the LRA.
- if an employer has unilaterally introduced changes to the terms and conditions of employment of employees (ie the employer has done so without the employees' consent) or intends or proposes to do so.

18.3.5 Secondary strikes

18.3.5.1 The definition of a secondary strike

Study par 18.7.1 of the prescribed book.

The LRA defines a secondary strike as 'a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of the council, have a material interest in that demand.'

Do you think this type of strike is necessary and why?

18.3.5.2 Requirements for a protected secondary strike

Study par 18.7.2 of the prescribed book.

The LRA provides that the following requirements must be met before a secondary strike will be protected:

- the primary strike must be a protected strike;
- the secondary employer must be given seven days' prior written notice of the secondary strike; and
- the nature and extent of the secondary strike must be reasonable in relation to the possible direct or indirect effect that it may have on the business of the primary employer.

18.3.6 Legal consequences of protected strikes and lock-outs

18.3.6.1 Protection against civil liability

Study par 18.8.1 of the prescribed book.

The LRA provides that a person does not commit a delict (i.e. an unlawful act) or a breach of contract by taking part in either a protected strike or lock-out or any conduct in contemplation or in furtherance of a protected strike or lock-out. Therefore, no civil legal proceedings may be instituted against any person because of that person's participation in a protected strike or lock-out. Strikers who take part in a protected strike may not be interdicted from participating in such action. Employers who institute a protected lock-out may likewise not be interdicted from instituting such action. However, the protection does not apply to any act in contemplation or in furtherance of a strike or a lockout, if that act is a criminal offence.

18.3.6.2 Protection against dismissal

Study par 18.8.2 of the prescribed book.

The LRA provides that an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. If the reason for a dismissal is that the employee participated in or supported, or indicated an intention to participate or support, a protected strike, the dismissal will be an automatically unfair in terms of section 187 of the LRA. The employees may, however, be dismissed for one of two reasons, namely misconduct committed during the course of the strike or on the basis of the employer's operational requirements. Employees who during a protected strike commit acts of misconduct such as assault or malicious damage to property may be dismissed.

The employer must, however, ensure that the dismissal is fair and in accordance with the statutory requirements for a fair dismissal for misconduct.

Do you think employees who participate in a protected strike should be dismissed for whatever reason and why?

18.3.6.3 Payment of remuneration
Study par 18.8.3 of the prescribed book.

Given that a contract of employment is reciprocal in nature, the common-law rule of 'no work, no pay' applies to strikes and lock-outs. Employers do not have to remunerate employees for services not rendered during a protected strike or lock-out. There is however an exception to the 'no work, no pay' rule which applies in the case of protected strikes, i.e., if the employees' remuneration includes payment in kind in the form of accommodation, the provision of food and other basic amenities of life, the employer may not stop this payment in kind during the strike or lock-out if the employees request that it continues. After the strike or lock-out the employer may recover the monetary value of the payment in kind from the employees by way of legal proceedings in the Labour Court.

Do you think it is fair for employers not to pay employees during a protected strike?

18.3.6.4 Protection against discrimination
Study par 18.8.4 of the prescribed book.

The LRA prohibits discrimination against an employee for exercising any right conferred by the LRA, further that no person may advantage, or promise a benefit or advantage to, an employee in exchange for the employee not exercising his/her rights in terms of the LRA. The payment of a bonus or other forms of reward for not striking and doing the work of strikers can be seen as discrimination against strikers for exercising their right to strike. Alternatively, it can be seen as an advantage granted to non-strikers in return for them not exercising their right to strike.

18.3.7 Legal consequences of unprotected strikes or lock-outs

18.3.7.1 Interdicts and compensation
Study par 18.9.1 of the prescribed book.

A strike or lock-out which does not comply with the provisions of sections 64 and 65 of the LRA will be unprotected, with certain legal consequences. The LRA provides that the Labour Court has the exclusive jurisdiction to grant an interdict or an order restraining any person from participating in an unprotected strike or any conduct in contemplation or in furtherance of such a strike. The court may also grant an interdict or order, restraining any person from engaging in an unprotected lock-out or any conduct in contemplation or in furtherance of such a lock-out. The Labour Court also has jurisdiction to order the payment of 'just and equitable compensation' for any loss caused by the unprotected strike or lock-out. Compensation does not necessarily reflect the full and actual loss suffered by the aggrieved party, but merely an amount that is 'just and equitable', taking into account relevant factors.

18.3.7.2 The dismissal of strikers
Study par 18.9.2 of the prescribed book.

Participation in an unprotected strike, or certain forms of conduct in contemplation or furtherance of an unprotected strike may, constitute a fair reason for dismissal. In evaluating the fairness of such dismissals, the provisions of the Code of Good Practice: Dismissal contained in Schedule 8 to the LRA (the Code) must be taken into account. The substantive fairness of the dismissal must be determined in consideration of the following factors:

- the seriousness of the contravention of the LRA;
- attempts made to comply with the LRA; and
- whether or not the strike was in response to unjustified conduct by the employer.

The procedural fairness of the dismissal must be determined in consideration of the following factors:

- at the earliest opportunity, the employer must contact a trade union official to discuss the course of action it intends to adopt; and
- the employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.

18.3.8 The use of replacement labour
Study par 18.10 of the prescribed book.

Employers may use replacement labour during a protected strike, unless the whole or a part of the employer's business has been designated a maintenance service. Employers can also use replacement labour during a lock-out, but only if the lock-out is in response to a strike. Take note that the prohibition on replacement labour will also prevent an employer from making use of temporary employment services or of outside contractors.

Do you think an employer should be allowed to use replacement labour during strikes and why?

18.3.9 Picketing

18.3.9.1 What is a picket?

Study par 18.11.1 of the prescribed book.

A picket is an example of conduct in contemplation or furtherance of a strike or support of a strike or in opposition to a lock-out. Pickets are regulated in terms of section 69 of the LRA and the Code of Good Practice: Collective bargaining, industrial action and picketing (GN R1396 in GG 42121 of 19/12/1018).

Do you think pickets are necessary if employees have a right to strike?

18.3.9.2 The legal framework for the regulation of picketing

Study par 18.11.2 of the prescribed book.

Section 18 of the Constitution provides that everyone has the right 'peacefully and unarmed' to assemble, to demonstrate, to picket and to present petitions.

18.3.9.3 Protected pickets

Study par 18.11.3 of the prescribed book.

A picket must comply with the following requirements in order to enjoy protection:

- it must be authorised by a registered trade union, for the purpose of peacefully demonstrating;
- it must be in support of a protected strike or
- in opposition of any lock-out.

The picketers must conduct themselves in a peaceful, unarmed and lawful manner. They may carry placards, chant slogans and sing and dance, however, they may not forcefully prevent or intimidate suppliers, clients and customers of the employer, members of the public, employees who are not on strike and replacement workers, from entering or leaving the premises of the employer. They may also not commit any unlawful action, such as: intimidating, coercing, threatening or assaulting any person; causing or threatening to cause any damage to any property whether it belongs to the employer or not; inciting violence; wearing masks; or having any dangerous weapons or objects in their possession. A picket may take place in any place to which the public has access but outside the employer's premises. With the permission of the employer, picketing may take place on the employer's premises. If employees seek this permission, the employer may not unreasonably withhold permission.

Picketing rules must be established to regulate the conduct of picketers and employers during the picket. These rules will be negotiated and contained in a collective agreement that will apply generally to all strikes and lock-outs that may occur in the future within the employer's workplace.

18.3.10 Strike violence

Study par 18.12 of the prescribed book.

Strikes in South Africa have been raked with violence and other unlawful acts. These issues were addressed at the National Economic Development and Labour Council ('NEDLAC'). Employers and employees within NEDLAC reached agreement on certain matters which it was hoped, would contribute to the level of violence decreasing. Study this in your prescribed book.

SELF TEST QUESTIONS

1. Under which circumstances are employees not required to comply with the procedural requirements in order for the strike to be protected?
2. Discuss whether employees engaged in essential services may participate in a strike action.
3. Discuss the requirements for a protected secondary strike.

STUDY UNIT 19
PROTEST ACTION

OUTCOMES

After you have completed this study unit, you should be able to

- define protest action;
- mention and explain procedural requirements for a protected protest action and to apply them in a practical situation; and
- explain the legal consequences of a protected and unprotected protest action

19.1 PRESCRIBED MATERIAL

- Chapter 19 of Essential Labour Law

19.2 GENERAL INTRODUCTION

A protest action is another form of industrial action besides those discussed in the previous Study Unit. Employees and trade unions often pursue other, broader interests beyond the workplace in order to advance socio-economic interests. However, they may not use strike action for this purpose.

The LRA affords employees and trade unions the right to participate in protest action as a form of industrial action in pursuit of socio-economic interests. The role that trade unions play in society therefore extends to more than just work-related matters. Trade unions often engage in campaigns that go beyond matters of mutual interest between employers and employees. Trade unions and their federations in South Africa played an important role in putting pressure on the government to bring about political changes in the country. This wider role that trade unions and workers play is in line with ubuntu, since their pursuit of socio-economic interests, benefits not only workers, but also the whole of society.

19.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with protest action.

19.3.1 The right to protest

Study par 19.1 of the prescribed book.

One of the aims of the LRA is 'to advance economic development, social justice, labour peace and the democratisation of the workplace'. In terms of its section 77, the LRA grants employees, other than those involved in the provision of an essential service or a maintenance service, the right to participate in protest action where the protest action is instituted to promote or defend the socio-economic interests of workers, provided that the procedural requirements set in this section are met. If it is protected, workers who participate in such action will enjoy the same protections as those conferred by section 67 of the LRA on employees who engage in protected strike action.

19.3.2 The nature of protest action

Study par 19.2 of the prescribed book.

Section 213 of the LRA defines protest action as '. . . the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of a strike.' The main difference between a strike and protest action lies in their purposes. The purpose of a strike has to do with 'matters of mutual interest' between the employer and employees whereas that of a protest action has to do with 'socio economic interests' such as Education.

Do you think it is necessary to have protest action in addition to strikes?

19.3.3 Procedural requirements for protected protest action

Study par 19.3 of the prescribed book.

Section 77 of the LRA regulates the manner in which protest action is to be instituted and it prescribes the following procedure to be followed for a protest action to be protected:

Every employee who is not engaged in an essential service or a maintenance service has the right totake part in protest action if —

(a) the protest action has been called by a registered trade union or federation of trade unions;
(b) the registered trade union or federation of trade unions has served a notice on NEDLAC stating-
    (i) the reasons for the protest action; and
    (ii) the nature of the protest action;
(c) the matter giving rise to the intended protest action has been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter; and
(d) at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.'

If the above requirements are met, the protest action will be protected in the same way as protected strikes or lock-outs. Take note that section 77(2) of the LRA provides that, even if the above requirements have been met (i.e. the protest action is protected) the Labour Court can grant a declaratory order restraining a person from participating in the protest action. Before making such a declaratory order, the Labour Court must consider the nature and duration of the protest action, the steps taken by the registered trade union or federation of trade unions to minimise the harm caused by the protest action and the conduct of the participants in the protest action. If an employee continues with protest action in breach of such an order, his/her protection against dismissal is forfeited. The LRA further provides that protection against dismissal in case of participation in protected protest action is lifted if the employee — takes part in protest action or any conduct in contemplation or furtherance of protest action in breach of an order of the Labour Court; or otherwise acts in contempt of an order of the Labour Court made in terms of this section.

SELF TEST QUESTIONS
1. Can employees engaged in essential services participate in a protest action?
2. What are the procedural requirements for a protected protest action?
3. What is the difference between a strike and a protest action?

STUDY UNIT 20
WORKPLACE FORUM

OUTCOMES:

After you have completed this study unit, you should be able to

- distinguish between workplace forums and trade unions;
- explain how workplace forums are established;
- describe the main functions of workplace forums; and
- distinguish between consultation and joint decision-making as functions of a workplace forum.

20.1 PRESCRIBED MATERIAL

- Chapter 20 of Essential Labour Law

20.2 GENERAL INTRODUCTION

Workplace forums were introduced to enable all employees to participate in decision-making in the workplace, irrespective of their trade union membership. These forums are aimed at dealing with non-wage-related matters separately from the collective bargaining system, which is adversarial in nature.

Labour law and Africanisation, both of which encourage fairness and transparency in reaching decisions, involve an inclusive approach of consultation and joint decision-making in dealing with matters. The introduction of workplace forums was aimed at encouraging this approach within the workplace. The main functions of workplace forums are consultation and joint decision-making. Traditionally, in African culture, 'dikgoro' served as forums for consultation and joint decision-making where important decisions affecting the community were taken. This is a horizontal approach according to which not all decisions are made from the top, giving all parties an opportunity to present their views. This approach humanises the law because decisions made are generally based on consensus. This approach also encourages and allows for a transparent and accommodative way of dealing with matters.

20.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with workplace forums.

20.3.1 From adversarial bargaining to joint decision-making
Study par 20.1 of the prescribed book.

Since collective bargaining is adversarial in nature, the drafters of the LRA saw a need for another way in which employers and employees could interact. The LRA makes provision for an institution in which employers and employees can interact in a more co-operative manner and through which consultation and joint decision-making can take place. Chapter V of the LRA provides for the regulation of workplace forums which may be established by trade unions and employers.

Do you think it is necessary in South Africa to have workplace forums and why?

20.3.2 The establishment of a workplace forum

20.3.2.1 Statutory requirements

Study par 20.2.1 of the prescribed book.

Sections 80 and 81 of the LRA make provision for two types of workplace forums. In both cases application mustbe made to the CCMA for the establishment of a workplace forum. According to section 80(1) of the LRA, aworkplace forum may be established in any workplace in which an employer employs more than 100 employees. Workplace forums are restricted to the larger employers because of the financial and administrative burdens they might place on smaller employers. Only a representative tradeunion may apply for the establishment of a workplace forum. Section 81 of the LRA makes provision for the establishment of trade union-based workplace forums. Once again, only a representative union (or two or more unions acting jointly) can apply for the establishment of a workplace forum. But in this case a further requirement is set; the trade union or unions must have concluded a collective agreement with the employer in terms of which the union(s) has/have been recognised for the purposes of collective bargaining in respect of all employees in the workplace.

Take note that for the purpose of workplace forums the concept of ‘employee’ means ‘any person who is employed in a workplace, except a senior managerial employee whose contract of employment or status confers the authority to do any of the following in the workplace — represent the employer in dealings with the workplace forum or determine policy and take decisions on behalf of the employer that may be in conflict with the representation of employees in the workplace.’

20.3.2.2 Establishment

Study par 20.2.2 of the prescribed book.

If the statutory requirements for the establishment of a workplace forum have been met, a CCMA commissioner will be appointed to assist the parties to conclude a collective agreement regulating the functioning of the forum, however, if a collective agreement is not concluded, the commissioner can establish the forum and determine its constitution.

20.3.2.3 The functions of a workplace forum

Study par 20.3 of the prescribed book.

The LRA provides for the following four basic functions of a workplace forum:

- to promote the interests of all employees in the workplace;
- to enhance efficiency in the workplace;
- to be consulted by the employer, with a view to reaching consensus about certain matters; and
- to participate in joint-decision-making about certain matters.

The two most important functions of a workplace forum are the right to be consulted by the employer in respect of certain matters and the right to participate in joint decision-making in respect of certain other matters.

20.3.2.3.1 Consultation

Study par 20.3.1 of the prescribed book.

The matters for consultation with a workplace forum are as follows:

- restructuring the workplace, including the introduction of new technology and new work methods;
- changes in the organisation of work;
- partial or total plant closures;
- mergers and transfers of ownership in so far as they have an impact on the employees;
- the dismissal of employees for reasons based on operational requirements;
- exemptions from any collective agreement or any law;
- job grading;
- criteria for merit increases or the payment of discretionary bonuses;
- education and training;
- product development plans; and
- export promotion.

20.3.2.3.2 Joint decision-making
Study par 20.3.2 of the prescribed book.

The matters for joint decision-making with the workplace forum are as follows:

- disciplinary codes and procedures;
- rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
- measures designed to protect, and advance persons disadvantaged by unfair discrimination; and
- changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

Take note that section 86 of the LRA requires an employer to consult and reach consensus with a workplace forum before implementing any proposal concerning the matters that must be the subject of joint decision-making.

20.3.2.4 Disclosure of information
Study par 20.4 of the prescribed book.

Section 89(1) of the LRA requires an employer to disclose all relevant information that will allow a workplace forum to engage effectively in consultation and joint decision-making. However, the employer is not obliged to disclose information that is legally privileged; or, that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court; or information that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or, information that is private, personal information relating to an employee unless that employee consents to the disclosure of that information.

SELF TEST QUESTIONS

1. Besides consultation and joint-decision making what are the other two functions of a workplace forum?
2. Draw a distinction between consultation and joint decision-making as functions of workplace forums.
3. In the table below indicate three matters in respect of which consultation can take place and three matters that can be settled by way of joint decision-making with a workplace forum.

Consultation	Joint decision-making
• • •	• • •

STUDY UNIT 21
DISPUTE RESOLUTION

OUTCOMES:

After you have completed this study unit, you should be able to

- Distinguish between disputes of interest and disputes of right.
- Distinguish between different dispute resolution institutions.
- Describe different methods through which disputes may be resolved.
- Describe the jurisdictions and functions of each dispute resolution institution.
- Explain circumstances under which an award may be varied, rescinded or reviewed.
- Explain the resolution of unfair dismissal and unfair labour practice disputes.

21.1 PRESCRIBED MATERIAL

- Chapter 21 of Essential Labour Law

21.2 GENERAL INTRODUCTION

Dispute resolution is one of the key objectives of the LRA. The LRA establishes dispute resolution institutions such as the CCMA, the Labour Court, the Labour Appeal Court, etc. This is in line with principles of ubuntu which encourages peace and that if disputes arise they must be resolved. In African tradition there are ‘Kgoros’ which are established to resolve disputes so that there is peace in the society. The LRA provides for different methods through which disputes may be resolved, which include conciliation, mediation and arbitration. These allow parties themselves to first attempt to resolve disputes with the help of a third party (through conciliation and mediation) and if this fails, the next step will be to allow a third party to decide on behalf of the parties (arbitration). All these methods are cost-effective as compared to court proceedings.

21.3 IMPORTANT MATTERS TO UNDERSTAND

This study unit deals with dispute resolution.

21.3.1 Introductory matters

21.3.1.1 The traditional distinction between disputes of interest and disputes of right

Study par 21.1.1 of the prescribed book.

There are two types of disputes that may arise between parties in an employment context: disputes of interest and disputes of right. This distinction is not made in South African labour legislation; however, it forms the basis of the approach to labour dispute resolution.

Disputes of interest relate to the creation of new rights. These disputes arise where employees, or trade unions acting on behalf of employees, seek to further their interests where there are no currently existing rights that they may enforce, for example where employees seek higher wages or new or improved conditions of employment such as more leave, less overtime, shorter working hours for the same pay, the introduction of day-care facilities and the like. In other words, there is no existing right to the changed conditions of employment that may be enforced, but employees and their unions and employers clearly have an interest in such changes. This type of disputes are best resolved through the process of collective bargaining which includes the right to strike or recourse to lock-out.

Disputes of right relate to the existence, interpretation or application of a right. A dispute of right is a dispute where employees or employers do not seek to create a new right but rather seek to enforce a right that allegedly already exists. In such a case, the dispute concerns the entitlement to such a right and/or the extent and content of such a right, for example, disputes about alleged unfair dismissals (the right not to be unfairly dismissed is granted in the LRA); disputes about alleged unfair labour practices (the right to fair labour practices is granted in the LRA); disputes about alleged unfair discrimination (the right not to be unfairly discriminated against is granted in the EEA); and, disputes about an alleged breach of contractual rights (the contract is also, just like legislation, a source of rights).

21.3.1.2 The resolution of rights disputes — different sources of rights and different causes of action

Study par 21.1.2 of the prescribed book.

The following are different sources of rights in respect of the employment relationship: the LRA, the BCEA and the EEA. Public servants and their employer, the State, also enjoy rights granted by legislation such as the Public Service Act of 1994 and the Employment of Educators Act 76 of 1998.

The Constitution is also a source of important, most notably the right to equality (section 9) and the labour relations rights (section 23). A collective agreement and a contract of employment are also important sources of employment rights. Public servants may also be able to enforce certain rights derived from the principles of administrative law.

Different rights contained in the abovementioned sources are enforced in different ways and the available remedies to a successful party may also differ. This raises the question as to whether employees are allowed to pick and choose which right to rely on. Take note of relevant principles discussed in the prescribed book in this regard.

21.3.1.3 The resolution of rights disputes in terms of the LRA

Study par 21.1.3 of the prescribed book.

One of the objectives of the LRA is to provide the institutions and simplified procedures for a tailor-made system of labour dispute resolution by means of conciliation, arbitration and adjudication by bargaining councils, the CCMA and the labour courts.

21.3.2 Statutory dispute resolution institutions

21.3.2.1 The Commission for Conciliation, Mediation and Arbitration

Study par 21.2.1 of the prescribed book.

The CCMA is the central institution in the statutory labour dispute resolution system established by the LRA. It has jurisdiction in all provinces of the Republic of South Africa and consists of a governing body, commissioners and staff. The functions of the CCMA are regulated in section 115 of the LRA. In terms of this section the CCMA must attempt to resolve, through conciliation, any dispute referred to it in terms of labour legislation. If a dispute which has been referred to it remains unresolved after conciliation, the CCMA must arbitrate the dispute if labour legislation requires it and any party to the dispute has requested that the dispute be resolved through arbitration. The CCMA must also arbitrate a dispute which remains unresolved after conciliation and in respect of which the Labour Court has jurisdiction, if all the parties to the dispute consent to arbitration under the auspices of the CCMA.

The CCMA has the power to make rules regulating, among others, the practice and procedure in connection with the resolution of a dispute through conciliation and arbitration, the process by which conciliation is initiated, the form, content and use of that process, the way in which the arbitration process works, the forms to be used by parties and the CCMA, and the circumstances in which the CCMA may charge a fee in relation to conciliation or arbitration proceedings or for any of the services provided by the CCMA. These rules have been published as the Rules for the conduct of proceedings before the CCMA (the CCMA Rules) (see Government Notice R223 in Government Gazette 38572 of 17/3/2015). Note that there are other functions of the CCMA as discussed under par 21.2.1 of the prescribed book.

21.3.2.2 Bargaining councils

Study par 21.2.2 of the prescribed book.

The resolution of disputes is one of the most important functions of a bargaining council. The constitution of a bargaining council must provide for a procedure in terms of which disputes between parties to the council are resolved. A bargaining council may also resolve disputes where the parties to the dispute are not party to the council, provided that the parties to the dispute fall within the sector and area in respect of which the council is registered.

21.3.2.3 Accredited agencies

Study par 21.2.3 of the prescribed book.

In terms of section 127 of the LRA private institutions may apply to the governing body of the CCMA for accreditation to perform dispute resolution functions such as conciliation and arbitration. The governing body of the CCMA may accredit such a body to perform dispute resolution functions if it is satisfied that the services provided by the body will meet the CCMA's standards and that the bodywill be able to conduct its activities effectively.

21.3.2.4 The Labour Court and the Labour Appeal Court

Study par 21.2.4 of the prescribed book.

The Labour Court is established by section 151 of the LRA as a court of law and equity. It is a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction equal to that which a court of a provincial division of the High Court has in relation to matters under its jurisdiction. Section 157 of the LRA regulates the jurisdiction of the Labour Court. The powers of the Labour Court are set out in section 158 of the LRA, which include the power to grant urgent interim relief and interdicts and to make an order directing the performance of any act which order, when implemented, will remedy a wrong and give effect to the primary objects of the LRA. It may also make declaratory orders and award compensation or damages. It also has powers to review decisions and arbitrations of CCMA commissioners.

The Labour Appeal Court is established in terms of section 167 of the LRA, also as a court of law and equity and is the court of appeal in respect of all judgments and orders made by the Labour Court. It is a superior court that has authority, inherent powers and standing in relation to matters under its jurisdiction equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction. Section 173 of the LRA regulates the jurisdiction of the court and provides that it has exclusive jurisdiction to hear and determine all appeals against the final judgments and the final orders of the Labour Court.

21.3.2.5 The Constitutional Court

Study par 21.2.5 of the prescribed book.

Those dissatisfied with a decision of the Labour Appeal Court may apply to the Constitutional Court for leave to appeal against the decision. In certain circumstances, a party to a dispute may request the Constitutional Court to hear a matter without the dispute having been considered by the Labour Court or the Labour Appeal Court. However, the Constitutional Court will not easily grant such a request for direct access.

21.4 Statutory dispute resolution processes - Conciliation

21.4.1 Principles of conciliation

Study par 21.3.1 of the prescribed book.

Conciliation by a bargaining council or the CCMA is the first step in most dispute resolution processes prescribed by the LRA. By including conciliation as a first step in the dispute resolution process, it was envisaged that many, if not most, disputes could be resolved at this first step, thereby leaving only a relatively small number of disputes to be resolved by means of arbitration or adjudication. Conciliation is a process whereby a conciliator (a neutral third party not involved in the dispute) tries to assist the parties to reach their own settlement of the dispute. The conciliator leads and tries to persuade the parties to reach a mutually acceptable settlement and does not impose a settlement on the parties. During conciliation, a party to the dispute may appear in person or be represented only by a director or employee of the (employer) party or by a member, an office-bearer or official of that party's registered trade union or registered employers' organisation. Where the party to the dispute is a trade union or employers' organisation, the representative has to be authorised to represent the union or employers' organisation. Neither party may be assisted by an independent legal practitioner.

21.4.2 The difference between conciliation and facilitation

Study par 21.3.2 of the prescribed book.

Facilitation is a consensus-seeking process that may be used by parties in the context of consultations that are required when an employer has given notice that it intends to terminate the employment of employees on the ground of its operational requirements, commonly referred to as retrenchment. A facilitator will assist the parties in deciding how to approach various issues and the priority of each issue. The facilitator will then guide the parties through the process they have agreed on. Facilitation regulations were issued in October 2003 (see Government Notice R1445 in Government Gazette 25515 of 10 October 2003).

Do you think it is necessary to have different methods of dispute resolution?

21.4 Statutory dispute resolution processes - Arbitration

21.4.1 General principles of arbitration

Study par 21.4.1 of the prescribed book.

A matter may be referred to arbitration if that is the next step as set by legislation, if conciliation was unsuccessful and the certificate of outcome has been issued and served by the CCMA. Arbitration in terms of the LRA is a process in terms of which a neutral third party such as a CCMA commissioner, bargaining council arbitrator or an arbitrator nominated by an accredited agency, hears both parties' versions of events and then decides the dispute. CCMA commissioners have wide powers in conducting arbitrations. A commissioner may conduct the arbitration in a manner that he/she considers appropriate to determine the dispute quickly and fairly. Take note that an arbitration award issued by a commissioner is final and binding and it may be enforced as if it werean order of the Labour Court. Note, however, that advisory arbitrations are not enforceable.

21.4.2 Special forms of arbitration

Study par 21.4.2 of the prescribed book.

First, there is advisory arbitration. This type of arbitration is closer to conciliation than arbitration as it is not binding on the parties, however it has a persuasive effect. The LRA provides for advisory arbitration in the following three instances: a party may not resort to strike action about a 'refusal tobargain' as defined in section 64(2) of the LRA without first referring the dispute to advisory arbitration (section 64); sections 150A-D of the LRA provide for advisory arbitration in instances of protracted and violent strikes or strikes which have lost their functionality to collective bargaining and in terms of section 200A(3) of the LRA, parties may ask for an advisory award on the legal nature of their relationship, i.e. whether their relationship is one of independent contractor and client or one ofemployment.

Second, there is a con-arb procedure. In the case of disputes about an unfair dismissal or an unfair labour practice which fall within the arbitration jurisdiction of a bargaining council or CCMA, the council or the CCMA must commence with arbitration immediately after conciliation fails. This is commonly referred to as the con-arb procedure.

Third, there is a pre-dismissal arbitration (now called 'Inquiry by an arbitrator'). In terms of this process, an employer, with the consent of the employee or in terms of a collective agreement, may, instead of holding an internal enquiry into the alleged misconduct or incapacity of the employee prior to a possible dismissal, request a council or accredited agency or the CCMA to investigate the alleged misconduct or incapacity of the employee and make a ruling which will have the same effect as an arbitration award.

21.5 Court adjudication

Study par 21.5 of the prescribed book.

Labour Court adjudication is a formal legal process similar to ordinary legal proceedings in any court of law. In other words, a judge will hear the parties' cases and decide the matter. Parties may, however, seek leave to appeal to the Labour Appeal Court and thereafter to the Constitutional Court against a judgment of the Labour Appeal Court.

21.6 Jurisdictional issues

21.6.1 The technical nature of jurisdiction

Study par 21.6.1 of the prescribed book.

The essential question in the context of jurisdiction is whether an institution will have the power to hear the matter. The jurisdiction of bargaining councils, the CCMA and the Labour Courts is provided for in the LRA and is based on the nature of the dispute between the parties. These institutions have no inherent jurisdiction and may only consider matters which fall within their statutory jurisdiction to conciliate, arbitrate or adjudicate.

Study the diagram provided under par 21.6.1 of the prescribed book.

21.6.2 Jurisdictional issues in unfair dismissal and unfair labour practice disputes

Study par 21.6.2 of the prescribed book.

There are three jurisdictional issues that commonly arise in the context of unfair dismissal and unfair labour practice disputes. The first is whether the applicant is an employee; the second issue relates to time-periods; the third is a jurisdictional issue which is often encountered arising from the fact that, as far as dismissal disputes are concerned, section 191 of the LRA apportions jurisdiction for purposes of arbitration and adjudication between bargaining councils, the CCMA and the Labour Court according to the reason for the dismissal. And as far as unfair labour practices are concerned, the list of unfair labour practices in section 186(2) is seen to be exhaustive which means that if the employer's conduct is not covered by this list, there is no jurisdiction to hear the case.

21.6.3 Overlapping jurisdiction: bargaining councils and the CCMA

Study par 21.6.3 of the prescribed book.

The LRA often provides that a dispute must be referred to a bargaining council with jurisdiction or, in the absence of a council, to the CCMA for conciliation and, in some instances, arbitration. It therefore means that the CCMA will not have jurisdiction over a dispute if there is a bargaining council with jurisdiction. Thus, if a dispute has been incorrectly referred to the CCMA, proceedings must be stopped, and the dispute must be referred to the relevant bargaining council instead.

21.6.4 Overlapping jurisdiction: Labour Court and High Court

Study par 21.6.4 of the prescribed book.

As stated before the possible overlap in jurisdiction between the High Court and the Labour Courts has proven to be very problematic. Employees retain the choice to rely on either legislation or contract and, in those cases where they have chosen to rely on contract, section 77(3) of the BCEA clearly provides for the concurrent jurisdiction of the High Court and the Labour Court.

21.7 Variation, rescission, review and enforcement of arbitration awards

Study par 21.7 of the prescribed book.

In terms of section 143 of the LRA an arbitration award (with the exception of an advisory arbitration award) is final and binding and may be enforced, once certified by the Director of the CCMA, as if it were an order of the Labour Court. It is no longer necessary to have an award made an order of the Labour Court before it is enforced.

In terms of section 144 of the LRA an arbitration award or ruling may be varied or rescinded by a commissioner on his/her own accord or on the application of any party affected by that award if the award was wrongly sought or made in the absence of a party affected by that award; if there is an ambiguity or obvious error or omission in the award (but only to the extent of that ambiguity, error or omission); if the award or ruling was made as a result of a mistake common to the parties to the matter; or, if the award was made in the absence of any party, provided that good cause is shown.

Section 145 of the LRA expressly provides for a general right to review any arbitration award issued by councils and the CCMA. It is important to be able to draw a distinction between a review and an appeal. In the case of an appeal, the facts and the merits of the case are reconsidered based on the record of proceedings, and the appellate court takes a new decision on the facts and the merits of the case, if it decides that the first decision was wrong. In contrast, the approach on review is not to test the award for correctness, but rather whether it falls within an acceptable range of outcomes which the reviewing court can 'live with'.

21.8 The resolution of unfair dismissal and unfair labour practice disputes

Study par 21.8 of the prescribed book.

The greatest number of disputes dealt with by the LRA's dispute resolution institutions arise from alleged unfair dismissals, alleged unfair labour practices and alleged unfair discrimination. The procedures to be followed in resolving unfair dismissal and unfair labour practice disputes are set out in section 191 of the LRA.

21.8.1 Automatically unfair dismissals

Study par 21.8.1 of the prescribed book.

With this type of dispute, the employee must first refer the dispute for conciliation to either a bargaining council, or the CCMA if there is no bargaining council with jurisdiction over the employer and the employee. The referral must be within 30 days from the date of the dismissal. The second step is for the council or the CCMA to attempt to resolve the dispute through conciliation within 30 days of the date on which the referral was received. The employee may then, as a third step, refer the matter to the Labour Court. This referral must be made within 90 days after certification that conciliation has failed to resolve the dispute. The parties may appear in person or be represented by any of the persons who were permitted to represent them during the conciliation proceedings. However, they may also be represented by legal practitioners. A legal practitioner is defined in section 213 of the LRA as 'any person admitted to practise as an advocate or an attorney in the Republic'. Either of the parties (the employer or the employee) may take the fourth step, namely lodging an appeal against the judgment of the Labour Court in the Labour Appeal Court and if needs be, to take it further to the Constitutional Court.

21.8.2 Misconduct and incapacity dismissals and unfair labour practice disputes

Study par 21.8.2 of the prescribed book.

The first step in the resolution of disputes about dismissals for misconduct or incapacity and unfair labour practices is a referral to a council or the CCMA for compulsory conciliation. In the case of these types of dismissal, the referral must be done within 30 days, however, unfair labour practice disputes must be referred within 90 days. Should conciliation fail, a certificate stating that the dispute remains unresolved must be issued and arbitration will follow. The 'default' approach in this regard is that the con-arb process explained above must be followed.

An employer, with the consent of the employee or in terms of a collective agreement, may, instead of holding an internal enquiry into the alleged misconduct or incapacity of the employee prior to a possible dismissal, request a council or accredited agency or the CCMA to investigate the alleged misconduct or incapacity of the employee. In such an inquiry a party may appear in person or be represented by a co-employee, a director or employee (if the party is a juristic person) or an office- bearer or official of that party's registered trade union or registered employers' organisation. Representation by a legal practitioner is only permitted if the parties agree to this, or if approved by the presiding arbitrator in terms of the usual rules for legal representation at the CCMA in misconduct or capacity cases.

21.8.3 Constructive dismissal

Study par 21.8.3 of the prescribed book.

The procedure for the resolution of a dispute about a constructive dismissal is the same as for the resolution of a dispute about a dismissal for misconduct or incapacity, however, if the underlying reason for the intolerability of continued employment is one that would make the constructive dismissal automatically unfair (such as discrimination), the dispute should be dealt with as an automatically unfair dismissal.

21.8.4 Dismissal after a transfer of an employment contract

Study par 21.8.4 of the prescribed book.

The procedure for the resolution of a dispute about this type of dismissal is the same as for the resolution of a dispute about a dismissal for misconduct or incapacity. This form of dismissal must however be distinguished from the case where the reason for dismissal is a transfer, or a reason related to a transfer, contemplated in section 197 or 197A of the LRA as in the latter case, the dismissal is an automatically unfair dismissal.

21.8.5 If the reason for the dismissal is unknown

Study par 21.8.5 of the prescribed book.

Where the reason for dismissal is unknown, the same dispute resolution procedure must be followed as for dismissal for misconduct or incapacity.

21.8.6 Dismissals for operational requirements

Study par 21.8.6 of the prescribed book.

In as far as a small scale and individual operational requirements dismissal is concerned, section 191(5)(b)(ii) provides that disputes about the fairness of dismissals based on an employer'soperational requirements must, if conciliation fails, be referred to adjudication by the Labour Court rather than to arbitration.

Study par 21.8.6 of the prescribed book , for exceptions in this regard.

The resolution of a dispute about a large-scale dismissal for operational reasons by a big employer is regulated in section 189A of the LRA. A distinction must be made between a dispute about the procedural fairness, and a dispute about the substantive fairness, of such a dismissal as different procedures are prescribed for the resolution of these disputes.

21.8.7 Remedies

Study par 21.8.7 of the prescribed book.

The LRA provides for the following remedies for unfair dismissals and unfair labour practices: reinstatement; re-employment and compensation. A reinstatement order restores the relationship between the employer and the employee as if it was never broken. Rights, such as seniority rights, will be unaffected. A re-employment order implies the imposition of a new relationship which may be different from the employment relationship which existed prior to the earlier dismissal. The employee may be given his/her old job but without the rights, such as seniority rights, which had been acquired in terms of the old employment relationship. It may also mean that the employee is given another job that differs from his/her previous job. Reinstatement or re-employment are primary remedies for unfair dismissal.

In terms of section 193(2) the Labour Court or the arbitrator should rather award compensation than reinstatement or re-employment if the employee does not wish to be reinstated or re-employed;if the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. Note that this exception only extends to events prior to the dismissal and not to subsequent events such as the parties' conduct at the arbitration. Compensation will also be awarded if reinstatement or re-employment would not be reasonably practicable or if the dismissal is only procedurally unfair.

21.9 Summary: the way the LRA divides jurisdiction over rights disputes between councils, the CCMA and the Labour Court for purposes of arbitration or adjudication

Study par 21.9 of the prescribed book.

Study the table/diagram under par 21.9 of the prescribed book for an overview of how the LRA divides jurisdiction to arbitrate or adjudicate between councils, the CCMA and the Labour Court, with reference to the relevant sections. These sections describe the jurisdiction of the different institutions relating to that specific type of dispute.

SELF TEST QUESTIONS

1. What is a dispute of interest?
2. Name two dispute resolution institutions available under the LRA.
3. What remedies are available under the LRA in case of an unfair dismissal?