



THE SOUTH AFRICAN
MEDICAL ASSOCIATION

**TRADE UNIONS' RESPONSIBILITIES
TOWARDS ITS MEMBERS
EMPLOYMENT RIGHTS, PROTECTION
AND ENFORCEMENT
PERSPECTIVE**

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perspective





MODULE 1- The right to fair Labour Practice – The Constitution and the Labour Relations Act

- Chapter 2 of the Constitution Act 108 of 1996 (The Bill of Rights) enshrines a wide variety of human rights and freedoms.
- These include political and civil rights (first generation rights), socio economic and cultural rights (second generation rights) and the environmental rights (third generation rights).
- Included amongst the socio economic rights are the 'labour rights' set out in section 23 of the Constitution, which provides as follows:



THE CONSTITUTION - Section 23

- Everyone has the right to fair labour practices
- Every worker has the right-
 - (a) To form and join a trade union
 - (b) To participate in the activities and programmes of a trade union; and
 - (c) To strike
- **Darcy du Toit et al** - “Fairness is at the heart of section 23 and is by its nature an expansive concept, which is premised on the circumstances of a particular case as well as the conflicting and evolving rights and interests of employers and employees collectively”.
- Fairness is not defined in the LRA: In **NEHAWU v University of Cape Town 2003 (2) BCLR 154 (CC)**, the Constitutional Court noted that, since ‘fair labour practice’ involves a value judgement based on specific circumstances it is neither necessary nor desirable to define this concept.



- The Labour Relations Act and the Basic Conditions of Employment Act are expressly designed to give effect to the Rights contained in Section 23 of the Constitution.
- The Employment Equity Act, though enacted primarily to give effect to the prohibition of unfair discrimination contained in section 9 (equality clause) of the constitution, is no less concerned with the regulation of labour practices and cannot be read in isolation from section 23.
- All the three statutes are to be interpreted 'in compliance with the constitution' and must be purposively construed in order to give effect to the constitution.
- Therefore legislation that is capable of two conflicting interpretations must be given the meaning that best accords with the constitution, unless there is a clear legislative intention to the contrary.



THE LABOUR RELATIONS ACT (N0 66 of 1995)

- The Act defines an unfair labour practice in section 186(2) as follows.

“Unfair labour practice” means any unfair act of omission that arises between an employer and employee involving –

- a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;



- c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
- d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

COURTS

- The courts have held that this list of unfair labour practices is exhaustive (**Nawa v Department of Trade and Industry [1998] 7 BLLR 701 (LC) at 703**) which means that an act or omission by the employer that does not fall within the scope of one of the above would not amount to an unfair labour practice.



- The Public Service Coordinating Bargaining Council (PSCBC), Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) and the Commission for Conciliation Mediation and Arbitration (CCMA) have jurisdiction to adjudicate the unfair labour practice disputes only as (narrowly) defined by the LRA.
- Section 23(1) of the Constitution affords everyone the right to fair labour practices. This provision and its meaning in relation to the LRA were dealt with in the case of [Mathews v Glaxosmithkline SA \(Pty\) Ltd \[2006\] 27 ILJ 1976 \(LC\)](#). The Labour court in this matter advanced a principle that state that any party who alleged an unfair that a practice was not regulated by the LRA, may have recourse by approaching a court as a result of the provisions of s 23 of the Constitution. (i.e payment of different severance packages to retrenched employees of one employer)



MODULE 2 - The Right not to be unfairly dismissed and the recognised grounds for dismissal

- Section 185 (a) of the Labour Relations Act provides for every employee, the right not to be unfairly dismissed.
- Section 186(1) of the LRA deals with the meaning of dismissal
- The Labour relations Act further recognise certain forms termination of a contract of employment as being automatically unfair dismissals in terms of Section 187(1)
- Section 187(2) however provides further that despite subsection (1) (f)- a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job



- A dismissal based on age is fair if the employee has reached the normal or agreed retirement age for the persons employed in that capacity.
- Section 188(1) stipulates that a dismissal that is not automatically unfair is nonetheless unfair if the employer fails to prove that
 - The reason for dismissal is a fair reason and;
 - That the dismissal was effected in accordance with a fair procedure.
- Section 191 deals with the timeframes and forums which a dispute relating to unfair dismissals must be referred and state that such a dispute must be referred within 30 days.



RECOGNISED OR PERMISSIBLE GROUNDS FOR DISMISSAL

- Although the LRA provides for the right not to be unfairly dismissed, it does acknowledge that there may be grounds that may be legally permissible to dismiss an employee or employees and any such ground must be motivated by a 'fair reason' and effected in accordance with a 'fair procedure' – [Section 188(1). The only such reasons capable of being considered as fair are those:
 - relating to the employee's conduct;
 - relating to the employee's capacity (ill health, poor performance and incompatibility); or
 - based on the employer's operational requirements



DISMISSAL RELATED TO A EMPLOYEE'S CONDUCT (MISCONDUCT)

- Section 188(1)(a)(i) of the Labour Relations Act 66 of 1995 (LRA) states that a dismissal would be unfair if the employer fails to prove that the dismissal was for a fair reason and in accordance with a fair procedure, also referred to as substantive fairness and procedural fairness.
- The fair reasons for which an employee may be dismissed are conduct, capacity and operational requirements.
- Misconduct can be defined as unacceptable or improper behaviour, especially by an employee or professional person.



- There is no exhaustive list of what constitutes misconduct but it can range from absenteeism, late coming, sexual harassment, assault, theft, poor performance for reasons other than incapacity, intoxication, intimidation, dishonesty, displaying disrespect and incitement, to name but a few.
- In the matter of [Sedick & another and Krisray \(Pty\) Ltd \(2011\) 32 ILJ 752 \(CCMA\)](#) it was even found that dismissing an employee for posting something on Facebook that brings the name of the employer into disrepute would be substantively fair.
- Also worth noting is that the employer is entitled to determine the standard of conduct for its employees as confirmed in the case of [FAWU on behalf of Rala & others v Coca Cola Bottling & another \(2002\) 23 ILJ 196 \(CCMA\)](#).



- The Code of good practice is important in that it provides valuable guidelines for the handling of dismissals related to misconduct.
- The key principle of the Code is that parties should treat one another with mutual respect and while employees are protected from arbitrary treatment, employers are entitled to satisfactory conduct and performance.
- The Code provides guidelines to the person who has to determine whether a dismissal for misconduct is unfair or not. The factors are:
 - a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - b) if the rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.



- In terms of procedural fairness, it is normally expected of the employer to investigate possible misconduct to determine whether there are grounds for dismissal.
- The employee should be notified of the allegations and should be given an opportunity to state his or her case in response to the allegations.
- Apart from being allowed reasonable time to prepare a response, the employee should also be allowed representation by a fellow employee or trade union representative.
- The Code provides that discipline against a trade union representative, trade union official or office bearer of a trade union should only be instituted once the trade union has been informed and consulted.
- If an employee is indeed dismissed, he or she should be given a reason for the dismissal and should be reminded of the right to challenge the dismissal by referring same to a council with the necessary jurisdiction to hear unfair dismissal disputes.



- As stated above, an employee has the right to refer the dismissal to a relevant council.
- If it is found that the dismissal was indeed unfair, the commissioner may elect to award compensation or even order that the employee be reinstated.
- Although it is generally expected that a dismissal must be both substantively and procedurally fair, it should be noted that in the matter of [Mzeku & others v Volkswagen SA \(Pty\) Ltd & others \(2001\) 8 BLLR 857 \(LAC\)](#) the Labour Appeal Court held that reinstatement may not be ordered where the dismissal is substantively fair but procedurally unfair.
- This is in turn in line with the Code in relation to the provision that the employer may, in exceptional circumstances, deviate from the suggested fair process.



DISMISSAL RELATED TO EMPLOYEE'S CAPACITY (ILL HEALTH OR INJURY AND POOR PERFORMANCE)

- A fair reason for dismissal related to capacity essentially involves the employer's legitimate loss of confidence in the ability of the employee to perform in accordance with the contract of employment.
- The Act does not define the word 'capacity' which is equivalent to 'the power or ability to do something'. In contractual terms incapacity amounts to a species of supervening impossibility of performance that might be permanent or temporary, partial or absolute.
- In terms of the LRA termination for this reason amounts to dismissal within the meaning of section 186(1)(a).
- The code of good practice for dismissals distinguishes between incapacity due to ill health or injury and incapacity due to poor work performance [Schedule 8 items 8-11].



POOR PERFORMANCE

- A dismissal for poor work performance is usually justified on account of lack of skills or qualities necessary to perform the tasks that the employee is required to accomplish.
- To use the words of the Code of Good practice, a dismissal is effected because the employee “*fails to meet a required performance standard*”, **Item 9 of the code of Good practice** so provides. Therefore a dismissal for poor work performance contemplates a dismissal of an employee who cannot meet the required performance standard as opposed to an employee who won't or could not be bothered to meet the required standard of performance.
- In order to determine whether the employee failed to meet the required standard of performance, the employer has an obligation to give an employee appropriate evaluation, instruction, training, guidance or counselling.



- In light of the above guideline, the employer may not legitimately dismiss without such proper assistance offered to the employee and the employee still failed to meet the performance standard.
- In this respect, Section 188(2) of the Act provides that any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure *must* take into account any relevant code of good practice issued in terms of this Act.
- **Item 9 of schedule 8** to the code of good practice stipulate that any person determining whether a dismissal for poor work performance is unfair should consider the following:



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

(b) if the employee did not meet a required performance standard whether or not-

- (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard.
- Finally, insofar as the appropriateness of a dismissal as a sanction for poor performance, the employer is required first to consider ways short of dismissal to remedy the employee's failure to meet the required standard and the employer must further satisfy itself that dismissal is an appropriate penalty for that failure.



ILL HEALTH OR INJURY

- A contract of employment essentially provides for the provision of labour by another in return of remuneration
- Therefore once agreement is reached that an employee will work for the employer a contract of employment is entered into.
- Both parties develop certain rights and duties. It is therefore either implied or clearly documented that an employee is hired to satisfy operational requirements of the employer.
- It follows without saying that there is a commercial rationale which underlies the employment relationship. Should this rationale be diluted, through illness or injury for instance, the employer could question the continuance of this relationship.
- A dismissal related to ill health or injury is regarded as a 'no fault dismissal' as the employee even if was willing to perform his/her duties was effectively encumbered by his/her inability to perform her/his duties due to ill-health. in terms of the code of good practice, **[Items 10 and 11 of Schedule 8]** the following is provided:



- **Item 11 deals with the issue of fairness in effecting a dismissal related to ill health or Injury and provides that, any person determining whether a dismissal arising from ill health or injury is unfair should consider-**
 - (a) Whether or not the employee is capable of performing the work; and
 - (b) If the employee is not capable-
 - (I) the extent to which the employee is able to perform the work;
 - (ii) 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 employee's duties might be adapted; and
 - (iii) The availability of any suitable alternative work.



INCOMPATIBILITY

- May be defined as inability [on the part of the employee] to work in harmony either within the corporate culture of the business or with fellow employees.
- The approaches have been divided in terms of which category of dismissals incapacity dismissals does this form of incapacity fall under. There are views that suggest that it falls under poor performance whilst other views suggested it fell under operational purposes.
- The employer will however need to ensure that it accommodated in one form or another of the recognised forms of dismissal in order for incompatibility to be regarded as justified.



DISMISSAL FOR REASONS BASED ON THE EMPLOYER'S OPERATIONAL REQUIREMENTS

- The dismissal based on operational requirement, in terms of section 213 of the LRA, means requirements based on economic, technological, structural or similar needs of the employer.

Simply put, this is the so called “retrenchments.”
- Employers are legally obliged to consult employees affected directly and through the unions to explain the process and reasons. The Employer cannot unilaterally make changes to employee's conditions of service without consultation. The consultation process would be to seek alternative means to dismissal.
- The consultation process should attempt to reach consensus on various issues



- This kind of dismissal is mostly applied the private sector. However, the same process applies to both the Public and Private Sector employees.
- Employees need to take note that all employees dismissed are entitled to severance package in terms of the Basic Conditions of Employment Act or Company policies.
- Employees alleging unfair dismissed on the basis of operational requirements may approach the Labour Court for adjudication.



MODULE 3 - SEXUAL HARASSMENT AT THE WORKPLACE

- The Employment Equity Act no 55 of 1998 was promulgated with the objective amongst others of promoting the constitutional right to equality and exercise of a true democracy.
- Furthermore and in respect of the employment arena, The Act aims to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination.



- Chapter 2 of the Act deals with the prohibition of unfair discrimination, and state at Section 5 that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
- Section 60 of the Employment Equity Act (EEA) deals with the liability of employers and provides that, if the employer fails to take the steps necessary to deal with unfair discrimination or sexual harassment, the employer himself can be charged with unfair discrimination on the grounds of sexual harassment.
- This suggests that, wherever an employer becomes aware of sexual harassment in the workplace it should take the disciplinary steps without undue delay.



- For example, in the case of *Christian v Colliers Properties (2005, 5 BLLR 479)*, one Ms Christian was appointed as a typist by the employer. Two days after starting work, her boss asked her if she had a boyfriend and invited her to have dinner with him. He also asked her to sit on his lap and kissed her on the neck. When she later objected to the manager's conduct he asked her whether she was "in or out". When she said that she was "not in" he asked her why he should then allow her employment to continue. She was dismissed with two days' pay and referred a sexual harassment dispute. In a default judgment the court decided that:
 - The employee had been dismissed for refusing her superior's advances.
 - This constituted an automatically unfair dismissal based on sexual discrimination
 - Newly appointed employees are as deserving of protection from sexual harassment as are their longer serving colleagues



MODULE 4 - PRECAUTIONARY SUSPENSION FROM THE WORKPLACE

THE LRA

- Section 186 (2) (b) LRA: Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving (b) the unfair suspension of an employee or unfair disciplinary action short of dismissal in respect of an employee.
- Suspension is defined as temporary prohibition of an employee from rendering his/her services to the employer. It is normally during an investigation against the employee. During the suspension period the employment relationship still continues. There is preventive suspension (Suspension pending a DC) and punitive suspension (suspension as a penalty). Both these are covered by section 186 (2) of the LRA.



- **COURTS APPROACH -**

Mokgotle v Premier of North West and another (2009) 30 ILJ 605 (LC) – *Suspension and audi partem*

Court held that there was no evidence that the employee was going to interfere with the investigation and that he was supposed to be heard before suspension. The decision to suspend the employee was set aside.

The South African Post Office Ltd v Jansen Van Vuuren (2008) 29 ILJ 2793 (LC) - *Issues in display: substantive grounds of suspension and compensation* - Employer was ordered to pay employee one month's salary for the unfair suspension.

The employer has a contractual duty to pay the employee unless suspension without pay is contracted.

An employer must have substantive grounds and apply procedural fairness when deciding to suspend an employee because wrongful and unfair suspension could cause the employer to be liable for damages.



A suspension imposed for an unreasonable period has been determined to be unfair by the Labour Court, in the matter of *Ngwenya v Premier of Kwazulu Natal (2001) 22 ILJ 1667 (LC)*, the court held that suspension for an indefinite period is not only not in the interest of the employee but also against public interest.

The fact that the employee is paid during that suspension does not ease up the infringement on the right to dignity and the humiliation to one's reputation.



MODULE 5 - COMPENSATION FOR WORKPLACE INJURIES AND DISEASES

- The employer has, in common law, a duty to ensure the provision of a safe, healthy and free of hazards employment environment.
- In common law, if an employee is injured or contracts a disease through the negligence of his or her employer, the employer shall be liable in delict for the losses suffered by such an employee.
- Such claims must be instituted in the civil courts, and the employee shall bear the evidentiary burden to prove that the employer was negligent, that the harm was caused by the negligence, and the extent of the damages.
- In many instances, this duty on the employee proved to be difficult to prove, and further employees had to bear the cost of litigation against wealthy employers, who may be expected to defend such actions with vigour.



THE COMPENSATION REGIME IN SOUTH AFRICA

- In South Africa like most other countries of the world, the state accepts some responsibility for employees who are injured in the workplace, or fall ill because of unhealthy working conditions.
- The occupational injuries and disease regime that provides for the compensation of employees for injuries and diseases contracted at the workplace is codified under the Occupational Injuries and Diseases Act 130 of 1993 (COIDA).
- COIDA established the office of the compensation Commissioner, who has the responsibility to administer the social insurance scheme established by an Act of Parliament (COIDA), and financed from a fund into which levies of contributing employers are paid.
- COIDA applies to all employees and, if deceased, their dependants. In this case, the Act expressly includes casual employees, directors or members of body corporate who have concluded contracts of service with the company or body corporate, and if they are working within the scope of their contracts.



WHEN IS COMPENSATION PAYABLE

- The Act gives every employee or their dependents a right to compensation from the fund if the employee has met with an accident resulting in disablement or death
- or if the employee contracts an 'occupational disease' that arise out of and in the course and scope of employment



EMPLOYER'S LIABILITY FOR OCCUPATIONAL INJURIES AND DISEASES

- Our courts have however recently accepted that an employee may still have a claim in delict against an employer for illness or injuries sustained in the workplace if such injury or illness does not arise out of and in the course and scope of employment.
- A case in point in this regard is the decision of the Supreme Court of Appeal in *MEC for Department of Health (FS) v De Necker (924/2013) [2014] ZASCA 167 (8 October 2014)*. This decision of the Supreme Court of Appeal re-emphasised the principle that an employee may still found a claim in delict for injuries or illness sustained or contracted at the workplace, if such illness or injury does not arise out of or in the course and scope of the employee employment. Therefore a sufficient causal connection between the accident and the employee's employment or work must exist before the provisions of COIDA may apply.



- The COIDA compensation regime is an important social insurance scheme that ensures that employees that meet accidents at workplaces and that arise out of or in the course and scope of their employment are justly compensated on the no fault regime and without unduly long and costly litigation process. However with the SCA decision of De Necker, employers should consider themselves warned that they may not be able to hide behind the COIDA, if they are negligent in not providing adequate protection for their employees at work, particularly those in potentially hazardous circumstances or late at night.
- Therefore Safety and security at the workplace is a matter of great importance that the employer may not afford to neglect for another day least a flood of civil claims are to flow.



END -THANK YOU