STUDY UNIT 1 (CHAPTER 1) - GENERAL OVERVIEW

1. Draw a clear distinction between individual labour law and collective labour law.

- **Individual labour law**: concerns the relationship between employer & an individual employee. Conclusion, contents, enforcement & termination of employment contract.

- **Collective labour law**: concerns the relationship between an employer or employer's organisations (collective entities) and trade unions. Bargaining between employers & trade unions; strikes & lock outs (negotiations)

2. Mention four sources of employment law in South Africa.

- Legislation
- The Constitution
- Case law precedents
- International Labour Organisations (ILO Conventions)
1. Draw a distinction between an employee and an independent contractor. In your answer you must discuss the three different tests used by the courts and what they entail.

**Independent contractor** is contracted to perform a certain task or to produce a specific result, may perform the task through others, must perform within a certain period and such contract terminates on completion of the work he was contracted to do or expiry of the given time.

**Employee** is appointed to render personal services to the employer in terms of the job description. The employer may choose when to use the employee, and the contract expires on death of the employee or on the expiry of period of service.

**Definition of employee:**

Sec 213 LRA, Sec 1 EEA, and Sec 1 BCEA = definition of employee:

“an employee is:
(a) any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer...”

(a) incorporates:-

An employee **includes** the common-law contract of service (*locatio conduction operarum*), and

**excludes** the contract of work (*locatio conduction operis*) which relates to an independent contractor.

(b) includes:-

Any person who in any manner assists in carrying on or conducting the business of the employer.
Courts have formulated various tests to distinguish between employees and independent contractors:

**TESTS:** Control Test, Organisation Test, Dominant Impression Test

<table>
<thead>
<tr>
<th>CONTROL TEST</th>
<th>ORGANISATION TEST</th>
<th>DOMINANT IMPRESSION TEST</th>
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</thead>
<tbody>
<tr>
<td>Looks at the control over the work the person does, the manner in which the work must be done and when the work must be done.</td>
<td>Looks at whether the person is part and parcel of the business. The person's work is integrated into the business of the employer and is not just an accessory to the business.</td>
<td>This test is favoured by the courts and considers the employment relationship as a whole, rather than concentrating only on one factor.</td>
</tr>
<tr>
<td>Right to Control is more extensive in the employment contract - if there is no control by one party over another, then there is no contract of employment.</td>
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</tbody>
</table>

*Smit v Workmen's Compensation:*

Presence of right of supervision and control is not the sole indicia, but merely one of them, albeit an important one and there may also be other important indicia to consider depending on the provisions of the contract as a whole.

**Held,** that object of the contract wherein Smit was employed as an “agent” for an Insurance Co. was contract of work and not of service because:

- Agent received no remuneration for his activities unless one of his proposals were accepted by the Co.;
- There was a lack of supervision and control over agent;
- Remuneration was on commission basis

Therefore, contract of work = Independent contractor.

*Niselow v Liberty Life:*

As part of “Dominant Impression test”, court added so-called ‘Economic Capacity test’, which holds that an employee dedicates his/her sole income-earning capacity to the employer. (Not to be treated as separate 4th test, but part of Dom Impression Test)
Section 200A LRA: (Definition)

“Until the contrary is proved, a person who works for, or renders a service to, any other person is presumed to be an employee, if any one or more of the following factors are present:

(a) manner in which a person works is subject to the control or direction of another person;

(b) person’s hours of work are subject to the control or direction of another person

(c) the case of a person who works for an organisation, the person forms part of that organisation;

(d) person has worked for that other person for an average of at least 40hrs per month over the last 3 months;

(e) person is economically dependent on the other person for whom he/she works or renders a service;

(f) person is provided with tools of the trade or work equipment by the other person; or

(g) person only works for or renders a service to one person.”

Code: Who is an employee? Item 32 - Use as part of application of Dominant Impression Test

<table>
<thead>
<tr>
<th>EMPLOYEE</th>
<th>INDEPENDENT CONTRACTOR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Object of contract: to render personal services</td>
<td>Object of contract: to perform specified work or produce a specific result</td>
</tr>
<tr>
<td>Employee perform services personally</td>
<td>May usually perform through others</td>
</tr>
<tr>
<td>Employer choose when to make use of services of employee</td>
<td>Perform work(produce result) within a fixed period contracted to</td>
</tr>
<tr>
<td>Contract terminates on death of employee</td>
<td>Contract not necessarily terminate on death of Indep Cont.</td>
</tr>
<tr>
<td>Contract also terminates on expiry of period of service in contract</td>
<td>Contract terminates on completion of work or production of specified result</td>
</tr>
</tbody>
</table>

Definition of employer:

- Any person or body which employs any person in exchange for remuneration, and

- Any person who permits any person to assist him/her in conducting its business.
2. Can an illegal worker receive any protection from the law? Substantiate your answer.

A distinction has been made between the protection in terms of the Constitution or in terms of the LRA for illegal workers.
**Kylie v CCMA and others: (Prostitute case)**

Labour Court (2008) first held that a prostitute was not entitled to protection against unfair dismissal in terms of the LRA as the courts/CCMA would not sanction or encourage illegal activities. Decision overruled by the Labour Appeal Court (2010) Held, that the scope of rights under the Constitution is broad and extends to ‘everyone’. This includes sex workers, even if the full range of remedies in terms of the LRA may not be available to them.

A prostitute will therefore have a right to fair labour practices as a result of the employment relationship despite the illegality of the type of work performed.

Due to the fact that there cannot be a valid contract of employment, she will not be protected against unfair dismissal; however, her claim will be in terms of section 23 of the Constitution via civil court.

**Discovery Health v CCMA & others: (illegal foreigner)**

Court to decide whether an employee with a valid contract of employment, but without a valid work permit could claim unfair dismissal.

Immigration Act - Prohibits employment of an illegal foreigner/or who’s status does not authorise him legal employment in SA.

An illegal foreigner may still be able to enforce his contractual rights against an employer (eg. payment for work done)

Court Held, illegal foreigners may still be protected by the Constitution, Section 10 which guarantees everyone’s right to dignity and the right to fair labour practices (Sec 23).

Labour Appeal court accepted sec 23 Const. provides broader protection than labour laws.

3. **Distinguish between different types of employees.**

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent</td>
<td>Person employed for an indefinite period</td>
</tr>
<tr>
<td>Temporary/contract/fixed-term</td>
<td>Person employed for a specific period or for a specific project</td>
</tr>
<tr>
<td>Casual</td>
<td>Person works for same employer not more than 3 days p/week Employment can either be permanent or temporary</td>
</tr>
<tr>
<td>Part-time</td>
<td>Person works only certain times on certain days, can be temporary or permanent</td>
</tr>
</tbody>
</table>

Marked = “Atypical workers”
STUDY UNIT 3 (CHAPTER 3) – IMPACT OF COMMON LAW ON EMPLOYMENT CONTRACT

1. Duties of Employer:
In terms of the common law, employers and employees have certain rights and corresponding duties even if the parties do not agree or specifically include it in the contract of employment.

<table>
<thead>
<tr>
<th>DUTIES OF EMPLOYER</th>
<th>DUTIES OF EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>To remunerate employee: (Primary duty)</td>
<td>To render a service to employer: (Primary duty)</td>
</tr>
<tr>
<td>- Employers duty to pay employee</td>
<td>- Employee’s labour potential placed at disposal of employer</td>
</tr>
<tr>
<td>- “no work, no pay” = during strikes ito BCEA</td>
<td></td>
</tr>
<tr>
<td>To provide employee with work:</td>
<td>To work competently and diligently:</td>
</tr>
<tr>
<td>Employer not required to provide employee with work</td>
<td>- Contract of employment = guarantee that</td>
</tr>
<tr>
<td>except where:</td>
<td>employee capable of doing the work and performed</td>
</tr>
<tr>
<td>- commission-based,</td>
<td>competently and diligently</td>
</tr>
<tr>
<td>- dependent on actual work done,</td>
<td></td>
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<tr>
<td>- employee’s success depends on the performance of</td>
<td></td>
</tr>
<tr>
<td>certain duties on a regular basis eg. actor</td>
<td></td>
</tr>
<tr>
<td>To provide safe working environment:</td>
<td>Obey lawful and reasonable instructions:</td>
</tr>
<tr>
<td>- depending on nature of work/workplace to provide</td>
<td>- Employee under control and authority of employer</td>
</tr>
<tr>
<td>employee with protective devices/clothing/supervision</td>
<td>- Non-compliance with duty constitute serious</td>
</tr>
<tr>
<td>- Protection against harassment ito EEA</td>
<td>insubordination/breach of contract, except where</td>
</tr>
<tr>
<td>- Employer to contribute to Compensation fund (COIDA)</td>
<td>employee refuses to follow orders outside scope of</td>
</tr>
<tr>
<td>ensuring compensation where injured on duty</td>
<td>employment contract</td>
</tr>
<tr>
<td>To deal fairly with an employee:</td>
<td>Fiduciary duty to act in good faith and serve</td>
</tr>
<tr>
<td>- Constitutional right to fair labour practices,</td>
<td>employers interests:</td>
</tr>
<tr>
<td>- LRA protects against unfair treatment</td>
<td>- Employment relationship built on trust, honesty &amp;</td>
</tr>
<tr>
<td>- Includes common law duties</td>
<td>confidence = implicit of an employment contract</td>
</tr>
</tbody>
</table>

2. Vicarious Liability:
- Regulated by common law;
- Based on considerations of public policy;
- Employer is liable for the unlawful and delictual acts of an employee performed during the course of business.
- Does not mean employer will have no recourse against employee – depending on the circumstances, employer can discipline the employee for misconduct and even claim repayment (sec 3 BCEA)
In order for an employer to be held vicariously liable, 3 requirements must be met:

- There must be a contract of employment;
- Employee must have acted in the course and scope of employment, and
- The employee must have committed a delict (an intentional or negligent unlawful act or omission by an employee causing a third party to suffer damages or personal injury).

Each case must be considered on its own merits. The fact that the act of an employee was expressly forbidden by the employer, or constituted a criminal act, will not always absolve the employer from being held vicariously liable for the employee’s wrongful actions. (*Viljoen v Smith*)

Bezuidenhout NO v ESKOM: (*ESKOM truck accident*)

Employee provided with a company truck marked as ESKOM property for purpose of carrying out its duties. Employee expressly prohibited from giving lifts to any person without permission of employers. Employee offered to lift a hitch-hiker and along the way negligently caused an accident during which the passenger suffered severe head injuries. HELD, instruction not to carry passengers placed a limitation on the scope of employment – employer was not vicariously liable:

- Driver knew he was prohibited from giving lifts and had no intention of furthering his master’s affairs by doing so;
- Presence of passenger added nothing to the interest of the employer in the proper administration of its service.

3. Contract of Employment:

**Definition:**

An employment contract is a voluntary agreement between two parties, in terms of which the employee places his/her labour potential at the disposal of the employer in exchange of some form of remuneration.
Requirements:
- There must be a voluntary agreement;
- Parties must have capacity to act;
- Agreement must be legally possible/lawful;
- Performance must be physically possible;
- Any formalities prescribed for that particular type of contract must be satisfied (eg. candidate attorney contract registered/accepted by Law Society)

There is no formal requirement that contract must be in writing - terms may also be express or tacit.

Remedies for Breach of Contract:
- Innocent party can accept the breach and cancel the contract;
- Compel the defaulting party to perform (specific performance) Common Law
- Can also over-and-above, claim damages from defaulting party.

Ito LRA, breach by employer = unfair labour practice, unfair discrimination or unfair dismissal. If employee breaches contract = misconduct.

If employee were to claim breach of contract, the High Court and not the Labour court will have jurisdiction - and only common law remedies available - Question = to determine lawfulness and not fairness.

4. Restraint of Trade:
Purpose of restraint-of-trade agreement is to protect the employer’s trade secrets, goodwill and business connections. It prevents an employee from competing with his employer within a defined area and for a prescribed period.

Court must balance the following:

The public interest, which requires parties to comply with contractual obligations even if these are unreasonable or unfair Vs

The right of all persons to be permitted as far as possible to engage in commerce or the professions of their own choice
Magna Alloys & Research SA (Pty) Ltd v Ellis: (Restraint-of-trade)

Court had to balance competing interests of employee and employer. HELD, restraint-of-trade agreement is valid and enforceable unless it is contrary to public policy, which it will be if it is unreasonable. Reasonableness will be determined with reference to interests of both employer and employee, public policy and surrounding circumstances. Court to consider:

- Is there an interest deserving of protection at the termination of the agreement?
- Is that interest being prejudiced?
- How does that interest weigh up against the interests of the other party not to work?
- Is there another facet of public policy which requires that restraint should either be enforced or disallowed?
- Is the restraint wider than is necessary to protect the protectable interest?

An employer who unlawfully terminates a contract of employment containing a restraint clause should not be allowed to benefit from that restraint.

5. Changes to Contractual terms and conditions of employment:

An employer may not unilaterally change terms and conditions of employment. Can only be changed in the following ways:

- By agreement between parties in line with method prescribed in employment contract;
- By means of collective agreement betw. employer and trade union;
- Through sectoral determination by the Minister.

1. Advise Joe about the implications of the restraint of trade he has signed when he was employed by ZZ Connections.

A restraint of trade prevents Joe from doing any or all the activities mentioned in his contract of employment for a period specified and the area identified in the contract of employment, provided these are not unreasonable.

2. What does the employer’s duty to provide the employee with work entail?

The employer does not have the duty to provide the employee with actual work to do, except in certain special instances, such as where the employee’s salary depends on him/her doing actual work. The duty of the employer is to accept the employee into service.
3. Will X be in a position to enforce the contract he concluded with Z to murder Z’s business rival B? Substantiate your answer.

No. The rights and duties arising from the contract must be legally possible to perform. In other words, they must be permitted by the law. A contract which is contrary to either the common law or statutory law will be illegal and cannot be enforced. Agreeing to murder another person is one example of such a contract.

STUDY UNIT 4 - (CHAPTER 4) BASIC CONDITIONS OF THE EMPLOYMENT ACT (BCEA)

BCEA lays down minimum terms and conditions of employment. Minimum terms and conditions can also be included in sectoral and ministerial determinations and collective agreements.

General rule – employers and employees may deviate from these minimum terms and conditions only to improve them for employees, but not to decrease them.

A basic condition of employment in the BCEA constitutes any term of any contract of employment, except where:

- any other law provides a term more favourable to an employee;
- the contract provides a more favourable term to the employee; or
- the basic condition has been replaced, varied or excluded in terms of the Act.

Certain Core rights cannot be reduced. Only in limited circumstances will employers and employees be able to agree to certain terms and conditions less favourable than those specified in the act.

1. Scope of Application:

BCEA gives effect to and regulates the constitutional right to fair labour practices by:

- establishing and enforcing basic conditions of employment, and
- regulates the variation of such conditions by way of various mechanisms, and within the framework of regular flexibility.

General Exclusions from BCEA:
- Independent contractors,
- members of National Intelligence Agency,
- unpaid volunteers working for a charitable organisations,
- directors and staff of Comsec,
- persons undergoing vocational training,
- people employed at vessels at sea.

2. Minimum conditions of employment:

2.1 Working time:

- Chap 2 of BCEA dealing with working time, does not apply to:
  - senior managerial employees,
  - sales staff who regulate own hours of work and travel to clients,
  - employees who work less than 24 hrs a month for an employer, and
  - employees who earn more than R 172 000 per year.

<table>
<thead>
<tr>
<th>REGULATION</th>
<th>COMMENTS</th>
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</table>
| MAX WORKING HRS          | - max 45hrs p/week
                         | - 5days p/week = max 9hrs p/day
                         | - 6days p/week = max 8hrs p/day |
| LUNCH                    | - Min 1hr after 5hrs work
                         | Can be done away with/reduced to 30min, by agreement if work 6hrs or less |
| OVERTIME                 | - Max 10 hrs p/week
                         | - may be increased to 15hrs by collective agreement
                         | - overtime = 1.5 times normal pay
                         | - agreed overtime = max 12 hrs(incl. ordinary hrs) on any day |
| SUN&PUB HOL              | - pay double normal rate
                         | - if normally work on Sundays = 1.5 times normal pay
                         | Same applies to public holidays |
| NIGHT WORK               | - must be given allowance, or
                         | - reduction in hrs of work and
                         | - provided with transport
                         | - Night work = from 18:00 - 06:00
                         | - Only upon agreement |
| REST PERIOD              | - daily rest period = 12hrs betw ending and recommencing work,
                         | - weekly rest period min 36hrs, incl Sundays
                         | BCEA makes provision for daily and weekly rest periods |
| COMPRESSED WORK WEEK     | May agree to work 12hrs p/day without overtime pay, if:
                         | - employee not work more than 45 ordinary hrs p/week,
                         | - more than 10 hours' overtime p/week, or
                         | - more than 5 days p/week
                         | Average working hrs & overtime allowed where hrs calculated over period of time.
                         | Eg. agriculture agree to extend overtime to 15hrs p/week during harvest |
2.2 Leave:
- Chap 3 of BCEA dealing with leave, excludes:
  - employees working less than 24hrs p/month - such leave is based on agreement.

<table>
<thead>
<tr>
<th>REGULATION</th>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>VACATIONAL</td>
<td>Min 21 consecutive days pd leave (excl pub hol) p/year = 15 working days p/year</td>
</tr>
<tr>
<td>MATERNITY</td>
<td>4 Consecutive months, may commence: any time from 4weeks prior, or on date Med Dr/midwife certifies for health risks May not work 6 weeks after birth Miscarriage in 3rd trimester/still borne, entitled to 6 weeks leave</td>
</tr>
<tr>
<td>FAM. RESP.</td>
<td>3 days for every 12 months worked when: child born or is sick, or death of spouse/life partner, parent, adoptive parent/child, grandparent, child, grandchild or sibling</td>
</tr>
<tr>
<td>SICK LEAVE</td>
<td>6 weeks pd leave every 3 year cycle worked absent for more than 2 consecutive days/or more than 2 occasions in 8 week period, employer request medical cert. cert. be issued by MD or person reg with professional council</td>
</tr>
</tbody>
</table>

2.3 Wages:
BCEA nor any other law stipulates minimum wages. Collective agreements concluded in bargaining councils and ministerial and sectoral determinations may establish min wages - employers and employees will then be bound to contract into these minimum standards, or more favourably by agreement.

2.4 Notice periods:
Employers must give employees notice in writing (or verbally if they are illiterate), and employees must be paid during the notice period. Employers may decide to pay an employee without their working for the notice period. The periods of notice can be shortened in the contract of employment, but the general requirements are as follows:
<table>
<thead>
<tr>
<th>Period of employment</th>
<th>Notice period required</th>
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<tbody>
<tr>
<td>Less than six months</td>
<td>One week</td>
</tr>
<tr>
<td>Six months to one year</td>
<td>Two weeks</td>
</tr>
<tr>
<td>One year or more</td>
<td>Four weeks</td>
</tr>
<tr>
<td>Domestic or farm workers of more than six months</td>
<td>Four weeks</td>
</tr>
</tbody>
</table>

If an employee lives in accommodation provided by the employer, they are entitled to stay there for one month.

2.5 Certificate of Service

When an employee leaves, he or she is entitled to a certificate of service, stating:
- the employee's full name, job description and period of employment (dates)
- the employer's name and address
- the earnings and fringe benefits during the last payment cycle, and
- the reason for termination (if requested by the employee).

2.6 Children and forced Labour

No child under the age of 15 may be employed and no child under the minimum school-leaving age in terms of any law, if this is 15 or older, may be employed. A child must not do work that is inappropriate for their age, or that places their well-being, education, physical or mental health and spiritual, moral or social development at risk. The onus is on the employer to prove that he or she investigated and found that the child was old enough to be an employee. All forced labour is prohibited. If an employer is found guilty of these offences, they can sentence to up to three years' imprisonment.

3. Enforcement of the BCEA:

3.1 Courts

Labour Court has concurrent jurisdiction with the civil courts regarding any matter concerning the BCEA. - Issue compliance orders and issuing fines
3.2 Inspectors

BCEA provides for the appointment of Labour Inspectors. The State may appoint a number of labour inspectors to help monitor and enforce the basic conditions of employment, compliance orders and the various sectoral determinations. Labour inspectors may enter any workplace as long as it is a reasonable time of day. They do not need to tell the employer that they intend to visit, nor do they need a warrant. (But entering a home or other place may only be done with the consent of the owner or occupier, or if authorised by the Labour Court.) Labour inspectors must have signed certificate stating their position and functions and which legislation they are allowed to monitor and enforce.

Labour inspectors have the power to question, inspect and copy any records, as long as they give the employer a receipt for anything taken and return it within a reasonable period of time.

It is an offence to refuse to co-operate with a labour inspector or to provide him or her with false information, and offenders can be imprisoned for up to one year.

4. Variation of Basic Conditions

Core terms that cannot be varied at all:

1. Maximum working Hours
2. Provisions relating to sick leave
3. Provisions relating to night work
4. 4 month’s maternity not less than 2 weeks’ annual leave

The BCEA allows for some terms and conditions of employment to be varied, replaced or excluded by way of the following:

4.1 Collective Agreement:

An agreement between trade unions and employers may change conditions of work, provided same is consistent with the purposes of the Act.

4.2 Ministerial determination:

Determination replaces or excludes basic minimum conditions iro any category of employees or employers.

- May vary maximum ordinary weekly working hours if:
- determination has been agreed to in a collective agreement,
- operational requirements of the sector necessitate this,
- majority of employees are not members of a registered trade union.

Ministerial determination may relate to:

- ordinary hours of work
- overtime
- meal intervals
- daily and weekly rest periods
- annual leave
- Does not include minimum wages.

must 'on the whole' be more favourable to employees than those conditions set out in the BCEA.

For: Special public works programme, small businesses & welfare sector.

4.3 Sectoral determination:

Sectoral determination by the Minister into the BCEA

- Primarily establishes and regulates minimum wages
- Could also include other employment conditions.

Determination may be made:

- upon investigation by Director General of Dept of Labour
- at the initiative of the Minister or
- requested by employers' or employees' organisation into a particular sector or area and
- after consideration of representations of the public, and preparation of a report

The Employment Conditions Commission (ECC) must advise Minister on:

- ability of employers to continue to carry on their business successfully;
- operation of small, medium, macro and new enterprises;
- cost of living;
- alleviation of poverty;
- inequality in wages; and
- likely impact of the determination on current and future employment.

Sectoral determinations may relate to:

- hours of work
- overtime
- meal intervals
- daily and weekly rest periods
- annual leave;
must ‘on the whole’ be more favourable to employees than required by the BCEA.
Sectoral determinations may not reduce the protection for night work and maternity leave.
May vary ordinary hours of work only if:
- determination is by collective agreement;
- operational requirements of the sector necessitates;
- majority of employees are not members of a registered trade union.

Minimum wages and conditions set out in a sectoral determination will apply to the employment contract betw. employer and employee.

Applies to areas of:
- Farming
- Private Security
- contract cleaning
- industry of hospitality
- taxi
- domestic workers
These are sectors that are not well organised and not capable of effective collective bargaining or unions.

1. **State the number of weeks/moths allowed in terms of the BCEA for maternity leave and sick leave and the cycles applicable to each type of leave.**

- Maternity leave: Four consecutive months with no cycle stipulated;
- Sick leave: six weeks for every period of 3 years employment. Leave cycle calculated as the number of days the employee would normally work during a 6 week cycle.

2. **See Q 2 HB pg 50 - Will a female employee be entitled to take family responsibility leave when her husband is ill?**

No, only the sickness of a child will an employee be entitled to take family responsibility leave.

3. **See Q 3 HB pg 50-51 - Catherine works as a clerk for Ezekiel’s Cell Shop. Catherine works from 08h00 to 16h00, Monday to Friday. Her contract of employment makes no provision for overtime. No trade union is active in**
the workplace. The manager requested Catherine to work overtime next Monday, Tuesday and Wednesday for five hours in each day at no extra pay. Catherine does not agree to such overtime as she wants to be paid a special rate for working overtime. Catherine wants to know what rates of pay and other terms are applicable to overtime, and approaches you for advice. Advise her fully on the terms and conditions of overtime that would apply in her situation.

Catherine’s contract of employment does not make provision for overtime and therefore the terms and conditions of the BCEA will apply.

Overtime may only be worked in terms of an agreement, and then not more than 10hrs p/week, and must be remunerated at one-and-a-half times the normal rate of pay.

If Catherine agrees to work the overtime requested by the employer, it will amount to 15hrs of that particular week. This is in excess of what the BCEA allows. No collective agreement applies as there is no trade union involved and therefore no possibility that the hours might be extended in this manner.

Though Catherine’s employer may request her to work overtime, an employee may only work for a maximum of 12 hrs per day and 10 hrs p/week, and only if she agrees to it. As she works from 08:00 to 16:00, she works 8 hrs per day. She could then work an additional 4 hrs per day, but not for everyone of the three days requested, as she would then exceed the 10hrs maximum overtime per week. Any combination which does not exceed 12 hrs per day and 10hrs per week may be agreed to at the rate of one-and-a-half times her normal remuneration.

4. List the different ways through which contractual terms and conditions of employment can be changed.

- Agreement between employer and employee,
- Method prescribed in the contract of employment,
- Collective agreement between employer and relevant trade union,
- Operation of law, eg. BCEA,
- Sectoral agreement.

5. Simon works for Muthu as a painter and handy man. He breaks a tool which belonged to Muthu. Muthu, the employer wants to deduct the monetary value of the tool from Simon’s salary. Is this legal?

In terms of Section 34 of the BCEA, the employer may not deduct from an employee’s remuneration unless –
- the employee agrees in writing to the deduction in terms of a debt specified in the agreement;
- the deduction is required or permitted by law, collective agreement, court order or arbitration award.
- such a deduction may be made to reimburse the employer for loss or damage if the loss or damage occurred in the course of employment and was due to the fault of the employee.

Therefore, it is not legal for Muthu to merely deduct the sum of the loss or damage sustained from Simon’s salary. If the tool broke due to Simon’s gross negligence, Simon would have to agree to the deduction in writing, or if Simon does not agree, the employer will have to follow fair procedure or approach the relevant legal institution – CCMA/civil court – depending on the contract of employment for resolution.

6. **Company ABC** is in the process of dismissing employees based on the operational requirements of the business and has complied with all the substantive and procedural requirements for such dismissals to be fair. However, it managed to find employment for employee X at Company KK. X refuses to take up this employment because he first wants to go on holiday. Is X entitled to severance pay from ABC?

An employee dismissed on operational requirements of the employer, the employer must pay the employee severance pay equal to one weeks pay for each completed year of service with that employee. In terms of Section 41 of the BCEA, an employee who unreasonably refuses to accept alternative employment with that or any other employer, is not entitled to severance pay.

The question therefore is whether X’s refusal to take up employment at Company KK due to X first wanting to go on holiday constitutes unreasonable refusal of the employment offer.

Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the employee’s refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the employee’s personal circumstances play a greater role.

7. Name examples of sectors in which sectoral determinations are found and the reasons why they are found in those particular sectors.
Farming, Private Security, contract cleaning, industry of hospitality, taxi and domestic workers. These are sectors that are not well organised and not capable of effective collective bargaining and trade unions. This is because there is not one central workplace where the union may go and recruit members, or request one employer for organisational rights for a specific workplace. Eg. deduction of subscription fees.

STUDY UNIT 5 (CHAPTER 5) - EMPLOYMENT EQUITY ACT (EEA)

1. **Section 9 Constitution** -> **Equality:**

   (2) Equality includes full and equal enjoyment of all 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.

   (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

   (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)

Sec 9 -
- Provides for the prohibition of unfair discrimination on a (non-exhaustive) number of grounds
- Authorises affirmative action

2. **TERMINOLOGY:**

<table>
<thead>
<tr>
<th>FORMAL EQUALITY</th>
<th>SUBSTANTIVE EQUALITY</th>
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</thead>
<tbody>
<tr>
<td>Sec 9(3) and (4) Constit</td>
<td>Sec 9(2) Constit</td>
</tr>
<tr>
<td>- Focuses on protecting individuals against discrimination</td>
<td>- Opportunities are determined by individual's status as a member of a group</td>
</tr>
<tr>
<td>- Views individual ability and performance to achieve success</td>
<td>- Discriminatory acts = behaviour towards groups, resulting in disadvantage</td>
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<tr>
<td></td>
<td>- Prohibition of unfair discr. is insufficient to achieve true equality</td>
</tr>
<tr>
<td></td>
<td>- Affirmative action measures required to correct imbalances</td>
</tr>
<tr>
<td>DIFFERENTIATION</td>
<td>DISCRIMINATION</td>
</tr>
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<td>-----------------</td>
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</tbody>
</table>
| - Treating people differently  
- eg. applying for posts/promotions  
- Acceptable because it is based on acceptable considerations eg. level of responsibility, expertise, skills. | - Particular form of differentiation  
- Based on unlawful grounds even when no specific intention to discriminate. |

<table>
<thead>
<tr>
<th>DIRECT DISCRIMINATION</th>
<th>INDIRECT DISCRIMINATION</th>
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</table>
| - when someone is clearly treated differently because of a certain characteristic - race/gender/disability/marital status etc | - when criteria that appear to be neutral, negatively affects a certain group disproportionately. Eg. woman or Hindu people.  
- Unless criterion can be justified by the requirements of the job, it will amount to unfair discrimination. |

- sec 6(1) EEA = non-exhaustive list of 19 grounds -> other grounds may exist.  
- 3 more criteria than in Sec 9 Constit = family responsibility, HIV status and Political opinion.  
- Grounds often relate to individual’s personal attributes or biological characteristics or associational, intellectual or religious beliefs.

<table>
<thead>
<tr>
<th>SPECIFIED GROUNDS FOR DISCR.</th>
<th>UNSPECIFIED GROUNDS FOR DISCR.</th>
</tr>
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</table>
| - listed grounds such as:  
- race, conscience, sex/gender, pregnancy, age, birth, political opinion, family responsibility, sexual orientation, religion, language and HIV/AIDS | - where claim of unspecified ground, court use dignity as a measure to determine whether the ground has potential to form basis for discrimination.  
- eg. Citizenship = not specified, but can be ground for discrimination  
- other eg. Qualifications, tertiary teaching/research experience, professional ethics, mental health/illness, political/cultural affiliation, being parent. |

3. Purposes of the EEA:

EEA gives effect to the equality provisions of the Constitution and Promotes the achievement of equality in the workplace.

Provides the foundation for non-discrimination and affirmative action in employment law.
EEA applies to all employers re prohibition of unfair discrimination.

Application of Affirmative Action only applies to designated employers, but specifically excludes the following categories of employers:

1. Members of the National Defence Force,
2. Members of the National Intelligence Agency,
3. Members of the South African Secret Service,
4. Members of the South African National Academy of Intelligence, and
5. the Directors and staff of Comsec. (Electronic Communications Security (Pty) Ltd).

**THE EEA’S TWO-FOLD PURPOSE:**

<table>
<thead>
<tr>
<th>PURPOSE OF EEA</th>
<th>HOW?</th>
<th>APPLICABLE TO WHO?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Prohibition of Unfair Discrimination <em>(Formal Equality)</em></td>
<td>- By promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination - By prohibiting direct and indirect unfair discrimination on one or more of the specified or unspecified grounds</td>
<td>- Applicable to all employers and employees (also covers job applicants)</td>
</tr>
<tr>
<td>2. Provision for Affirmative Action <em>(Substantive Equality)</em></td>
<td>- To redress the disadvantage experienced by designated groups</td>
<td>- Applicable only to designated employers and employees.</td>
</tr>
</tbody>
</table>

- Other legislation = **PEPUDA** (Promotion of Equality and Prevention of unfair Discrimination Act) - promotes equality and preventing unfair descr. in all spheres of society. Does not apply to person defined as “employee” (EEA applies), but workers excluded from EEA (independent contractors) may rely on PEPUDA.

- **BBBEEA** (Broad-Based Black Economic Empowerment Act) - To promote economic transformation and enable meaningful participation of black people in the economy. Racial composition of ownership and management structures in skilled and new enterprises.

- The **LRA** = dismissal on the ground of discrimination as automatically unfair with severe penalties attached to it. Sec 187(1)(f)
4. PROHIBITION AGAINST UNFAIR DISCRIMINATION

(FIRST PURPOSE OF EEA):

4.1 Establishing unfair discrimination:

Sec 6(1) EEA = No person (natural or juristic) may unfairly discriminate against an employee in any employment policy or practice.

Upon pursuit of claim of unfair discrimination - ENQUIRY before court = 3 stages:

1. Establishing a **factual foundation** for alleged differentiation & ground/s on which same took place. = Basis of claim
   - Eg. Muslim employee not nominated for training - must prove he submitted his application for training & those of other successful applicants.

2. A **link/nexus must** be established between the differentiation and alleged (specified/unspecified) ground/s. = reason/cause for diff
   - Muslim must show religion is *prima facie reason* for denied training. If this is found true = discrimination and presumed unfair.

3. Employer has opportunity of **showing** that alleged unfair discrimination was **fair**. = Justification
   - Employer show Muslim employee not sent for training as minimum requirement of 5 years experience needed. - all others have 5 yrs exp but Muslim only has two - => JUSTIFIED

4.2 Justification grounds for discrimination:

Sec 6(2) EEA = 2 grounds - **Affirmative Action & Inherent Job Requirements**:

4.2.1 Affirmative Action:

- measures applied by designated employers to ensure suitably qualified people from designated groups are equally represented in all occupational categories and levels in the workplace.

- Designated groups = Black women, women, disabled persons. (Black = Africans, Coloureds, Indians and Chinese citizens)

- Designated employers =
  - Enterprises with 50+ employees;
- Employers with less than 50 employees, but with annual turnover specified in schedule 4 of EEA;
- Municipalities;
- Organs of State (incl. SAPO, ESKOM, SABC etc)
- Employers designated to such terms ito collective agreement.

**4.2.2 Inherent Requirements of the Job:**
- Job requires certain attributes - not unfair to exclude people without attribute
- Courts have **narrow** interpretation = only requirements that cannot be removed from the relevant job description (without changing the nature thereof) are regarded as inherent requirements.

**4.3 Other specific forms of discrim. prohibited: (Harassment & testing)**

**4.3.1 Harassment:**
- Any type of harassment = unfair discrimination.
- Sexual harassment = most common - serious transgression. - The 2005 Code of Sexual harassment in the workplace - provide guidance & how to curtail such conduct. - Physical, verbal & non-verbal.

The Code – Sexual Harassment =

1. Unwelcome conduct of a sexual nature that violates the rights of an employee (dignity/privacy)
2. Conduct that constitutes a barrier of equity in the workplace; and
3. Action based on sex/gender/sexual orientation, whether conduct welcome or not.

<table>
<thead>
<tr>
<th>FORMS OF SEXUAL HARASSMENT</th>
<th>CHARACTERISTIC</th>
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<tbody>
<tr>
<td><strong>1. VICTIMISATION</strong></td>
<td>- employee is victimised/intimidated for failing to submit to sexual advances</td>
</tr>
<tr>
<td><strong>2. QUID PRO QUO</strong></td>
<td>- Employment circumstances - Promotion/increase influenced by employer/manager/co-employee to coerce an employee to surrender to sexual advances</td>
</tr>
<tr>
<td><strong>3. SEXUAL FAVOURITISM</strong></td>
<td>- A person in a position of authority rewards only those who respond to sexual advances</td>
</tr>
</tbody>
</table>
UASA obo ZULU AND TRANSNET PIPELINES: male employee repeatedly sexually harassed co-employee. Verbally harassed her - calling her his wife and made repeated demands on her to have sex with him. She made it repeatedly clear that his conduct was unwanted and unwelcome. After assault where he lifted her dress and attempted to have sex with her (witnessed by co-employee) she finally reported him. After disciplinary enquiry, employee was dismissed. Employee did not deny sexual harassment and showed no remorse. He maintained such conduct was part of his culture.

Arbitrator held, certain forms of misconduct so serious that rules relating to them did not have to be spelt out to employees; that it was NOT part of that particular culture for a man to demand sexual favours from a woman whom he had a collegial relationship. And even if part of culture, the arbitrator held strongly against sexual harassment as having no place in civilised society.

- Dismissal was upheld.

**Media 24 Ltd & another v Grobler:** Grobler was harassed by her manager. Her complaints were ignored - resulting in her resigning. Court found - claim of sexual harassment can be based on 3 possible legal bases/or three separate causes of action:

1. Vicarious Liability;
2. The EEA; and
3. The LRA (Court held, Grobler was automatically unfairly dismissed)

Sec 60 of EEA = employee alleging contravention of Act must bring to the attention of employer. Employer must then consult relevant parties & take necessary steps to eliminate conduct. Employer deemed vicariously liable if:
- Did not follow this procedure; and
- Cannot prove that it did all that was reasonably practicable to ensure that an employee would not contravene the EEA.

**Ntsabo v Real Security CC:** Employee’s supervisor sexually harassed her by suggesting they have ‘intimate relationship’, touching her private parts, making unwanted sexual proposals and threatening her with a report about bad work performance if she did not give in to his demands. - Manager failed to deal with it. Employee resigned.

Labour Court - found sexual harassment, awarded employee compensation for an unfair dismissal ito LRA and damages ito EEA for future medical costs, and general damages.
- Award based on employees supervisor contravened provisions of EEA & failure by employer to deal with allegation of sexual harassment constituted unfair discrimination into the Act. Employer liable.

The EEA:
- Every employer must take steps to eliminate unfair discrimination in employment Policy or practice;
- employer = Pro-active

The 2005 Code on Sexual Harassment in the workplace makes it compulsory for employers to develop sexual harassment policies should stipulate:
- sexual harassment is a form of unfair discrimination;
- sexual harassment in the workplace will not be permitted or condoned;
- complainants in sexual harassment matters have the right to follow the formal and informal procedures in the policy and appropriate action must be taken by the employer;
- confidentiality is of utmost importance;
- it is be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual nature;
- disciplinary sanctions may be imposed on a perpetrator, ranging from warnings to dismissal depending on seriousness.

4.3.2 Testing employees and applicants for employment:
EEA regulates testing in the workplace.
- May only be used to evaluate applicants for employment to determine whether they are suitable for the job & to evaluate existing employees.
- Medical testing, HIV/AIDS testing, Psychological testing.
- Testing in itself does not constitute discrimination, but the manner carried out may be discriminatory.

(a) Medical Testing:
- Prohibited, unless legislation permits or requires, or is justified in light of medical facts, employment conditions, social policy, fair distribution of benefits, or inherent req. of the job.

(b) Psychological Testing:
- Prohibited, unless scientifically shown that the test used is valid and reliable, can be applied fairly to all employees, not biased against any employee or group.
(c) HIV Testing:
- Prohibited, unless considered justifiable by the Labour Court.

Joy Mining Machinery, a division of Harnischfeger (SA) (Pty) Ltd v NUMSA & others:
- Circumstances where HIV testing allowed:
  - to prevent unfair discrimination;
  - if employer requires testing to determine the extent of HIV in workplace to place itself in a better position to evaluate its training and awareness programmes and to formulate future plans;
  - if purpose was that employer needed to know the prevalence of HIV at its workplace in order to be pro-active in its prevention amongst employees, to treat symptoms and plan contingencies, incl. fair distribution of employee benefits, medical aid and training replacement labour;
  - if medical facts indicated the need;
  - if employment conditions required testing;
  - if social policy requires;
  - If the inherent requirements of the job necessitated it,
  - if particular categories of employees/jobs requires it.

Irvin & Johnson Ltd v Trawler & Line Fishing Union & others: Court held – the court's sanction was not necessary if the testing was voluntary and anonymous as there could be no unfair discrimination.

4.4 Equal pay for equal work or work for equal value:
- Labour Court held - remuneration is an employment policy or practice.
- Paying an employee less than another for performing the same or similar work based on a specific or unspecific ground constitutes less favourable treatment.
- Claim may be brought into the EEA.

Mangena & others v Fila South Africa (Pty) Ltd & others: Shabalala, black employee, claimed he was getting paid less than McMullin, white female, for doing the same work - based on race. Court took into account ILO Convention 100 on equal pay between sexes and extended it to include other specified or unspecified grounds such as race. However – no factual foundation was laid by Shabalala and his allegations were speculative. He was admin clerk, mechanical job – whereas McMullin did sale-on consignment job involving large clients and had to make and judge decisions. Shabalala failed to establish prima facie case. His claim was held to be misplaced.
4.5 Resolution of unfair discrimination disputes:

1. Complainant make reasonable attempt to resolve dispute internally
2. Refer to CCMA for Conciliation within 6 months of alleged discrimination
3. Refer to Labour Court/parties agree to arbitration by CCMA

Labour Court has wide discretion - grant compensation/issue interdict to prohibit employer from continuing discrimination.

5. AFFIRMATIVE ACTION (SECOND PURPOSE OF THE EEA):
5.1 Outline:

Capeter III of EEA - To redress past disadvantages and to achieve employment equity in the workplace through the implementation of affirmative action measures.
- Affirmative action measures must be designed to attain employment equity.
- AA measures do not create a right to be appointed or promoted - can only be used as a defence against a claim of unfair discrimination.

Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council: Labour Court – AA measures must be applied fairly and rationally - This means that when designated employers reach this goal, appointments and promotions on the basis of AA will be unfair discrimination.

Minister of finance v Van Heerden & another: Constit Court - held, AA measures that 'properly fall' within the requirements of the Constitution are presumed NOT to be unfair. For AA measures to be rational, it must:

- Target people or categories of people who had been disadvantaged by unfair discrimination,
- Be designed to protect and advance such people or categories, and
- Promote the achievement of equality.

5.2 Contents of Affirmative Action: must be designed to:
- Identify & eliminate employment barriers that adversely affect people from designated groups;
- further diversity in the workplace;
- reasonably accommodate people from designated groups to enable them to have access to and advancement in employment;
- Ensure equitable representation of suitably qualified people from designated groups;
- retain and develop people from designated groups; and
- implement appropriate training, including skills development.

5.3 Designated employers:

Only designated employers must implement AA measures, other employers may voluntarily comply.

Employers’ specific duties in designing AA plan:
- **Consult** with representative trade unions/employees/representatives nominated. All occupational categories and levels must be represented.
- **Disclose** relevant info to the consulting parties – allow effectiveness.
- **Collect info** and **Analyze** policies and procedures – to identify employment barriers adversely affecting people from designated groups.
- Prepare and implement employment equity **plan** incl.:
  - objectives to be achieved for each year;
  - numerical goals for under-represented people from designated groups;
  - strategies and timetables;
  - duration of plan;
  - procedures to monitor and evaluate the implementation of the plan;
  - internal procedures to resolve disputes
  - people in workforce responsible for monitoring & implementing plan;
  - Reports to be made to the Director-General of the Dept. of Labour on the progress made.

5.4 Beneficiaries of Affirmative Action:

5.4.1 Designated Groups:

- Black people (Africans, Indians, Coloureds, Chinese), women, people with disabilities. Must be citizens of RSA.
- Fourie v Provincial Commissioner of the SA Police Service (North West): LC found there were different degrees of disadvantage between black and white women in the workplace. Applicant complained she was unfairly discriminated against by being refused promotion. Held, degree of discrimination was lower than that suffered by African people, who bore the brunt of apartheid. Court held degrees of disadvantage, cognisance must be had of:

- SA history,
- Imbalances of the past,
- that apartheid was designed to protect white people,
- that black employees suffered the brunt of discrimination,
- the purposes and objectives of the EEA.

Held, that applicant not being promoted was fair and rational in the circumstances - No black officers at police station in question & number of women in the Police station had already exceeded the numbers required.

5.4.2 Meaning of 'Suitably Qualified': Depends on their:

- formal qualifications (degrees/diplomas)
- prior learning (diplomas not completed)
- relevant experience
- capacity to acquire, within a reasonable time, the ability to do the job (or put differently, the potential of a person)

5.5 MONITORING & ENFORCEMENT OF AA:

Formal & Informal ways of enforcing AA provisions:

1. Employees and trade union representatives - may bring contraventions to attention of inter alia - the employer, trade union, labour inspector, DG of DoL or the Commission for Employment Equity (CEE).

2. The Act is enforced by labour inspectors by obtaining written undertakings from employers that they will comply with the Act; by issuing compliance orders; requesting reviews by the DG; or by the DG referring cases of persistent non-compliance to the Labour Court.

Labour Court = wide powers - issue compliance orders / imposing fines.
CEE = reports annually to the Minister on progress towards the achievement of employment equity in the workplace of designated employers.
1. List the employers' duties in order not to be deemed liable for harassment by its own employees against co-employees in terms of the EEA.

Sec 60 of EEA = employee alleging contravention of Act must bring to the attention of employer. Employer must then consult relevant parties & take necessary steps to eliminate conduct. Employer deemed vicariously liable if:

- Did not follow this procedure; and
- Cannot prove that it did all that was reasonably practicable to ensure that an employee would not contravene the EEA.

2. Company IT Jinx employs Mr Solo as a computer technician. A few months after he has commenced with his employment he informs his manager that he is busy with a process of changing his sex to become a woman. Soon after, Mr Solo is dismissed. The reason for this, according to the disciplinary notice, is because he has misled the company by not disclosing during the interview that he was undergoing a sex change. Mr Solo knows that you are studying Labour Law and approach you for advice. Advise him with reference to applicable case law and legislation.

*Atkins v Datacentrix* - (Sex change / gender re-assignment)

Applicant alleged he was unfairly dismissed against the grounds of sex/gender when employer terminated contract of employment. Atkins = qualified and experienced IT technician, worked for Amava of which Datacentrix was a client. Atkins offered position at Datacentrix and accepted. Shortly after, Atkins informed Datacentrix that he intended having gender re-assignment with the view of changing his gender from male to female by way of surgical and hormonal treatment.

Hours before Applicant commenced working, Respondent informed him that the fact of him withholding such aspect from the interview panel, was a serious case of misrepresentation which constituted dishonesty. The Respondent considered this to constitute a repudiation of the employment contract, it accepted such repudiation, and held that Atkins' services would no longer be needed.

The Applicant was dismissed on the basis of dishonesty and breach of contract. The Applicant had not resigned from his previous employment from Amava and he carried on working for them after the fall out with the Respondent.

He referred the matter to the CCMA, but it remained unresolved. The CCMA indicated that the dispute concerned an automatically unfair dismissal which had to be referred to the Labour Court.
It was common cause that the applicant was a transsexual, and that transsexualism was a medically recognised psychological disorder. The court’s point of departure was that the discrimination on the grounds of sex/gender against a transsexual person, constituted unfair discrimination. Both the LRA and the EEA which prohibit unfair discrimination against an employee on the basis of sex/gender, was found to be applicable to the applicants case. The former for dismissal based on unfair discrimination and the latter for the unfair discrimination.

Sec 187(1)(f) of the LRA – it is an automatically unfair dismissal where the employee has been dismissed because the employer unfairly discriminated against him/her directly or indirectly, on any arbitrary ground.

Sec 6(1) of the EEA prohibits direct and indirect unfair discrimination against an employee in any employment policy or practice based on an extensive list of grounds including gender, sex, sexual orientation, and a number of other grounds.

The only defence against discrimination would be that such discrimination was fair. The Respondent, however, did not rely on fair discrimination as a defence. It built its case on the assumption that there was a duty on the applicant to have disclosed his intentions to undergo a gender re-assignment. While the dismissal of the applicant was not in dispute, the “true reason” for the dismissal was disputed. The only inference the court could draw from the facts was that the respondent would not have employed the applicant in the 1st place had he disclosed his intentions with re to the gender/sex change.

Evidence showed that the dominant reason for the dismissal was the employers unhappiness about the applicant wanting to undergo an operation to change his sex. The respondent could not show the reason for dismissal was not automatically unfair.

The Question was whether there as a legal duty on the applicant to have disclosed that he wanted to undergo such a process. If there was such a duty, he should have disclosed such facts and that would have been the end for the applicant. If no such duty, that would be the end for the respondent.

The issue of gender was not relevant to the field of work - ie. IT.

It was emphasised that once the applicant has changed his gender, he continued to remain an employee and was still entitled to the protection afforded to him by the LRA, EEA and the Constit - he did not then become a "less worthy human being".
Court held, the respondent was seen to be insensitive to the plight of the applicant. It further held, that it was important to send a message to employers who might still have prejudices about such people.

Applicant experienced pain and this constituted an infringement on the dignity. The court wanted to protect such employees by (1) awarding them a substantial amount of compensation which, (2) could act also as a deterrent to employers from acting discriminatory.

A claim for damages under the EEA was dismissed because there was no evidence to prove such a claim. However, court ordered that the respondent had unlawfully and unfairly discriminated against the applicant on the grounds of his sex/gender. The applicants dismissal was automatically unfair and respondent had to pay R100 000.00 compensation and ordered to take steps to prevent the same discrimination or any similar practice occurring in respect of other employees, and to report back to the court in this regard. The Respondent had to apologise in writing to the applicant and had to pay the applicant’s costs of the application.

In casu, Mr Solo’s dismissal by IT Jinx was automatically unfair based on his sex/gender. Court can order that Mr Solo be re-instated, or in the absence of this, it can award Mr Solo compensation; order the respondent to take steps in preventing such discrimination in respect of any other employees and to report back to the court in this regard, that the respondent must apologise to the applicant and pay the applicant’s costs.

3. Do you think that an employer can justify appointing a male as a bus driver in preference to a female?

The question is whether the physical characteristics of men and women are relevant to the inherent requirements of the job. An employer who endeavours to use this defence, will have to make out a case that it is essential for a buss driver to be male. A mere perception or stereotype that one has to be a male to be a bus driver will not suffice. The employer will have to argue that the job requires the attributes of being a male and only then will it be fair to exclude females. Unlikely for a job as a bus driver as physical strength is not essential for the job. Therefore, unless the above can be shown, the employer will not be able to justify discrimination against female bus drivers based on sex/gender.
4. In terms of Company KLM’s pension policy, male employees are granted pension benefits based on formulas that are higher than those for its female employees. Discuss whether this is differentiation or discrimination, and if it discrimination, is it direct or indirect and on what grounds is it based?

The pension policy differentiates between male and female employees. The differentiation is based on sex, a prohibited ground in terms of Sec 6(1) of the EEA and it is an illegal ground. The pension policy of KLM constitutes direct discrimination based on sex. *Association of Professional Teachers v Minister of Education*

5. (Text book q2) The Dept of Education's Housing Policy does not grant its female employees housing subsidies unless their spouses are permanently and medically unfit for employment. No such restriction applies to male employees. Does this constitute unfair discrimination?

Yes, this constitutes direct unfair discrimination on the basis of sex as a specified ground in the EEA. *Association of Professional Teachers v Minister of Education*

6. (Text book q3) Tuba Enterprises - test its employees for HIV/AIDS on a voluntary and anonymous basis. Employer argues it requires info on the prevalence of HIV/AIDS in its workforce in order to assess the impact thereof and to implement effective proactive measures to prevent employees from becoming infected with HIV. Does Tuba Enterprises need to apply to the Labour Court for an order directing such testing is authorised before it may proceed?

*Irvin & Johnson Ltd v Trawler & Line Fishing Union & others:* Court held - the court’s sanction was not necessary if the testing was voluntary and anonymous as there could be no unfair discrimination. Therefore, it would not be in conflict with the broad purpose of the EEA. Anonymous and voluntary testing of employees therefore does not fall within the ambit of section 7(2) of the EEA and so the Labour Court does not have to authorise such testing. Tuba Enterprises can therefore proceed with the testing of its employees without applying to the Labour Court for an order that the testing is justifiable.
STUDY UNIT 6 (CHAPTER 6) – PROTECTION AGAINST UNFAIR LABOUR PRACTICES UNDER THE LABOUR RELATIONS ACT (LRA)

- A dispute re unfair labour practice must amount to a ‘dispute of right’. (incl. existing rights).
- A ‘dispute of interest’ concern a creation of new rights. - must be resolved by industrial action - not by the court.
- Sec 186 of LRA may provide protection for employees based on unfair labour practices committed by employers.

2. THE LRA:
- LRA gives effect to the right to fair labour practices guaranteed in the Const.
- It protects employees against unfair labour practices by employers within the employment relationship.

Diff. betw Const. and LRA:

<table>
<thead>
<tr>
<th>RIGHT TO FAIR LABOUR PRACTICES: CONSTITUTION</th>
<th>PROTECTION AGAINST UNFAIR LABOUR PRACTICES</th>
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</thead>
<tbody>
<tr>
<td>- = Right to fair labour practices</td>
<td>- = Protection against unfair labour practices</td>
</tr>
<tr>
<td>- wide application</td>
<td>- limited application - list of actions included in definition of unfair labour practice</td>
</tr>
<tr>
<td>- protects ‘everyone’ - incl. workers who are not employees its LRA</td>
<td>- protects employees only against specific actions by employers</td>
</tr>
<tr>
<td>- infringement of right to fair labour practices will be determined with regard to surrounding circumstances</td>
<td>- employee cannot commit unfair labour practice towards employer - only employer towards employee</td>
</tr>
</tbody>
</table>

- Sec 185(b) LRA:
    
    ‘Every employee has the right not to be ... subjected to an unfair labour practice’

- Sec 186(2) LRA: Gives content to the concept of unfair labour practice by describing a number of practices:
    
    ‘Unfair Labour Practice means any unfair act or omission that arises between an employer and an employee involving:-

(a) the unfair discrimination, either directly or indirectly, against an employee on the grounds of race, colour, gender, sex, religion, conscience, belief, culture, language, family responsibility or marital status or any other arbitrary grounds;
(b) 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

(c) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(d) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(e) An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act [PDA] ...on account of the employee having made a protected disclosure defined in the Act.

3. Listed Unfair Labour Practices:

The unfair conduct of an employer can relate to:

1. Promotion;
2. Demotion;
3. Probation;
4. Training;
5. Provision of benefits;
6. Suspension or any other disciplinary action short of dismissal;
7. Refusal to Re-instate or re-employ ito an agreement;
8. Employee suffering Occupational Detriment on account of a Protected disclosure (whistle-blowing)

3.1 Promotion:
- Promotion = managerial prerogative.
- Employer may promote most suitable candidate.
- Employee does not have legal entitlement to be promoted. – Could be reasonable expectation.
- Employer to act fairly - procedurally and substantively.
- Decision NOT to promote employee is reviewable if employer cannot justify its decision/decision proves to be seriously flawed.
- Courts will intervene in disputes about promotion only if employer acted in bad faith – Must be shown:
  - Employer exercised decision capriciously;
  - Reason provided cannot be substantiated;
  - Decision taken on wrong principle; or
  - Decision was taken in biased manner.
3.2 Demotion:
- Demotion = employee:
  - transferred to lower level;
  - receives less remuneration;
  - loses benefits, or
  - experiences loss in status.

*SA Police Service v Salukazana & Others*: transfer of an employee to another area - brought about change in his conditions of service and a lowering of his status, held to be a demotion and an unfair Labour practice.

*Nxele v Chief Deputy Commissioner*: court found that the transfer of an employee, in contravention of the employer's transfer policy, resulted in diminishing the employee status and responsibility, and actually constituted demotion. Employee had not consented to demotion, transfer was unlawful and unfair therefore invalid.

Demotion based on operational reasons is allowed as long as such action is taken in accordance with fair procedure. Demotion can be an option avoiding dismissal. Demotion could be fair as a disciplinary penalty, based on valid reasons.

3.3 Probation:
- Purpose of probation is to afford an employer the opportunity to evaluate employees performance before confirming the appointment. The Code sets requirements for a probationary period as follows:
  - period should be determined in advance
  - period should be reasonable duration, determined with reference to:
    - the nature of the job, and
    - the time it would take to determine the employees suitability.

- The Code: Dismissal = probation should not be used for the wrong purposes.
- The employer is allowed, at the end of the probationary period, to:
  - extended the probationary period to enable the employee to improve performance,
  - dismissed the employee, or
  - confirm the appointment of the employee.
- Probationary period may be extended only if it is justified. Example, where the job requirements of such that an extended period is required to determine whether the employee is suitable for the job.
**SACTWU v Mediterranean Woollen Mills:** held, employer who does not want to confirm a probationary employee's appointment must show that the procedure priority dismissal included:

- giving the employee an opportunity to prove
- making the employee aware that the work performance was an acceptable,
- counselling the employee if he was not able to handle the work,
- treating the employee sympathetically and with patience.

- If employee still fails, the contract can be terminated.

3.4 Training:
- Employer acted unfairly towards the employee is far as the provision of training is concerned, will amount to an unfair Labour practice.
- Training is necessary for the advancement of the employee and if the employer has an est practice of training employees.

**Mduli & SA Police Service:** employer removed the employee (and inspector) from a training course which would have enabled him to promote to the rank of captain. Based on allegation of misconduct relating to miss use of an official vehicle. Allegation withdrawn. Arbitrator ordered the employer to renominate the employee for the next training course. Employee can alleged a legitimate expectation to training, only if employer acted arbitrarily, capriciously or inconsistently in denying employee training.

3.5 Provision of benefits:
- Interpretation given to the term 'benefits' is quite narrow.
- Dispute about unfair Labour practice must amount to a dispute of right in order to qualify as an unfair Labour practice.
- Dispute about remuneration are regarded as interest disputes, a right has not yet been created. Interest dispute must be resolved by industrial action and not the court.

**Schoeman v Samsung Electronic:** employer changed the employees commission structure - claimed it was an unfair Labour practice. Court held, commission was not a benefit but part of remuneration. Difficult to separate benefits from remuneration. Remuneration = interest dispute.
3.6 Suspension or any other disciplinary action short of dismissal:
- Two types of suspension:
  1. Precautionary Suspension (Pending inquiry)
  2. Punitive Suspension (Sanction for Misconduct following disciplinary action).

1. Precautionary Suspension (Pending inquiry)
- allow employer to investigate alleged misconduct, to decide whether disciplinary action should be taken.
- Suspension, is with pay unless, the employee agrees otherwise/law dictates/collective agreement authorises.
- Employee should not be suspended unless:
  - Prima facie reason to believe employee committed serious misconduct;
  - Objectively justifiable reason for excluding the employee from workplace exists.
- Fair procedures must be followed.
- Employees must be offered opportunity to be heard before placed on suspension.

*Mogothle v Premier North West Province*: held, should be used only when there is a reasonable apprehension that the employee will interfere with investigations or pose some other threat.

*Tungwana / Robin Island museum*: suspended pending a disciplinary enquiry into allegations that he failed to disclose outside interests and acted negligently. Applicant referred suspension to the CCMA. Commissioner found charges against applicants were unfounded. No Prima facie reason to believe applicant had committed serious misconduct, employer had no reason to exclude employee from workplace. Employee awarded six months salary as compensation.

2. Punitive Suspension:
- Fair suspension without pay could be an alternative to a sanction of dismissal in an attempt to correct the behaviour of an employee.

*County Fair v CCMA and SA Breweries Ltd b Woelfrey*: held, suspension without pay was impermissible disciplinary penalty - where appropriate.

Any other Disciplinary action short of dismissal:
- could amount to unfair Labour practice. Eg. Warnings and transfers without reason.
3.7 Refusal to Reinstate or Re-employ an employee in terms of any agreement:
- employees protected against the refusal by employer to reinstate or re-employ in terms of any agreement.

3.8 Employee suffering an occupational detriment on account of protected disclosure (whistle-blowing):

1. Requirements:
- occupational detriment in contravention of the PDA amount to unfair Labour practice.
- Act regulates disclosure by employees of information on suspected criminal and other improper conduct by employers/co-employees, provides remedy in this regard
- 3 Requirements:
  - employee made a protected disclosure,
  - employer must have taken some retaliation action against the employee which amounts to the employee suffering from an occupational detriment,
  - detriment suffered must be on account or partly on account of the making of the protected disclosure = Nexus between disclosure and retaliating action by employer.

2. Meaning of “occupational detriment” and “protected disclosure”:
- Occupational Detriment:
  - subjection of an employee to any of the following as a result of whistle-blowing:
    - disciplinary action,
    - dismissal, suspension, demotion, harassment or intimidation,
    - transfer against will,
    - refusal of transfer or promotion,
    - subjection to a term of employment,
    - subjection to a term of retirement which is altered or kept altered to the employees disadvantage,
    - refusal of a reference or provided with an adverse reference,
    - denial of appointment to any position or office,
    - being threatened with any of these actions,
    - being adversely affected in respect of employment, employment opportunities and work security.
- Protected Disclosure:
- A protected disclosure is the disclosure of information to specific persons or bodies such as legal advisers, employers, members of Cabinet, the public protector or the auditor general.
- Information must be disclosed - suspicion, rumours and personal opinion do not constitute information.
Disclosure must be made:
- in good faith, and
- reasonably believe
- that the information disclosed is substantially true.

Theron v Minister of Correctional Services: disclosure on the poorer health care of prisoners made by a prison doctor to the inspecting justice of prisons and the relevant parliamentary committee, was held to be a protected disclosure.

Engineering Council of SA v City of Tshwane Metropolitan: managing engineer, informed employer orally and in writing, and copied the Engineering Council and the DoL that the employer wanted to appoint unskilled and in experienced people who were unable to perform their duties in the electrical control section. Held, copying of the letter to the Engineering Council and the DoL constituted a protected disclosure. Municipality could not discipline managing engineer or impose any sanction on him for doing so. Municipality was interdicted from proceeding with disciplinary action against him.

Young v Coega Development Corporation: court indicated employs these have choice to approach the Labour court order the High Court regarding matters relating to the PDA.

4. Resolution of Unfair Practice Disputes:

- ALLEGED UNFAIR LABOUR PRACTICE-

1. Refer for Conciliation to bargaining council/CCMA within 90 days

2. Was dispute resolved at conciliation?

2.1 If Yes - Matter settled.

2.2 If No - 3. Does it relate to Probation?

3.1 If Yes - Refer to Con-Arb
3.2 If No - 4. Does it relate to occupational detriment?

4.1 If Yes - refer for adjudication by Labour Court/High Court

4.2 If No - Refer to Arbitration

- Con-Arb process = single expedited process, met there is arbitrated immediately after a certificate of Non-Resolution is issued.
- Arbitrator determine unfair Labour practice dispute - order for re-in statement, re-employment or compensation of not more than equivalent of 12 months remuneration.
- Arbitrators and commissioners - wide powers = make declaratory orders, protective promotions, remitting the matter back to employer for reconsideration and reinstatement.
- Employee alleging unfair Labour practice must prove allegations, employer then given opportunity to show conduct was fair.

1. Define the concept of unfair labour practices from the LRA and Constitutional context. In your discussion, explain whether there is a difference between the LRA framework of unfair labour practices and the Constitutional framework of unfair labour practices.

Sec 186(2) LRA: Gives content to the concept of unfair labour practice by describing a number of practices:

'Unfair Labour Practice means any unfair act or omission that arises between an employer and an employee involving:-

(a) the unfair discrimination, either directly or indirectly, against an employee on the grounds of race, colour, gender, sex, religion, conscience, belief, culture, language, family responsibility or marital status or any other arbitrary grounds;

(b) 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

(c) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(d) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
(e) An occupational detriment, other than dismissal, in contravention of the
Protected Disclosures Act [PDA] ... on account of the employee having made a
protected disclosure defined in the Act.

| RIGHT TO FAIR LABOUR PRACTICES: |
| CONSTITUTION |
| - = Right to fair labour practices |
| - wide application |
| - protects ‘everyone’ - incl. workers who are not employees in LRA |
| - infringement of right to fair labour practices will be determined with regard to |
| surrounding circumstances |

Protection against unfair Labour practices in terms of the LRA is capped = LRA
provides a limited list of actions included in the definition of unfair Labour
practices.

2. Can an employee commit an unfair labour practice against the employer in
terms of the LRA? Justify your answer.

No. The definition of an unfair Labour practice in the LRA refers only to unfair
conduct by employer towards an employee. Only employees are protected
against unfair Labour practices committed by an employer.

3. Is the list of unfair labour practices in section 186(2) of the LRA
exhaustive? Explain.

Yes. The list of unfair Labour practices in terms of section 186(2) is exhaustive.
This means that an employee will not be able to complain of any other form of
unfair conduct not listed in this section.

4. Employer Super Inc. has, for the past two years, been paying employees a
specific amount of R 200.00 p/m as a transport allowance, but has not
increased the amount since then. The Union threatens to declare a
dispute regarding the fact that the amount has not been increased. Will
this be a dispute of right or of interest? Discuss.

The matter is a debate dispute of interest. A dispute of interest relates to
proposals for the creation of new rights, and is not merely about remuneration.
Such dispute relates to the new or better terms and conditions of employment
and remuneration. In the case of a dispute of right, the bargaining Council, or
CCMA will consider whether the dispute concerns the application or
interpretation of existing right and whether the dispute is about enforcement
of a right in terms of a contract of employment, the BCEA, a collective agreement, a sectoral determination or a wage determination.

5. Mr O is an assistant head of salaries at the firm Petrol Inc. He has been employed in this position for two years. When the Paymaster suddenly falls ill, he is requested by management to take over the responsibilities of the Paymaster until the latter returns. After three weeks the Paymaster resigns for health reasons will stop Mr O performs his duties diligently and on various occasions is assured by management that they are satisfied with his work performance. Position of Paymaster is advertised and Mr O, confident that he is able to do the job applies for the position. Much to his surprise he is not appointed to the position. Mr O feels that firm Petrol Inc. has acted unfairly. Discuss.

Acting in a position does not entitle an employee to be appointed to the position. However, Mr O, could argue that the employer created an expectation that Mr O would be permanently appointed to the position in which he had been acting. Mr O would probably argue that in view of the positive feedback he received from management he was confident that he would be promoted. Mr O can argue that there is at most a duty on employer to give the employee an opportunity to be heard prior to making the final decision.
STUDY UNIT 8 (CHAPTER 8) – DISMISSAL AND OTHER WAYS OF TERMINATING THE CONTRACT OF EMPLOYMENT

1. DISMISSAL IN GENERAL:
- Sec 185 of LRA = every employee has right not to be unfairly dismissed.
- If employee alleges termination amounts to unfair dismissal, must prove:
  - He is an employee (ito LRA), and
  - he was dismissed.
- Burden of proof then rests on employer to prove dismissal fair by:
  - proving fair reason for dismissal (Substantive fairness); and
  - fair procedure was followed (Procedural fairness)

- Sec 186 of the LRA = Dismissal means:
  (a) an employer has terminated a contract of employment with or without notice;
  (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
  (c) an employer refused to allow an employee to resume work after she -
    - took maternity leave in terms of any law, collective agreement or her contract of employment, or
    - was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;
  (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; and
  (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;
  (f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer ito Sec 197 or 197A, provided employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

2. DEFINITION OF DISMISSAL:
2.1 Termination of contract by employer, with/without notice:
- Giving one month’s notice ito BCEA where employee caught red handed committing breach of contract. - rather pay employee than have him work for the month.
Where employee commits serious breach of contract, employer terminate contract summarily – immediately without notice – Employee must still get opportunity to be heard.

SA Post Office v Mampuele: Employee removed as director of PO. Employer simultaneously terminated employment – articles of association of PO stated that when a director ceased to hold office for any reason – contract terminated automatically and simultaneously. Employee's contract contained similar clause. Employer argued it was not a dismissal, because action was compelled by Articles of Association and agreement in contract of employment. Court rejected argument, Held, against public policy and not possible in law. Employee had right not to be unfairly dismissed and could not contract out of this right, and a contract cannot provide for automatic termination of contract of employment.

2.2 Refusal/failure by employer to renew fixed-term contract:
- If employee reasonably expects employer to renew fixed-term contract of employment, but employer offers to renew it on less favourable terms, or does not renew it at all, this will constitute Dismissal.
- Question = whether employers conduct constituted reasonable expectation of renewal of fixed-term contract. (Previous renewals/assurances of renewal)

Black v John Snow Public Health Group: applicant claimed non-renewal of fixed-term contract constituted unfair dismissal. Court held, while previous renewals were relevant to determine whether there was a reasonable expectation, they were decisive. Employee worked for non-governmental organisation, dependant on foreign funds, and hence, had to review its position annually in light of the actual funding received. Employee knew that, although next years budget made provision for her, that there was no more than a financial plan. Employer never created a reasonable expectation.

2.3 Refusal to allow employee to resume work after maternity leave:
- Refusal in this instance will qualify as dismissal.
- BCEA = employee entitled to 4 consecutive month’s maternity leave (unpaid).
- Dismissal would be automatically unfair.

2.4 Selective Re-employment:
- Dismissal of a number of employees for same/similar reasons, but subsequently offers to re-employee one or some, while refusing to re-employ others, will constitute dismissal.
- may not necessarily be unfair.
2.5 Constructive Dismissal:
- Where employee resigns because employer made continued employment intolerable for the employee, constitutes dismissal in the form of Constructive Dismissal.

_Copeland and New dawn Prophesy Business Solutions_: employee had to show intolerable working conditions, having exhausted all internal mechanisms available - out of desperation had no alternative but to resign. Held, 3 elements must be present for Constr. Dism.:
- employee must show resigned;
- must show reason for resignation was continued employment became intolerable;
- show that employer's conduct created intolerable circumstances.

_Albany Bakeries v van Wyk_: Employee resigned after being demoted. Court held, under circumstances, demotion made continued employment intolerable.

_WL Ochse Webb & Pretorius v Vermeulen_: employee resigned after employer's change to the commission structure of all employees had led to reduction in income. Labour Appeal Court held, even though change made employment intolerable amounting in constructive dismissal, Employer acted fairly under circumstances - uniform commission structure in workplace.

2.6 Employee being provided with less favourable terms after trf of business:
- Form of Constructive Dismissal.
- Sec 197 & 197A of LRA - designed specifically to protect interests of employees who are transferred between employers.
- If employee resigns cos of substantially less favourable conditions under new employer, termination = dismissal.
- Contract of Employment must continue under new employer on terms/conditions that are on a whole not less favourable to the employee.
- Employee can claim Constructive Dismissal.

3. AUTOMATICALLY UNFAIR DISMISSALS:
3.1 Concept of Automatically unfair Dismissals:
- Sec 187 LRA = Automatically Unfair Dismissals
- To provide a remedy to employee when basic right of employment infringed.
- Only Justification for infringement of basic right:
  - Inherent requirements of job;
  - dismissed due to normal retirement age.
- Automatically unfair dismissal = more severe penalty → 24 months salary.
LRA = 9 types of Automatically Unfair Dismissals: Sec 187
1. Employer acts contrary to employees right to freedom of association;
2. Participation in or supporting a protected strike or protest action;
3. Refusal to do the work of employees who are on protected strike;
4. Compelling an employee to accept a demand made by the employer;
5. Exercising rights against the employer;
6. Pregnancy, intended pregnancy or any other reason related to pregnancy;
7. Unfair Discrimination;
8. Transfer of a business;
9. Protected Disclosures.

3.2 Employer acts contrary to employees right to freedom of association:
- Employees right to join trade union and to participate in activities of trade union. Dismissal for this = automatically unfair.

3.3 Participation in or supporting a protected strike or protest action:
- dismissal for this reason = automatically unfair.
- Applicable to Protected Strikes only.
- Two exceptions: employee may be dismissed during protected strike for:
  - Misconduct; and/or
  - Operational Reasons.

3.4 Refusal to do the work of employees who are on protected strike:
- Dismissal for this reason = automatically unfair.
- If employee refuses to do own work while other employees on strike, it will amount to insubordinance.

3.5 Compelling an employee to accept a demand made by the employer:
- dismissal for this reason = automatically unfair.
- Also known as “Lock-out” dismissal.
- Unfair as employer actually bullying employee to accept demand or be dismissed.
- Employer has right to change workplace rules and practices. Terms and conditions of employment can only be changed by negotiation.
NUMSA v Fry’s Metals: Employer wanted to change shift system. After several attempts to persuade Union, employer took position that unless union accepts change, employees will be dismissed for operational reasons. Employer argued that in that particular business, he needed employees willing to adhere to new shift system and that dismissal would therefore not be to force employees to accept new system, but to find employees who will work in terms thereof. Held, employer’s demand was final and not mere threat. It constituted a fair dismissal for operational reasons.

3.6 Exercising rights against the employer:
- Dismissal for this reason = automatically unfair.
- LRA prohibits victimization of employees exercising their rights into LRA.

3.7 Pregnancy, intended pregnancy or any other reason related to pregnancy:
- Automatically unfair if dismissed for this reason.

Swart v Greenmachine Horticultural Services: Employee harassed and victimized due to non-disclosure of her pregnancy during the interview for the job. After joining company, she disclosed pregnancy and was reprimanded for poor work conduct and eventually dismissed based on misconduct. Held, employee shown that her non-disclosure of her pregnancy was dominant reason for dismissal. No obligation on employee to disclose her pregnancy. Constituted automatically unfair dismissal.

Mashava v Cuzen & Woods Attorneys: Candidate attorney did not disclose her pregnancy during the interview for appointment. When appointed and informed employer, she was dismissed for deceiving employer during interview. Held, deceit would warrant dismissal, but that failure to disclose pregnancy is not deceit.

Wardlaw v Supreme Mouldings: Employee not allowed back from maternity leave - employer discovered during her absence she had not performed her duties properly. Not automatically unfairly dismissed - reason for dismissal related to the neglect of work prior to maternity leave and not her pregnancy.

3.8 Unfair Discrimination:
- Dismissal automatically unfair if based on unfair discrimination, directly or indirectly, on any arbitrary ground.
- Only justified id discrimination based on:
  - the inherent requirements of the job,
  - age of retirement for persons in that capacity.
**Allpass v Mooikloof Estates:** Employee, when requested by employer to disclose personal particulars a few days after starting the job, revealed that he had a number of illnesses (Incl. HIV) and allergies (allergic to penicillin). Employer dismissed and removed employer from premises. Employer argued, employee had misrepresented himself. Two issues: (a) Whether employee was capable of performing his duties, and (b) Whether his dismissal was based on misconduct or his HIV status.

Court Held, employers opinion that employee was ill, based on general stereotype of people with HIV. Resulting in giving the employee an economic death. Found, employee was automatically unfairly dismissed.

**Dlamini & others v Green Four Security:** Employees dismissed after refusal to shave beards in terms of company’s dress code. Claimed unfairly discriminated against, based on Religious beliefs. Court questioned whether being cleanly shaved was inherent requirement of the job. Held, workplace rule could be inherent requirements of the job. Company’s “Distinctive Image”.

3.9 Transfer of business:
- Dismissal because of business as a going concern = automatically unfair.
- must be a causal link between the transfer and the dismissal in order to establish unfair dismissal.

3.10 Protected Disclosures:
- “Whistle-blowing” - dismissal = automatically unfair.

3.11 Dispute resolution for **automatically unfair dismissal**:

```
DISMISSED BY EMPLOYER

Refer disputer within 30 days for Conciliation to CCMA/Bargaining Council

Conciliation successful
  Matter resolved

Conciliation not successful
  Referred to Labour Court

Labour Court makes Ruling
  Appeal to Labour App Court
```
4. FAIR DISMISSALS ITO LRA:
- LRA = provision for fair dismissal = Dismissal for fair reason and using correct procedure.
- As an alternative to dismissal, employer consider:
  - Counselling, warnings, and informal correction.
LRA allows for dismissals for three reasons:
  - Misconduct
  - Incapacity
  - Operational Reasons

4.1 Dismissal for MISCONDUCT:
4.1.1 Substantive Fairness
The Code: Dismissal, sets out requirements for Substantive Fairness:
- Did employee contravene rule/standard of workplace?
- Was rule valid/reasonable?
- Was employee aware of rule?
- Was rule consistently applied by employer?
- Is dismissal appropriate action for contravention of rule? Dismissal must be last resort.

4.1.2 Application of Substantive Fairness:
- basic duty breached in all cases of misconduct is the common-law duty to act in good faith towards employer.
- best way to determine if conduct constitutes misconduct, is to determine whether the employee did not perform a duty expected of him/her.

(a) Unauthorised absence from work, abscondment, desertion and time-related offences:
- repeated late-coming
- abusing sick leave (Esp before and after w-ends – AECI Explosives case)

Distinguish betw. Abscondment or absence without leave (AWOL) and Disertion:

<table>
<thead>
<tr>
<th>AWOL</th>
<th>DESERTION</th>
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<tr>
<td>- Employee not want to terminate empl contr., but stays away from work without leave.</td>
<td>- Employee, without resigning, stays away from work with intention of terminating contr. of empl.</td>
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<td>- warrants dismissal if period of absence is reasonably long</td>
<td>- Employer must terminate contract by holding disciplinary hearing in abstentia.</td>
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<td>- If employee returns after few days with sufficient reason for absence, dismissal may not be appropriate. (Hospitalised/imprisoned)</td>
<td>- even if employee returns after dismissal, employer must give opportunity to be heard</td>
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(b) Attitudes of hostility, abusive language, racism and insubordination:
- Employer may expect employees to work together in a reasonable harmonious relationship.
- Employee showing hostility - can be dismissed. Abusive language, including swearing or remarks that instigate racism, religious discrimination, sexism or any other discriminatory action, the employee is guilty of misconduct. Each case will depend on the context.

(c) Theft (petty theft, stock losses), team misconduct, dishonesty and breach of trust relationship:
- fixed by an employee causing irreparable harm to the relationship of trust and confidence between employer and employee = fair dismissal.
- Application in circumstances where the value of property stolen was minimal - Miyambo v CCMA case, court held - even though the value of the property was minimal, act of stealing acting in trust relationship and have significant economic repercussions.
- Petty theft cases - the circumstances will determine whether the dismissal of breach of trust will be fair, court will have to balance the duty of employee to act in good faith with the LRA’s approach that employers must follow process of progressive discipline and you dismissal as a matter of last resort.
- Re - misconduct -> where employer cannot identify the guilty party, it may resort to a dismissal of the group of employees. Foschini Group v Maidi & Others: employer experienced 28% loss of clothing stock at a small branch. Employees at the branch refused to attend disciplinary enquiry and were dismissed. The Labour Appeal Court found, dismissal of all employees at branch was fair. Where employees unable to explain huge stock losses and show that it was beyond their control, the only inference was that they were guilty. This is known as "team misconduct".

(d) Other forms of misconduct:
- assault
- conflict of interest
- damage to property
- intimidation
- sexual harassment
- alcohol and drug abuse.

4.1.3 Procedural Fairness:
- Procedural fairness is important for dismissal based on misconduct as well as any other form of dismissal.
- The main principle is that the employer must give the employee an opportunity to be heard and to defend herself against allegations.

Checklist to ensure Procedural Fairness:

1. Did the employer conduct an investigation to determine whether the ground for dismissal?
2. Did employee notify employee of allegations?
3. Did employee get reasonable time to prepare?
4. Was employee allowed to state a case in response to the allegations?
5. Was employee and allowed assistance of a union representative or co-employee?
6. Did the employer, after the enquiry, communicating the decision taken, and furnish the employee with written notification of that decision as well and the reasons for decision?
7. If the employee is dismissed, employer remind him of any rights to refer the matter to a bargaining Council or CCMA?

- Discipline against a union representative employee - the union must be informed and consulted first.
- Employee may waive right to hearing.

4.1.4 Dispute resolution for a dismissal based on misconduct:

**DISMISSED BY EMPLOYER**

Refer disputer within 30 days for Conciliation to CCMA/Bargaining Council

Conciliation Successful

Matter resolved

Conciliation not successful

Matter set down for Arbitration

Commissioner makes award

Review by Labour Court in limited circumstances
4.2 Dismissal for INCAPACITY:
- Sec 188 LRA
- poor work performance, ill health or injury
- incapacity involves some form of behaviour, conduct or inability which is neither intentional nor negligent.
- Known as “No-fault” dismissal.

LRA = Two types:

1. Poor work performance
   - During Probation
   - After Probation

2. Illness or injury
   - Temporary Illness
   - Permanent Illness

4.2.1 Poor work performance during probation:
- The code: Dismissal: compels employer to give the employee on probation following assistance before dismissal for poor work performance:
  - evaluation, instruction, training, guidance or counselling needed to perform duties
  - employer must make clear to the employee what performance standard is and where shortfall is
  - must give employee assistance and opportunity to improve
  - employer should measure progress and give feedback
- Purpose of probation is to see if employee can do the work.

4.2.2 Poor work performance after probation:
- employer should consider other ways short of dismissal, remedy poor performance.
  - Investigate to determine reasons for unsatisfactory performance
  - give appropriate evaluation, instruction, training, guidance or counseling
  - if employee continues work performance, can be dismissed, and
  - during this process employee has right to be heard and assisted by union representative or co-employee.

4.2.3 Ill health or Injury:
- LRA allows for dismissal of ill or injured employees
- employer compelled to:
  - consider alternatives before dismissal
  - get input from employee on alternatives before dismissal.
- The Code: Dismissal = specifically states an employer should attempt to accommodate in the workplace and employee injured on duty.
- Employer need not accommodate the qualified applicant or employee with a disability is this would impose and unjustified hardship on the business on the employer.

Substantive fairness in cases of dismissal for injury or illness:
- employer must make informed decision
- employer must determine whether or not employee is capable of performing work
- if employee not capable the employer must:
  - determine extension to which employees able to perform work,
  - extent to which employees work circumstances may be adapted to accommodate disability,
  - where not possible, extent to which employees duties may be adapted

Procedural fairness:
- employee gets opportunity to respond and make suggestions,
- employer must consult with employee,
- employer must consider available medical information, and
- employer must attempt to accommodate employee where reasonably possible.

Checklist to ensure procedural fairness in cases of temporary as well as Permanent illness or injury: employer take following into account:
1. Nature of job;
2. Period of absence;
3. Seriousness of illness or injury;
4. Possibility of securing temporary replacement;
5. Degree of incapacity;
6. Cause of incapacity;
7. Availability of suitable alternative work or adaption of duties or work circumstances to accommodate employees disability.

- Employees who become disabled during employment, where practicable, BV integrated into work.
- Employer must consider all alternatives to retain employee, if not, dismissal would be unfair.
4.2.4 Dispute resolution for dismissal based on **Incapacity**:

**DISMISSED BY EMPLOYER**

Refer disputers within 30 days for Conciliation to CCMA/Bargaining Council

- Conciliation successful: Matter resolved
- Conciliation not successful: Matter set down for Arbitration
  - Commissioner makes award
  - Review by Labour Court in limited circumstances

See integrated example page 141 textbook.
- **LRA** = protects against unfair dismissal – substantive and procedural fairness.
- **BCEA** = regulates sick leave, determine period of absence.
- **EEA** = prohibition of discrimination on basis of disability, disability qualify as designated employees.
- **COIDA** = injured on duty – qualify for compensation.
- If not qualify for benefits of **COIDA** – claim from **UIA**.

4.3 Dismissal for **OPERATIONAL REQUIREMENTS**:

- "No-Fault" Dismissal
- Operational requirements defined in **LRA** – distinguishes four broad categories of operational requirements:
  - Economic needs;
  - Technological needs;
  - Structural needs;
  - Similar needs.

- Similar needs would justify retrenchment in cases where:
  - employee’s actions or presence has a negative effect on business;
  - employees conduct led to breakdown of trust relationship;
  - enterprises business requirements required changes to be made to employees terms and conditions of employment.

**Joslin v Olivetti Systems**: similar needs case -> Joslin, marketing manager of Olivetti, carried camera round his neck, up to 36 pens in shirt pockets or wore a
Springbok cricket cap. Retrenched - actions created a negative impression amongst co-workers. Court found, dismissal and unfair and Joslin eccentricity harmless. Only those forms of eccentric behaviour that such a gross nature that they cause consternation and disruption in the workplace would justify dismissal for operational reasons.

**Albany Bakeries**: manager made racist remarks - fairly dismissed - presence caused disharmony in the workplace.

**Fry’s Metals v national Union of Mineworkers**: employer changed shift system for more effective operation. Trade union refused despite several attempts at resolving matter. Employer dismiss employees who refuse to work on new shift system and replace them with employees willing to do so.

4.3.2 Substantive fairness:
- difficulty = employer determines economical, technological or structural needs of business.

**Kotze v Rebel discount Liquor Group**: held, court should not second-guess the employee is commercial reasons for taking a specific decision to retrench employees.
- Later decisions, courts of view that employers version will not merely be accepted on face value. Rather, court should determine whether retrenchment had reasonable basis and commercial rationale. Retrenchment should remain a matter of last resort.

Sec 189A LRA = dismissal will be substantively fair for operational reasons if following requirements are met:
- reason for dismissal must be operational requirements as defined in the LRA (economical, technical, structural or similar needs)
- reason must be the real reason for the dismissal and not a cover-up for another.
- Reason on which the dismissal is based, must exist.
- Reason must be justifiable and based on rational grounds.
- Objective test must be applied when determining the rationality of reason.
- Must have been proper consideration of alternatives, employer give reasons why no alternative to dismissal.
- Employer must be able to show dismissal was last resort.
- Selection criteria must be fair and objective.

4.3.3 Procedural fairness in terms of **Sec 189**:
- compulsory to follow process carefully:
Checklist for Procedural fairness regards retrenchment Sec 189:

1. Was there prior consultation?
   - Must take place when contemplating dismissal - National Union of Metalworkers

2. Whom did employer consult with?
   - Person or group in collective agreement,
   - if no collective agreement, workplace forum,
   - registered trade union, if none, with employees or representatives.

3. How did parties consult?
   - Section 189 (2) = attempt to reach consensus
   - Jenkin v khambula Media Connexion: single meeting not sufficient to constitute consultation - dismissal thus procedurally unfair.

4. Did parties attempt to reach consensus?
   - Appropriate measures to avoid dismissal;
   - appropriate measures to minimise the number of dismissals;
   - appropriate measures to change the timing of dismissals;
   - appropriate measures to mitigate adverse effects;
   - selection criteria;
   - severance pay.

5. Did employer disclose relevant information in writing?
   - Section 189 (3) & 16 - employer compelled to disclose relevant information
   - parties right to demand information is not restricted;
   - Ito Sec 16(5) = categories of information that need not be disclosed:
     - legally privileged;
     - employer not disclose without contravening prohibition imposed on employer by any law or order of court;
     - confidential and, if disclosed, may cause substantial harm to employee or employer;
     - private personal information relating to employee unless consent by employee.
   - CCMA may order to disclose certain info.

6. Did employees get the chance to respond?

7. Did employer consider or representations?
   - Must consider and give reasons why not acceptable.

8. Did employer use fair and objective selection criteria?
   - “Last in, First out” or “First in, first out”

9. Did employer pay severance pay?
   - sec 41 BCEA - minimum of one weeks salary per completed year of continuous service.
4.3.4 Procedural fairness in terms of **Sec 189A**:  
- applies to big employers undertaking large scale retrenchments.  
- Big employer = 50+ employees  
- large scale dismissal determined in relation to number of employees dismissed and size of business: Ito LRA:  
  - if employer employs up to 200 employees and 10 dismissed, or  
  - more than 200, not more than 300, and 20 dismissed, or  
  - more than 300, not more than 400, and 30 dismissed,  
  - more than 400, not more than 500, and 40 dismissed etc...  

See Example in textbook, pg 147

- The process in terms of section 189A differs from the process under section 189:  
  - 189A, the parties can get the help of a facilitator to assist with the resolution of retrenchment issues;  
  - 189A, parties are forced to comply with the prescribed time frames;  
  - 189A, the parties can choose to refer the matter to the Labour court for adjudication, or go on strike.

(a) **Who can request a facilitator?**  
- Employer can request appointment of facilitator when it gives notice of the proposed retrenchments, or  
- representative of the majority of employees fighting dismissal;  
- must be done within 15 days of the employer’s notice;  
- during consultation process parties may still agree to appoint facilitator.

(b) **What does facilitator do?**  
- Conduct facilitation in line with the consultation regulations:  
  - chairs the meeting between parties;  
  - decides in the issue of procedure that arises in the course of the meeting;  
  - arrangers further facilitation meetings of the consultation with parties;  
  - direct parties to engage in consultation with facilitator been present.  
- Facilitator is decision is final in respect of any matter concerning the procedure for conducting the facilitation.
(c) What are the time limits set by section 189A?
- If facilitator appointed, employer may not dismiss employees before 60 days have elapsed from date on which appointment of facilitator was requested.

(d) What if no facilitator was appointed?
- Minimum of 30 days must have lapsed before dispute about the contemplated dismissal can be referred for conciliation to the CCMA or Council.
- No dismissal may be carried out during this period.

4.3.5 Dispute resolution for a dismissal based on OPERATIONAL REQUIREMENTS:

DISMISSED BY EMPLOYER

Refer dispute within 30 days for Conciliation to CCMA/Bargaining Council

Conciliation Successful
Matter resolved

Employees embark on strike

Conciliation not successful
Matter referred to Labour Court

Labour Court makes ruling

Appeal to Labour Appeal Court

5. Other aspects of dispute resolution:

5.1. Conciliation:
- after internal processing workplace have been followed, employee once to challenge fairness of dismissal - reason for dismissal will determine dispute resolution route.
- Alleged unfair dismissal, the LRA requires matter must first be referred for conciliation;
- conciliation is unsuccessful, disputes about dismissal based on misconduct or incapacity will go for arbitration
- dispute about automatically unfair dismissal must go for adjudication to Labour court;
dispute based on operational requirements refer to Labour court if conciliation unsuccessful;
- union may also choose to strike regarding dispute, but then matter can no longer be referred to the Labour court.

5.2 Arbitration:
- the LRA specifically determines when the dispute must go for arbitration and when for adjudication;
- arbitration can take place at a bargaining Council or CCMA;
- award by the arbitrator is final. Award can only be taken on review.

5.3 Reviews and Appeals:
_Sidumo & another v Rustenburg platinum Mines:_ the test for review = “is the decision reached by the Commissioner, one that a reasonable decision maker would not reach?”
- If a reasonable decision maker would have come to a different decision in the arbitrator, then the matter may be reviewed.
- Section 167 of the LRA allows for appeal, unless it is a constitutional matter. Labour appeal court is the highest court of appeals for Labour matters.
- Review regards the procedure to reach conclusion whereas appeal regards the conclusion reached.

5.4 Remedies:
- Primary remedy for unfair dismissal is reinstatement - must be ordered except in the following circumstances when compensation be awarded:
  - employee does not wish to be reinstated or re-employed;
  - circumstances surrounding dismissal are such that continued employment relationship would be intolerable;
  - not reasonably practicable for employer to reinstate or re-employee employee;
  - dismissal is unfair only because employer did not follow fair procedure
- The LRA Amount of compensation for unfair dismissal = maximum of 12 month salary can be awarded for compensation.
- Compensation for employee whose dismissal is automatically unfair must be just and equitable in all circumstances but not more than 24 month remuneration.

6. Other ways of terminating the employment contract:
1. Resignation by employee;
2. Termination on completion of an agreed period of work;
3. Termination by mutual agreement;
4. Termination grounds of impossibility of performance;
5. Termination as a result of insolvency of employer:
   - contract is suspended from date of sequestration for period of 45 days after appointment of trustee;
   - conduct may be terminated by trustee liquidator prior to the 45 days term of suspension.
   - Employee need not renders services to the employer;
   - employee is entitled to severance pay and to claim damages suffered as a result of such termination.

6. Termination as a result of retirement.

1. **Company X** which employs 40 employees inform you that is currently contemplating 20s 20 of employees due to financial constraints. Advise company X on the following:
   - applicable provisions of the LRA;
   - persons to be consulted before ensuing retrenchments;
   - information that may not be disclosed during consultation;
   - severance pay to be paid to dismissed employees;

   - Company X will be dismissing employees for operational requirements. Since company X employs less than 50 employees, it is a small employer and section 189 of the LRA will be applicable.
   - Any person whom the employer is required to consult in terms of a collective agreement, if there is no collective agreement that required consultation, a workplace forum, if there is no workplace forum any registered trade union whose members are likely to be affected and if there is no such union, employees likely to be effected all their nominated representative.
   - Legally privileged information;
   - confidential information;
   - private and personal information;
   - information which when disclosed will contravened prohibition by law;
   - the payment of severance pay is regulated in section 41 of BCEA;
   - an employer must pay the employee and minimum of one weeks salary per completed year of continuous service. Parties may agree on more payment.

2. **Mention and discussed two remedies for unfair dismissal.**
   Reinstatement is a primary remedy. In terms of this remedy an employee is placed in his position before the alleged unfair dismissal. Reinstatement or re-employment cannot be ordered under the following circumstances:
   - when the employee does not wish to be reinstated;
• when the circumstances surrounding the dismissal of such that a continued employment relationship will be intolerable;
• when it is not reasonably practicable for the employer to reinstate or re-employee employee;
• whether dismissal is unfair only because the employer did not follow fair procedure.

Compensation is the other remedy and it must be just and equitable. A minimum of 12 month salary can be awarded compensation for employee whose dismissal is found to be substantively or procedurally unfair.

For the purpose of compensation, remuneration is copulated at the employees rate of remuneration on the date of dismissal the compensation for automatically unfair dismissal must be just and equitable but not more than the equivalent of 24 month remuneration.

3. Jane has been employed by PQM Pty Ltd as a typist. Jane’s manager Leonard, always insults Jane by calling her an idiot. At one stage Linda chartered a chain and said that he did not like and will dismiss her. As a result Jane resigned and claim that she has been dismissed. Advise Jane on the validity of a claim.

Jane’s claim is based on constructive dismissal. Constructive dismissal is a form of dismissal in terms of section 186 of the LRA. Jane must prove that the resignation was not voluntary. She must be able to prove that she resigned because the employer made continued employment relationship intolerable. Jane must also prove that the resignation was last resort, that there was no other option then resigning.

4. Textbook Q2. Under which circumstances will the Labour court not order reinstatement or re-employment as remedies for unfair dismissal.

Reinstatement or re-employment cannot be ordered under the following circumstances:

• when the employee does not wish to be reinstated;
• when the circumstances surrounding the dismissal of such that a continued employment relationship will be intolerable;
• when it is not reasonably practicable for the employer to reinstate or re-employee employee;
• whether dismissal is unfair only because the employer did not follow fair procedure.

5. Susan is working as a nurse at the University Hospital in Durban. On one January she comes to work wearing a nose ring. Her supervisor, tells her to remove the nose ring because it is against the code of conduct for
nurses prescribed by the hospital. Susan refuses to remove it and get into an argument with the supervisor during which Susan court the supervisor a conservative cow. The supervisor accuses Susan insubordination. Susan is subsequently dismissed and she comes to you for advice.

(a) would Susan dismissal be substantively fair if Susan has never heard of them were about the nose ring?

Substantive fairness entails that one considers:

• whether or not the employee contravened a rule or standard regulating conduct in the workplace;
• whether a rule or standard was in fact contravened;
• whether or not the rule was valid or reasonable rule or standard,
• whether the employee was aware, or could reasonably be expected to have been aware of the rule;
• whether the rule had been consistently applied by the employer;
• whether dismissal was an appropriate sanction for the contravention of the rule

(b) Assume that the supervisor and Susan meet each other of the work at the pub across from the hospital. Susan again called supervisor a conservative cow. They started to fight and Susan punches her in the face. Susan is of the opinion that the employer cannot take disciplinary action against their for misconduct after working hours and all the premises of the employer. Discuss.

This deals with the discipline of employees who commit misconduct outside working hours and all the work premises. Key issues with the misconduct committed is relevant to the workplace contravention of a rule must in some way affect or be relevant to the business of the employer.

(c) Assume that the supervisor suffered a nervous breakdown after the incident. She is booked all from work for an indefinite period. Can the employer dismissed her? If so, discuss on what basis she can be dismissed, and what procedure the employer should follow.

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;
• if the employee is not capable:
  - the extent to which the employee is able to perform the work;
  - the extent to which the employees work circumstances might be adapted to accommodate the disability;
- where this is not possible, the extent to which the employee’s duty may be adapted;
- the availability of any suitable alternative work.

(d) Assumed that employer makes life difficult for Susan after she was successfully reinstated. Thereafter she must work longshots an employer transfers her to a remote movable hospital. She wants to resign. Advise Susan on whether this will be a good idea.

If Susan terminates the contract of employment in constitute a constructive dismissal Susan is terminated the contract of employment because the employer made continued employment intolerable. Such a termination may be done only as a measure of last resort or where there is no alternative. Susan carries the burden of proof, so this will be a risky decision.

6. Jane works for E. She informed E of her pregnancy. The next day Jane find a later on her desk stating that she can no longer work of day and that E is unhappy with her quality of work. Jane feels that this is untrue and unfair and, as a result resign. Will generally awarded claim that she has been unfairly dismissed?

Although Jane resigned it will be regarded as a constructive dismissal. The resignation was as a result of E making it impossible for her to continue working. The dismissal will constitute an automatically unfair dismissal in terms of section 187. This section protects employees against dismissal for any reason relating to pregnancy will stop Jane will have to prove not only that she was an employee and dismissed but also that the dismissal was related to her pregnancy. If she can prove all of these, the dismissal would be automatically unfair constructive dismissal.

7. Discuss the concept of progressive discipline.

Employees must know and understand the purpose of discipline. This relate to certainty about the standards which are required of them and the steps to correct behaviour. Progressive discipline may consist of councelling and warning, and formal and informal advice and correction. Repeated misconduct will warrant warnings, which may be graded according to degrees of severity. More serious infringements all repeated misconduct may warrant a final warning, or another action short of dismissal. Dismissal should be reserved for cases of serious misconduct all repeated offences.