Labour Law and Labour Relations

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The views expressed in this document are not necessarily those of the Fasset Seta.
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1. INTRODUCTION

The appointment of the Wiehahn Commission in 1977 led to the amendment of labour legislation in 1979 which in turn led to more practical application of labour laws and subsequent amendments to various acts. Dramatic socio-political reforms at the beginning of the 90’s culminated in the elections of 1994, significantly affecting industrial relations policy and legislation.

In 1994 the Department of Labour broadly stated its policy in the following terms, namely to:

- As far as possible, leave the regulation of labour relations to employers and employees
- Legislate minimum conditions of employment only, regarding “circumstances under which they are not determined by statutorily recognised agreements or other statutory measures”
- Provide for procedures to regulate collective negotiation and the application of industrial democracy
- Provide for collective agreements and dispute settlement
- Ensure the negotiating balance between employers and employees
- Consult with employees and employers wherever changes to legislation are considered

The result of the above has been a set of labour acts, codes of good practices, sectoral determinations and several amendments that provide a comprehensive framework of legislation that regulates work relationships and provide guidance to employers with regard to issues at work and how to deal with it.

_The Department of Labour is central in these processes, and the basic idea behind most pieces of legislation is to advance economic development and social justice._

The legislation is also meant to give effect to certain sections of the Constitution and the obligations incurred by the Republic as a member of the International Labour Organisation (ILO).

Work is a fundamental human activity. Most people spend the greater part of their working day working, and also the greater part of their lives working in various
capacities. Modern economic life is organised to sustain economic activity, and human beings must perform these duties in a specific and organised way.

The relationship between an employee (provider of labour) and the employer (beneficiary) has changed dramatically over centuries. Modern employment is a relationship typified by an exchange of work (effort) in return for a reward (cash or in kind). It therefore makes sense to understand the employment relationship as well as the legislation that regulates this relationship.

Labour law, through its various acts, make a distinction between individual and collective issues in the workplace. In law, the employer is often a corporate or a juristic person. The employer is therefore a business entity rather than an individual. Every employee has an individual employment contract, and the actions flowing from that individual relationship is one-on-one. For example, an employer will take disciplinary action against an individual employee. Late-coming or absenteeism does not affect the entire workforce. Remuneration is also an individual issue. However, sometimes labour law is collective in nature. A strike is one example where the employer will deal with the trade union. Collective labour law deals with the interaction of groups of employees and their organisations.

The main labour acts regulating workplace relationships and conditions, are:

- The Labour Relations Act no 66 of 1995 (as amended)
- The Basic Conditions of Employment Act (BCEA), no 75 of 1997 (as amended)
- Employment Equity Act no 55 of 1998
- Compensation for Occupational Injuries and Diseases Act, no 130 1993 (as amended)
- Unemployment Insurance Act, no. 63 of 2001
- Protected Disclosures Act, no 26 of 2000
- Skills Development Act
- Skills Development Levies Act
- Occupational Health and Safety Act (OHS)

This workshop has been scheduled to cover the first six acts. The last three acts are referred to at the end of the module.
Seeing that the employer and the employee enters into an agreement – an employment contract – it is prudent to spend some time to study the employment contract.
2. EMPLOYMENT AS A LEGAL ARRANGEMENT

The contract of employment is usually entered into between a person (employer) and another person who is to work for the employer (an employee) for remuneration, and under the supervision of the employer. This relationship has legal consequences and is a legal relationship governed by the law of contract.

2.1 Basic principles of a contract

The contract must comply with the requirements of all valid contracts:

- There must be agreement or consensus (a meeting of minds), i.e. the parties must agree on the same thing, even the nature of the contract (e.g. permanent contract vs agency contract or a fixed term contract). The principle is that the parties must be free to reach an agreement or not. Once they have reached an agreement, they are bound by it. Therefore, it also means that if there is no agreement, there is no contract.

- The agreement must be freely obtained. Parties do not have to reach an agreement, but choose to do so of their own free will. Any form of duress will nullify the contract. Duress does not simply mean a mere threat of some sort, but must be a real and imminent threat of physical harm to the person.

- Performance of the contract must be possible or capable of performance. No one can conclude a contract to do something that is not possible. If a contract is vague or incapable of performance, there can be no meeting of minds. The phrase often found in job descriptions, ‘performs all other duties as required’ is meaningless and vague since it creates excessive power for the employer.

- The contract must not be contra bonos mores (against public moral values) and lawful. One party may not conclude a contract that is illegal or contrary to the law. An example would be that it would be illegal to appoint a drug dealer since possession and dealing in drugs are illegal in South Africa.

*The employer cannot contract outside the law. It is therefore not possible to enter into an employment contract that requires an employee to work more than 20 hours overtime per week. Therefore, most provisions in the BCEA are written in mandatory language or state that ‘the employer may not require or permit….’*

Source: Labour Law in Practice, Andrew Levy
• The contract must comply with any formalities which may be prescribed and must be properly obtained. If someone is tricked into an agreement, one cannot say that a ‘meeting of minds’ has taken place. Any form of trickery or undue influence makes the contract voidable.

• The objects of the contract must be clear. The purpose of the contract must be clear and there must be a mutual understanding of what the task is that is required, even if it is broadly categorised by terms such as supervisor, secretary or driver.

• The parties must have a contractual capacity or legal status to act or contract. According to the BCEA, no employer may employ a child under the age of 15.

Should the employer not provide a contract of employment, it does not mean that no contract exists. It merely means that the employer is not complying with legislation. The Basic Conditions of Employment Act (BCEA) then becomes the employment contract. Within the BCEA comes, in certain industries, Sectoral Determinations, that considers specific realities of the type of employment in that industry. Good examples are Sectoral Determination 6 (Security Industry where the majority of workers work shifts). Specific agreements can be made between an employer and a bargaining council that is written into a Sectoral Determination.

There is no benefit in not supplying an employee with an employment contract. On the contrary, the employer is breaking the law in not providing an employment contract and is therefore not complying with labour legislation.

2.2 Common law duties of the employer

2.2.1 Pay (remuneration)
The payment of wages is the primary duty of the employer in terms of the employment contract. The remuneration is determined by the parties themselves. The contract of employment is a reciprocal one: the employee receives remuneration for work done.

2.2.2 Receive employee into service
The employer is obligated to receive the employee into service. The employer must honour its contractual obligation to enter into an employment relationship with the employee. If the employer fails to do this, it will amount to a breach of the employment contract.
2.2.3 Duty to provide work
As long as the employer pays the employee the remuneration agreed upon, the employer will not, as a rule, be breaching the contract of employment if the employee is left sitting idle.

Exceptions to the rule are instances where an employee works for commission. The employee must be provided with work. Failure on the part of the employer to provide work in this instance, will amount to a breach of contract.

2.2.4 To provide leave
The BCEA lays down certain minimum standards and imposes a statutory duty on the employer to give the employee leave. Section 20 of the BCEA provides that an employer must grant an employee at least 21 consecutive days’ leave on full remuneration in respect of every annual leave cycle.

2.2.5 Provide safe working conditions
An employer is obliged to provide employees with safe working conditions. Safe machinery and tools, as well as safe procedures and processes are the obligation of an employer. These duties are imposed through the Occupational Health and Safety Act (1993).

2.2.6 Miscellaneous duties
The employer is obliged to provide the employee who leaves with a certificate of service (BCEA, section 42). It also requires the employer to keep records imposed by various pieces of legislation, and the duty not to victimize any employee.

2.3 The common law duties of an employee
Common law terms and conditions need not be expressed in the contract or do not have to be mentioned at all. These are conditions that are so clear and so obvious that both parties must understand them. It is, for example, not necessary to state in a contract that an employee may not steal from the employer. It is obvious and fundamental and need not be expressed in a contract. The employee who steals from an employer breaches the common law duty of good faith.
Below are a number of examples of common law that do not have to be written into any employment contract or into a set of disciplinary rules. They are implicit.

- The duty to attend work regularly and reliably
- The duty to obey
- The duty of good faith
- The duty of loyalty
- The duty to perform
- The duty of respect

2.3.1 The concept of an employee

The employment conditions as described in the BCEA should form part of every employment contract in South Africa. The question now arises as to who qualifies for a contract of employment. In other words, it is important to understand who is regarded as an “employee” according to the Act.

According to the BCEA an “employee” means: “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.” In addition, the Act states that an employee is “any other person who in any manner assists in carrying on or conducting the business of an employer.”

An employee is a person:

- Who puts his/her service at his/her employer’s disposal
- Who, in the course of performing his/her task, operates under the control, authority and supervision of the employer and carries out the employer’s orders to do the work precisely as directed
- Who is considered to be part of the employer’s business organisation and renders his/her services on a permanent basis for payment agreed upon
Employers often attempt to manipulate employment conditions and increase their flexibility. The idea is to deal with rapid changes in the workplace and decrease their employment commitments. In this process, many different forms of employment came to fruit with a wealth of names and titles. Research has shown terminology such as subcontracting, part-time employment, temporary employment, casual employment, home-based employment – all in an effort to circumvent legislation. These forms of employment are often referred to atypical employment, and fall under the definition of ‘employee’, except for those deemed to be independent contractors.

2.3.2 An employment relationship identified
Any party who alleges that an employment relationship does not exist has to prove this. For example, an applicant in an unfair dismissal case does not have to prove that s/he is an employee if one of the seven conditions mentioned below exists. The employer, however, will have to prove that there is no employment relationship, but rather one of independent contracting as claimed.

The following important factors to consider to prove an employment relationship:
- The person is subject to control
- The persons’ hours of work are regulated
- The person is subject to a reporting relationship
- The person has averaged 40 hours a month over the last three months
- The person receives a wage or salary predominantly from the job
- The person does not work for anyone else

2.3.3 What is an “independent contractor”?
Any person who works for a company in the form of providing a service to the employer. This would include all individuals involved with outsourced work and activities. It also includes consultants contracted by the company or any person who is in his/her own business.

An independent contractor has the following characteristics, and:
- Undertakes to perform a certain job
- Does not operate under the control and supervision of the employer
- Uses his/her own discretion regarding the ‘how’ and ‘when’ of doing the job
• Is not subject to the orders of his/her employer and is regarded as an independent third party merely rendering his/her services for the performance of a specific piece of work

Since employment begins with the hiring of an individual, it is best to give attention to the beginning of the working relationship.


3. LABOUR LEGISLATION IN ACTION

There are various processes within an organisation that are influenced by the different labour acts. Managers and supervisors can prepare themselves by ensuring that they are informed about the most basic issues in order to minimise risk. Compliance to legislation and codes of good practice ensure that the minimum amount of time is spent on ‘issue management’.

3.1 The concept of discrimination

Advertisements and job interviews should be standardised, and be carefully worded. One often finds advertisements where the employer is looking for someone who is ‘young and energetic’, or for a non-smoker. Some employers even look for employees who have a good sense of humour. These requirements are irrelevant, and can be the start of a troublesome relationship.

Discrimination is to show favour, prejudice or bias for or against a person on any arbitrary grounds. This is on the basis of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture and language.

3.1.1 Criteria that indicate unfair discrimination in an interview

The EE Act has introduced the concept of “Fair Discrimination” and “Unfair discrimination”.

- **Fair discrimination** is allowed on the following grounds:
  - Discrimination based on affirmative action
  - Discrimination based on inherent requirements of the job such as the nature of the job and qualifications required to do the work
  - Compulsory discrimination by law in terms of the Basic Conditions of Employment Act or any other relevant legislations for example children under 15 are not allowed to work
  - Discrimination based on productivity that leads to increases given on merit

- **Unfair discrimination** can be either direct discrimination or indirect:
  - Direct discrimination is clearly indicated policies and practices for example paying a woman less than a man because she is a woman for the same work with some qualifications
Indirect discrimination is a subtle form of discrimination for example testing either medical or psychological, when it is not job related.

**Example:**

Cindy and Rosanne were retrenched from their company. They are both secretaries and they can start work immediately. They have the same qualification, although Rosanne has one year more work experience than Cindy. But Cindy’s typing speed is higher than Rosanne’s. Rosanne is four months pregnant and Cindy did not wear a wedding ring, so the panel assumed that she is unmarried. What selection criteria will be discriminatory in this case?

**Answer:**

The selection process should not be influenced by the fact that one candidate is pregnant and the other (properly) unmarried. If the selection panel does take these aspects into consideration, it is discriminatory. The selection criteria should look at competence only which will be aspects such as years of experience and typing speed.

### 3.2 Recruitment and contracting

Before the employer makes an offer of employment, it needs to find a suitable candidate for a specific position. Employers make use of various methods and media to reach their target audience in an effort to find a suitable candidate. Some jobs are never advertised, but filled from internal sources. The more demanding and sophisticated the job is, the more scientific and precise the process of recruitment and selection will be, the costlier the process will be.

There are a number of issues regarding the recruitment and selection process that need to be considered:

Section 9 of the Employment Equity Act (EEA) protects job applicants from discrimination when applying or being selected for a job. The Act regard an applicant as an employee and grants the applicant the same protection against discrimination as an existing employee. In this way, employers can ensure that, from the start, employees are treated in a fair manner. It therefore makes sense to implement policies and procedures to guide the recruitment and selection process to ensure fair procedures and choices, and to mitigate risk.
3.3 Documents required for conducting interviews

The documents required for job interviews, varies from company to company. However, standardisation of documents and procedures will ensure that the recruitment process is a fair process and not a process beset with pitfalls. It therefore makes sense that documents used and questions asked during the selection process should be the same for all candidates. Documents must be kept as evidence in case a dispute arises.

Documentation can include:

- The original advertisement
- Job application forms
- Short-listing of job applicants
- The interview questionnaire (to determine whether there were discriminatory questions)
- The applicant’s qualifications
- References
- Proof of recognition of prior learning
- Assessment results (if any assessment has been conducted)
- Feedback document

3.4 Pre-employment testing

The EEA deals with the issues of pre-employment testing, and must know which tests are to be done for which reason. All employees need to be treated in the same manner. Employers may not force workers or job applicants to undergo medical tests unless

- The law permits or orders it
- It is acceptable because of:
  * Medical facts
  * Employment conditions
  * Social Policy
  * The fair distribution of benefits
  * Job requirements

3.4.1 Medical testing

Certain occupations have statutory requirements regarding medical testing prior to appointment. Some also require testing on an ongoing basis. For example, an airline
pilot will be required to undergo regular tests due to the nature and responsibility of his/her work. Workers who do underground work are also required to undergo medical tests, as does divers and operators of winding machines. It also makes sense to e.g. do an eye test on a driver of a company vehicle of any kind.

There is a blanket ban on pre-employment HIV testing unless special application is made to the Labour Court for permission to do this.

3.4.2 Psychometric testing
Psychometric tests of workers or job applicants are illegal unless the tests:

- Have been proven valid and reliable. This means that the tests are registered with the Health Professions Council of South Africa (HPCSA).
- Are fair to all workers, and standardised for South African situations.
- Do not discriminate against a worker or a group

3.5 Questioning during an interview
All questions asked should be non-discriminatory and should be related to the job requirements. Compose questions to be asked in an interview referring to work specific criteria.

3.5.1 Potential questions to ask
Using the job description or job profile, draw up job related questions. The questions are aimed to evaluate competence. These will include:

- Ask for an explanation how to do something
- Ask to list the steps in performing a specific task(s)
- Present the person with a job-related problem and ask for an explanation or how to solve the problem.
- Ask about previous experience; ask about achievements as well as problems that were encountered.
- Ask the person to demonstrate their competence. This can be a test for example a typing test, of give the person something that is broken and ask them to fix it, or to do a presentation.
- Review each candidate’s CV, and list work related questions. For example, if someone claims they developed a new product – ask them to tell you more about it and describe what they did. This can link to achievements or problems solved.

The following are examples of questions that you can compose to be asked in an interview, referring to work specific criteria, e.g.
Does your present position link up with the position you are applying for now?
According to you, what does this position entail?
How can you relate your work experience with the position you are applying for?
How can the training criteria, as mentioned in the job specification, help you make a success of it?
If you are appointed to the position, what will you change and why?
What are your strengths and weaknesses?
How do you deal with conflict or criticism?
What do you know about our company and why do you want to work here?
Describe a short-term goal you have set for yourself and how you intend on achieving this goal?
Where do you see yourself in five years?
What are you looking for in a job?
What are your salary requirements?
What have your achievements been to date?
Are you happy with your career-to-date?
What is the most difficult situation you have had to face and how did you tackle it?
What do you like about your present job?
What do you dislike about your present job?
Why do you want to leave your current employer?
How does your job fit in to your department and company?
What do you enjoy about this industry?
Give an example of when you have worked under pressure.
What kinds of people do you like working with?
Give me an example of when your work was criticised.
Give me an example of when you have felt anger at work. How did you cope and did you still perform a good job?
What kind of people do you find it difficult to work with?
Give me an example of when you have had to face a conflict of interest at work.
Tell me about the last time you disagreed with your boss.
Give me an example of when you haven't got on with others.
Do you prefer to work alone or in a group? Why?
This organisation is very different to your current employer - how do you think you are going to fit in?
What are you looking for in a company?
How do you measure your own performance?
What kind of pressures have you encountered at work?
Are you a self-starter? Give me examples to demonstrate this?
- What changes in the workplace have caused you difficulty and why?
- How do you feel about working long hours and/or weekends?
- Give me an example of when you have been out of your depth.
- What have you failed to achieve to date?
- What can you bring to this organisation?

It is necessary to prepare questions before the interview, because:

- The interview is the last chance to make a choice between candidates
- Preparation ensures that the relevant information will be gathered from the candidates

The entire interview cannot be planned. The candidate might say something that you want more detail. Be flexible, especially with follow-up questions. While being flexible, make sure that no discriminatory questions are asked by any of the panellists. The idea of a panel of course implies that one should not go blind into an interview and that the panel should be informed and agrees on the process.

Requirements of the LRA as stipulated in Section 2 are:

<table>
<thead>
<tr>
<th>From the LRA: 5. Protection of employees and persons seeking employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) No person may discriminate against an employee for exercising any right conferred by this Act.</td>
</tr>
<tr>
<td>(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-</td>
</tr>
<tr>
<td>(a) require an employee or a person seeking employment-</td>
</tr>
</tbody>
</table>
<pre><code>| (i) not to be a member of a trade union or workplace forum; |
| (ii) not to become a member of a trade union or workplace, forum; or |
| (iii) to give up membership of a trade union or workplace forum; |
</code></pre>
<p>| (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or |
| (c) prejudice an employee or a person seeking employment because of past, present or anticipated- |
| (i) membership of a trade union or workplace forum; |
| (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum; |</p>
(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
(v) disclosure of information that the employee is lawfully entitled or required to give to another person;
(vi) exercise of any right conferred by this Act; or
(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

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

Source: LRA

3.5.2 Questions that are unacceptable (discriminatory) in any interview
You need to make sure that in an interview with a prospective employee, you avoid questions that could be regarded as discriminatory:

- No referral may be made to any of the previous-mentioned criteria, unless the intention is to use them for affirmative action purposes

The golden rule is stick to the questions that are job related and nothing else. Any questions or comments about any of the topics on the list below will be regarded as discriminatory. Do not ask any questions about:

- religion
- political orientation or trade union membership
- family responsibilities such as plans around child care
- HIV status
- disability
Interview questions should relate directly to the inherent requirements of the job description for which the job seeker is being interviewed for. The purpose of the interview is to establish whether the job applicant is able to deliver on the requirements of the specific job vacancy. Any questions that hold no relevancy to the job seeker's ability to perform specific tasks are regarded as irrelevant.

During the interview, one might want to make a comment or just say something informally to make the person feel at ease or make a joke. Stay away from any of the above topics and don't make comments such as:

- “I see you are wearing a wedding ring, are you planning to start a family?”
- “From your postal address I see you live in Daveton, how are you going to be at the office in time every morning?”
- “Women can be emotional. How do you deal with your emotions?”
- “You wrote matric when you were sixteen, and you have just completed your degree – don’t you think you a bit young for this job?”

The examples above are all issues that need to be treated with care. There might be situations where language, religion, marital status or gender may be a relevant factor. It makes no sense to consider a devoted Hindu applicant for the position of a rabbi at a school for Jewish children. In the same breath, one does not have to employ a Zulu person as a Zulu teacher, since there can be qualified candidates who can be successful Zulu teachers.

### 3.6 Providing references

Much has been made about not giving an honest reference for a candidate (especially if it is a negative one), and that one should be mindful not to slander an ex-employee. If one provides a negative reference to a prospective employer, it cannot be regarded as slander, since the opinion is not broadcasted into the public domain. However, one should be mindful of the reasons for providing a negative reference. It must be based on fact, and not based on emotions.

### 3.7 The offer of employment

Once the recruitment and selection process has been completed, the employer will hopefully have a suitable candidate in mind, and a job offer will be made. A job offer has three requirements in law:

- The employee must be hired for a specific task

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1 Adapted from: http://www.jobs.co.za/job-seekers/career-advice/article/37/discriminatory-job-interview-questions
There must be an agreement on the hours of work

There must be an agreement on remuneration

It has been mentioned previously that the BCEA form the basis of an employment contract. It can therefore not be argued that, in the absence of an employment contract, an employee is not entitled to leave, sick leave or overtime pay. Section 4 of the BCEA set out the specific provisions that are incorporated in every employment agreement. Every employee is entitled to leave, sick leave, family responsibility leave, overtime pay, specific hours of work, etc. An employment contract may also not be less favourable than what is contained in the BCEA (sectoral determinations included). For example, there cannot be an agreement between employer and employee that the employer will have two weeks of annual leave per year. Such a contract will be invalid.

Employers need to take care when making an offer of employment. No member of the recruitment committee must provide information that will make a prospective employer think that they have been appointed. Verbal employment contracts (with enough supporting evidence) are binding. Bear in mind that an employee might give notice based on verbal information, or a letter of employment. Once the letter is accepted as an offer of employment, a formal contract is the next step.

3.8 The employment contract

An employment contract can be a very rigid document, and some employers try to make provision for each and every possible scenario in the contract. One very often finds all kinds of titles and ways to describe what type of contract has been issued to an employee. Below are a number of 'types of employees' that is found in employment contracts:

- Permanent full-time workers
- Contractors
- Part-time employees
- Casual employees
- Independent contractors (who are not employees at all)

In legal terms, these above distinctions do not exist. An employee is an employee, is an employee.

There are two types of contracts that require some attention and that is legally distinct:

- Open-ended contracts are employment contracts with the intention of having no end date. These contracts are for jobs that are permanent.
• Fixed term contracts have a start and an end date, and are normally used when a piece of work or a specific contract must be completed by a specific date. Software and engineering companies often make use of these types of contracts. When a software programme is done and implemented, the contract for some software engineers will come to an end. When a dam or a bridge is built, the employment contract will come to an end once the project is completed.

3.8.1 Basic contents of an employment contract

A simple, but effective employment contract should include the following:

• A description of the parties to the contract, the place of work, when the contract starts and a job title. A job description is not necessary.

• State the place where the employee will work. If there is more than one site of work, state that in the contract by inserting a clause in this regard.

• Specify the hours of work, as well as the agreement to work overtime, the limitations of overtime as well as the terms of payment.

• Refer the employee to the BCEA with regards to issues such as leave, sick leave, maternity leave and family responsibility leave. The employer does not have to include it in full in the contract. Should the employer offer more favourable conditions regarding the above, it should be stated in the contract. For example, should the employer offer 5 days family responsibility per annum, it should be stated as such, since the BCEA refers to three days of leave.

• There should be a clear statement about the remuneration that is to be paid to the employee. It should include details of when and how payment will be made, as well as what the components of the pay packet will be. This statement can include cash, contributions to medical aid, or retirement schemes.

• Bonuses or incentive schemes should be described in detail, since this type of remuneration is often one of contention. Instead of just concentrating on when a bonus will be payable, it might be practical to describe the circumstances under which a bonus will not be payable. Either way, it is something that requires thorough thought and consistent implementation.

• Notice periods to be given to terminate the contract should also be specified, although it is dealt with in legislation. Again, these provisions may not be less favourable than those specified in section 37 of the BCEA. A notice period should be the same for an employer and employee. For example, it cannot be required from an employee to give two months’ notice, but the employer can give one month’s notice. Should the notice period differ from those set out in the BCEA, it must be stated in the contract.

• There should be a general statement to the effect that ‘your employment is conditional on your complying with the term of the contract, your common law obligations and the policies, procedures and rules of the company as amended from time to time.'
Should there be important rules, policies or procedures that are of importance to work relationships in the company, it should be stated here.

Monies outstanding or owing to the employer may normally not be deducted from an employee. Should an employer want to make sure that any monies outstanding will be paid upon termination of the contract, it should be stated as such in the contract.

3.8.2 Material non-disclosure, misrepresentation and false information

Employment is a relationship of the utmost good faith. It is the duty of each party to disclose any issues that might have an effect on the employment contract. Most employers nowadays have a clause in the employment contract that states that all information provided is true and correct. Such a clause is not necessary, since good faith is covered through common law.

It does happen sometimes that an employee does not make a full disclosure, or even misrepresent him/herself. Such acts breach the common law duty of good faith. Should the employer find that an employee has breach the contract, a disciplinary procedure must still be followed before dismissal can take place.

3.9 Probation

Probation is a very useful process to ascertain if the employee is suitable for permanent or full-time employment. Item 8 of the Code of Good Practice: Dismissal deals with this issue. It is also a provision that is often abused. The following is important:

An employer may not use probation as a method or device to avoid creating permanent employment relationships by having indefinite probationary periods, nor can an employee be dismissed after probation if no communication or performance discussions have taken place. Every probationer is entitled to receive feedback.

A probation period is to be used to guide and train an employee where necessary. Should an employee be dismissed after probation with no tangible evidence of efforts to guide the employee and that feedback has been provided, s/he will be able to make a case for unfair dismissal. Should the employee not perform to standard, but the employer feels that the person is the right person for the position, it is possible to extend the probation. In such a case, the employer must make sure that the performance issues are annotated and re-assessed before a permanent contract is concluded.
Sometimes a manager will be asked to provide information on one of the team members, after they have left the company (also referred to as “giving a reference” or a testimonial). Career planning and development of the individual is part of the supervisor’s job, as we will discuss in module 6. Unfortunately, the growth opportunities that a company can offer are not always sufficient for specific individuals. The only way the individual can build his/her career is to seek other employment.

Giving a reference should be done in a positive and constructive way. Usually a personnel agency or someone screening applicants will phone and ask a set of questions. Questions are all job related. Question such as following can be asked:

- What was the employee responsible for while employed by your company?
- How did the person do the work (to what standard?)
- Achievements of the individual
- Can the person resolve problems?
- Interaction of the person with the rest of the team
- What motivates the person?
- If you could keep the person in you employ, will you or if you had the opportunity to employ the person, again would you?
- Management approach if a managerial position

The answers you give to these questions will have an impact on whether the person gets the new job or not. The answers should be honest and based on fact.
4. REGULATIONS RELATING TO WORKING HOURS

4.1 Normal working hours and overtime

In chapter 2 of the BCEA Act (section 6 to 8), working hours are stipulated in section 9 of the Act:

“An employer may not require or permit an employee to work more than:

a. Maximum of 45 hours a week
b. Nine hours in any day if the employee works for five days or fewer in a week
c. Eight hours in any day if the employee works more than five days. “

The Act allows for an extension of working hours if there is a need. Any working day can be extended with 15 minutes, but not more than 60 minutes in a week. This enables the employee to complete the work that they are busy with at the end of the day. This is especially applicable to people working in the public sector, in retail stores, restaurants and fast food outlets.

Chapter 2 of the BCEA also refer to the normal working hours that do not apply to:

- workers in senior management
- sales staff who travel and regulate their own working hours
- workers who work less than 24 hours in a month
- workers who earn more than R205 433.30 per annum
- workers engaged in emergency work are excluded from certain provisions


Chapter 2 of the BCEA Act deals with overtime work. Section 10 stipulates that:

There is a determination in place regarding overtime:

- An employer may not require or permit an employee
  - to work overtime except by an agreement
  - to work more than three hours a day or ten hours’ overtime per week
- An agreement may not require or permit an employee to work more than 12 hours per day, in other words, a worker may not work more than 3 hours overtime per day
- A collective agreement may increase overtime to fifteen hours per week for up to two months in any period of 12 months
Overtime must be paid at 1.5 times the employee's normal wage or an employee may agree to receive paid time off. If an employee is asked to work overtime, the person must receive payment for that. The employer is required to pay the employee at least one and one-half times the employee's wage. For example, if the person is paid R10 an hour and the person works one hour overtime the person must be paid R15 for that hour.

Alternatively, the employee and employer can agree on time off instead of payment for overtime. If both parties agree the person can:

- Take 30 minutes off for every hour worked overtime on full pay. Or
- The person can take 90 minutes off for every hour worked overtime with no pay.
- This has to be arranged before the person works overtime. These matters can be discussed with the union. Most companies will have policy in the regard.

### 4.2 Employees who do not qualify for overtime

All employees do not have to be paid overtime, even if they do work overtime. The following categories of employees do not have to be paid overtime (*Section 6(1) and 6(3) of the BCEA*):

- Senior managerial employees
- Sales staff who travel to the premises of customers and who regulate their own hours of work
- Employees who work less than 24 hours a month for you
- Employees who earn more than R205 433.30 per year (The Minister will change this amount from time to time)

*Warning! Remember that despite what the BCEA says, if the employee agreed in your employment contract*\(^2\) *to pay overtime, you must! Be careful of agreeing to pay overtime if you are likely to give your employee a salary increases that means s/he will earn more than R205 433.30 per year.*

\(^2\) From: http://www.labourlawhandbook.co.za/content/not-all-employees-need-be-paid-overtime-worked?gclid=CNj8yuCiKUCFQzS4woddkpVNg
**Tip:** Write the following clause into your employment contracts: Currently, employees who earn less than R205 433.30 per year must be paid for overtime worked. If at any stage during your employment your remuneration is increased so that you fall outside this threshold, you will no longer be paid for overtime worked, although you will still be obliged to work overtime as and when required.

### 4.3 Compressed working week

- Workers may agree to work up to 12 hours a day without getting overtime in cases of extreme urgency.
- However, they may not work more than:
  - 45 ordinary hours per week
  - 10 hours overtime a week
  - 5 days a week

### 4.4 Night work

Any work which takes place after 18h00 hours and before 6h00 hour the next day is regarded as night work, and the employer is obliged to pay a shift allowance. The Act does not state what this allowance must be, and it must therefore be paid as agreed between employer and employee if there is no bargaining council that regulates this payment. This accounts for employees who work:

- 45 hours in any week
- Nine hours in any day if an employee works for five days or fewer in a week
- Eight hours in any day if an employee works on more than five days in a week.

Workers working between 1800 and 0600 must:

- Get an allowance or
- Worked reduced hours and
- Have transport available to them (the employee does not have to provide or pay for the transport)

### 4.5 The regulations relating to breaks during hours of work

A break of 60 minutes is required after every 5 hours worked. In other words, lunch should be an hour. The company can however, negotiate this with the employees or through the union, to make lunch shorter, but not shorter than 30 minutes. In some
companies, employees will take a shorter lunch, to enable them to leave earlier in the afternoon.

There is a determination in the Act regarding breaks during hours of work:

- An employee must have a meal interval of 60 minutes after five hours work
- A written agreement may
  - reduce the meal interval to 30 minutes
  - Dispense with the meal interval for employees who work fewer than six hours a day.
- An employee must have a daily rest period of 12 consecutive hours and a weekly rest period of 36 consecutive hours which, unless otherwise agreed, must include Sunday.
- An employee who occasionally works on a Sunday must receive double pay
- An employee who ordinarily works on a Sunday must be paid at 1.5 times the normal wage
- Paid time off in return for working on a Sunday may be agreed upon.

Some of these hours are negotiated with employees e.g.; in the security industry it has been agreed that security guard work for 12 hours and then rest for 12 hours. The weekend they are given is longer than 36 hours.

In some construction companies, especially if the construction is far from where the workers live, they will work longer hours during the week, to have a long weekend. Having a long weekend from time-to-time enables the employees to visit their families. These are all examples of agreements that can be worked out between employers and employees.

4.5.1 Meal intervals

An employer must give an employee who works continuously for more than five hours a meal interval of at least one continuous hour.

During a meal interval, the employee may be required or permitted to perform only duties that cannot be left unattended and cannot be performed by another employee. An employee must be remunerated:

- for a meal interval in which the employee is required to work or is required to be available for work; and
- For any portion of a meal interval that is in excess of 75 minutes, unless the employee lives on the premises at which the workplace is situated.
4.5.2 When employees may be required to work during a meal interval

A team member might be required to work over lunch if their work cannot be left unattended. The person can also be required to work over lunchtime if no one else can do the work. If the company requires a person to work through lunch hour, the person has to be paid for that hour. The same applies if the company requires employees to stay on the company premises during lunchtime.
5. LEAVE

Labour legislation allows for a number of types of leave:

- Annual leave
- Sick leave
- Maternity leave
- Parental leave
- Family responsibility leave

Other types of leave such as study leave is not statutory leave, and it is up to the company to include it in their conditions of employment or not. There is no obligation to do so by law.

5.1 Annual leave

Chapter three of the BCEA Act describes annual (holiday) leave in sections 20 and 21. Leave is based on an “Annual Leave Cycle”, which means 12 months from the time that the individual has started working for the company or the 12 months following the completion of the previous cycle. An employee is entitled to 21 consecutive days paid leave in one leave cycle. This translates into 15 working days per 12-month leave cycle.

Leave has to be taken within 6 months of the leave cycle ending. However, while an employee is serving notice, the person is not allowed to take leave. This leave has to be paid out to the individual on the last day of employment. Public holidays are excluded from annual leave. While a team member is on leave, the employer cannot expect this person to work.

The implementation of the Act varies from company to company. In the construction industry, leave is usually taken in December. In small companies leave is planned in such a way that someone is always at the office and not everyone is gone on leave at the same time. It is a good idea to discuss leave with each of the team members as part of the annual planning process.

The leave entitlement in the Act does not apply to:

- an employee who works fewer than 24 hours per month for an employer
- leave granted in excess of the leave entitlement
5.1.1 How leave should be managed in an organisation

- Employees are entitled to no less than 21 consecutive days’ annual leave or by agreement, one day for every 17 days worked or one hour for every 17 hours worked
- Leave must be granted not later than six months after the end of the annual leave cycle
- An employer must not pay an employee instead of granting leave, except on termination of employment

*It is against the law to ‘sell’ leave for cash. An employer may not agree to pay an employee for outstanding leave – it I against the law.*

Employers must bear in mind that leave that are not managed to the letter can be very expensive. It is best to have a policy on leave, e.g. who can approve leave, have a standardised form for a leave application, and make sure that leave taken is entered on the payroll system. It often happens that employees in key positions do not take their leave due to them as a result of work pressure. If there is no policy regarding this issue, it can mean that, upon the resignation of such a person, more than two months of leave must be paid to them.

5.2 Sick leave

- An employee is entitled to six week’s paid sick leave in a period of 36 months
- During the first six months an employee is entitled to one day’s paid sick leave for every 26 days worked. Once an employee enters into the 7th month of employment, they are credited with the full sick leave allowance, minus any sick leave taken in the first six months
- An employer may require a medical certificate before paying an employee who is absent for more than two consecutive days or who is frequently absent
- Sick leave is paid leave, and therefore should be managed carefully to prevent abuse there-of.
- Traditional healers who are registered according to the Health Professions Act, may issue a medical certificate
- An attendance note from a clinic is not a complaint medical certificate. In these cases, management must compile practical methods of dealing with this reality. Millions of South Africans are dependent on medication from clinics.
In case where abuse of sick leave is suspected, the eight-week rule should apply:

A clause in the BCEA (section 23) states that an employee has been absent from work for more than two consecutive days or more on more than two occasions during an eight-week period, and upon request, the employee does not produce a medical certificate stating that the employee was unable to work for a specific duration, the employer is not obliged to pay the employee.

5.2.1 Medical certificates

An employer may reject a medical certificate when it does not comply with the following rules:

- Submitting medical certificates that do not comply with the Health Professions Act. A valid medical certificate will have the following details:
  - Name and qualification of the person issuing the certificate
  - Contact number and physical address
  - Proper practice or registration number
  - It will contain words to the effect that "I have examined (XXXX name) and found her/him to be unfit for work for a period of XXX days.
  - The medical practitioner does not have to provide a diagnosis due to doctor/patient privilege
  - Date of examination
  - Signature of issuing person
  - It will be an original document
  - The writing needs to be legible

- Submitting a medical certificate that has been tampered with or altered in any way. For example, an employee might change the date on a certificate. This is also seen a fraudulent and would warrant dismissal as a first offence.

- Submitting a falsified medical certificate is a witting act – the employee cannot claim that s/he did not know or did not mean to. It is an act of dishonesty, i.e. it is fraud, and will, when discovered, make the continuation of an employment contract impossible.
5.3 Maternity leave

Section 25 of the BCEA deals with maternity leave.

- A pregnant employee is entitled to four consecutive months of unpaid maternity leave in the case of pregnancy and birth.
- An employee may elect to begin maternity leave at any time from four weeks before the expected birth of the child, and may return on a date of her choice. Should the employee return within six weeks of the birth of the baby, a doctor or midwife must issue a certificate to indicate that the employee is fit to return to work.
- A pregnant employee or employee nursing her child is not allowed to perform work that is hazardous to her or her child.

The following process should be followed:

- The employee must inform the employer in writing four weeks before she will start maternity leave. The notification should also state on which date she will return to work.
- Maternity leave is unpaid. A company may implement a policy that is aimed at supporting the employee.
- No woman may be employed in an occupation that might threaten her or the expected child’s health. Also, a nursing mother may not work in circumstances that would constitute a health risk to her or her baby.
- A woman who has a miscarriage during the last trimester of pregnancy, or has a stillbirth, is entitled to six weeks maternity leave after the event.
- Should a woman need to take maternity leave sooner due to complications or to return to work before the six weeks after the birth, a doctor or midwife must issue a certificate to support this application.
- The Act is mute regarding the number of times a woman can take maternity leave.

5.4 Parental leave (LRA Amended)

- An employee, who is a parent of a child, is entitled to at least ten consecutive days parental leave;
- An employee who is an adoptive parent of a child who is younger than two years is entitled to adoption leave of ten weeks consecutively. If there are two adoptive parents, one of the employees is entitled to adoption leave and the other employee is entitled to parental leave; and
- An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to commissioning parental leave of ten weeks consecutively. If there are two commissioning parents, one of the employees is entitled to commissioning parental leave and the other employee is entitled to parental leave.
5.5 Family responsibility leave

- No employee qualifies for family responsibility leave as defined in the BCEA until they have accumulated four (4) months of continuous service.

- Full time employees are entitled to three days paid family responsibility leave per year, on request, when the employee’s child is born or ill, or in the event of the death of the employees’ spouse or life partner, or the employee’s parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

- Any employer may require reasonable proof of the event, such as death certificates, medical certificates, etc.
6. NOTICE PERIODS FOR TERMINATION OF EMPLOYMENT

Chapter five of the BCEA Act deals with the termination of employment. This section of the Act does not apply to employees working for less than 24 hours a month.

An employee employed for more than one year has to give a notice of four weeks. If the person worked for the company less than a year but more than four weeks, two weeks’ notice is required, while someone employed for less than four weeks, can give one-week notice.

- 6 months or less – 1 week
- Less than 1 year – 2 weeks
- More than 1 year – 4 weeks

A joint agreement between the employer and the union can change the notice period, if all parties agree. The same can apply to an individual. In the letter of appointment or employment contract the employer and employee can agree to a different notice period. This is sometimes done with managerial positions and professional people with specialised skills, in which case a longer notice period will be agreed upon.

Pay instead of notice

Payment instead of notice can be negotiated with the employee. If the parties agree payment for the notice period and leave pay, it must be paid out immediately,

- An employer is allowed to waive the notice period
- Worker must still be paid

7. THE CONCEPT OF UNFAIR LABOUR PRACTICE

Unfair labour practice occurs when an employer fails to act or acts unfairly, towards a worker concerning:

- promotion, demotion, trial periods, training or benefits;
- suspending a worker or disciplinary action;
- refusing to re-employ a worker, as agreed; and
- an employer makes circumstances difficult for a worker who was forced to make a protected disclosure

An unfair labour practice is any unfair act or omission that arises between employer and an employee that involves:

- Unfair discrimination either directly or indirectly against an employee on any arbitrary ground, e.g. race, gender, sex, age, disability, sexual orientation, etc.
• The unfair conduct of the employer relating to the promotion, demotion, or training of an employee or relating to the provision of benefits to an employee.

  E.g. If all employees pass a test and all except one are promoted, the employer might be guilty of unfair conduct against that employee.

• The unfair suspension of an employee or any other disciplinary action, short of dismissal, in respect of an employee.

  E.g. If an employee and her supervisor have an argument and the employer suspends only the employee, even though it is unclear who was to blame for the argument, this could be an unfair suspension (this category excludes dismissal, because dismissals are dealt with in Chapter 8 of the Act.)

• The failure or refusal of an employer to reinstate or re-employ a former employee in terms of any collective agreement between an employer and employee.

  E.g. If an employee was retrenched but it was agreed with the employer that the employee would be re-employed if a suitable job became vacant, and the employer disregards the agreement by employing another person when a suitable job does become vacant, the employer will be guilty of an unfair labour practice.

• Employees who “blow the whistle” may not be dismissed and may not be subjected to disciplinary action, suspended, demoted, harassed, intimidated, or be refused a transfer or promotion.

  E.g. If an employee informs the Department of Labour that an employer has been deducting UIF amounts from all the employees’ wages in the factory but not making payment to the fund and the employer then discovers the employee’s disclosure the employer may not subject the employee to disciplinary action or in any other way prejudice the employee because of the disclosure.

If there is a dispute about an unfair labour practice the aggrieved employee may refer the dispute to a council or to the CCMA. The referral must be made within 90 days of the alleged unfair labour practice.

The council or CCMA must attempt to resolve the dispute through conciliation. If the unfair labour practice concerns probation, the CCMA or council must deal with the dispute by ‘con-arb’. This means that if conciliation is unsuccessful, the arbitration must start immediately. If the dispute does not concern probation then the employee must refer the dispute for arbitration within 30 days of the council or CCMA issuing a certificate that the dispute remains unresolved. The council or CCMA must then arbitrate the dispute.

The employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that he or she has been
prejudiced by his or her employer in contravention of the Protected Disclosures Act, 2000.

Summary of Latest Amendments relating to Unfair Labour Practice:

Chapter 8 of the LRA now deals with unfair dismissals and unfair labour practices, and the residual unfair labour practice is no longer contained in Schedule 7 (clauses 39, 40, 46 and 55):

- An unfair labour practice means any unfair act or omission that arises between an employer and an employee involving:
  - 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
  - the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
  - a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
  - 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”

- Unfair conduct relating to probation and paragraph (d) above are the new additions to the unfair labour practice definition contained in the Amendment Bill.

- The referral of unfair labour practice disputes to conciliation and arbitration is now governed by Section 191 of the Act, and must be referred within 90 days of the alleged unfair labour practice (or the employee becoming aware of it). This may be extended on good cause shown (clause 46).

- Where an alleged unfair labour practice concerns an employee being subjected to an occupational detriment in contravention of the Protected Disclosures Act 2000 for having made a protected disclosure, the employee may refer that dispute to the Labour Court for adjudication (Clause 46 (i)).

- The terms of reference for arbitrators in resolving unfair labour practice disputes are kept to determining the dispute on terms that the arbitrator deems reasonable (clause 47). Compensation awarded must be just and equitable, but not more than the equivalent of 12 months’ remuneration (Clause 48(c)).
The consequences of unfair labour practice for the organisation would include:

- A bad image of the organisation in the business world
- Huge financial claims against the organisation
- Re-employment of the employee
- It can create a negative feeling amongst the employees in the organisation
- It can lead to a lack of trust in management
- The organisation can be black listed for unfair labour practices
8. DISCIPLINE IN THE WORKPLACE

It stands to reason that every organisation must operate within the boundaries set by the various labour acts. The company has specific objectives, and is obliged to reach those objectives through the efforts of employees. It therefore makes sense to have a set of rules that regulates the effort of employees and the relationships between employees, and employees and employers.

It can furthermore lay some cornerstones on how to deal with performance and behavioural issues in the workplace through relevant and fair policies and procedures. Not all employee transgressions have to result in formal disciplinary action – there could be times that a counselling session would be all that is required.

Counselling will be appropriate where the employee is not performing to a standard or is not aware of a rule regulating conduct and/or where the breach of the rule is relatively minor and can be condoned. Disciplinary action will be appropriate where a breach of the rule cannot be condoned, or where counselling has failed to achieve the desired effect.

The organisation’s disciplinary code and procedure should make provision for the following:

8.1 Progressive discipline

The Act promotes the principle of **progressive discipline**. This means efforts should be made to correct employees’ behaviour by means of graded disciplinary action. The most effective way for an employer to deal with minor problems is by informal advice and correction. It is important that performance discussions are noted, and that the issues under discussion are clearly stipulated. In the case of poor performance, the employer must be clear about the standards that apply what the employee is not doing, and what is expected in future. This discussion and other similar discussions need to make it clear what behaviour is not acceptable, what performance standards are.

Repeated misconduct will justify repeated and more severe warnings until a final warning is issued.

An employer should apply progressive discipline on the understanding that discipline should be corrective rather than punitive. This means that the employer should endeavour to first correct an employee’s behaviour, such as by issuing:
• **Verbal Warning** - for minor transgressions. Verbal warnings are appropriate in the case of minor offences or if a rule was broken the first time. Hold a meeting with the employee. Allow the employee to explain and give reasons for what happened. If after the explanation, you still think that a verbal warning is appropriate, give it. State clearly that it is a verbal warning. The employee is allowed to have a representative with them during the meeting. A verbal warning is valid for three months. Complete the required verbal warning documentation and keep on record for the required period.

• **Written warning** - for consistent misconduct. A written warning is appropriate if the verbal warning is being ignored or if a serious offence took place, but not a dismissible offence. The procedure is the same as for a verbal warning; the only difference is that the warning is written. It is valid for 6 months and is kept on the personal file of the individual. Complete the required written warning documentation and keep on record for the required period.

• **Final Written Warning** - for persistent misconduct. Final Written warning is given if the same offence is committed within 6 months or it is an offence that warrants a final written warning. The final written warning is given after a disciplinary hearing (which is discussed in the next session) and is valid for 12 months. Complete the required written warning documentation and keep on record for the required period.

All warnings given, including a verbal warning should be acknowledged by the employee concerned. The employee must sign the warning or the disciplinary report. This means that the employee acknowledges receipt and understands the content of the warning. Should an employee refuse to sign, this should be noted and witnessed.

Warnings are not effective for an indefinite period and usually expire after six to twelve months so that two offences of the same nature committed over a period of fifteen months would both be considered as first offences and not a first and second offence. Warnings that have expired cannot be considered in a decision as to the guilt of an employee in that they cannot compound the transgression.
• **The need for consistency**

Consistency refers to the fact that all employees should receive equal treatment, but according to the circumstances, different decisions could be made as to sanctions. Care should be taken that clear reasons exist for imposing a particular sanction and that it does not constitute favouritism or ignorance on the part of the person responsible for the hearing.

• **The need for fairness**

Fairness is the most important aspect of the disciplinary procedure / code and has to be kept in mind at all times. What is fairness? According to the LRA:

- If there is an act, which justifies summary dismissal, or if the required notice is given, the dismissal is LAWFUL and therefore can be no breach of contract, or a civil action.
- It must follow a proper procedure to be procedurally fair.
- It must establish the reason or substance and therefore be substantively fair.

**Procedural Fairness** - The following steps should be followed to ensure procedural fairness. This means that the employee must:

- hear the charges against him/her
- be allowed a defence
- be entitled to representation if he/she so wishes
- be entitled to appeal against the decision to a higher authority

**Substantive Fairness** - Substantive fairness is the reason(s) used to determine a verdict. Reasons based on the Code of Conduct of the company, rules, standards and procedures or the organisation, e.g. the reasoning is based on how the misconduct is in violation of the code of conduct, rules, standards or procedure.

Substantive fairness is also based on being reasonable. Labour law is based on the “balance of probabilities” and not on “proof beyond reasonable doubt”. In other words, when reasoning in a labour case the chairperson, or arbitrator at the CCMA, will be asking what is the most probable or reasonable chain of events. Reasoning is also based on the contents of the act, in other words what is legal and what is not. The chairperson, or arbitrator, will also review previous cases (called case law) of the CCMA and Labour Court to guide them when deciding on an appropriate verdict.
A disciplinary code / procedure will not be effective unless it is comprehensive, accessible, lucid and conforms to the principles of natural justice and unless the rules and code have been clearly formulated. A disciplinary procedure has to be made to work.

First line managers in particular need to understand and be able to apply the conduct of the disciplinary procedure within your organisation. Not only do they need to know the generic principles underlying any disciplinary procedure to conduct investigations and hearings successfully, you also need to train yourself to remain calm and neutral and to weigh the relevant facts and reach a reasoned decision.

A disciplinary procedure which is fairly and consistently implemented can create trust, reliance and good faith in the labour relationship.

A hearing cannot be held simply on the basis of an allegation made. The allegation is followed by an investigation to establish the facts and gather evidence and statements. Only once this has been done, can you decide whether a hearing should be held or not.

A disciplinary process starts with an incident. To decide if a disciplinary hearing is necessary you must first investigate the charges. A formal disciplinary hearing is required when dismissal could be an outcome.

### 8.2 Arbitration instead of Disciplinary Hearing

In terms of recent amendments to the Labour Relations Act, employers and employees can agree that an arbitrator should be requested to conduct an enquiry in regard to the employee’s conduct or capacity. This permits parties, by agreement, to short circuit the statutory dispute resolution procedure and avoids much duplication in procedures.

Such arbitrations allow for a single procedure that results in a final and binding arbitration award. The decision of the arbitrator will be subject only to review by the Labour Court.

The employer pays a fee for the arbitration service rendered. The actual amount/fees have not yet been determined and will be subject of regulation.
8.3 The disciplinary hearing

8.3.1 Preparation for the hearing
Once it has been concluded that there is sufficient evidence to institute a disciplinary hearing, the investigating officer will have sufficient evidence to decide as to whether to institute a disciplinary or not you need to formulate charges, notify the accused and plan your strategy. Depending on the seriousness of the offence you would also have to decide whether you need to suspend the employee pending the hearing.

- Managerial involvement
The organisational disciplinary procedure should specify the level of management which will be responsible for deciding on the disciplinary measure to be taken. While verbal and first written warnings may be given by the employee's immediate supervisor, it is preferable that final written warnings be issued at a higher level. You as a supervisor will have to decide as to what action you need to take.

- Time Limits
Disciplinary action is subject to fixed time limits. This applies both to the period within which any action can be brought and the time allowed for an investigation, or enquiry and appeal. Time limits should preferably be relatively short as disciplinary action should be almost immediate, but particularly in the case of a serious offence, sufficient time should be allowed for notification of the employee and for the necessary evidence to be collected by both sides.

8.3.2 The procedures to be followed at a disciplinary hearing
A disciplinary hearing is held if the person does not adhere to a final written warning or the seriousness of the offence requires a disciplinary hearing. The employee can be suspended on full pay, if the presence of the person in the workplace will jeopardize the investigation. The employee is given not less than 3 days' notice of; time, date and venue of the hearing, details of the charge against him or her, which describe the alleged misconduct, and the right to be represented at the hearing.

Remember:
All disciplinary action needs to be procedurally fair and substantively fair.

- Procedural fairness in respect of a disciplinary hearing would include:
  - Adequate notice
  - The hearing must precede the decision
• The hearing must be timeous
• The employee must be informed of the charge/charges
• The employee should be present at the hearing. If not, the hearing should be conducted in absentia.
• The employee must be permitted representation (fellow employee or union member)
• The employee must be allowed to call witnesses
• The presiding officer should keep minutes
• The presiding officer should be impartial

**Substantive fairness** would include satisfying the following:

• Was the employee guilty of the offence charged?
• Did the gravity of the offence justify the penalty of dismissal?

### 8.3.3 Conduct an investigation

The next step in the disciplinary process, once it has been established that there is a case, is to do a thorough investigation. At this point, the employer should make it clear to the employee that s/he is merely under investigation and that no charges have been made, nor are they necessarily guilty. The purpose of the investigation is to establish:

• Which rule (contained within the disciplinary code and policy) has been broken, or which work standard had not been complied with
• What aspect of the conduct or performance is not acceptable
• If there is sufficient evidence
• Why and how the incident occurred
• Whether a formal hearing is the most appropriate action
• Whether the employer could have been reasonably expected to know the rule or standard

The investigation into the matter should answer the following questions:

• Is there any validity in the allegations?
• Is there enough evidence to prove the charges?
• Are the charges serious enough to merit a disciplinary hearing?

The answers to this question will provide the investigating officer (complainant) with a solid starting point that will provide:

• Reassurance and avoid bringing harm to a relationship by bringing a weak case to the hearing
• The information you need to formulate charges
• The opportunity to gather valid and sufficient evidence to take to the hearing
• A convincing case if the employee is indeed guilty

When investigating the case, the investigating officer should:

• Question all relevant parties
• Examine all available and relevant records
• Inspect the scene of the incident
• Inspect other sources of evidence

Evidence that is sufficient to convince the chairperson (of the disciplinary hearing) is called proof. In order to provide such proof, you will gather the following types of evidence:

**Witness evidence** – This would include people who saw or heard the incident, people who can explain processes and procedures and technical experts who can give evidence on illness, weapons used etc. Whilst you will get a written statement from the witness they have to appear in person at the hearing to testify. Presenting the written evidence will not be sufficient.

**Documentary evidence** – This may include records of telephone calls, letters, e-mails, time sheets or any other documentation relevant to the case.

**Objects** – Visual evidence e.g. a video tape of a theft taking place etc.

**Places** – if the case warrants it you may have to take the participants to the actual place where the incident happened to demonstrate some aspects of the case.

Evidence that may not be used is:

**Hearsay evidence** – This is indirect evidence i.e. a third party heard that he arrived two hours late for work.

**Opinion evidence** – A witness cannot give an opinion unless you are using a subject matter expert

**The verdict of a previous hearing** – Even if a person was found guilty of the same offence a month ago you cannot use the same evidence for the case. It would however be presented as aggravating circumstances towards the end of the hearing.
Character evidence – This is not acceptable unless the accused brings up the subject of his character during the hearing.

- Investigations and inquiries

Any transgression allegedly committed by an employee has to be investigated and, in each case, no matter how minor the transgression, the employee should be given an opportunity to explain or bring his side of the story.

In some instances, this would entail calling the employee aside and establishing the facts, as would be done for example if an employee arrived late. In the cases of more serious transgressions a detailed investigation may be necessary.

Witnesses may have to be found and statements might be taken, although it should be borne in mind that such statements cannot eventually be presented on their own. They serve as corroboration of evidence given during a final hearing.

Remember that the employee under suspicion should be informed that an investigation is taking place.

8.3.3.1 Balance of probabilities

An employer is not required to prove the commission of misconduct by an employee beyond a reasonable doubt — i.e. that if any reasonable doubt or possibility of another explanation exists as to the employee’s guilt, he cannot be found guilty. Confusion as to the standard of proof often leads to a defendant thinking it sufficient to ‘poke holes’ in the version of the employer’s witnesses to create doubt or offer other possibilities, but then fails to present an alternative probable version of his own. In weighing up the probabilities, the chairperson is not required to exclude every possible doubt in order to conclude the employee’s guilt.

8.3.4 Formulate the charges (complaint)

After gathering the facts, you must formulate the charges to be brought against the accused. The charge should be detailed and contain detail of who, what, when, where and why. This should be clear enough so there is no argument from the employee that he/she did not have sufficient information to prepare a defence. The charge must be simple – there is no need for legal terminology.
8.3.5 Notify stakeholders of disciplinary hearing (see Annexure A)

All written notices must be properly served on the employee concerned (written warning, final written warning, notice to attend a disciplinary procedure etc.)

It is recommended that the employee who is served with a notice should be asked to sign acceptance of receipt of the notice. However, if the employee refuses to sign when served with a notice, the employer should record this fact on the notice and state the time, date and place where the notice was handed to the employee concerned. It is also important to note that, should an employee sign that a notice for a disciplinary hearing has been received, it does not mean acknowledgement of guilt. It merely means that the notice has been received.

If a hearing is to be held, the employee must receive timeous notification. The notification should be in writing, in a language the employee can understand and should state:

- Clearly what the employee is alleged to have done
- Why this constitutes a breach of company rules
- What the rights of the employee are before and during the hearing
- Related transgressions

The employee may ask for further information or for disclosure of information which may be necessary for him to produce his defence. An employee is entitled to be represented by a union official or fellow-employee of his choice, to call witnesses and to cross-question the witnesses presented by management and to an interpreter if necessary.

At least 24 hours advance notice must be given, but it could be longer depending on the circumstances and how complex the case is.

8.3.6 Suspension of the accused (if necessary) pending the hearing

It is common practice amongst employers to suspend employees under suspicion of having committed dismissible offences. Not all dismissible offences warrant suspension. Suspension is justified only if there is a threat to other employees, the danger of sabotage or a possibility that the employee could tamper with evidence.

Suspension is a serious step which could prejudice the employee or cause unnecessary psychological stress. The fact that the employee is paid while on suspension (which has to be the case) does not justify unnecessary suspension.
An employee may be suspended pending a disciplinary hearing or as a sanction as an alternative to dismissal. The first type is not intended to be punitive but may be done if the employer feels that such an action is necessary for good administration or to ensure that the disciplinary investigation can effectively be conducted. Since this type is not punitive in nature the employer needs to continue to pay the employee, unless otherwise specified in statutory conditions. An employer may suspend an employee without pay as an alternative to dismissal provided that certain conditions are complied with.

8.3.7 Choose a neutral chairperson

It is simple justice that the accuser should not also be the judge and that the person making the decision where a misdemeanour is under investigation should not display a bias toward either party. For this reason, a disciplinary hearing should preferably be chaired by a person who has not been involved in the matter and has no previous knowledge of the allegations.

It is essential that the chairperson avoids discussing the matter with any of the parties before or during the hearing and in particular does not consult his/her fellow-managers before reaching a decision, although expert advice may be sought from the HR or IR Manager if the integrity of these persons is trusted by both parties.

8.3.8 Conduct a hearing – key people involved

The key people involved in the hearing are:

- **The chairperson** – His/her role is to:
  - Control the hearing
  - Hear and evaluate the evidence presented
  - Decide if the accused is guilty or not
  - Hear mitigating and aggravating circumstances
  - Decide on the appropriate corrective or disciplinary measure

- **The accused employee** – The accused has the right to attend the hearing from start to finish. This gives him the best chance in defending his/her case.

- **The accused’s representative** – The employee’s representative that will assist him with his defence. Note that this must be a fellow employee or a union representative, it may not be an attorney or an external consultant.
• **The complainant** – This is the person who will bring the charges against the accused. This should be the person who best understands the charges, and in many cases will be the person who investigated the case.

In addition to these key people there will also be the witnesses, an interpreter where necessary as well as a clerk who can take minutes and operate a tape recorder where necessary.

8.3.8.1 **Double jeopardy**

Double jeopardy is a well-known term in criminal law. This means that a person cannot be tried twice for the same offence. However, in labour law, double jeopardy is discussed and understood in more than one way.

Double jeopardy or double punishment applies in instances where a particular sanction has been enforced, and then subsequently a further or harsher sanction is enforced for that same act of misconduct.

In other words, double jeopardy could be summarized as instances where:

- a second prosecution for the same offense after acquittal takes place; or
- a second prosecution for the same offense after conviction takes place; or
- where corrective measures (“punishment”) are applied more than once for the same offence.

One finds that employers who continue to:

Give employees warnings and institute dismissals at the same time;

- Reopen cases that should be left alone;
- Set up new disciplinary hearings without good reason after the employee has already been disciplined for the offence; and
- Open new hearings with newly formulated charges, only to find that the “new” charges are merely a different way of wording the same charges in respect of which the employee managed to avoid dismissal.

The above will most likely be regarded as harassment, and the CCMA will not stand for it.

*There is a possibility that a case can be re-opened because new evidence has been discovered. In such a case, the employer may charge the employee again. This is not double jeopardy. However, the employer must have clear evidence of new evidence. It cannot be the same evidence dressed up in another way.*
8.3.9 Appeal
Once the decision as to sanction has been taken, the parties should be informed and the reasoning behind the decision briefly explained. The employee should be informed of his right to appeal, if an appeal procedure exists, or to dispute the decision.

The chairperson should record his own findings and ensure that records of the process are available.

To ensure that a disciplinary is effective and legally compliant the following guidelines should be used when you find yourself in a situation where you have to manage a disciplinary:

- Investigate and prepare the case thoroughly before the hearing
- Choose an unbiased and skilled chairperson who has no knowledge of the charges
- Ensure the accused is given every chance to prepare and defend his case
- Base the outcome on facts
- Ensure the penalty is appropriate to the offence
- Record the hearing so that you can prove you complied with the law.

8.3.10 Keep disciplinary records
It is essential that all disciplinary actions be recorded on a disciplinary form and on the employee’s disciplinary record. Such records will reflect the date of the transgression, its nature and the action taken. The reports should be witnessed and stored for later referral.

Records should be kept of counselling sessions, coaching sessions, performance discussions, sessions where warnings are issued and hearings. In the case of a hearing on a very serious offence, it is advisable that the entire proceedings are recorded, either by minute taking or on tape, and that these recordings be verified by the parties.

The Code of Good Practice recommends that employers keep a record for each employee specifying the nature of any disciplinary transgression/s, the actions taken by the employer and the reason/s for such action/s. For this reason, the disciplinary procedure requires the employer to file copies of any verbal, written or final written warning or any representation made by the employee on the employee's personal file.
8.4 Follow the procedure for the hearing

Ideally the allegations should for the first time, be put before the chairperson at the commencement of the hearing. There is a specific procedure that needs to be followed during the proceedings:

8.4.1. Introduction

The chairperson will introduce all parties to each other and explain the procedure. The Chairperson will ask the accused whether he/she was properly notified of the hearing and his/her rights and whether these rights have been observed. (Rights may include the right to a representative, an interpreter, access to information, sufficient time to prepare etc.). To avoid later accusations the chairperson may also ask whether it is acceptable to the employee and his/her representative that he/she chairs the hearing. There might be the need for a translator, and the respondent must be informed in time that s/he has the right to a translator.

All persons at the hearing should be introduced and agreement reached on the manner in which the proceedings are recorded.

To make sure that there are no hick-ups early on in the process, ensure that the parties involved sign off at the beginning of the hearing the following:

- That charges were received early enough
- That the accused acknowledge understanding of the charges
- That no translator is needed, or that a translator has been arranged

8.4.2. The charge

The allegations are read to the employee who is then asked whether he/she understands them. Acknowledgement of understanding needs to be signed.

8.4.3. Presenting evidence

The hearing then proceeds with the complainant explaining the events which led to the allegations. The employee or his representative then makes an opening statement.

Once the case of each party has been stated, they should, in turn, be allowed to argue the case and call witnesses. The chairperson needs to remind both of their right to cross-examine and should himself ask questions in clarification, but should not adopt
a prosecutorial stance. Where there is a conflict of fact, the chairperson should engage in further interrogation in order to establish which party is the more credible.

After both parties have presented argument, the chairperson may ask final questions in clarification and briefly sum up the main aspects of the case. Thereafter he retires to make his decision as to whether the employee has, on the balance of probability, committed the transgression.

It does not have to be proved ‘beyond reasonable doubt’ that the employee is guilty of the alleged transgression. All the chairperson has to do is weigh the factors which point to the employee having committed the transgression against those which may cast doubt on a conclusion as to guilt.

_In Labour Law, the chairperson does not deal with the concept of “beyond a reasonable doubt” as is the case with Criminal Law. The principle of a “balance of probabilities” is enough to make a finding._

For example: If an employee is proven to be the only person in an office, and money goes missing, it is enough to prove that, if this was the only person in the office, it stands to reason that s/he is the only person who could have taken the money, i.e. on a balance of probabilities. Another question to ask is whether a reasonable person, having the same evidence placed before him would come to the same conclusion.

8.4.4 Finding
Once the chairperson has heard all the evidence, he/she adjourns the hearing to evaluate the facts given in evidence and decides on the balance of probabilities whether the employee is guilty or not. If the employee is not guilty the hearing will end here.

The following are examples of recommended disciplinary sanctions for transgressions needing disciplinary action:

_Please note that this list contains only a few of the common examples and would need to be altered to suit your company’s policies and procedures as well as your particular industry_

<table>
<thead>
<tr>
<th>Severity</th>
<th>Example Transgressions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serious and/or</td>
<td>• Bribery, blackmail, corruption, fraud, dishonesty, theft or removal of property from Company premises, or from</td>
</tr>
<tr>
<td>Dismissible:</td>
<td></td>
</tr>
<tr>
<td>Severity</td>
<td>Example Transgressions</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>A formal disciplinary hearing is required in each of these instances</td>
<td>employees on Company premises where employed, or from customer's premises, or from Company vehicles.</td>
</tr>
<tr>
<td>before the appropriate sanction is decided on</td>
<td>• Unauthorised possession or misappropriation of Company, fellow employee’s or customer's property.</td>
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<td></td>
<td>• Wilful damage to, interference with or wasting of Company, employee or customer property.</td>
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<td></td>
<td>• Gross insubordination or failing to carry out reasonable instructions or neglect or improper performance of duties or wilful non-compliance with Company procedures and standing instructions.</td>
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<td></td>
<td>• Assault or any attempt to assault any person.</td>
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<td></td>
<td>• Being under the influence, or in possession of intoxicating liquor or drugs whilst at work, or taking of liquor or drugs whist on the Company's premises.</td>
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<td></td>
<td>• Clocking in or out falsely or clocking another employee’s clock card.</td>
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<td></td>
<td>• Failing to carry out safety precautions, dangerous horseplay and unauthorised removal of safety appliances.</td>
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<td></td>
<td>• Failing to report a work accident or damage to Company property.</td>
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<td></td>
<td>• Sexual harassment.</td>
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<td></td>
<td>• Unauthorised or negligent operation of machinery or equipment, wilful damage to or interference with or wasting of Company property, tools, machines, etc.</td>
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<tr>
<td></td>
<td>• Unauthorised use of Company vehicles, or driving any vehicle negligently.</td>
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<tr>
<td></td>
<td>• Unauthorised absence from work place for 3 days or more without notifying the Company.</td>
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<td></td>
<td>• Changing a medical certificate or using a false name; falsifying any document pertaining to the Company.</td>
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<td></td>
<td>• Gross insolence, insolence or defiance of authority.</td>
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<td></td>
<td>• Smoking, lighting of fires or burning of anything in high hazard areas, where signs indicating &quot;no smoking&quot; are clearly displayed.</td>
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<td></td>
<td>• Being in possession of a firearm or dangerous weapon without the written permission from the Managing Director.</td>
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<tr>
<td>Severity</td>
<td>Example Transgressions</td>
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<td>----------------------</td>
<td>---------------------------------------------------------------------------------------</td>
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<td></td>
<td>• Unprotected industrial action, or inciting other employees to participate in industrial action, including, but not limited to strikes &amp; work stoppages.</td>
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<td></td>
<td>• Disclosure or misuse of Company information unless reasonably required in terms of labour legislation.</td>
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<td></td>
<td>• Unauthorised use of Company property for private or other purposes.</td>
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<td></td>
<td>• Victimisation, racism or discrimination.</td>
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<td></td>
<td>• Intimidating or inciting employees to violence of any form.</td>
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<td></td>
<td>• Failing to observe safety rules or to wear protective clothing or equipment.</td>
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<td></td>
<td>• Making false statements when applying for employment</td>
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<tr>
<td>Serious:</td>
<td></td>
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<tr>
<td>A formal enquiry is</td>
<td>• Misuse of the company’s email, internet or telephone services and any other company business tools.</td>
</tr>
<tr>
<td>recommended before</td>
<td>• Refusing to perform any lawfully assigned regular work, or to obey management instructions without just or reasonable cause.</td>
</tr>
<tr>
<td>deciding on the</td>
<td>• Loitering in canteen or other departments or on Company premises after having clocked out or on completion of work or being absent from workstation or office without permission.</td>
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<tr>
<td>appropriate sanction.</td>
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<tr>
<td>Possible sanctions</td>
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<td>could be from a first</td>
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<td>written warning to final written</td>
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<td>warning depending on the circumstances</td>
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<td>surrounding the incident.</td>
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<tr>
<td>A disciplinary hearing is required in instances of a final written warning</td>
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<tr>
<td>Serious and/or Less</td>
<td></td>
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<tr>
<td>Serious:</td>
<td></td>
</tr>
<tr>
<td>A verbal discussion</td>
<td>• Sub-standard workmanship or wilfully failing to maintain output or work levels</td>
</tr>
<tr>
<td>which could result in</td>
<td>• Using abusive or insulting language or signs</td>
</tr>
<tr>
<td>a verbal or written</td>
<td>• Sleeping on duty</td>
</tr>
<tr>
<td>warning</td>
<td>• Bad time keeping, late for work or unauthorised absence from the workplace. Failing to report for overtime work when agreed to do so</td>
</tr>
</tbody>
</table>

Serious: A formal enquiry is recommended before deciding on the appropriate sanction. Possible sanctions could be from a first written warning to final written warning depending on the circumstances surrounding the incident. A disciplinary hearing is required in instances of a final written warning.

Serious and/or Less Serious: A verbal discussion which could result in a verbal or written warning.

Serious: Misuse of the company’s email, internet or telephone services and any other company business tools.

Serious and/or Less Serious: Sub-standard workmanship or wilfully failing to maintain output or work levels.
### Severity

<table>
<thead>
<tr>
<th>Example Transgressions</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Carelessness and non-compliance with Company rules, regulations and procedures</td>
</tr>
<tr>
<td>• Unauthorised absence from work of up to 3 days without notifying the Company</td>
</tr>
<tr>
<td>• Posting or distributing notices posters, etc. without the Company’s permission or soliciting of any kind</td>
</tr>
</tbody>
</table>

*Adapted from: www.hrworks*

#### 8.4.5. Mitigating and aggravating circumstances

If the verdict is guilty, the chairperson will reconvene the hearing and ask the employee to present factors in mitigation. Mitigating factors are those that could persuade the chairperson to impose a lighter penalty e.g. a clean disciplinary record, a show of remorse etc.

The complainant will then be given the opportunity to counter the employee’s evidence with aggravating evidence. This may result in a harsher penalty e.g. the accused was in a position of trust, or recent previous, similar offences.

The chairperson must then inspect the employee’s service record in order to establish whether there are any relevant and valid warnings on record. If there are current warning for similar offences to the current case these must be considered.

#### 8.4.6. Penalties

The duty of the chairperson is now to consider all the evidence before deciding on the sanction or penalty to be imposed.

Over and above mitigating and aggravating circumstances the decision should be tested by asking the following questions:

- Is the purpose of the sanction to deter others? Will the proposed sanction do so? Is it in fact necessary to do so? Here the nature of your business has to be considered. If, by the nature of the business, it is easy for other employees to do the same thing, then deterrence becomes an important consideration.

- Is it necessary to impose the sanction to prevent a recurrence – that is would the consequences be serious were the same thing to happen again? This also entails asking oneself if the employee is likely to do it again, whether it is in character for him/her to commit such an act. His previous record and performance are, therefore, of importance in this respect.
Can the employee possibly be rehabilitated without the sanction, or is the sanction necessary to rehabilitate him/her?

Will imposition or non-imposition of the sanction adversely affect the company, the employee or other employees?

If aggravating circumstances outweigh mitigating factors and if the answers to some or most of these questions point to the need for imposing a sanction of dismissal, then that sanction is in all probability well justified. Where the chairperson is of the opinion that the relationship cannot be restored, dismissal is justifiable.

8.4.6.1 Guidelines for Appropriate Sanctions

Disciplinary sanctions are often recorded in the company policies and procedures documentation as guidelines depending on the severity of the transgression.

The following is an example of such a document:

<table>
<thead>
<tr>
<th>Offence</th>
<th>First Offence</th>
<th>Second Offence</th>
<th>Third Offence</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Absenteeism without an acceptable reason</td>
<td>Written warning</td>
<td>Final written warning</td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Unauthorised absence from work area or duty during working hours</td>
<td>1st written warning</td>
<td>2nd written warning</td>
<td>Final written warning</td>
<td>Dismissal for 4th offence</td>
</tr>
<tr>
<td>Poor time keeping (clocking in / out, late / early)</td>
<td>1st written warning</td>
<td>2nd written warning</td>
<td>Final written warning</td>
<td>Dismissal for 4th offence</td>
</tr>
<tr>
<td>Laziness at work / poor work performance</td>
<td>1st written warning</td>
<td>2nd written warning</td>
<td>Final written warning</td>
<td>Dismissal for 4th offence</td>
</tr>
<tr>
<td>Failing to carry out instructions of supervisor or management</td>
<td>Final written warning</td>
<td></td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Insolence or insulting behaviour or refusal to obey lawful instructions</td>
<td>Final written warning</td>
<td></td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Threatening violence</td>
<td>Final written warning</td>
<td>Final written warning or dismissal</td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Intimidation</td>
<td>Dismissal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intentional damage to Company or employees</td>
<td>Warning/dismissal depending on seriousness</td>
<td></td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Drunk or under the influence of liquor or drugs</td>
<td>Written warning</td>
<td></td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Offence</td>
<td>First Offence</td>
<td>Second Offence</td>
<td>Third Offence</td>
<td>Notes</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>---------------------</td>
<td>---------------------------------</td>
<td>--------------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Theft, falsifying records, unauthorised possession of Company property</td>
<td>Dismissal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breaches of Statutory or Company rules and regulations</td>
<td>Final warning / corrective training</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Desertions (absent from work for 3 days without permission or a Doctors certificate)</td>
<td>Dismissal backdated to first day absent</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dishonesty concerning work done</td>
<td>Final warning</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victimisation</td>
<td>Final warning</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negligence</td>
<td>Final written warning or dismissal</td>
<td>Dismissal if, due to mitigating factors, he was not dismissed the first time</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unauthorised use of Company labour or material to work or doing private work during working hours</td>
<td>Final written warning or dismissal</td>
<td>Dismissal if, due to mitigating factors, he was not dismissed the first time</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inciting other employees to commit act(s) detrimental to the Company</td>
<td>Final written warning</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deliberate reduction of production, quality or efficiency</td>
<td>Final written warning</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fighting or being in possession of dangerous weapons</td>
<td>Dismissal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sabotage / refusal to work other than a procedural strike</td>
<td>Dismissal</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
9. DISMISSALS

Dismissals form a very big part of the case load of the CCMA and is the most contested of all aspects of employment law. Schedule 8 of the LRA contains a Code of Good Practice: Dismissals. This document provides basic information regarding dismissals.

The International Labour Organisation (ILO) has the following approach:

*Every single dismissal that takes place must be done in a manner that is fair and for a reason related to either the conduct or the performance of the employee, or the operational needs of the employer's business. Every single case of dismissal is unique and requires consideration and determination on its own facts.*

Due to the changes brought about by the Wiehahn Commission in 1979, the concept of unfair labour practice was introduced. It was only a matter of time for the then Industrial Court to introduce the concept of unfair dismissal. This concept will be discussed later in the module.

**9.1 The concept of Constructive Dismissal**

Constructive dismissal is where an employee resigns with or without a notice or leaves employment due to unfair pressure, unreasonable instruction or unbearable conduct on the part of the employer (LRA, s186, s192). Constructive dismissal is treated the same as other kinds of dismissals and the employee is entitled to relief in terms of the LRA.

Dismissal is a form of statutory dismissal that would be open to scrutiny by the law. Section 186(1)(e) of the LRA defines constructive dismissal as a dismissal where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee." In essence the conduct of the employer gives the employee no option but to resign or repudiate the employment contract.

As the employee, you should consider carefully whether you want to go this route as to immediately withdraw from the employment contract on this basis:

- can have financial implications as money can be deducted off your salary for your failing to work your notice period;
can be seen, if you find new employment, as a normal resignation to find better prospects and thereby precluding you from receiving legal redress;

If you do not find employment, you could find yourself against an employer who would rather delay and fight, than settle your lawful claim. You could find it difficult to prove your case against such an employer.

It is advisable to use the employer’s Grievance Procedure and seek expert advice prior to repudiating your employment contract on this ground.

Where an employee alleges that he/she has been dismissed by way of constructive dismissal, the employee bears the onus of establishing that a dismissal was unfair. An employee is required to prove that:

- his/her situation had become so intolerable that he/she was unable to work;
- he/she would have continued working indefinitely had the employer not created the unbearable situation;

He/she resigned because she did not believe that the employer would reform or abandon the pattern of creating an unbearable work environment

### 9.2 The concept of automatically unfair dismissal

To understand the concept of automatically unfair dismissal, we must first define dismissal. Under the LRA an employee is regarded as dismissed when:

A dismissal may be fair or unfair depending on the circumstances. The Act states that certain reasons for dismissal will always be unfair.

A dismissal will be regarded as automatically unfair if:

- An employee participated in a legally protected strike
- The reason for dismissal is that the employee refused to do any work normally done by an employee who at the time was taking part in a legally protected strike
- The reason for dismissal is that the employee has exercised freedom of association or that the employee is a member of a workplace forum
- The reason for dismissal is to compel the employee to accept a demand made by the employer
- The reason for dismissal is that the employee took action, or indicated an intention to take action, against the employer
- The employee was pregnant, or any reason related to her pregnancy
- The employer unfairly discriminated against the employee on an arbitrary ground, including sex, gender, race, social or ethnic origin, sexual orientation,
colour, age, religion, disability, conscience, belief, political opinion, language, marital status, culture or family responsibility

- An employer ends a contract of employment with or without notice to the employee
- An employee has a reasonable expectation that the employer will renew a fixed-term contract on the same or similar terms but the employer offers to renew it on less favourable terms or does not renew it at all.
- An employer refuses to allow an employee to return to work after maternity leave.
- An employer selectively re-employs some employees after dismissal for the same or similar reasons but fails to re-employ others
- An employer makes the working environment impossible for the employee to tolerate, which forces the employee to leave (known as constructive dismissal)

However, there are two exceptions to this last point of automatically unfair dismissal:

- An employer may retire someone who has reached the normal or agreed retirement age
- An employer may fairly dismiss someone if the reason for the dismissal is based on an inherent requirement of the job. For example: A teacher in a religious college who changes his/her faith could be justifiably dismissed.

**Example:**

The LRA's Dismissal Code goes further to say: “An employer's rules must create certainty and consistency in the application of discipline”. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood.

When an employer is taken to the CCMA, they must prove that the rule that the employee is alleged to have broken existed at the time of the alleged offence. Furthermore, that the dismissed employee knew he or she was breaking the rule when he or she committed the misconduct.

In the case of Martens vs. Nel (1998, 9 BALR 1167) Martens was a bartender in a night-club. He was dismissed for flirting with customers.

At the CCMA hearing he claimed that he had never been informed of any rule prohibiting such conduct.

The arbitrator found that the dismissal was unfair because Martens had not been given the rules relating to behaviour towards customers. The employer was ordered to pay Martens 10 months' remuneration in compensation.
As you can see from this above example, all employees should know the rules and policies of the company, and this example makes it clear that every organisation needs to:

- Draw up its own disciplinary code;
- Induct every employee into its disciplinary code;
- Keep proof that the above has been done;

So that if a dismissed employee claims at the CCMA that he or she did not know the rules, the employer can prove that this is an invalid excuse.

### 9.3 Statutory reasons for dismissal

According to the LRA Code of Good Practice, a person can only be dismissed for three reasons:

- Misconduct
- Incapacity (ability or health)
- Operational reasons (a no-fault dismissal due to retrenchment or reconstruction)

A code of good practice (Schedule 8 in the Act) sets out the principles of substantive and procedural fairness to be followed in the case of dismissal for misconduct or incapacity.

The principles of a fair dismissal for operational reasons are contained in the Act itself and in a code of good practice on dismissals based on operational requirements, issued by NEDLAC. If there is a collective agreement on disciplinary procedures, the employer must comply with the procedures of the agreement.

#### 9.3.1 Misconduct

Misconduct is an act that an individual knows is against the Code of Conduct, rules, procedures and standards of the company as well as unethical. In some cases it might even be an illegal act. Misconduct applies to all cases where employees are alleged to have breached a rule or the code of conduct of the company. Misconduct can include:

- theft of company property,
- violation of safety rules,
- fraud,
- falsification of documents,
• divulging confidential information,
• assault,
• unauthorised possession of dangerous weapons,
• absconding (disappearing from work without any explanation),
• Refusal to do work or not working properly.

Companies generally have an established set of disciplinary rules that specify standards of conduct required of the company employees. Where an employee breaches the Code of Company Conduct, and fault or intent is determined, the Disciplinary Process should be applied.

Item 3(4) of the Code of Good Practice classifies the following offences as examples of serious misconduct of such gravity that they could render a continued employment relationship intolerable and, therefore, subject to the proviso that each case is judged on its merits, could justify dismissal for a first offence:

• Gross dishonesty
• Wilful damage to the property of the employer
• Wilful endangering of the safety of others
• Physical assault on the employer, a fellow employee, client or customer
• Gross insubordination

Where allegations of possible misconduct in the workplace surface, such occurrences require strict and consistent attention, so as to ensure the right precedent is set. Disciplinary hearings are a necessary evil that each manager and organisation on a whole need to be well aware of and familiar to.

9.3.1.1 Examples of Gross Misconduct (Dismissible Offences)
The following are examples of gross misconduct as commonly recognised by employers and the law. It is not intended to be a complete or closed list. Gross misconduct could result in summary dismissal (i.e. dismissal without notice) if the facts of each case indicate that the circumstances are very serious and that continued employment would be intolerable. Dismissal must be for a fair reason, determined after following a fair procedure (a formal disciplinary enquiry):
<table>
<thead>
<tr>
<th>Offences involving:</th>
<th>Examples (not exhaustive):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dishonesty</td>
<td>Unauthorised possession or removal of company property</td>
</tr>
<tr>
<td></td>
<td>Making of and/or presenting false documents or information or evidence for personal gain</td>
</tr>
<tr>
<td></td>
<td>Altering, falsifying or misrepresenting official company documents, with the intent to defraud</td>
</tr>
<tr>
<td></td>
<td>Theft</td>
</tr>
<tr>
<td></td>
<td>Fraud</td>
</tr>
<tr>
<td></td>
<td>Accepting money or other consideration, not for company gain, for performing work or any other favour where this is not fully disclosed to the company</td>
</tr>
<tr>
<td>Managerial authority</td>
<td>Refusing to obey a lawful and reasonable instruction</td>
</tr>
<tr>
<td></td>
<td>Gross insubordination</td>
</tr>
<tr>
<td>Violence</td>
<td>Threatening violence and/or intimidation</td>
</tr>
<tr>
<td></td>
<td>Fighting</td>
</tr>
<tr>
<td></td>
<td>Assault on a manager, fellow employee, supplier or customer</td>
</tr>
<tr>
<td></td>
<td>Malicious (wilful) damage to the company’s property</td>
</tr>
<tr>
<td></td>
<td>Unauthorised possession of a weapon on company premises or use, or threatened use, of any such weapon</td>
</tr>
<tr>
<td>Social behaviour</td>
<td>Being under the influence of alcohol, drugs or other narcotic or similar substances at work, whilst on duty, or whilst driving a company vehicle</td>
</tr>
<tr>
<td></td>
<td>Serious abuse / misuse of company property. (Includes misuse of company telephones, Internet, E-mail)</td>
</tr>
<tr>
<td></td>
<td>Harassment, victimisation or unfair discrimination of any other nature for any arbitrary reason (e.g. related to race, religion, age, disability, culture, family responsibilities, marital status, gender, etc. – see section 6 of the Employment Equity Act 55 of 1998)</td>
</tr>
<tr>
<td>Absenteeism</td>
<td>Absconding or unauthorised absenteeism for five or more consecutive working days</td>
</tr>
<tr>
<td>Medical risk</td>
<td>Failing to report any dangerous contagious disease to employer where the employee is aware of the condition and the condition combined with the employee’s conduct places employees or clients at serious medical risk</td>
</tr>
<tr>
<td>Offences involving:</td>
<td>Examples (not exhaustive):</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Negligent conduct</td>
<td>Disorderly or reckless conduct causing bodily injury and/or damage to property</td>
</tr>
<tr>
<td></td>
<td>Gross negligence</td>
</tr>
<tr>
<td></td>
<td>Sleeping on duty (e.g. neglecting duty where the company or employees are placed at serious risk)</td>
</tr>
<tr>
<td>Contractual breaches</td>
<td>Gross breach of contract</td>
</tr>
<tr>
<td></td>
<td>Competing against the employer’s business, or pursuing interests knowing them to be competitive with the employer’s business</td>
</tr>
<tr>
<td></td>
<td>Divulging confidential company information or trade secrets to any unauthorised person</td>
</tr>
</tbody>
</table>

### 9.3.1.2 Absenteeism

Absenteeism occurs for a number of reasons. When a manager realises that there is a trend regarding absenteeism, it will be worth the time to investigate what the reasons might be. If it is a specific employee, an investigation is warranted – is there a management problem, or is the employee inclined to be absent without permission. If there is a whole department where the problem occurs, it is again worth it to launch an investigation. Paid absenteeism is expensive for obvious reasons.

Below are examples of absenteeism:

- **Employees who do not return from annual leave**

  This situation should be treated as unauthorised absence. The employer must first establish what the reason is for the late return. The onus is on the employee to provide a good reason why s/he was absent. It is also important to establish why the employee did not try to contact the employer as soon as s/he realised that they will not be at work at the agreed date. The employer should not accept inadequate answers or explanations.

- **An employee who is absent without permission, then returns, and demand that his/her absence must be annotated as annual leave**

  Common law prescribes that an employee should come to work regularly and reliably. They cannot decide when they want to come to work. The employee also cannot stay away from work and then insist that the absence must be annotated as annual leave. Should the reason for absence be acceptable, the employer can annotate it as annual leave. If not, it should be regarded as unpaid leave, and a disciplinary hearing should be scheduled.
Desertion takes place when an employee leaves the employer without the intention of returning. The employee has thus broken the contract. The employer can accept this breach and regard the contract as having ended.

The implementation of a policy on how desertion should be handled can illuminate many problems with regard to a subsequent disciplinary hearing. The policy should state after how many days (e.g. 3 to 5 days) of absence without notifying the employer, the employee will be regarded as a deserter. There is a process to be followed, namely a letter, telegram or message to the employee to contact the employer without delay. This places the onus of the next move on the employee.

The employer can assume that the employee ignored the message, or that s/he does not intend to return to work. Provided that the letter has been delivered to the employees’ home address, there can be no excuse for not contacting the employer.

**To avoid this situation, the employer can add a clause to the policy above that requires calling the employer personally to inform him/her of their intentions. Messages from other personnel or families are not accepted.**

**9.3.1.3 Examples of Other Misconduct (Not Immediate Dismissible Offences)**

The following list of examples of misconduct offences could result in written warnings or final warnings, but only after a disciplinary process, including an informal disciplinary investigation or hearing. Contraventions of these less serious disciplinary offences will be dealt with progressively and correctly. Repetition of offences could attract more serious disciplinary action, including dismissal:
### Examples (not exhaustive)

<table>
<thead>
<tr>
<th>Offences involving</th>
<th>Social behaviour</th>
<th>Impacting on work performance</th>
<th>Managerial authority</th>
<th>General</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Absenteeism - however, where the employee’s absenteeism is repeated or the employee is absent for five or more consecutive working days or more, such employee can be (summarily) dismissed</td>
<td>Unauthorised absence from work place / late coming / early knocking off / extended meal or teatime and loitering in change rooms</td>
<td>Insulting, rude or insolent behaviour</td>
<td>Negligence</td>
</tr>
<tr>
<td></td>
<td>Slack timekeeping</td>
<td>Loafing at work</td>
<td>Breaking company standards or rules</td>
<td>Disorderly conduct</td>
</tr>
<tr>
<td></td>
<td>Intoxication (being under the influence of alcohol, drugs or other similar narcotic substances)</td>
<td>Refusal or failure to carry out instructions</td>
<td></td>
<td>Violation of published company code of conduct</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sleeping on duty</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Note**: Depending on the circumstances, the above could be viewed as gross misconduct if the employer/employee relationship is adversely impaired or the company’s property and/or operations are jeopardised or any lives are endangered.

**9.3.1.4 Dismissal for Misconduct**

Addressing misconduct in the workplace falls on the employer's shoulders and each organisation should have a clear and comprehensive process of operation when addressing disciplinary hearings. It is up to the employer to prove that a dismissal is the fair and just way forward and if ill-equipped to do so employers may end up with egg on their face and what's worse, an untrustworthy or unreliable employee they now cannot get rid of.

When taking disciplinary action for misconduct, most employers fail in their attempts to dismiss a 'delinquent employee' because:

- Unfair administration of disciplinary proceedings
- Lack of relevant evidence
- Failure to prove guilty in accordance to generally accepted policies and procedures
• Failure to convince the chairperson of misconduct

Misconduct is one of the grounds recognised by the law that may give reason for the dismissal of an employee. In the case of misconduct by an employee, the employer should pursue corrective or progressive disciplinary procedures to rectify the situation.

Dismissal for misconduct is the last resort of an employer, when other measures to correct misconduct have failed or are pointless, e.g. the issuing of advice and correction of minor problems on the part of an employee, and a written warning for consistent misconduct followed by a final written warning for persistent misconduct. Dismissal should be considered as a last resort when enforcing workplace discipline.

Employers should also set out clear disciplinary rules that stipulate how employees should behave at work. All employees should be informed about these rules, through induction, notice boards, meetings etc.

Any person who is determining whether a dismissal for misconduct is unfair in terms of the labour law should consider:

• if the dismissal is substantively and procedurally fair
• whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
• 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; and
  * Dismissal was an appropriate sanction for the contravention of the rule or standard.

**Note: If there is a dispute about the fairness of a dismissal, the aggrieved employee has 30 days to refer the matter to the CCMA or the appropriate Bargaining Council.**

Dismissal for misconduct is the last resort of an employer, when other measures to correct misconduct have failed. The principles of a proper disciplinary procedure consist of substantive and procedural fairness:

**9.3.1.5 Substantive fairness**

In the LRA the Code of Good Practice on dismissals states that any person who has to decide on the fairness of a dismissal should consider whether or not:
• The employee broke a rule of conduct in the workplace
• The rule was valid and reasonable
• The employee knew of the rule or should have known of the rule
• The employer applied the rule consistently
• Dismissal is the appropriate step to take against the employee for breaking the rule instead of less serious action like a final written warning or a suspension

Repeated offences of a similar nature could justify the final step of dismissal. Dismissal for a first offence may be appropriate if the misconduct is very serious and makes the continued employment of that person intolerable.

Examples of serious misconduct are:

• Gross dishonesty (e.g. theft or misappropriation of company property)
• Deliberate damage to the property of the employer
• Deliberately endangering the safety of others
• Physical assault of the employer, a fellow employee or a customer
• Gross insubordination

Each case should be judged on its merits and the employer should also consider factors such as:

• The employee’s circumstances (e.g. length of service, current disciplinary record and personal circumstances)
• The nature of the job
• The circumstances of the infringement itself (e.g. was the employee justifiably provoked)

9.3.1.6 Procedural Fairness

Even if there are good substantive reasons for a dismissal, an employer must follow a fair procedure before dismissing an employee. This requires the employer to conduct an investigation into the alleged misconduct. This need not be a formal enquiry, but these requirements should be met:

• The employer must inform the employee of the allegations in a manner the employee can understand
• The union should be consulted before commencing an enquiry into the conduct of an employee who is a shop steward or union office bearer
• The employee should be allowed reasonable time to prepare a response to the allegations
• The employee must be given an opportunity to state his or her case
• The employee has the right to be assisted by a shop steward or other employee

After the enquiry, the employer should inform the employee of the decision, preferably in writing. If the employer dismisses the employee, the employer must give reasons and inform the employee of his or her right to refer the dispute for resolution to a council or the CCMA.

**Note:**

• After the enquiry, the employer should inform the employee of the decision, preferably in writing. If the employer dismisses the employee, the employer must give reasons and inform the employee of his or her right to refer the dispute for resolution to a council or the CCMA.

• Employers should keep records of disciplinary action for each employee, stating the nature of the misconduct, the disciplinary action, and the reasons for the action.

9.3.2 Incapacity

Incapacity occurs when an employee cannot perform duties properly owing to ill health or inability:

• One aspect is when a person cannot perform his or her duties due to ill health. This can be due to an accident and the person might have been injured in such a way that they can’t perform their duties the way they used to. In this case the company is required to investigate other employment opportunities within the organisation for the person. If no work is available, the company can offer a settlement, retirement (ill health) or early retirement.

Incapacity also includes sickness including substance abuse and alcoholism. The Employee Assistance Programme (EAP) can be used in conjunction with the Medical Aid to assist the person. If the person is HIV positive, the EAP will also assist the person and the HIV/AIDS policy of the company will apply.

• Incapacity can also mean that the person is struggling to perform his or her duties according to the standards required by the company. It is also up to management to ensure that correct and sufficient training is provided to build the capacity of the person. Dismissal is possible based on incapacity, but it is up to management to prove that the individual was given ample opportunity to improve capacity (knowledge and skills).
The LRA Code of Good Practice on dismissals sets out guidelines on what is necessary for a dismissal for incapacity to be substantively and procedurally fair.

### 9.3.2.1 Guidelines for Managing Incapacity - Poor Performance

Managing performance via some practical method of performance appraisal is critical for any manager of personnel. It enables you to identify performance gaps, develop talented people and deal with ineffective people.

When working with poor performance, you need to remember that you are dealing with the ability of the employee to perform the required tasks to the expected standards.

In terms of the law, a newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment. When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counselling the employee requires rendering satisfactory service. Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.

After probation, an employee should not be dismissed for unsatisfactory / poor performance unless the employer has:

- given the employee appropriate evaluation, instruction, training, guidance or counselling, and
- after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily

The labour law provides that 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, there should be procedural fairness, which would include the employee's right to be heard and to be assisted by a trade union, representative or a fellow employee.

### Substantive fairness

- Poor performance – Before an employer can dismiss an employee for poor work performance the employer must first give the employee appropriate evaluation, training or guidance and a reasonable time for improvement. The employer must investigate reasons for the poor performance. Only if
the employee still continues to perform poorly thereafter and the problem cannot reasonably be solved without dismissing the employee, will the dismissal be fair. It must be clear that the employee does not have the ability to do the work.

- Bad health or injury – If temporary incapacity will cause an employee to be away from work for an unreasonably long time, it will be unfair to dismiss the employee unless the employer first investigates all possible ways of avoiding this step. If the incapacity is permanent, the employer should try to find alternative work for the employee, or adapt the work so that the employee is able to do it. The employer must make a greater effort to accommodate the employee if the employee was injured while at work.

The steps to follow in the case of incapacity as a result of injury are described in detail in the OHS Act.

**Procedural fairness**

In investigations relating to poor work performance and incapacity, the employee should be given an opportunity to state his/her case and to be assisted by a shop steward or co-worker. This applies to employees on probation as well.

**9.3.2.2 Procedure Guidelines**

An employer is entitled to expect employees to meet acceptable levels of performance. These standards or levels of performance must be relevant to the workplace and reasonable. The performance standards must be made known by the employer to the employee.

At the same time employees are entitled to expect that they will be dealt with fairly and if the employee is not meeting the required performance standard this will be drawn to the employee's attention.

The objectives of this procedure are to:

- assist employees to overcome poor performance and to perform to the standard expected of them;
- promote efficient and effective performance by employees;
- enable the employer to function efficiently and effectively; and
- Assist the employer to apply corrective action where appropriate.
It is the responsibility of the employer to decide when it is necessary to apply this procedure. The employer must, depending upon the nature of the employee's job, give the employee:

- feedback
- evaluation
- training or guidance

On how to meet the expected level of performance.

The employee should also be given a reasonable period within which to meet the expected performance standard.

If, despite counselling and training, the employee is still not able to meet the required performance standard, within a reasonable time period set, the employer may dismiss the employee for poor performance.

**Note:** This procedure according to the Code of Good Practice is intended to apply to all employees who are not meeting a required performance standard. It does not apply to:

- probationary employees who should be treated in accordance with the procedure for probationary employees;
- employees who are not performing due to ill health or injury; or
- Employees who are alleged to have breached a rule of the employer regulating conduct, in which case the disciplinary procedure will apply.

It only applies to employees who can reasonably be expected to bring their performance up to the required performance standard.

### 9.3.2.3 Guidelines for Managing Incapacity - Ill health or injury

Incapacity on the grounds of ill health or injury may be temporary or permanent.

- **Temporary incapacity** - If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal.

  When alternatives are considered, relevant factors might include:
  - the nature of the job
  - the period of absence
• the seriousness of the illness or injury
• The possibility of securing a temporary replacement for the ill or injured employee.

• **Permanent incapacity** - The employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

In the process of the investigation the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

The following are relevant to the fairness of any dismissal:

• the degree of incapacity
• the cause of the incapacity

In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

**Note:** Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts and law have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

Any person determining whether a dismissal arising from ill health or injury is unfair should consider:

• whether or not the employee is capable of performing the work; and
• if the employee is not capable:
  * the extent to which the employee is able to perform the work
  * the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted, and
  * the availability of any suitable work

**Note:** The legislation related to Ill Health / Injury also includes:

• Labour Relations Act, schedule 8, as amended, items 10-11
• Basic Conditions of Employment Act, as amended, ss22-24
• Compensation for Occupational Injuries and Diseases Act, 1993
• Compensation for Occupational Diseases in Mines and Works Act
These legislative documents should be read in conjunction with each other to ensure that no law is contravened when dealing with incapacity ill health or injury cases.

### 9.3.3 Organisational requirements

If a company has to dismiss employees for reasons which are related to purely business needs and not because of some failing on the part of the employee, a no-fault dismissal can take place. Organisational requirements are due to changes within the company with some positions becoming redundant. If this happens the company has to consider alternative work for the individual. Alternatively, the company has to consider re-skilling. If neither is possible, the LRA stipulates clearly in (section 179) the steps to be followed in the case of retrenchments.

This is a topic in itself and for the purposes of this module you only need to be aware of its existence; as dismissal for operational reasons (retrenchments) is generally dealt with at a high level within the organisation. Suffice to know that an employer may dismiss employees for operational reasons, but only if the employer has first attempted to avoid such an event by reaching an agreement with recognised representatives of employees.

There is a very specific procedure of consultation and time frames to follow. The most important concept is the fact that, once an employer contemplates retrenchment or restructuring (anything that will change the conditions of employment of an employee), it must be discussed with the employee(s) involved.

- The employee must at least be informed of the following:
  - The reason for retrenchment or restructuring
  - The time frames envisaged
  - The number of employees involved in the process
  - The reasoning behind the selection of certain employees for retrenchment

All this must be done in writing, and the employee must sign the document, acknowledging receipt thereof. The employee then gets an opportunity for representation, i.e. providing reasons why s/he thinks that the retrenchment/restructuring process is not the correct route to take. S/he can also provide a comprehensive CV to indicate what other skills or qualification they have to contribute in another area of the organisation.

Once the employer decides to proceed with the process, the cost of the process must be kept in mind:
• At least 30 days' notice during which the consultation process takes place (60 days if there are more than 50 employees involved
• One week of remuneration for every year worked
• All outstanding leave monies are to be paid out as well

Note:

If the employee wishes to challenge the fairness of the dismissal by using a council or the CCMA the matter must be referred to the correct body within 30 days of the dismissal.

Employers should keep records of disciplinary action for each employee, stating the nature of the misconduct, the disciplinary action, and the reasons for the action.

Remember:

If procedure is not fair, substantive fairness is also impossible.

9.4 Steps to ensure substantively and procedurally correct and fair dismissals

9.4.1 Fair and unfair dismissals explained

A dismissal may be unfair or fair depending on the circumstances:

Fair Dismissal - Dismissal is fair if:

• the specific requirements of a job are not being met (i.e. poor performance)
• a worker has reached retirement age

Unfair Dismissal - Dismissal is unfair if:

• a worker intended to or did take part in or supported a strike or protest; or
• a worker refused to do the work of a striking or locked out co-worker, unless his refusal will endanger life or health; or
• a worker is forced to accept a demand; or
• a worker intended to or did take action against an employer by:
  o exercising a right; or
  o taking part in proceedings; or
• a worker is pregnant or intends to be pregnant; or
• an employer cannot prove:
• a worker’s misconduct or inability; or
• that the employer’s operational needs are valid; or
• that the dismissal procedure was fair

• dismissal is for a reason related to a transfer as a going concern or after insolvency
• dismissal is on account of an employee having made a protected disclosure in terms of the Protected Disclosures Act 2000
• an employer discriminated against a worker because of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility

**Procedural Fairness**

In a case of possible misconduct, the following steps need to be followed to ensure procedural fairness. This means that the employee must:

• hear the charges against him/her
• be allowed a defence
• be entitled to representation if he/she so wishes
• be entitled to appeal against the decision to a higher authority

**Substantive Fairness**

Substantive fairness is the reason(s) used to determine a verdict. Reasons based on the Code of Conduct of the company, rules, standards and procedure. The reasoning is based on how the misconduct is in violation of the code of conduct, rules, standards or procedure.

Substantive fairness is also based on being reasonable. Labour law is based on the “balance of probabilities” and not on “proof beyond reasonable doubt”. In other words, when reasoning in a labour case, the chairperson or arbitrator at the CCMA will be asking what is the most probable or reasonable chain of events. Reasoning is also based on the contents of the act, in other words what is legal and what is not. The chairperson or arbitrator will also review previous cases (called case law) of the CCMA and Labour Court to guide them when deciding on an appropriate verdict.

Fairness therefore is based on both the correct use of procedure and reasonable reason. A fair procedure, unfairly applied, is worse than no procedure at all. If
procedural fairness was compromised, it is impossible for substantive fairness to take place.

Example:

**A CASE IN POINT – AUDI ALTERAM PARTEM RULE**

*Beheni vs Persian World*

*CCMA Arbitration Case - No WE5621-03*

The employee was dismissed for late-coming.

The employer testified that he had issued several warnings for late coming. On the day in question the employer was the only person in the shop when the employee arrived 40 minutes late.

The employee said it was in fact 20 minutes. The employer told him that whether he was 20 or 40 minutes late he was still late.

The employer then paid the employee two weeks’ notice pay.

It was put to the employer that prior incidents of late-coming related to the employee having to attend a funeral and having been involved in an accident. The employer conceded that his wife had been given these explanations.

The commissioner held that even in a small business, the basic procedures relating to discipline and dismissal apply.

The employee was not afforded a fair disciplinary hearing but merely informed of his dismissal without the opportunity to present an informed defence.

The employee was awarded three month’s compensation.

**SOURCE:** Workplace of The Star 12 May 2004

### 9.4.2 Steps to ensure procedural fairness

The following are the steps to ensure procedural fairness, as discussed earlier:

- The employee must be given notice of the charge (nature of the offence) against him
- The employee must have been given sufficient warning in terms of the disciplinary code or reasonable expectations
- The employee must be given reasonable time to prepare his response
- During the hearing the employee must be given the opportunity to state his or her case
• The employee must be allowed representation.
• After the hearing the employee must be fully informed of the reason for the decision taken
• Where an employee has been dismissed, he or she must be reminded that he or she can refer the matter to the CCMA

9.5 Misconduct vs. Poor Performance
Poor performance does not look at the behaviour of the employee at work - problems of behaviour are addressed under misconduct. Poor performance looks at whether the job, which the employee is being paid to do, is being done properly. Therefore, in establishing whether poor performance exists, one must ask the following questions in relation to the employee and the job:
• Is the output sufficient?
• Is the quality acceptable?
• Are company operating procedures being followed?
• Are costs kept within budget or is the amount of rejects unacceptably high?
• Is the effort put in by the employee sufficient?
• Is it perhaps inability to do the job at the required level – can the employee perform satisfactorily at a lower level?
• Is it incompetence - not insufficient effort, but a clearly a lack of ability to do the job?
• Is it carelessness – lack of attention to detail?
• Is it a form of negligence, but not misconduct - in other words “I don’t care”?

Misconduct deals with behaviour – performance deals with ability.

Both poor performance and ill health or injury are categorised as incapacity.

Adapted from: www.labourguide.co.za

9.6 Dismissal for Poor Work Performance
A dismissal for poor performance is only justified if the employee was counselled, offered assistance, given a reasonable time within which to improve the performance and despite being made aware of the possible consequences of a failure to improve his/her performance, did not do so.

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.
Note: Any person determining whether a dismissal for poor work performance is unfair should consider:

- whether or not the employee failed to meet a performance standard; and

- 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.

**Substantial Fairness:** Before an employer can dismiss an employee for poor work performance the employer must first give the employee appropriate evaluation, training or guidance and a reasonable time for improvement. The employer must hold an investigation into reasons for the poor performance. Only if the employee still continues to perform poorly thereafter and the problem cannot reasonably be solved without dismissing the employee, will dismissal be fair.

**Procedural Fairness:** In investigations relating to poor work performance and incapacity, the employee should be given an opportunity to state his or her case and to be assisted by a shop steward or co-worker.

In the event that the employee does not meet the required performance standard, despite the employer following this procedure, the employee may be dismissed. The employee should be informed that if the employee intends to challenge the dismissal the dispute must be referred to the CCMA or to a bargaining council with jurisdiction, within 30 days of the date of dismissal.

**Note:** The Labour Law Handbook for managers suggests 10 things you must do before you dismiss an employee for not performing:

- Set performance standards
- Communicate those performance standards to your employees
• Evaluate your employee’s performance (conduct evaluations regularly, perhaps half-yearly depending on the circumstances)

• Make sure you have given sufficient instruction on the tasks you require him to do and how you want them done

• Provide the training the employee needs to perform

• Provide guidance along the way on how to meet the standard the employee seeks to improve

• Counsel your employee on his poor performance. Do this in a joint problem-solving way. Work with your employee to establish the reasons for his poor performance so that you can work with him on a plan of action designed to remedy the problems

• Give your employee a fair opportunity (a reasonable period of time) to meet the required performance standard. What’s considered reasonable will depend on your particular circumstances

• Only consider dismissal if you have exhausted reasonable ways of getting the employee to improve to the required standard

Give the employee an opportunity to make representations before you dismiss.

Adapted from: www.labourlawhandbook.co.za

9.6.1 Correcting Poor Performance

The first step is to hold a meeting (an informal affair) with the employee. You explain where the employee is falling short, what standard is not being met, and discuss the matter fully to see if the reason for the poor performance can be established.

It may be a domestic crisis that the employee has (pending divorce, sick child, financial problem, etc.) or it may even be a work-related problem, such as a supervisor who is victimizing the employee, harassing the employee in some way, and so on.

The important thing is to establish to cause – if you don’t know the cause, you cannot treat the problem. Treating the symptoms is a useless exercise – the problem will not go away unless you treat the cause.

Whatever the cause, try to find a mutually acceptable way of dealing with it – it may be training that is required, it may be that you have to refer the employee to an outside body such as the Department of Social Welfare, a good divorce lawyer, and so on.

Perhaps you will have to assist the employee financially, or help them obtain a loan from a financial institution, but it is vitally important that all the proceedings are recorded in detail. These records will be required if you eventually have to dismiss the
employee and the matter is taken up with the CCMA. You will have to prove that correct and fair procedures were followed, and you need written records to do this.

**Remember that in a case of unfair dismissal, the employee only has to prove that a dismissal took place. The employer must prove the fairness of the dismissal.**

At the end of the counselling session, the employee must be warned of the consequences of failure to improve where such warning is appropriate.

Bear in mind that the aim of the counselling session is not to punish the employee, but to assist him/her to recognize and overcome the problem.

There is no rule of thumb regarding how many counselling sessions are required before dismissal, nor how much assistance or training must be given before dismissal, or demotion to a lower position which the employee can handle. It will depend on many factors, such as:

- length of service
- how long has the employee been doing the job before he/she started doing it wrong
- the nature of the job
- the extent of the employee’s willingness to co-operate and help solve the problem
- what effect the poor performance has had on the Company
- The nature of the poor performance itself, e.g. if it is a vital function that is not being done, then that is serious – immediate improvement is required.

In the counselling session, you must be specific – it is not acceptable to state that the employee is “not making the grade” or “is not doing the job properly.”

- The specific problem area must be defined and discussed in detail. It is no good telling the employee to “pull his socks up” or “get his act together”
- Be specific about what improvement is required, what standard is required to be met, in what area and by when

The counselling process is termed as “evaluation, instruction, training or guidance” - make sure that this is what you do.

If the matter comes to dismissal, then the Code of Good Practice – Dismissal, must be applied, as well as your own procedures if any. You are obliged to consider whether the employee did in fact fail to meet a performance standard, if he or she could reasonably be expected to have been aware of the required standard, whether a fair
opportunity was given to the employee to meet the required standard, and most importantly you must assess whether or not dismissal is an appropriate (and perhaps the only available) sanction under the circumstances of the case.

Generally speaking, and considering all the facts of the matter, you should spend as much time as is reasonably expected to show that the employee was afforded all reasonable opportunity to rectify the matter.

Obviously, if the poor performance is causing major operational problems, you will have to inform the employee that he has only a limited amount of time to rectify the matter before action is taken.

9.6.2 Disputes over dismissals
An employee may refer a dispute about a dismissal to the CCMA or a council for conciliation. If a dispute remains unresolved, the employee may refer the dispute to arbitration by the CCMA or a council or to adjudication by the Labour Court. The following dismissal disputes may be referred to arbitration:

- Dismissals for misconduct or incapacity
- Constructive dismissals or where an employee resigns after being given less favourable terms and conditions of employment following a transfer of a business as a going concern.
- An individual employee who has been dismissed for operational reasons may refer a dispute either to the CCMA for arbitration, or to the Labour Court for adjudication.
- Automatically unfair dismissals, dismissals for participating in an unprotected strike, and operational requirement dismissals (other than those that only involve one employee) may be referred to the Labour Court for adjudication.

9.6.3 Documenting evidence to support a recommendation for dismissal
Before any evidence can be presented at a disciplinary hearing a witness has to testify to the contents of the document. In other words, the person has to confirm that the evidence is true reflection of events. Original copies of the document should be handed to the chairperson of the hearing. Real evidence is defined as “things which were examined by court as means of proof.”

What can be used as evidence?

- Documents that have been authenticated - proven to be original
- Oath or sworn statement
- Approved minutes of meetings
transcript of a disciplinary hearing,
Videos and Photographs (authenticated).

For a dismissal to be substantively fair, enough proof must be available to support the recommendation for dismissal. This can include

- A signed copy of the disciplinary code of an organisation whereby the employee acknowledges that he or she is aware of transgressions (offences)
- Proof of verbal warnings and counselling
- Proof of written warnings
- A formal letter in the case of a final warning
- Proof of investigations prior to the disciplinary hearing to establish the facts of the case
- Proof of grievance procedures

It is essential that all disciplinary actions be recorded on a disciplinary form and on the employee’s disciplinary record. Recording can include:

- Reports: Disciplinary incidents
- Warnings: Breach of disciplinary code
- Final written warning
- Disciplinary record card

Note: Additional information on all the topics discussed in this module can be downloaded from the CCMA website at www.ccma.org.za

9.6.4 Kind of information required in a certificate of service

Workers are entitled to a certificate of service.

A certificate of service is an official letter from a previous employer certifying that a former employee has been employed by the previous employer for a stipulated period and position the person filled. Section 42 of the Act list what should be included on a certificate:

- Employer’s full name
- Name and address of the employers
- A description of any council or sectoral employment standard by which the employer’s business is covered
- The date of commencement and date of termination of employment.
- The title of the job and a brief description of the work for which the employee was employed at date of termination
- the remuneration at date of termination
- If the employee requests the reasons for termination of employment
10. THE CCMA AND DISPUTE RESOLUTION

The Commission for Conciliation, Mediation and Arbitration (CCMA) has the following functions:

- Attempt to resolve, through conciliation any dispute referred to it in terms of the LRA.
- Arbitrate the dispute if the act requires arbitration or if a dispute remains unresolved after conciliation, or if any party has requested that the dispute be resolved through arbitration.
- Assist in the establishment of workplace forums
- Compile and publish information and statistics about its activities

The labour matters that the CCMA deals with include the following:

- Freedom of Association
- Organisational rights
- Mutual interest issues such as wage increase and improved conditions of employment
- Unfair dismissals where an employee is dismissed due to an unfair reason or unfair procedure was followed
- Unfair labour practices where an employee has been unfairly disciplined (not dismissed), unfairly suspended, demoted or not provided training or benefits (excluding salary or wages).
- Unfair discrimination, where an employee is unfairly treated on the grounds of race, gender, ethical background, sexual orientation or any other form of discrimination as listed in the EE Act.

The CCMA also provides training on labour relations matters such as: establishing collective bargaining structures, establishment of workplace forums, preventing and resolving disputes, grievance and disciplinary procedures, employment equity and sexual harassment. CCMA website: www.ccma.org.za

10.1 Dispute Resolution mechanisms

The Act established the following dispute resolution mechanisms:

- The Commission for Conciliation, Mediation and Arbitration (CCMA), an independent body that seeks to resolve disputes through conciliation, and arbitration
- The Labour Court and the Labour Appeal Court, which are the only courts which can hear and decide most labour disputes
The Act also promotes private procedures negotiated between parties for the resolution of disputes. The CCMA:

- Is an independent body even though it is mainly state funded?
- Is controlled by a governing body on which government, business and labour have three representatives each. The governing body has an independent chairperson. The CCMA’s director is a member of the governing body.
- Has an office in each province and national office in Johannesburg?
- Has both part-time and full-time commissioners who perform conciliation and arbitration functions

The CCMA must attempt to resolve, through conciliation, workplace disputes referred to it. If conciliation fails, the CCMA must settle the dispute by arbitration if the Act says the next step is arbitration and if any party to the dispute refers the dispute to arbitration.

It will also assist with the establishment of workplace forums and can further assist parties on a range of issues, including advice on dispute resolution design and collective bargaining structures.

With regard to labour law, a dispute is a special term that refers to a disagreement between two parties, namely the employer and employee(s), in a matter of mutual interest like promotion, redeployment, discipline or misconduct. A dispute is usually declared after attempts to resolve a disagreement or a grievance have failed.

The Labour Relations Act sets out the procedures to be followed to resolve disputes over unfair labour practices and unfair dismissals. The LRA provides for the establishment of the Labour Court and the Labour Appeal Court. The CCMA was established by the LRA to:

- Attempt to resolve workplace disputes by conciliation and arbitration
- Assist in the establishment of workplace forums and statutory councils
- Give advice and assistance to partners in a dispute

The following is a representation of the dispute system in the LRA:
Notes:

**Mediation** can be defined as a process in which:

- a third and neutral party attempts to resolve a dispute between two or more parties
- the mediator reports on the nature and scope of the dispute, facts that have been discovered and any proposed confidential settlement to the concerned parties
- the settlement proposal is not compulsorily binding on any party

**Conciliation** is a process in which a dispute is presented to a third party with a view to resolving the dispute without necessarily presenting a formal settlement proposal at the end of the process.

**Arbitration** is a process by which a dispute between two or more parties is adjudicated by a neutral third party with the aim of resolving the dispute by making an award that is binding on the parties. If a party is not satisfied with the outcome
of a dispute after mediation, conciliation or arbitration, the dispute can be referred to the Labour Court.

Workers who are unfairly dismissed or unfairly treated may refer disputes for conciliation in writing to:

- a statutory or bargaining council; or
- the CCMA

Referrals must be made within:

- 30 days of a dismissal date or an employer’s decision to dismiss;
- 90 days of the date of an unfair labour act; or
- 90 days of the date when a worker became aware of an unfair act.
- A dispute may be referred after the above periods if a worker can show good cause
- The employer must receive a copy of the referral.

### 10.2 Unresolved Disputes

If a dispute remains unresolved:

- a council or the CCMA must arbitrate it, if a worker requests it, if:
  - a worker alleges that the dispute is about his conduct or capacity;
  - a worker alleges that his employer made working conditions intolerable or less favourable after a transfer;
  - a worker does not know why he was dismissed;
  - the dispute is about an unfair labour practice;
- a worker may refer a dispute to the Labour Court, if he says the reason is:
  - automatically unfair;
  - based on operational needs;
  - the worker refused to join a trade union;
  - the worker was refused trade union membership;
  - The worker was expelled from a trade union.

A council or the CCMA must arbitrate immediately if:

- the dismissal is linked to a worker’s probation; or
- any other dispute where no-one objects to it being settled in terms of this subsection

### 10.3 Dispute Compensation Remedies

Compensation remedies for unfair dismissals have been amended to resolve the inflexible provisions previously governing arbitrators in cases of procedural unfairness.
The 24-month remuneration maximum for automatically unfair dismissals was deleted in previous drafts of the Bill, but has since been retained.

For all substantive and/or procedurally unfair dismissals (incapacity, misconduct or operational requirement dismissals) arbitrators will now have the discretion to award compensation which is just and equitable, up to a maximum of 12 months’ remuneration (as defined) calculated at the date of dismissal (clause 48(a)).
11. DEALING WITH GRIEVANCES

Employee grievances are wide-ranging and vary from general dissatisfaction with wages and conditions of service, dissatisfaction regarding promotion or training and complaints about lack of facilities or inadequate equipment to unhappiness on the part of the employee regarding unfair treatment, unreasonable orders, unrealistic expectations and blatant discrimination.

*It is important to bear in mind that the Labour Relations Act makes provision for a grievance process for employees in the same way it makes provision for the disciplinary process for employers. It must therefore be viewed and treated with the same seriousness as the disciplinary process.*

Most important to bear in mind is the fact that a grievance that is dealt with due to unhappiness, conflict or any form of perceived discrimination in a timeous and thorough manner, can prevent a lengthy legal process.

It is important to handle conflict internally effectively:

- Open communication takes place and management becomes aware of complaints and can deal with them effectively.
- It creates the opportunity for upward communication from employees
- It prevents disputes from arising
- It indicates management’s concern for the well-being of employees
- It creates awareness of employees’ problems
- It renders the disciplinary procedure more acceptable since employees also have a means of objecting to management performance
- It saves time and ensures that productivity is not influenced by, for example, strikes and court cases
- It ensures a fair procedure if a proper policy is in place

It is crucial for employers to handle internal conflict and for those who receive grievances:

- To ensure that the employee is not mistreated in any way after having lodged the grievance
- To investigate each grievance thoroughly while keeping an open mind
- To judge the validity of the grievance based on the facts and not based on who has lodged the grievance or who has been named in the grievance.
Some employers not only ignore all employee grievances but also victimise certain employees for raising those grievances.

Such employees are arbitrarily labelled as "trouble-makers" and are told to "like it or take a hike".

**Example:**

*In the case of Kannemeyer vs Workforce Group (2005, 8 BALR 824) the employee lodged an internal grievance with her employer because her commission rate had been reduced without her agreement.*

*Thereafter, according to her, she was victimised for having lodged this grievance.*

*She then resigned and claimed constructive dismissal on the grounds of her reduced commission rate and because the employer, who had instituted disciplinary proceedings against Kannemeyer for poor work performance, claimed that she had resigned in anticipation of the outcome of the poor work performance hearing.*

*That is, the employer denied that she had resigned due to victimisation but rather because she wanted to avoid being dismissed for poor performance.*

*The arbitrator found that:*  
  
  - The employer had brought no evidence disputing the employee's allegations of victimisation.

*Instead of resigning, the employee could have considered lodging a second grievance against the way in which her first grievance had been handled.*

*However, as she had received a negative response to her first grievance she could be forgiven for having lost faith in the grievance process.*

  - While the poor performance charges appeared to be genuine the employee had been victimised for lodging her grievance

*This constituted unfair constructive dismissal.*

  - The employer was required to pay the employee eight months’ remuneration in compensation.

Usually a formal grievance is initiated when, within the day-to-day work situation of the employee, an incident occurs that leaves the employee with a general feeling of dissatisfaction or injustice that cannot be resolved. A grievance of this nature is the type of issue which, if unresolved, may lead to a dispute between the company and the employee or group of employees.

A grievance procedure fulfils the following functions / objectives:

- It creates the opportunity for upward communication from employees
- It ensures that complaints are effectively dealt with by management
- It prevents disputes from arising
- It renders the disciplinary procedure more acceptable, since employees also have a means of objecting to management performance
- It emphasises management’s concern for the well-being of employees

11.1 Steps in the grievance process

In the light of these guidelines, a grievance procedure might, depending on organisational structure and management style, consist of the following steps:

Step One: The employee verbally raises a complaint with his immediate supervisor. The supervisor undertakes to investigate the complaint and to furnish the employee with his opinions and suggestions.

Step Two: Should the employee find the supervisor’s suggestions unacceptable he/she lodges a formal written grievance for the attention of the supervisor or the next level of management. The manager then investigates the matter, discusses the matter with the employee and records his findings and recommendations.

Step Three: If, at this stage the employee is still dissatisfied, the written grievance, together with the report of the manager, is forwarded to the next level of management. The manager concerned studies the written documents, interviews the employee and any other persons involved and gathers all relevant information. On the basis of this the manager presents his findings and proposed solution to the employee. The manager is obliged to report in writing on his investigation, recommendations and outcome.

Step Four: A grievance which remains unresolved is then channelled to the next level of management, and the same procedure is repeated. At this stage the danger of a dispute becomes very real and the HR manager may be invited to sit in on the discussions.
**Step Five:** In the final stage the grievance is brought to the attention of top management. Discussions held will involve various management representatives at this stage. The meetings may now begin to take the form of negotiations. A lack of a solution at this stage will result either in the employees backing down or in a declaration of dispute.

The grievance may be resolved at any stage during the procedure. If this occurs the method of settlement should be noted in writing and the employee should, also in writing signify his satisfaction with the solution.

Graphically a grievance and dispute procedure would look as follows:

Source: Butterworths Labour Relations Library
**Important to note:**

- Every employee must have the right to bring his or her grievance to the attention of top management
- Management, at various levels, should pay attention to the grievance and try to resolve it. Do not ignore it or regard a grievance as something that an employee does not have a right to do.
- There should be time limits for each stage of the procedure
- The grievance will not be resolved before the employee declares himself or herself satisfied. It does not matter if the grievance seems trivial – it must be dealt with.
- The employee has the right, if the grievance remains unresolved, to declare a dispute
- The grievance submitted as well as all other related documentation must be saved for future reference
- A grievance, however, trivial it may seem, must be treated as confidential

**11.2 Internal policies and procedures to resolve a dispute or grievance**

All organisations should have internal policies and procedures to resolve a dispute or a grievance:

- **Dispute** – argument, disagreement or difference of opinion between an employee and employer OR between two or more employees
- **Grievance** - A grievance is when an employee expresses dissatisfaction with some aspect the job situation or a perceived violation of rights. A typical grievance can include:
  - Perception of pay inequality
  - Unsatisfactory working conditions
  - Racial or sexual discrimination
  - Physical or verbal abuse by a co-worker
  - Unfair treatment by a supervisor

The effective implementation of these internal policies and procedures to resolve a dispute / grievance would increase effective communication and promote teamwork in the workplace.
12. ESTABLISHING A DISCIPLINARY CODE OR PROCEDURE

A disciplinary code is an internal document, devised by the employer, in which the rules of conduct are spelt out and the suggested penalties for breaking these rules are listed.

The purpose of a disciplinary code and procedures is to regulate standards of conduct and incapacity within an organisation. The aim of discipline is to correct unacceptable behaviour and adopt a progressive approach in the workplace:

- **Employer’s obligation** - The employer needs to ensure that all employees are aware of the rules and expected reasonable standards of behaviour for the workplace.

- **Employee’s obligation** - The employee needs to ensure that he/she is familiar with the relevant disciplinary standards in the workplace and that he/she complies with the disciplinary code and procedure at the workplace.

The use of a disciplinary code and procedure ensures that all employees are treated in the same way and that:

- People are given an opportunity of a fair hearing before dismissal occurs
- The same transgressions are treated in the same manner by all managers
- Employees know what to expect and managers know what actions to take and decisions to make

The type of disciplinary procedure established will depend on the nature and structure of the organisation, but there are some key considerations that should be observed:

- A disciplinary code should be comprehensive and complete. It should contain a list of transgressions which may occur and specify the disciplinary measures to be applied in each case.

- The procedure must be clear and accessible to employees.

- The procedure should conform to the principles of natural justice i.e. the incident should be investigated, the punishment should match the offence, an employee must be fully informed of the reason for the disciplinary action, he/she must be provided with an opportunity to present his side of the story, he should be allowed a representative and circumstances should be considered to ensure conformity in disciplinary measures

These rules apply to all disciplinary actions, but particularly to those which may lead to the dismissal of the employee. The Code of Good Practice related to the LRA states the most important principle as *respect between the parties*. The code places emphasis on both fairness and on the effective operation of a business and states that, although employees need to be protected from arbitrary action, employers are entitled to expect satisfactory conduct and performance from their employees.
The Act demands that employers should adopt disciplinary rules that set out how employees should behave at work. All employees should be informed of them, unless they are so well known that everyone can be expected to know them.

As required by Schedule 8 of the LRA, the penalties for breaking the rules described in the organisation’s disciplinary code need to be appropriate and fair.

All companies should have guidelines on which offences are regarded as dismissible offences (in the disciplinary code). If the employee does something that falls within this guideline, the disciplinary procedure should be followed. The guideline includes aspects of misconduct as listed below:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Warnings</th>
<th>Dismissal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deliberate violation of safety rules</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Theft, fraud, falsification of documents, divulging confidential information, bribery</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Assault – threatened and, attempted or actual</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Intimidation</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Unauthorised possession of dangerous weapons</td>
<td>×</td>
<td>✓</td>
</tr>
<tr>
<td>Non-observance of non-smoking areas</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Unauthorised use or misuse of company property</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Extended breaks, late arrival and early departure</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Sleeping on duty</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Under the influence of alcohol/drugs (based on a test or refusal to test)</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

The above list is just an example and if an offence is dismissible immediately or not will depend on the nature of the work done. For example, if a bus driver, drives under the influence of alcohol and the person is found guilty after a disciplinary hearing, the person can be dismissed because it is a criminal offence to drive under the influence of alcohol.

Dismissible offences are linked to the nature of the job and are job specific.
When designing the disciplinary code for your organisation:

- Remember the offences need to be clearly described
- The rules need to be reasonable and fair
- They need to be realistic so that it is possible for employees to follow them
- The employer should try to include all those rules that pertain specifically to the company or organisation
- The rules need to be applied consistently across all occupations (what is good for the goose is good for the gander).
13. INJURIES ON DUTY AND OCCUPATIONAL DISEASES

The Compensation for Occupational Injuries and Diseases Act, no 130 of 1993 is the governing Act that deals with occupational injuries and diseases. The aim of the COIDA is to provide for compensation in the case of disablement caused by employees in the course of their employment, or death resulting from such injuries or disease.

13.1 Steps to follow

Anyone who employes one or more workers must register with the Compensation fund and pay annual fees. The following steps should be followed when reporting to the Compensation Fund:

Step 1: An accident must be reported when an employee meets with an accident arising out of and in the course of employment resulting in a personal injury for which medical treatment is required.

Written or verbal notice of an injury at work is to be given to the employer before the completion of the shift. Good practice on the side of the employer will be to make a list of all witnesses of the accident for the investigation of the incident. The official form that needs to be completed is W.Cl 2 - Notice of Accident and Claim for Compensation. This form should be completed whenever an employee meets with an accident out of or in course of employment that leads to personal injury or where medical treatment is required or in the case of death. It is the employer’s duty to submit the W.Cl 2 within a period of 7 days to the Compensation Commissioner.

Guidelines relating to the completion of the form:

a) Firstly, complete “Part A”, page 1 of the form by providing the full details, sign and date from where indicated.

b) Secondly, detach “Part B” (an automatic copy of “Part A”, page 1) by tearing it at the perforation, hand “Part B” to the employee and request him/her to hand it to the doctor/hospital concerned. In serious cases, “Part B” must be handed to the emergency services personnel who have responded to the emergency.

The employee making the claim must submit to a medical examination at a reasonable time and place nominated by the commissioner or mutual association concerned, or by arrangement if the employee cannot go to the office of the nominated medical practitioner.

c) Thirdly, complete “Part A”, page 2 of the form by providing the full details.
After the completion of the form, send the form with a certified copy of the employee’s ID and the first medical report (W.Cl 4) (if available) to Compensation Commissioner. The doctor should complete the W.Cl 4 form, stating how serious the injury was and how long the employee is likely to be off work. This is sent to the employer who sends it to the Commissioner.

Please note that employers are obligated to report all alleged accidents to the Compensation Commissioner, even if they do not believe the employee’s report. Good practice on the employers’ side should include the keeping of partially completed W.Cl 2 forms as well as certified copies of all employees’ identity documents.

**Employees are not responsible for the payment of medical cost. If an employee requests a second doctor’s opinion, he/she will be responsible for the payment of medical cost for the second opinion.**

**Step 2:** After receiving and registering the claim, the Compensation Commissioners office should forward a postcard (W.Cl.55) to the employer. A claim number (reference number) is provided on the postcard (W.Cl.55). This number should be used for all paperwork relating to a claim. When the first doctor’s report has been submitted with the accident report, the Compensation Commissioner will consider the claim and make a decision.

After the Compensation Commissioner has considered the claim a postcard (W.Cl.56) be sent to the employer. The W.Cl.56 will only be used by the Commissioner when liability is accepted for payment of the claim. Where a W.Cl.56 is not issued, it normally indicates that the Compensation Commissioner has not accepted liability for any payment. If the worker disagrees with the decision, they can appeal the decision within 90 days by submitting form W929 to the Commissioner.

**Step 3:** If the injury continues for a long time (prolonged absence), the medical practitioner must send a Progress Medical Report (W.Cl 5) to the Commissioner. The progress report should be submitted on a monthly basis until the condition is fully stabilised. This informs the Commissioner of how long the employee is off work.

**Step 4:** Once the medical practitioner handling the case is satisfied that the employee is fit for duty, the practitioner will issue a Final Medical Report (W.Cl 5), which must be sent to the Compensation Commissioner. In this report the doctor states either that the worker is fit to go back to work or that the worker is permanently disabled.
The practitioner must send this form to the employer who sends it to the Commissioner. Please note that the Progress Report and Final Medical Report are on the same form (W.Cl 5).

**Step 5:** When the employee resumes work, a Resumption Report (W.Cl 6) must be completed and submitted to the Commissioner. Only after every one of these forms has been submitted will the Compensation Commissioner make all of the payments and close the case.

**Step 6:** The worker and the employer should keep copies of all the forms.

Source: https://www.labourguide.co.za/injuries-on-duty/177...

In terms of section 76.3(b) of the Compensation for Occupational Injuries and Diseases Act, no amount in respect of medical expenses shall be recoverable from the employee.

According to the Act, workers who suffer from a work-related disease or injury, have the following rights:

- The right to full free medical attention, including free transport to the hospital.
- Compensation for loss of income due to workplace injury or disease (temporary disability).
- Compensation for permanent loss of normal body functioning following a workplace injury or disease (permanent disability).
- Benefits payable to family in the case of the death of a worker due to workplace injury or disease.
- Increased compensation should the cause of the workplace injury or disease has arisen out of negligence on the part of the employer or fellow employee.
- Compensation is also payable if the workplace injury or disease was caused by a third party, but arose during the course of the duties of the employee.

Any injury on duty must be reported to the employer and the relevant documentation completed. It is up to a medical practitioner to gauge what the extent of an injury is. An employer may not refuse to complete the forms, and must submit the forms to obtain a reference number from the Compensation Fund.
13.2 Benefits to the Employer

- Assistance in the claiming, registering and administration of claims
- Assistance with Assessment
- Apply for a rate reduction on behalf of the employee
- Apply for rebates every 3 years (‘COID Outbonus’)
- Assist with legal requirements and compliance
- Assistance with re-opening of claims
- Assist with the administrative process – Reimbursement from Compensation Commissioner
- Assistance with Audits on old cases
- Identification of problem cases
- Alleviate Case Management workload that is time and admin intensive
- Communication with the employee regarding the progress of the claim
- Ongoing reporting and feedback

13.3 Benefits to the Employee

- Free Medical treatment (Reasonable costs)
- Continue to receive 75% of salary/wages (while the case is open up a maximum of 2 years)
- Does not use ‘sick leave’ – COID falls under ‘other’ leave
- Assistance with the COID claims process
- Pension to spouse and dependents in case of death
- Funeral costs
- Function loss payment
- Peace of mind – ‘my case is managed by a capable team’
14. A SUMMARY OF RELEVANT LEGISLATION

The text below are shortened versions of the Acts. Important to bear in mind is that posters of the followings Acts need to be displayed in the workplace where most employees will readily have access to the posters:

- Basic Conditions of Employment Act (BCEA) no 75 of 1997 (as amended)
- Employment Equity Act no 55 of 1998
- Occupational Health and Safety Act no 85 of 1993
- Skills Development Act no 97 of 1998 (as amended)

14.1 The Basic Conditions of Employment Act (BCEA) no 75 of 1997 (as amended)

The BCEA mainly regulates the individual relationship between an employee and employer and is mainly prescriptive in nature.

The purpose of the Act is to:

- Ensure that working conditions of unorganised and vulnerable workers meet the minimum standards that are socially acceptable in relation to the level of development of the country
- Remove the rigidities and inefficiencies from the regulation of minimum conditions of employment and to promote flexibility
- Ensure that the working time of employees must be arranged so as not to endanger their health and safety, and with due regard to family responsibilities

The Act applies to:

All organisations (employers and employees) except:

- The South African National Defence Force (SANDF)
- The National Intelligence Agency
- The South African Secret Service
- Unpaid charity workers / volunteers
- Employees who work on ships who falls under the Merchant Shipping Act

Some parts of the act have exclusions, e.g.:

- Working hours don’t apply to:
  - Workers in senior management
  - Sales staff who travel and regulate their own working hours
Workers who work less than 24 hours per month
Workers who earn more than R 149 763-00 per year

Annual leave doesn’t apply to:
Workers who work less than 24 hours per month
Leave over and above that provided for by the Act

Scope of the Act applies to every contract of employment entered into in SA. The act regulates working hours of employees, deals with health and safety, requirements for remuneration, and termination of employment.

14.2 The National Minimum Wage Act no 9 of 2018

The purpose of the National Minimum Wage Act No. 9 of 2018 (“NMWA”) is to advance economic development and social justice by:

- improving the wages of lowest paid workers
- protecting workers from unreasonably low wages
- preserving the value of the national minimum wage
- promoting collective bargaining
- supporting economic policy

The NMWA has set the national minimum wage rate at R20.00 for each ordinary hour worked for all workers except:

- farm workers
- domestic workers
- workers employed on an expanded public works programme
- workers who have concluded learnership agreements contemplated in the Skills Development Act No. 97 of 1998

Alternative specific minimum wages have been set for these excluded categories of workers.

The payment of the national minimum wage cannot be waived, and it takes precedence over any contrary provision in any contract, collective agreement, sectoral determination or law, except a law amending the NMWA.

Workers who have concluded learnership agreements contemplated in section 17 of the Skills Development Act 97 of 1998 are entitled to the allowances contained in Schedule 2 of the NMWA.
The calculation of the national minimum wage is the amount payable in money for ordinary hours of work. It excludes:

- any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a sectoral determination
- any payment in kind including board or accommodation, unless specified otherwise in a sectoral determination
- gratuities including bonuses, tips or gifts; and any other prescribed category of payment

Any deduction made from the remuneration of a worker must be in accordance with section 34 of the BCEA, provided that the deduction made in terms of section 34(1)(a) of the BCEA does not exceed one quarter of a worker's remuneration.

14.3 The Labour Relations Act no 66 of 1995 (as amended)

The application or purpose of the LRA is to advance economic development, social justice, labour peace, and a democratisation of the workplace by fulfilling the primary objectives of the LRA, which are to realise and regulate the fundamental rights of workers and employers under Section 27 of the SA Constitution.

**Applies to:**

All organisations (employers and employees) except:

- The South African National Defence Force (SANDF)
- The National Intelligence Agency
- The South African Secret Service

The Act promotes the right to fair labour practices, to form and join trade unions and employers’ organisations, to organise and bargain collectively, and to strike and lock-out. In doing so it reflects the vision of employees’ and employers’ rights contained in the Constitution.

The Act also favours conciliation and negotiation as a way of settling of labour disputes. It expects parties to make a genuine attempt to settle disputes through conciliation before going on to the next step, which could be arbitration, adjudication or industrial action. By providing a more simplified dispute resolution process, the Act aims to achieve quick, effective and inexpensive resolution of disputes.

It thereby aims to reduce the level of industrial unrest, and to minimise the need for costly legal advice. The Commission for Conciliation, Mediation and Arbitration
The concept of freedom of association is enshrined in the South African Constitution and included in the Labour Relations Act (LRA).

Freedom of Association is included in Chapter 2 of LRA. The Freedom of Association includes three aspects:

- **Workers have the right to form and join** a union of their choice. As union members, the workers have the right to elect office-bearers, officials and trade union representatives (shop stewards). The worker has the right, if
elected, to hold the elected office. The person has the right to perform duties as described in the trade unions constitution.

- **Employers have the right to form and join** employer’s organisations. Just as the workers, employers have the right to elected office bearers and hold the elected office

- **Everyone** in the workplace **is protected against discrimination**. This includes the fact that no one can be forced to join a union or be stopped from joining. The same applies to employers and their organisations.

If any person thinks that they have been victimised or their right to association tampered with, they have to prove that they have been compelled, threatened, prohibited in any manner. It is then up to the employer to prove that it did not happen.

### 14.3.2 Organisational rights protected by the LRA – Trade Unions

The rights discussed in the previous section, lead to organisations such as Trade Unions and Employers Associations.

In each sector of the economy, there are Trade Unions and Employers Associations operating. They represent members during wage negotiations and other work-related negotiations.

- Each organisation has the right to determine its own constitution, rules and elections of office bearers
- Each of these organisations have administrative duties that need to be completed as part of their work
- They participate in the federations that they are affiliated to, e.g. NUMSA is affiliated to COSATU.

**Note:** In April 2010 there were 198 registered trade unions in South Africa. For a list of these, see the webpage: [http://www.labourguide.co.za/general/trade-unions-78](http://www.labourguide.co.za/general/trade-unions-78)

The Act provides for the following organisational rights:

- **Trade union access to a workplace.** This includes the right of unions to:
  - Enter an employer’s premises to recruit or meet members
  - Hold meetings with employees outside their working hours at the employers’ premises
  - Conduct elections or ballots among its members on union matters
• Deductions from employees' wages of trade union subscriptions by the employer for the trade union through a stop order facility.

• Election of trade union representatives at a workplace. The more members the trade union has, the more representatives it can elect. The trade representative can:
  o Assist and represent employees in grievance and disciplinary proceedings
  o Monitor the employers' compliances with labour laws, for example, sectoral determinations and health and safety regulations or any collective agreement, and report any contravention to the employer, union or any responsible authority
  o Perform any other function agreed to between the union and the employer

• Leave for trade union activities during working hours. Union representatives are entitled to reasonable time off with pay during working hours to:
  o Perform their functions as union representatives
  o Receive training in the functions of union representatives

• Union office bearers who are employees may take off reasonable time to perform their union duties. The amount of time to be taken, as well as the number of days' paid leave, is matter for negotiation between the union and the employer.

14.4 Employment Equity Act no 55 of 1998

The Employment Equity Act requires designated employers to compile and implement an Employment Equity Plan aimed at promoting equal opportunities and affirmative action, while eliminating unfair discrimination. Designated employers include those who employ more than 50 people or have an annual turnover of a certain amount.

The Act is intended to redress the employment disadvantages of black (Africans, Coloured and Indian) people, women and those with disabilities ("designated groups"). A designated employer is required to implement affirmative action measures for designated groups in order to achieve employment equity. This will be subject to regular reviews. Employers who do not comply with the Act may be subject to fines. The Act, which came into effect in various stages during 2000, impacts directly on recruitment practices and the composition of the workforce.

The Employment equity act does away with all forms of discrimination in employment in SA. The EE Act aims to:
• Promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination,

• Implement affirmative action measures to redress disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.

This Act requires the development of an Employment Equity Plan, which must be submitted to the Department of Labour.

**Applies to:**

All organisations (employers and employees) except:

• The South African National Defence Force (SANDF)
• The National Intelligence Agency
• The South African Secret Service

With special reference to designated groups.

The provision for affirmative action applies to:

• Employers with 50 or more workers or whose annual income is more than the amount specified in the Act
• Municipalities
• Organs of state
• Employers ordered to comply by a bargaining council agreement
• Any other employers who volunteer to comply

**14.4.1 The requirements placed on employers by the EE Act**

**Employment Equity** is about correcting differences in the labour market in terms of employment, occupation and income, and removing barriers that prevent access to equal opportunity and changing the organisation to promote diversity and fairness.

The Act makes provision for:

• Steps to be taken by an employer to end unfair discrimination in the employment policies and practices.

• Unfair discrimination that is prohibited on the grounds of: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, HIV status, religion, conscience, belief, political opinion, culture, language and birth.

• Medical and psychometric testing can only be done with proper reasons and if it is job related.
• Employers are required to prepare and implement employment equity plans after conducting a workforce analysis and consulting with unions and employees.

• Employment Equity plans must contain specific affirmative action measures to achieve the equitable representation of people from designated groups in all occupational categories and levels in the workforce.

• Designated employers must take measures to progressively reduce disproportionate income levels.

• Any employer who intends to contract with the state must comply with its employment equity obligations.

The Act describes designated groups as Blacks (Broadly including Africans, Coloureds and Indians), women and people with disabilities.

14.4.2 Employment equity plan
Employment Equity is a process that is undertaken by the company as a whole. Three steps that employers can take to promote equity in the workplace are:

• End unfair discrimination

• Testing for recruitment purposed should be job related.

• Implement EE plans after consulting the workforce

Companies need EE plans because it will provide goals and a planned process to implement EE measures. It is also a requirement of the EE Act. The process of implementing employment equity is based on an Employment Equity Audit. The audit results in an Employment Equity Plan.

14.4.3 The process to be followed in implementing employment equity
Once the audit has been done, a plan (Employment Equity Plan) is developed to address any shortcomings and required changes within the company to promote equity. The plan includes the following:

• The objective to be achieved in one year.

• The Affirmative Action measures to be implemented.

• In the occupational categories and level, where the audit identifies under representation, numerical goals are set to achieve equitable representation by suitably qualified people from designated groups, with a time-table and strategies intended to achieve these goals the plan can be for a year or longer.
• The procedures that are to be used to monitor and evaluate the implementation of the EE plan. This is the criteria that are to be used to evaluate progress made towards greater equity.

• Dispute resolving measures

• Role of managers in monitoring and implementing the EE Plan.

The skills audit evaluates policy and procedure of the company to determine if any barriers to employment equity exist. These barriers are any policies, procedures or practices that might prevent equal opportunity. Once the barriers have been identified, the EE Plan will specify how these will be removed. Barriers can be identified in recruitment and selection policy, in remuneration policy, in job grading, training and physical access problems on buildings and office equipment.

The EE Committee or Consultative forum will identify these barriers and recommend changes in policy accordingly. It is the responsibility of the team leader, supervisors and managers to implement the changed policy. If the numerical goals involve a specific department, once a vacancy develops, the team leader is required to appoint a new staff member according to the EE plan.

Three aspects in EE plans include:
• Objectives to be achieved within a year,

• occupational categories and levels which are under-represented in the company and

• monitoring of the plan

14.4.4 The role of the employment equity committee
The EE Act requires the company to draw up an EE plan, through a consultative process. Section 16 of the Act describes the consultative process that the employers should go through. The parties that have to be consulted are:

• Representatives from the representative trade union

• If no representative trade union exists in the company, representatives from the workforce as selected by them.

The role of the EE committee is to draw up the EE plan, monitor its implementation and report to the Department of Labour.

14.4.5 Who should be represented in the EE COMMITTEE?
All employees should be represented on the EE Committee either through a union or the employees selecting representatives. The representatives should be from all
occupational categories and levels in the company to form an EE committee, sometimes called a consultative forum. Due to the fact that the information required for the EE Plan overlaps with the requirements stipulated in the Skills Development Act (SDA) the forum will deal with both the issues of Employment Equity and Skills Development.

**14.4.6 The employment policy and practices related to the EE plan**

One of the most important aspects of Employment Equity is recruitment and selection of the suitably qualified designated person.

With an Employment Equity plan in place, employment policy needs to be in line with the plan. Employment policy need to enable line managers and HR to implement the EE Plan. If a certain designated group has to be employed in a specific position, the position might only be advertised in newspapers that target the designated group.

Policy will include guidelines on the type of employee that will be given preference i.e. for a specific position preference might be given to a black man, however if no suitable black man can be appointed, the second preference would be a black woman, third preference a coloured man and fourth preference would be a coloured woman and so on.

The policy will also specify how competency and profiling is done. This will not only consider the qualifications, but also relevant skills and experience needed for the position. This will assist the manager during the recruitment process to identify the most suitable candidate. In the past qualifications were sometimes used as the only criteria, creating a barrier for people who have skills and experience only.

Employment practices change. The screening methods become more flexible, giving recognition to the relevant skills and experience. The interviewing methods change and interview panels have to be representative of the workforce. The interviewing questions also change as explained lesson 3. If the company uses tests, these have to be explained and should be job related.

**Employment policies hinder the implementation of the EE plan if the policy has barriers such as the method of screening or interviewing candidates.**

**14.4.7 Barriers that adversely affect disadvantaged people**

Barriers to equal opportunity have to identified and removed. Barriers that exist are: Lack of training opportunities, lack of opportunities to gain experience and growth.
Taking note of all the points listed in the Code of Good Practice, they will require effort from all in the company. Implementing the above will lead to a change in culture and transformation of the organisation.

**Example:**

Various companies have implemented a flexible policy around leave and religious holidays. Leave policy stipulates that certain days can be taken as leave irrespective of which religious day it is. Jewish employees can then take off during Yum Kippur and Hindus can take off on Diwali.

Other barriers to Employment Equity can include: training and development, promotion practices and remuneration.

Employment Equity leads to company-wide changes in culture and in policy. Emphasising equity leads to a different approach in recruitment and selection, remuneration, promotion and training and development. Employment Equity is now regulated by law in South Africa, requiring employers with more than 50 employees to draw up an EE plan.

14.5 **Protected Disclosures Act no 26 of 2000**

The **Protected Disclosures Act** is supported by section 8 and 32 of the Constitution:

Section 8 affirms the right of all people in South African and affirming the values of dignity, equality and freedom. This section also points out that legislation or common law will be developed to protect the rights of individuals. Section 32 states all individuals have a right to information, held by another person “that is required for the exercise or protection of any rights”.

All these legislations aim to make the protection of human rights a reality in the bill of rights:

- ‘No person shall be unfairly discriminated against, directly or indirectly’
- Clause 10 – entitles every person to ‘…respect for and protection of his or her dignity.’
- Clause 15 – details the right to freedom of speech and expression.

Section 27 of Chapter 3 of the Constitution relates specifically to labour relations and provides that:

- Every person shall have the right to fair labour practices
- Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers’ organizations
Workers and employers shall have the right to organize and bargain collectively

Workers shall have the right to strike for the purpose of collective bargaining

Employers' recourse to a lockout for the purpose of collective bargaining shall not be impaired.

The purpose of this Act is to protect an employee, whether in the private or public sector, from being subjected to an occupational detriment on account of having made a protected disclosure. To provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure and to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by their employer.

The Protected Disclosures Act protects whistle blowers in the workplace. In the preamble of the Act, the effect of criminal activity on the economy is pointed out and the importance of “accountable and transparent corporate governance” is highlighted. The Act has three objectives:

- To protect the employees, in the private or public sector, from being subjected to an occupational disadvantage (victimisation) an account of having made a protected disclosure.
- The act provides for procedure to make a protected disclosure.
- The act spells out remedies if any victimisation takes place after a protected disclosure was made.

A “Protected Disclosure” is described in the Act as:

*any disclosure (confession) made by an employee, who believes that making the confession could lead to victimisation by the employer. A disclosure is about any action within the workplace that is:

- criminal offence,
- failure to comply with a legal obligation,
- a miscarriage of justice,
- when someone’s health has been endangered,
- the environment is being demanded
- or unfair discrimination had taken place."

The content of the disclosure is of such a nature, that if the person confronts the employer all relevant evidence of the misconduct, irregularity or illegality (impropriety) will be destroyed. A disclosure can be made to a legal advisor, to the employer within
the employer’s policies and procedure. Disclosure can also be made to the Public Protector, the Auditor-General, or even a Cabinet Minister.

**Applies to:**

All organisations (employers and employees). Independent contractors are not covered by the Private Disclosures Act

---

**14.6 Unemployment Insurance Fund Act**

Purpose of Act 20 is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment.

Application of Act 25 applies to all employers and employees, other than-

(a) employees employed for less than 24 hours a month with a particular

(b) employees who receive remuneration under a learnership agreement registered employer, and their employers; registered in terms of the Skills Development Act, 1998 (Act NO. 97 of 1998), and 30 their employers;

(c) employers and employees in the national and provincial spheres of government;

(d) persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers.

---

**14.7 Compensation for Occupational Injuries Act**

The aim of the **COID Act** is to provide for compensation in the case of disablement caused by occupational injuries and diseases, sustained or contracted by employees in the course of their employment, or death resulting from such injuries and diseases; and to provide for matters connected therewith.

In terms of section 42 of the Compensation for Occupational Injuries and Diseases Act, the Compensation Fund may refer an injured employee to a specialist medical practitioner designated by the Director General for a medical examination and report. Special fees are payable when this service is requested.
14.8 Understand the Skills Development Act and Skills Development Levies Act

The Skills Development Act places certain requirements on employers for the development and training of staff. In this section we will list the requirements for a Workplace Skills Plan (WSP) and annual training report.

14.8.1 The requirements of the SDA - workplace skills plan and annual training report

In terms of the Skills Development Act (SDA) 97 of 1998 and the Skills Development Levies Act (SDL) 9 of 1999, every employer employing more than 50 people is required to plan for training and report on the training done to the appropriate SETA. The Workplace Skills Plan (WSP) is the document stipulating the training needs and plans to address the training needs in a company. On an annual basis the company reports on progress made against the plan in the Annual Training Report (ATR).

The plan stipulates how the training and development needs will be addressed. The following is an outline of a typical WSP:

- Details of the company and the company subsidiaries
- Organisational skills profile including occupational categories, qualifications, and positions filled in the company
- Strategic priorities including details on the number of people who will receive specified training and money spend
- Quality Assurance
- Authorisation of the plan

The aim of the WSP is to determine the knowledge and skills needed within a company to remain competitive. Every company should have an HR plan stipulating the type of staff needed in the next five years or more, to be able to train and appoint the correct staff members. The WSP can be part of the HR plan or complement it.

As the WSP is implemented, the company is required to report on the implementation on an annual basis to the SETA.

14.8.2 The requirements of the SDA - workplace skills plan and claiming back levies

The Skills Development Levies Act requires all businesses employing more than 50 employees in South Africa to pay 1% of payroll to the South African Revenue Services (SARS). SARS administers the collection of these levies: 2% is used for administration of the levies, 18% is paid towards the National Skills Fund and 70% to the SETAs.
The SDA stipulates the establishment of the Sector Education and Training Authorities (SETA) and the National Skills Authority (NSA).

14.8.3 Paying the Skills Development Levy
An employer must pay a skills development levy every month if:

- The employer has registered the employees with SARS for tax purposes (PAYE), and/or
- The employer pays over R500 000 a year in salaries and wages to their employees (even if they are not registered for PAYE with SARS)

An employer must pay 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments).

The employer must register with SARS and pay the levy monthly. SARS will supply the correct forms to fill in (SDL 201 return form). The levy must be paid to SARS not later than 7 days after the end of every month.

The levies paid to SARS are put in a special fund. 80% of the money from this fund will be distributed to the different SETAs and the other 20% will be paid into the National Skills Fund. The SETAs will then pay grants to employers who appoint a Skills Development Facilitator. The National Skills Fund will fund skills development projects that don't fall under the SETAs.

14.8.4 The concept of learnerships
Learnerships are intended to address the gap between current education and training provision and the needs of the labour market.

A learnership is defined as a work-based route for learning and gaining qualifications. It includes both structured work experience (practical) and structured institutional learning (theory). In other words, it includes both on the job and academic components. A learnership is not the only way to gain a full NQF qualification but does offer a very specific approach.

The criteria for a learnership are set out in the Skills Development Act. These indicate that the learnership must:

- consist of a structured learning component
- include practical work experience
- be governed by an agreement between the learner, employer and education and training provider
- lead to a qualification registered on the NQF and
- relate to an occupation
• Include job rotation, on-going mentorship and assessment in order to fully support the learner.

The idea is that people really learn the "ins and outs" of an occupation by practicing all its aspects under the watchful eye of an experienced and qualified person. In order to become qualified themselves, learners will have to be assessed against occupational standards (which have been registered on the National Qualification Framework) that have been agreed in advance by industry stakeholders. They can also accumulate credits awarded on the successful completion of these standards and achieve a nationally recognised qualification that will signal their “qualified” status.

14.8.5 The concept of lifelong learning
Lifelong learning is a concept that is used in and outside of the workplace. It is a process where an individual takes responsibility to learn on an ongoing basis. It includes part time or fulltime study, learner ships, in-company training linked to gaining experience with or without a mentorship programme.

Lifelong learning is defined as "all learning activity undertaken throughout life, with the aim of improving knowledge, skills and competence, within a personal, civic, social and/or employment-related perspective."

Lifelong learning is therefore about:

• acquiring and updating all kinds of abilities, interests, knowledge and qualifications from the pre-school years to post-retirement

• Learning opportunities should be available to all on an ongoing basis. In practice this means that an individual selects a learning pathway, suitable to their needs and interests at all stages of their lives. The content of learning, the way learning is accessed, and where it takes place may vary depending on the learner and their learning requirements.

Lifelong learning is also about providing "second chances" to update basic skills and also offering learning opportunities at more advanced levels. All this means that formal systems of provision need to become much more open and flexible, so that such opportunities can truly be tailored to the needs of the learner, or indeed the potential learner.

14.8.6 The role of the training committee in the skills development process
The SDA stipulates clearly that the WSP is drawn up by the SDF in consultation with the training committee.

Companies with more than 50 employees are required by the SDA, to establish a Training Committee within the company. The committee is established to provide a
forum for consultation with all employees, especially with employees not at management level. The committee appoints the Skills development facilitator and consults about the WSP.

The composition of the committee should represent the employees from all occupational groups. If more than 10% of employees belong to a union, the union should be represented.

The committee deals with all issues relating to training and development as well as career planning.

### 14.8.7 Gather information for the WSP / Annual Training Report (ATR)

To compile the reports required by the SETA, you need to do research to find out what information the SETA required, and then plan to gather the required information for incorporation into the WSP.

Skills development should be a continuous, planned and structured process that is influenced by the SETA requirements, but not dependent on them. The WSP/ATR should be the end result of a business-driven skills planning process. This will ensure the Return on Investment from training, as programmes will be focused on the competence required for the Key Performance Areas of the business.

The skills planning process should include:

- A Skills Audit (about every 3 to 5 years) to determine the current state of skills in the company, followed by
- An annual Training Needs Analysis to identify the main skills gaps and training needs that must be addressed to improve our organisation’s performance, resulting in
- A comprehensive training and development plan for learning and other skills development programmes to improve employee and organisational performance. This document should be used as a basis for compiling the WSP/ATR, which only includes information that is relevant for the SETA.

### 14.8.8 The levies / grant system of the SETA

The Skills Development legislation requires employers to pay 1 percent of their payroll as a Skills Levy to the SETAs. Employers qualify for SETA grants from their levy contributions if they meet certain requirements, such as submitting a WSP – which describes the training plan for the year – and an Annual Training Report (ATR) – which records the training conducted in that year.

The SETAs encourage employers to offer training that enables their employees to obtain credits on the NQF, and therefore to record details of the unit
standards/qualifications that programmes are designed to achieve in their WSPs. The SETAs also encourage employers to use accredited training providers who have met the ETQA requirements in respect of quality assurance systems.

14.9 The Acts and how they interact and support the SA Constitution

The South African Constitution was adopted by parliament in 1996. This Constitution represents the collective wisdom of the South African people and has been arrived at by general agreement. The Constitution of South Africa does not exist as a single document but as an accumulation of customs and precedents, together with laws defining certain of its aspects.

The Bill of Rights forms part of the Constitution and a number of points contained in Chapter Two are supported by the Acts that we will be discussing in this module.

The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil the rights in this chapter. The rights in the Bill of Rights are subject to limitations contained or referred to in section 36 or elsewhere in the Bill.

The labour legislation we are dealing with expands and articulates the rights of workers in South Africa through their scope and application.

- **Application** - The Bill of Rights applies to all laws and binds the legislature, executive and judiciary and all organs of state.
- **Equality** - Everyone is before the law and has the right to equal protection and benefit of the law.
- **Human Dignity** - Everyone has inherent dignity and the right to have their dignity respected and protected. When we study the Acts more closely later in the module you will see how they protect human dignity and the rights of all concerned
- **Slavery, Servitude and Forced Labour** - No one may be subjected to slavery, servitude or forced labour. In this respect the BCEA protects employees and prevents labour practices that could place employees in a situation where unfair practices could amount to slavery and forced labour.
- **Assembly, Demonstration, Picket and Petition** - Everyone has the right, peacefully and unarmed, to assemble, demonstrate, picket and to present
petitions. To this end the LRA makes provision for lawful strikes, the right to belong to unions and to participate in bargaining and workplace forums.

- **Freedom of Trade, Occupation and Profession** - Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

- **Labour Relations** - Everyone has the right to fair labour practices. Every worker has the right to form and join a trade union, to participate in the activities of a trade union and to strike.

- **Association** - Every employer has the right to form and join an employer's organisation and to participate in its activities. Every trade union and employer's organisation have the right to determine its own administration, activities, to organise and to form and join a federation. The Labour Relations Act supports and promotes this notion.

- **Environment** - Everyone has the right to an environment that is not harmful to their health or well-being, to have the environment protected.

- **Children** - Every child has the right to a name and nationality from birth, family/parental care, basic nutrition, shelter, basic health care and social services, to be protected from maltreatment, neglect, abuse. Be protected from exploitative labour practice.

- **Education** - Everyone has the right to a basic education, including adult basic education, and to further education. They have the right to receive education in the language of their choice. The SDA and SDLA support the Constitution through the promotion of lifelong learning through in-house training as outlined in the Workplace Skills Plan and learnerships.

- **Access to Courts** - Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum. Here the LRA makes provision through the CCMA where labour related disputes may be reported to receive a fair hearing and judgement.

- **Limitation of Rights** - The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This means that we all need to abide by
the laws of the land but that these laws have to answer to the basic beliefs of the Constitution.

- **Interpretation of Bill of Rights**: When interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underline an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider.

The LRA outlines the rights of both the employee and the employer in various sections, the EEA outlines the rights of employment equity and the SDA outlines the rights of workers to gain new skills to improve their quality of life.

Section 2 of the constitution deals with the Bill of Rights; below is a summary of the most important aspects of this section in the constitution:

- Chapter 2, section 23 includes the following aspects linked to the rights to fair labour practice:
  
  Every worker has the right to form and join a trade union, participate in activities of the trade union and to strike. The same applies to any individual who wants to form and participate in an employers’ organisation. Trade unions and employer organisations have the right to organise, form a federation and perform administrative activities. Involvement in collective bargaining is included and the use of collective agreements.

  The points above are all included in the **Labour Relations Act** (LRA). In the Act more detail is provided on how employees can join a union and how the company interacts with the union. The same constitutional points are included in the **Basic Conditions of Employment Act**.

- The **Employment Equity Act** is supported by Section 9 (Chapter 2) of the Constitution:

  “*Equality includes the full and equal enjoyment of rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.*”

  The EE Act and the SDA support each other by promoting the development and growth of individuals in the workplace.
References and Further Reading

• Know your LRA. A guide to the Labour Relations Act, 1995 (as amended). Second Edition. Published by The Department of Labour

Web references

(Accessed on March 2008 and November 2010)

• www.financialplan.about.com
• www.seedprog.co.za
• www.paralegaladvice.org.za
• www.labour.gov.za
• www.capegateway.gov.za
• www.acts.co.za
• www.journaids.org
• www.alp.org.za
• www.shift-schedule-design.com
• www.sasbo.org.za
• www.labour.gov
• www.workinfo.com/free/sub_for_legres/lra.html
ANNEXURE A – Notice of a Hearing

NOTIFICATION TO ATTEND A DISCIPLINARY ENQUIRY
(NB: The notice to attend a hearing has to be handed to the employee 48 hours before the hearing)

NOTICE ISSUED TO ALLEGED OFFENDER

<table>
<thead>
<tr>
<th>NAME OF OFFENDER</th>
<th>POSITION</th>
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<tr>
<th>MANAGER/SUPERVISOR</th>
<th>DATE AND TIME OF NOTICE ISSUED</th>
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CHARGES: You are hereby notified that a formal disciplinary enquiry will be conducted in respect of the following alleged charges against you: (summary detail)

a. Gross dishonesty in that you submitted a falsified medical certificate for the period of 26 – 30 May 2014
b. Repeated absenteeism as per the following dates: 8, 9, 10 May, 26 – 30 May, as well as per staff attendance register

c.

NOTIFICATION OF VENUE

<table>
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<tr>
<th>DATE</th>
<th>TIME OF HEARING</th>
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RIGHTS: The alleged offender has the following rights

a. To present your case
b. Cross examination of the employer’s witness
c. To be represented at the enquiry by a fellow employee
d. To call a witness. The Business Unit Manager must be informed so that a reliever can be arranged
e. To an interpreter who is a fellow employee. The request must be made before the enquiry starts, and not at the enquiry
f. Should the outcome of the enquiry be dismissal, you have the right to refer the matter to the CCMA within 30 days

IMPORTANT NOTICES

a. You are advised that should you refuse and/or fail to attend this disciplinary enquiry, it will be held in absentia (without you present) and the outcome will be binding.
b. You are to attend the hearing in full prescribed uniform

Acknowledgement of receipt of notice

I, __________________________________________, fully understand the content of this notification and do not sign this document as an admission of guilt, but purely as receipt thereof.

Signature of employee: ___________________________ Time: ___________________________
Signature of witness: ____________________________ Date: ____________________________
ANNEXURE B – Disciplinary Hearing Procedures

DISCIPLINARY HEARING
RECORD OF PROCEEDINGS - PART: 1

NAME OF RESPONDENT: ____________________________
DATE: ___________________ TIME: ___________________
CO.NO: ____________________________

PRESENT

<table>
<thead>
<tr>
<th>NAME</th>
<th>CAPACITY</th>
<th>SIGNATURE</th>
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<tbody>
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</table>

WELCOME AND INTRODUCTION BY PRESIDING OFFICER

Presiding officer to confirm with the respondent:

<table>
<thead>
<tr>
<th>Question:</th>
<th>Yes</th>
<th>No</th>
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</thead>
<tbody>
<tr>
<td>1) Were you served with a notification?</td>
<td></td>
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<tr>
<td>2) Did you have enough time to prepare?</td>
<td></td>
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<tr>
<td>3) Do you know you can have a representative? (If no representative present)</td>
<td></td>
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<tr>
<td>4) Do you wish to have a representative?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5) Do you wish to have interpreter?</td>
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</table>

Comments on any of these questions:

You have the following rights:

• The right to bring witnesses
• The right to produce evidence
• The right to cross question the Complainant
• The right to cross question witnesses
• The right to state your case
• The right to appeal the outcome in the case of Final Written Warning/Dismissal within 3 days
• The right to refer the matter to the CCMA within 30 days if dismissed.

I hereby confirm that I understand and agree with the above.

Respondent: ____________________________
Presiding Officer: ____________________________
Witness: ____________________________
DATE: _______/_____/_____

PLEADING OF THE RESPONDENT

How do you plead on the charges laid against you?
Charge 1: ____________________________________________
Guilty Not guilty
Charge 2: ____________________________________________
Guilty Not guilty
Charge 3: _________________________________________________________________________

Guilty Not guilty

I hereby confirm that I understand and agree with the above ______________________ (Respondent)

Presiding Officer __________________________

Witness___________________________

DATE_____/_____/________

DETAILED STATEMENT OF COMPLAINANT:________________________

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

DATE_____/_____/_____

DETAILED STATEMENT OF RESPONDENT

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

DATE_____/_____/_____

EVIDENCE SUBMITTED

Complainants’ Evidence.

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

DATE___/___/_____

Respondent evidence:

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

DATE___/___/_____

Witness:

__________________________________________________________________________________

__________________________________________________________________________________

__________________________________________________________________________________

DATE___/___/_____
CROSS QUESTIONING:

___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

DATE ___/___/____

CROSS QUESTIONING:

___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

DATE ___/___/____

CLOSING ARGUMENTS

Complainant:

___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

DATE ___/___/____

CLOSING ARGUMENTS

Respondent:

___________________________________________________________________________________
___________________________________________________________________________________
___________________________________________________________________________________

DATE ___/___/____
DISCIPLINARY HEARING
RECORD OF PROCEEDINGS – PART: 2

REVIEW OF RECORD

DATE_____/_____/______

MITIGATION

DATE_____/_____/______

PRESIDING OFFICER SUMMARY

DATE_____/_____/______

PRESIDING OFFICER FINDINGS

Charge 1:

Charge 2:

Charge 3:

DATE_____/_____/______

PENALTY IMPOSED AND RESPONDENT RIGHTS

Signature: ___________________                                  __________________________

Presiding Officer                                    Complainant

Date: __________________________

Signature: ___________________                                  __________________________

Respondent                                    Representative of Respondent

Date: __________________________
THE RESPONDENT HAS THE RIGHT TO APPEAL WITHIN 3 DAYS ON THE
PRESCRIBED FORM IF THEY FEEL THE PRESIDING OFFICER HAS IN ANY
WAY BEEN UNFAIR, INTIMIDATORY OR HAS VICTIMISED THE IN ANY WAY.

DOES THE RESPONDENT WISH TO APPEAL

YES  NO

APPEAL FORM

I __________________________  Coy No: ______

Name of appellant

Hereby appeal against the:

| Final written warning of the disciplinary hearing |
| Dismissal following the disciplinary hearing |
| Dismissal following the enquiry for incapacity |

Held on the ______________________

My grounds for the appeal are as follows:

| New evidence or witness available |
| Correct procedure not followed |
| Evidence does not support p/o findings |
| Penalty too harsh for offence |
| Victimisation |
| Mitigation |

SUMMARY IN SUPPORT OF GROUNDS

___________________________________________________________________________________
___________________________________________________________________________________

SIGNATURE:

_____________________________________________
Appellant

_____________________________________________
Received for the Company

Date: ______________  Date: ______________

Time: ______________  Time: ______________
## ANNEXURE C – Labour Relations Grid

<table>
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<td><strong>Purpose:</strong></td>
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<tr>
<td>• Ensure that working conditions of unorganised and vulnerable workers meet the minimum standards that are socially acceptable in relation to the level of development of the country</td>
<td>• To give effect to section 27 of the Constitution;</td>
<td>• Promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination,</td>
<td>• To protect the employees, in the private or public sector, from being subjected to an occupational disadvantage (victimisation) an account of having made a protected disclosure.</td>
<td>• To establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment.</td>
<td>• To provide for compensation in the case of disablement caused by occupational injuries and diseases, sustained or contracted by employees in the course of their employment, or death resulting from such injuries and diseases; and to provide for matters connected therewith</td>
</tr>
<tr>
<td>• Remove the rigidities and inefficiencies from the regulation of minimum conditions of employment and to promote flexibility</td>
<td>• To regulate the organisational rights of trade unions;</td>
<td>• Implement affirmative action measures to redress disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.</td>
<td>• The act provides for procedure to make a protected disclosure.</td>
<td>• Dealing with the payments of:</td>
<td>• Unemployment benefits</td>
</tr>
<tr>
<td>• Ensure that the working time of employees must be arranged so as not to endanger their health and safety, and with due regard to family responsibilities</td>
<td>• To promote and facilitate collective bargaining at the workplace and at sectoral level;</td>
<td>• The act spells out remedies if any victimisation takes place after a protected disclosure was made</td>
<td>• The act provides for procedure to make a protected disclosure.</td>
<td>• Unemployment benefits</td>
<td>• Illness benefits</td>
</tr>
<tr>
<td></td>
<td>• To regulate the right to strike and the recourse to lockout in conformity with the Constitution;</td>
<td></td>
<td>• The act provides for procedure to make a protected disclosure.</td>
<td>• Maternity benefits</td>
<td>• Maternity benefits</td>
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<td>• To promote employee participation in decision-making through the establishment of workplace forums;</td>
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<td></td>
<td>• Dismissal and retrenchment benefits</td>
<td>• Dismissal and retrenchment benefits</td>
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<td></td>
<td>• To provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;</td>
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<td>• Adoption benefits</td>
<td>• Adoption benefits</td>
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<td>• Dependant’s benefits</td>
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<tr>
<td>• To establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act; • To provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; • To give effect to the public international law obligations of the Republic relating to labour relations; • To amend and repeal certain laws relating to labour relations; and • To provide for incidental matters. Exclusions: • The South African National Defence Force (SANDF) • The National Intelligence Agency • The South African Secret Service • Unpaid charity workers / volunteers</td>
<td>Exclusions: • The National Defence Force; • The National Intelligence Agency; and • The South African Secret Service. Exclusions: • The South African National Defence Force (SANDF) • The National Intelligence Agency • The South African Secret Service • Contractors are not included</td>
<td>Exclusions: • Contractors are not included</td>
<td>Exclusions: • Employees employed for less than 24 hours a month with a particular • Employees who receive remuneration under a learnership agreement registered employer, and their employers; registered</td>
<td>Exclusions: • National and provincial state departments; • Certain local authorities • Employers insured by a company other than the Compensation Fund</td>
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<td>• Employees who work on ships who falls under the Merchant Shipping Act</td>
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<td>• All organisations (employers and employees)</td>
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<td>• Employers with 50 or more workers or whose annual income is more than the amount specified in the Act • Municipalities • Organs of state • Employers ordered to comply by a bargaining council agreement • Any other employers who volunteer to comply</td>
<td>• All organisations (employers and employees)</td>
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<td>• All organisations (employers and employees)</td>
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</table>

in terms of the Skills Development Act, 1998 (Act NO. 97 of 1998), and 30 their employers; • Employers and employees in the national and provincial spheres of government; • Persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic like Mutual Associations.
• There are currently two approved mutual associations: • Federated Employers Mutual Assurance (FEMA), for the building industry; and • Rand Mutual Assurance Company (RMA), for the mining industry.