Chapter 2 Exclusive Protection for employees in terms of legislation

1. Who is an employee?
The primary aim of the LRA is to promote sound relations between employers and employees – workers falling outside the LRA do not obtain direct protection. The definition of an employee is generally:
- Any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive any remuneration
- Any other person who in any manner assists in carrying on or conducting the business of an employer
The first part of the definition includes domestic and farm workers.

2. Guidelines to distinguish between employees and independent contractors
Three tests;
- Control – control over the type of work the person does, the manner and when it must be done
- Organisation test – is the person part and parcel of the business and not just an accessory
- Dominant impression test – favoured by the courts and considers the employment relationship as a whole
S200A of the LRA provides a rebuttal presumption of an employment relationship between the parties. The Code also provides a comparison between an employee and independent contractor as follows;

<table>
<thead>
<tr>
<th>Employee</th>
<th>Independent contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Object of the contract is to render personal services</td>
<td>Object of the contract is to produce a specified result or perform specific work</td>
</tr>
<tr>
<td>Employee must perform the services personally</td>
<td>Can perform through others</td>
</tr>
<tr>
<td>Employer may choose when to use services</td>
<td>Must perform work within period fixed by contract</td>
</tr>
<tr>
<td>Contract terminates on death of employee</td>
<td>Contract need not terminate on death</td>
</tr>
<tr>
<td>Contract terminates on expiry of period of service</td>
<td>Contract terminates on completion of work or production of desired result</td>
</tr>
</tbody>
</table>

3. Categories of employees
Most common categories of employees are;

<table>
<thead>
<tr>
<th>Type of employee</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent employee</td>
<td>Person employed for indefinite period</td>
</tr>
</tbody>
</table>
| Temporary / Contract / fixed term | Employed for a specified period or contract
  - Works for the same employer but not more than 3 days per week
  - Can be either temporary or permanent
  - Person works only at certain times
  - Works on certain days but limited to three days per week
| Casual | |
| Part time | Can be either temporary or permanent |

Note the definition of employee does not distinguish between the categories.
4. Unprotected workers

a. Illegal workers
In terms of the common law an illegal contract is void or voidable but in terms of the Constitution and the LRA provision is made for illegal workers. (see Kylie v CCMA and others which was a decision overturned by the Labour Appeal Court). Similarly in the Discovery case, the Court has found even though workers may not be protected by the LRA they are protected by the Constitution.

Thus if a person is not protected by the LRA they can obtain protection via the Constitution in;
- S23 – everyone has the right to fair labour practices
- S10 – everyone has the right to dignity

b. Statutory exclusions of workers
Specific exclusions from the definition of employee in the LRA are;
- NIA, SA secret service and SA National academy of intelligence
- Staff of Comsec
- Members of the NDF

5. Who is an employer?
The definition of employer is not provided for in any legislation and must be looked at in terms of the definition of an employee. An employer may thus be defined as;
- Any person or body who employs any person in exchange for remuneration
- Any person who permits any person to assist him in conducting his business
This includes the issue of labour brokers who generate other concerns such as;
- Difficult to identify the employer / employee relationship
- Employee ends up with reduced salary as the broker extracts some rent for their services
- The protection for unfair dismissal is not shared between the broker and the client
Chapter 3  The impact of the common law on the contract of employment

1. Introduction
The fact that parties are in an employment relationship has consequences notably as a result of labour legislation and the impact of the common law relating to basic rights and duties of employees and employers. Both parties have rights and duties that, even though may not be expressly stated in the contract of employment, flow from the common law.

2. Duties of the employer and the employee

   a. Duties of employers

   To remunerate the employee
   The primary duty is to pay the employee and then if he does not work then no pay is due. The BCEA does though provide for paid leave in certain circumstance but principle of no work / no pay still applies.

   To provide work
   The employer is generally not required to provide the employee with work unless the employee’s salary is commission based or where the employer’s success is dependent on the performance of certain duties on a regular basis – such as acting.

   To provide safe working conditions
   This includes the provision of protective equipment and the exercise of proper supervision. It can also extend to protection of harassment by the employer or colleagues in terms of the EEA. It also encompasses the duty of an employer to a compensation fund should the employee be injured.

   To deal fairly with the employee
   This is captured by the constitutional duty to fair labour practices. The LRA also protects employees against unfair treatment during the time of employment and unfair dismissal.

   b. Duties of employees

   To render services to the employer
   The primary duty – to render labour potential to the employer

   To work competently and diligently
   When the employee enters the contract, he/she guarantees that they will be capable of doing the work

   To obey lawful and reasonable instructions
   The employee is under the control of the employer and non compliance with this rule is subordination and breach of contract unless the order is outside the scope of the employment contract

   To serve the employers interests and act in good faith
   The employment relationship is built on trust and is an implicit term in the contract

3. Doctrine of Vicarious Liability
This provides that an employer is liable for the unlawful or delictual acts of an employee performed during the course of business. This is regulated by the common law and not legislation. This doctrine
protects third parties and does not mean that the employer will not have later recourse against the employee. In order for the employer to be held liable, the following three requirements must be met;

- There must be a contract of employment
- The employee must have acted in the course and scope of employment
- The employee must have commissioned a delict.

_Bezuidenhout v Eskom_ where the employee had a truck but was forbidden to give lifts without authority. The court found this prescription placed a limitation on the contract and thus exonerated Eskom from vicarious liability in a case where Eskom was sued for injuries caused to a hitch hiker given a lift by the driver and subsequently involved in an accident.

4. **Impact of the contract of employment on the employment relationship**

**Introduction**
The contract of employment contains the terms and conditions but these can be changed under certain conditions.

**General contact principles**
The contract must contain all the requirements of the law for the conclusion of a valid contract, namely;

- There must be an agreement between the parties
- The parties must have capacity to act
- The agreement must be lawful and legally possible
- Performance under the agreement must be possible
- If any formalities are prescribed, these formalities must be satisfied e.g. a candidate attorney must be registered with the Law Society

The contract of employment need not be in writing and its terms may be express or tacit. However there are certain terms which the employer is obliged to provide in writing to the employee in terms of the BCEA which include;

- The full name and address of the employer
- The name and occupation of the employee
- The place of work
- The date of commencement, ordinary days of work and hours of work
- The employee’s wage, overtime rate, other cash payments due, payment in kind and value thereof and the frequency of remuneration as well as deductions
- The leave entitlement
- Period of notice required
- And other documents which may form part of the employment contract

The employer must keep these for three years after termination. The employer is obliged to display a statement of the employee’s rights in terms of the BCEA at the place of work.

**Remedies for breach**
If the parties do not perform in terms of the contract this is breach in terms of the common law. In the event of breach the parties may terminate or compel the defaulting party to perform.

The LRA has largely replaced the processes for breach provided by contract law. In terms of the LRA, a breach by the employer will probably amount to an unfair labour practice. If an employee breaches then
it amounts to misconduct. Note the High Court has jurisdiction for an employee claiming breach (not the Labour Court) and only common law remedies are available. Such a termination deals with lawfulness and not fairness.

**Restraint of trade**

There to protect the interests of the employer. In determining whether a restraint of trade is enforceable, the court will balance the public interest (requiring parties to comply with the contractual obligations even if unreasonable or unfair) against the right of all persons to be permitted to engage in commerce or the profession of their own choice. Questions that should be considered include;

- Is there an interest deserving protection at the termination of the agreement?
- Is that interest being prejudiced?
- If so, how does the interest weigh up against the interests of the other party not to work?
- Are there other factors requiring the restraint to operate or be disallowed?
- If the restraint wider than necessary?

**Changes to contractual terms and conditions of employment**

Even though the terms of the employment relationship are bound by contract, there are also other statutory and collective agreements at play. An employer may not unilaterally change the terms and conditions and it can only be done as follows;

- By agreement between the employer and employees in methods prescribed in the contract
- By means of a collective agreement between the employer and trade union
- By operation of law e.g. the BCEA
- Through a sectoral determination by the Minister.

5. **Customs and practices in the workplace**

In addition to contract and labour law, customs will also have an impact e.g. given an afternoon off per month.
Chapter 4    Basic Conditions of Employment Act

1. Introduction

The Act lays down the minimum terms and conditions for employers from which, as a general rule, employers may depart but only to improve these. Employers and employees may thus not contract out of the BCEA but this can happen in limited circumstances.

A basic condition of employment in the BCEA constitutes a term of any contract of employment except where;

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

2. Scope of Application

The BCEA gives effect to the Constitutional right to fair labour practices, enforcing basic conditions of employment and regulating the variation of such conditions. The BCEA is applicable to almost all employees except;

- NIA, SA secret service and SA National academy of intelligence
- Unpaid volunteers working for charitable organisations
- Directors and staff of Comsec
- People undergoing vocational training
- People employed on vessels at sea
- Independent contractors

In addition there are partial exclusions – people excluded from certain chapters of the Act

3. Minimum conditions of employment

3.1 Working time

Chapter 2 of the BCEA regulates working time but is not applicable to senior managers;

<table>
<thead>
<tr>
<th>Max 45 per week;</th>
<th>Employers endeavour to reduce time to 40 hrs/w</th>
</tr>
</thead>
<tbody>
<tr>
<td>- 5 days per week &lt; 9 hrs/d</td>
<td>- Can be extended by 15 mins/w but not more than 2 hrs per week</td>
</tr>
<tr>
<td>- 6 days per week &lt; 8 hrs/d</td>
<td></td>
</tr>
</tbody>
</table>

- One hour meal interval for 5 hours continuous work
  - Can be reduced by agreement to 30 minutes

- Overtime - max 10 hrs /w but can extend to 15 by collective agreement
  - Overtime only by agreement;
  - Pay 1 ½ times normal or time off
  - O/T may not be more than 12 hrs on any day

- Sunday and public holiday rates are at double and if the employee normally works on a Sunday this is at 1 ½ times

- For night work ;
  - allowance applies
  - Night work is after 6 pm and before 6 am
  - Night work can only be done in terms of an
• reduced hours of work
• be provided with transport to and from place of residence

Employee is entitled to;
• Daily rest period of 12 hours between working periods
• A weekly rest period of 36 hours

Parties may agree the employees can work up to 12 hours in a day without overtime provided;
• The employee does not do more than 45 hours per week
• More than 10 hours overtime in the week

Ordinary hours and overtime can be averaged over a four month period in terms of a collective agreement

Averaging of working and overtime hours is allowed for peak periods in certain sectors due to their cyclicality

3.2 Leave
Chapter 3 of the BCEA regulates leave but is not applicable to employees who work less than 24 hours a month.

| Minimum of 21 consecutive calendar days paid leave excluding public holidays |
| Maternity leave – 4 consecutive months |
| • Commence from 4 weeks before birth or |
| • On a date where deemed necessary either for employees’ or the unborn’s health |
| This is unpaid leave and the employee must notify the employer in writing |

| Entitled to 3 days family responsibility leave |
| • When child is sick |
| • In the event of the death of the employee’s spouse, partner, parent, child etc |
| Only applicable to employees who have worked longer than 4 months and who work at least 4 days a week. No provision in the event of the death of an in-law |

| Six weeks paid sick leave in every three yearly cycle. If absent longer than two days a sick note is required from a doctor |
| 3.3 Other matters |
| a. Wages |
Neither the BCEA nor any other law stipulates minimum wages for employees. However these are determined in collective agreements and ministerial and sectoral determinations. Employees must be paid in Rands, weekly, fortnightly or monthly in cash, cheque or direct deposit. |

| b. Notice periods |
| BCEA provides for minimum notice periods in the event that the contract does not make provision therefore; |
| • One week if employed for less than 6 months |
| • Two weeks if more than 6 months but less than a year |
| • Four weeks if more than a year or a farm worker or domestic employed for more than 6 months |
Notice can be reduced to two weeks by collective agreement. Alternatively an employer may pay out an employee salary equivalent to the notice period.

c. **Severance Pay**
Dismissal based on operational requirements means payment of one week per year’s employment. But an employee who unreasonably refuses an offer of alternative employment is not entitled to severance pay.

d. **Certificate of service**
An employer is required to supply an employee with a certificate of service when employment is ended.

4. **Children and forced labour**
The BCEA prohibits the employment of children under 15. However children less than 15 can participate in sporting, advertising and cultural events provided that;

- Nourishment is provided
- Pay directly to parents or guardian
- Space set aside for rest and play
- Maximum hours are stipulated (four > 10 yrs and three < 10 years) as are rest periods after 2 hours continuous work for those > 10 and 1.5 hrs for those <10 years
- Safe transport to be provided between home and workplace

5. **Enforcement of the BCEA**

5.1 **The Courts**
Labour court has concurrent jurisdiction with civil courts with the former having wide powers including compliance orders and the issuing of fines

5.2 **Inspectors**
Provision is made for inspectors who must monitor and enforce compliance. Inspectors are allowed to;

- Enter workplaces
- Question employers / employees
- Inspect documents
- Obtain written undertakings from an employer in default to comply and issue a compliance order if the employer refuses, else recourse may be obtained from Labour Court for compliance.

6. **Variation of Basic Conditions**
The BCEA allows for some terms and conditions to be varied except for core terms which include;

- **Maximum** working hours
- Provisions relating to **night** work
- Provisions relating to **sick** leave
- 4 months **maternity** leave
- Not less than 2 weeks **annual** leave

Terms can be varied by way of the following means;
6.1 Variation by way of collective agreements
A collective agreement may change conditions of work provided it is not in conflict with the BCEA.

6.2 Variation by way of Ministerial determination
This replaces or excludes basic minimum conditions in respect of any category of employees or employers but does not set minimum wages. In general the replacement must be more favourable to employees and these determinations may thus relate to:
- Ordinary hours of work
- Overtime, daily and weekly rest periods
- Annual leave
- Meal intervals

Typically these determinations relate to small businesses, the welfare sector and special public works programmes.

6.3 Variation by way of sectoral determination
Such determinations normally apply to minimum wages but can include other conditions of employment and are made after an investigation by the DG of the DoL at the initiative of the Minister or requested from an employee’s or employer’s association.

The terms must on the whole be more favourable to employees than required by the BCEA. It may vary ordinary hours of work if:
- The determinations has been agreed to in a collective agreement
- The operational requirements of the sector requires this
- The majority of members are not members of a trade union

Examples for sectoral determination include the hospitality industry, taxis, security firms, domestics or areas in which unionisation is difficult to achieve.
Chapter 5  Employment Equity Act

1. **Introduction**

   Equality embraced only in the 1990s under the new constitutional order in S9, specifically 9(2) which provides that legislative and other methods designed to protect or advance persons may be taken. Furthermore 9 (3) and 9(4) are anti-discriminatory clauses.

2. **Basic Terminology**

   a. **Formal and Substantive equality**
      - Formal equality – S9(3) and 9(4): focuses on protecting individuals against discrimination. Views individual performance as the only factors relevant for achieving success.
      - Substantive equality 9(2) – recognises opportunities are determined by an individual’s status as a member of a group. Prohibition on unfair discrimination is insufficient to achieve true equality and hence affirmative action measures are required.

   b. **Differentiation and discrimination**

      Discrimination is a particular form of differentiation made on unlawful grounds even if there is not the intention to discriminate.

   c. **Direct and indirect discrimination**

      Direct is easy to pick up – someone is treated differently because of a characteristic e.g. gender. Indirect discrimination occurs when criteria that appear to be neutral negatively affects a certain group disproportionately. Unless the criterion used can be justified it will amount to discrimination.

   d. **Specified and unspecified grounds for discrimination**

      The EEA prohibits unfair discrimination on a non-exhaustive list of 19 grounds – implying other reasons can exist. Prohibited grounds are the same as the Constitution but also include family responsibility, HIV status and political opinion. The commonality in the list is the potential to demean people and the court will use dignity as a measure to determine whether the unspecified ground has the potential to form the basis of discrimination.

3. **Purposes of the EEA**

   The EEA applies to all employees as far as discrimination is concerned but where Affirmative action is involved it does not apply to:
   - SANDF, NIA, SA secret service and SA National academy of intelligence
   - Directors and staff of Comsec

   The EEA provides the foundation for affirmative action and non-discrimination in employment law.

4. **First Purpose – the prohibition of unfair discrimination**

   a. **Establishing unfair discrimination**

      Section 6(1) provides that no person may unfairly discriminate against an employee. If the latter wished to pursue a case then this consists of three steps;
• Establish a factual foundation and grounds for the alleged differentiation which lays the basis of the claim
• Establish a link between the differentiation and the alleged grounds – if a link is established the differentiation become discrimination and presumed to be unfair
• The employer is provided that the alleged discrimination was fair and justified

b. Justification grounds for discrimination
S6(2) provides for two grounds for unfair discrimination;
• Affirmative action – measures have to be applied by designated employers to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels

<table>
<thead>
<tr>
<th>Designated people</th>
<th>Designated employers</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Blacks</td>
<td>• Larger enterprises with &gt; 50 people</td>
</tr>
<tr>
<td>• Women</td>
<td>• Smaller enterprises but with a turnover as defined</td>
</tr>
<tr>
<td>• People with disabilities</td>
<td>• Municipalities</td>
</tr>
<tr>
<td></td>
<td>• Organs of state (ACSA, SANRAL etc)</td>
</tr>
<tr>
<td></td>
<td>• Employers that are designated in terms of a collective agreement</td>
</tr>
</tbody>
</table>

• Inherent requirements of the job – if the job has an inherent requirement for a person with a particular attribute then that will not be discrimination

c. Other specific forms of discrimination prohibited
• Harassment as unfair discrimination – any harassment is deemed unfair although the term is not defined. Sexual harassment is the most common form and conduct could be physical, verbal and non-physical. In terms of the Code sexual harassment can be conduct that is;
  o Of a sexual nature that is unwelcome and violates the rights of an employee
  o Constitutes a barrier to equity in the workplace
  o Action based on sex and/or gender and/or orientation whether unwelcome or not
Forms of sexual harassment can be sexual favouritism, quid pro quo harassment and victimisation. A claim can be found on three legal bases; EEA, LRA and vicarious liability. The EEA requires the employee to bring it to the attention of the employer who must consult all relevant parties to eliminate such conduct. The employer will be deemed liable for contravention if he did not follow the procedure and cannot prove that it did all that was reasonably practical to do to ensure that an employee would not contravene the EEA. The Code: Sexual harassment stipulates the following;
  o It is a form of unfair discrimination
  o It is not permitted or condoned
  o Formal or informal procedures may be used in a sensitive, efficient and effective way
  o Confidentiality is of utmost importance
  o It is a disciplinary offence to retaliate against a complainant
  o Disciplinary actions may vary from warning to dismissal depending on the severity of the offence
• Testing employees and applicants for employment – The EEA regulates testing in the workplace (including psychological and similar assessments) and distinguishes medical
testing in general and HIV testing in particular. Testing does not in itself constitute discrimination but the manner in which it is carried out may well be.

- Medical testing – medical testing is prohibited unless legislation permits or requires it or is justified based on inherent job requirements, conditions, policy etc.
- Psychological testing – prohibited unless it is scientifically verifiable, can be fairly applied to all and is not biased against an employee or group
- HIV testing – prohibited unless found justifiable by the Labour Court. The Act does not stipulate the grounds for justification but prescribes only the conditions that the court can impose when it grants an order. In Joy Mining v NUMSA the following factors were stipulated under which it can be allowed:
  - To prevent unfair discrimination
  - If the employer required statistics to allow pro-active intervention plans for contingencies, training, medical aid, training and awareness programs
  - If medical facts indicated the need
  - If employment conditions required testing
  - If social policy required testing
  - If the inherent requirements of the job needed it
  - If particular categories of employees / job needed testing

**d. Equal Pay for equal work or work of equal value**
This is not expressly regulated but the Labour Court has held that remuneration is an employment policy or practice. Differential pay for the same work based on a specified or unspecified ground constitutes less favourable treatment and hence any claim for equal pay for work (or work of equal value) that is the same or similar can be brought in terms of the EEA.

**e. Resolution of unfair discrimination disputes**
A dispute must be referred to the CCMA within 6 months after the alleged discrimination occurred. The CCMA must be satisfied that reasonable attempts were made to resolve the dispute prior to referral. If conciliation is unsuccessful, the dispute may then go to the Labour Court unless the parties agree to arbitration.

**5. Second Purpose of the EEA – Affirmative Action**

**a. Outline of affirmative action**
Chapter III addresses AA, which is to redress past disadvantages and achieve employment equity. It is defined as
‘..designed to ensure that suitable qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer’
Note that the measures must be designed to attain employment equity. Furthermore they must be applied fairly and rationally implying that when the goal is reached, appointments and promotions based on AA will be discriminatory. The CC has held that AA measures that properly fall within the requirements of the Constitution are presumed not be fair and to be rational it must;
- Target people or categories of people who have been disadvantaged
- Protect or advance such people or categories of people
- Promote the achievement of equality

Only AA measures with reason and designed in accordance with the EEA are thus acceptable.
b. The contents of affirmative action

AA measures must be designed to;

- Identify and eliminate employment barriers affecting those from designated groups
- Further diversity in the workplace
- Reasonably accommodate those 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 these people
- Implement appropriate training methods including skills development

Measures implemented may include preferential treatment (such as targeted recruitment) but not quotas. Furthermore the EEA does not require designated employers to implement decisions or practices that constitute a barrier to the prospective or continued employment or advancement of those from non designated groups.

c. Designated employers

All such employers must implement AA measures to achieve employment equity and has specific duties in designing a plan which include;

- Consult with representative trade unions or their representatives, employees across all occupational categories as well as those from non designated groups
- Disclose relevant information to the consulting parties to allow for effective consultation
- Collect and analyse information on policies and procedures in order to identify barriers that adversely affect those from designated groups
- Prepare and implement an employment equity plan including:
  - Objectives to be reached
  - Numerical goals under representation
  - Strategies and timetables
  - Duration of the plan
  - Procedures to monitor and evaluate the implementation of the plan
  - People in the workforce responsible for monitoring and implementation
- Reports to be made annually to the DG of the DoL on progress – annually for companies > 150 employees, bi-annually for less

Other requirements include providing a copy of the plan to employees, submitting a statement to the ECC on income distribution with a view to reducing disproportionate levels of income. Failure to comply may result in fines or refusal of state tenders.

d. Beneficiaries of AA

- Designated groups – blacks, coloured, Indians, women and people with disabilities. Even though the Act is silent on nationality, the regulations stipulate that they must be South African. Note personal past disadvantage was not a requirement only membership of a disadvantaged group. The courts have also established the notion of degrees of disadvantage in the implementation of AA programs in *Fourie v Provincial Commissioner of SAPS*. The Court suggested the following needs to be taken into account, SA history, apartheid being designed to favour whites over blacks, imbalance, blacks took the brunt of apartheid and the objectives of the EEA. It has subsequently being argued that the racial basis for redress should be substituted for a class basis since anti-poverty measures are more acceptable.
e. **The meaning of suitably qualified**
In terms of the Act, suitably qualified depends on formal qualifications, prior learning, relevant experience and capacity to acquire the ability to do the work within a reasonable time period. An employer needs to take these factors into account when assessing suitability and the employer may not discriminate solely on the basis of a person’s lack of relevant experience.

f. **Monitoring and enforcement of AA**
Chapter V provides for both informal and formal ways of enforcement.
- Employees and trade unions may bring contraventions to the attention of the employer, trade union, inspector, DG or Commission for Employment Equity.
- The Act is also enforced by labour inspectors by; obtaining written undertakings from employers that they will comply, issuing compliance orders, requesting DG review and by referring cases of persistent non-compliance to the Labour Court. The latter can issue compliance orders and impose fines. The CEE on the other hand provides a watchdog role, reporting annually to the Minister on progress.

When measuring compliance a number of factors need to be taken into account;
- The extent to which suitably qualified people are equitably represented with regards:
  - The demographic profile regionally and nationally
  - Pool of suitably qualified people which the employer may reasonably expect to appoint or promote
  - Present and anticipated economic and financial factors
  - Employer’s present and planned vacancies in the various categories and levels
- The employers labour turnover
- Progress made in implementing employment equity compared to its peers in the same sector
- Reasonable efforts by the employer to implement its plan
- The extent to which an employee has made progress in eliminating employment barriers
Chapter 6  Protection against unfair labour practices under the LRA

1. Introduction
A dispute concerning an ulp is a dispute of right whereas disputes of interest concern new rights. The latter are resolved by industrial action, the former by invoking aspects of the LRA.

2. The LRA
The Constitution provides the right to protection against an unfair labour practice within the context of the employment relationship. The Constitutional provisions;
- Are wide, protecting everyone unlike the LRA who protects specific persons defined
- Are all encompassing whereas the LRA defines specific unfair practices
- An infringement of the right in terms of the constitution is taken with respect to the surrounding circumstances whereas in terms of the LRA only an employer can commit an ulp.

Section 185 (b) of the LRA provides protection for an employee not to be subject to an ulp. Section 186 (2) gives content thereto.

3. Listed Unfair Labour Practices
Section 186(2) (a) – unfair conduct by the employer relating to promotion, demotion, probation or training or the provision of benefits

   a. **The unfair conduct of an employer relating to promotion S 186(2) (a)**
   Promotion is a managerial prerogative and no employee has a legal entitlement thereto. An employer is required to conduct itself procedurally and substantively in its decision to promote or not and failure to do so could be viewed as seriously flawed. The courts normally only intervene if the decision was taken in bad faith and it must be shown that;
   - The employer exercised it discretion capriciously
   - Reasons could not be substantiated
   - The decision was taken on a wrong principle, or
   - The decision was biased

   b. **The unfair conduct of an employer relating to demotion S 186(2) (a)**
   Demotion means inter alia; transfer to a lower level, loss of salary, reduction in status, loss of benefits. Various cases relating to the transfer of employees which in effect led to a loss in status or benefits have being found to constitute an ulp.
   A demotion that arises for operational reasons (e.g. restructuring) is permissible as long as it is done in accordance with fair procedure – likewise when demotion is made as a disciplinary measure.

   c. **The unfair conduct of an employer relating to probation S 186(2) (a)**
   Probation is governed by the Code which requires that it should be of a pre-determined period and of reasonable duration taking into account the requirements of the job and the time taken to evaluate the employee’s suitability. In terms of the code the employer is entitled to; extend the probationary period (if justified), dismiss or confirm the appointment of the employee. Before extension or dismissal the employee is allowed to make representations.
An employer who does not want to confirm an appointment must show the procedure prior to dismissal included;

- Giving the employee an opportunity to improve
- Making the employee aware that the work performance was unacceptable
- Counselling the employee
- Treating the employee sympathetically and with patience

d. The unfair conduct of an employer relating to training S 186(2) (a)
An employer acting unfairly towards an employee with regards training is committing an ulp. An employee can allege a legitimate expectation to training and an employer should not act arbitrarily, capriciously or inconsistently in denying an employee appropriate training.

e. The unfair conduct of an employer relating to the provision of benefits S 186(2) (a)
The Act does not define benefits and the interpretation by the courts is narrow. Disputes regarding remuneration are regarded as interest disputes and are not ulps. Thus a change in commission structure is not a dispute of rights (ulp) but that of interest. In terms of modern salary structures it is difficult to separate benefits from remuneration leading to different interpretations as regards to transport allowance, provident fund benefits etc.

f. The unfair conduct of an employer relating to suspension or other conduct short of dismissal S186(2) (b)
Two types of suspension;
- Precautionary suspension – suspension pending an enquiry to allow an employer to investigate an alleged misconduct. The decision to suspend will depend on the circumstances but the employee should not be suspended unless;
  - There is a prima facie reason to believe serious misconduct
  - Some objectively justifiable reason for exclusion from the workplace
Suspensions need to be based on substantively valid reasons and fair procedures followed before implementation which could include the right to be heard before being placed on suspension.
- Punitive suspension – fair suspension without pay could be an alternative to a sanction of dismissal in an attempt to correct the behaviour of the employee
- Any other disciplinary action short of dismissal – any unfair disciplinary action short of dismissal could amount to an ulp such as warnings and transfers without consultation

g. The unfair conduct of an employer relating to refusal to reinstate or reemploy an employee in terms of an agreement S 186(2) (c)
Former employees can be protected against refusal for re-engagement in terms of a prior arrangement.

h. The unfair conduct of an employer relating to an employee suffering an occupational detriment on account of a protected disclosure (whistle blowing) S186(2) (d)
Three requirements have to be met in this instance
- The employee must have made a protective disclosure
- The employer must have taken retaliatory action which amount to the employee suffering from an occupational detriment
- The detriment suffered must be on account of (the LRA) or partly on account of (the PDA) making the protected disclosure – that is causation
Occupational detriment means in this instance;
- Any disciplinary action
- Dismissal, suspension, demotion, harassment or intimidation
- Transferral
- Refusal of a transfer or promotion, denial of appointment
- Subjection to a term of employment
- Subjection to a term of retirement that is altered or kept altered to the employee’s disadvantage
- Refusal for a reference
- Being threatened with the above or subject to any other aspect related to work security, employment opportunities etc.

Protected disclosure is that related to specific persons such as lawyers, employer’s members of Cabinet, the public protector or Auditor general. A general protected disclosure includes that to the media. The employee must:
- Make the disclosure in good faith
- And reasonably believe and
- The information disclosed is substantially true

Courts have generally protected employees by interdicting employers from any action after protected disclosures has been made.
Chapter 8     Dismissal and Termination of Employment

1. Introduction
In terms of S185(a) every employee has the right not be unfairly dismissed. Dismissal in defined in S186 and an employee who alleges unfair dismissal must prove;
- That they are an employee
- Was dismissed in terms of one of the actions of S186
The burden of proof will then shift to the employer who must show the dismissal was not unfair by;
- Providing reasons – substantive fairness
- Showing due process was followed – procedural fairness

2. Definition of dismissal
Definition is covered in S186 covered below by a sub section.

a. Termination of a contract by the employer with or without notice S186(a)
Most common form of dismissal and notice referred to must at least comply with the BCEA. In serious cases the contract may be summarily terminated but not before the employee is heard.

b. Refusal or failure by an employer to renew a fixed term contract S186(b)
If an employee reasonably expects an employer to renew a contract and this is not done or alternatively the contract is renewed on less favourable grounds, this constitutes an unfair dismissal. The key issue is whether the employer’s conduct created a reasonable expectation to renew.

c. Refusal to allow an employee to return to work after maternity leave S186(c)
In terms of the BCEA, an employee is entitled to four consecutive months of maternity leave and in terms of the LRA this would be an automatically unfair dismissal.

d. Selective reemployment S186(d)
Dismissals of a number of employees but then rehire of one or more of them can be considered a selective dismissal, although not necessarily unfair. The latter would occur when an employer retrenches and later when conditions improve selectively re-employs as long as fair procedure was followed and the employer could justify this.

e. Constructive dismissal S186(e)
Where an employee resigns because an employer has made life intolerable constitutes dismissal. In this case the termination of the employment contract was coerced and not done voluntarily. The employee must show that resignation came about as a result of the employer’s actions and the following elements are required;
- The employee must show they resigned
- The employee must show that the reason for resignation was that continued employment was intolerable
- The employee must show it was the employers conduct which made the employment intolerable

f. An employee provided with less favourable terms after the transfer of a business S186(f)
If an employee resigns after the terms of employment are substantially less than previous, this constitutes a dismissal. The LRA aims to protect job security and in the event of a transfer of business, the new conditions of employment must, on the whole, not be less favourable than prior.
This part of the definition of dismissal also needs to be read in conjunction with S197 and S197A of the LRA which is designed to protect employees undergoing transfers between employers.

3. Automatically unfair dismissals
   a. Concept of automatically unfair dismissals
      These dismissals are described in S187 of the LRA and the purpose is to provide a remedy to employees whose basic rights have been infringed. The only reasons that may justify such an infringement are;
      - If it is an inherent requirement of the job
      - The employee had reached retirement age
   b. The employer acts contrary to the employee’s right to freedom of association – S187 (intro)
      Freedom of association refers to an employee’s right to join a union and to participate in its activities. If an employer dismisses an employee because of this, the dismissal will be automatically unfair. A senior manager may be a member of a union but he also needs to act in good faith towards the employer implying a careful balancing if interests.
   c. Participation in or supporting a protected strike or protest action - S 187(a)
      This protection only extends to protected strikes but employers may even be dismissed in cases of misconduct or for operational reasons.
   d. Refusal to do the work of employees on a protected strike - S187(b)
      This does not count for employees refusing to do their work while others are on a protected strike – in this instance it amounts to insubordination.
   e. Compelling an employee to accept the demand of an employer S187(c)
      This amounts to the bullying of an employee by threatening dismissal if a demand is not acceded to – type of dismissal is referred to as a lock-out dismissal. This protection should be seen against the employer’s right to change workplace rules which should be done by negotiation. Eg NUMSA v Fry Metals where the employer embarked on a lock out after the union refused to accept changes to the shift system (however the employer did provide a case for operational reasons (and won)).
   f. Exercising rights against the employer - S187(d)(i)
      This is to protect the sanctity of the LRA and prohibit the victimisation of employees exercising their rights in terms of the LRA.
   g. Pregnancy, intended pregnancy or any issue related thereto S187(e)
      It appears that the courts have upheld claims in the cases where a prospective employee has not disclosed her pregnancy status until after employment and then was dismissed.
   h. Unfair discrimination - S187(f)
      Discrimination may be made directly or indirectly on any arbitrary ground including but not limited to race, gender, sex, ethnic or social origin, sexual orientation, political opinion etc. Some measure of discretion is allowed if the reason for discrimination is based on the inherent requirements of the job or age (the normal or agreed-to retirement age).
i. **Transfer of a business - S187(g)**
The circumstances for each case will determine the period after the transfer for which this protection will last. An employer is entitled to restructure after buying a business but if this amounts to dismissal of all or most employees this could be viewed as unfair.

j. **Protected disclosures S187(h)**
The PDA defines what actions constitute a protected disclosure.

k. **Dispute resolution for an automatically unfair dismissal**
The onus of proof lies with the employee. In addition to showing that they were dismissed, the employee must also allege that it was due to one of the reasons above. The employer must show why this was not the case.

4. **Fairs Dismissals in terms of the LRA**
The LRA makes provision for fair dismissal provided they are fair and use the correct procedure. Dismissals should only be for serious conduct and the employer should otherwise make use of counselling, warnings and informal corrections.

a. **Dismissal for misconduct**

**Substantive fairness**
The code: dismissal sets the following requirements for substantive fairness.
- Did the employee contravene a rule or standard regulating conduct in the workplace?
- Was the rule valid and reasonable?
- Was the employee aware of the rule or could she have reasonably be expected to be aware of the rule?
- Was the rule consistently applied by the employer?
- Is dismissal an appropriate action for contravention of the rule? The appropriateness of dismissal will depend on, inter alia;
  - Length of service
  - Previous disciplinary record
  - Personal circumstances
  - Nature of the job
  - Circumstances of the infringement

**Application of substantive fairness**
The basic duty that has been breached in all cases of misconduct is the common-law duty to act in good faith towards the employer. Employers generally provide a guideline as to what constitutes misconduct but this cannot cater for all cases. Thus the best was to determine misconduct is whether an employee did not do something expected of him/her for example;
- Unauthorised absence from work, abscondment, desertion and time relate offences – the primary duty of an employee is to make his/her services available to the employer. Failure to report for work constitutes breach of the employment contract and the circumstances thereof, the degree of punishment required. In this respect the difference between AWOL and desertion (intentional stay away with the objective of terminating the contract) become important
- Attitude of hostility, abusive language, racism – the principle is that employer / employees are expected to work together in a reasonable harmonious relationship. The mere fact that abusive language is used is insufficient and all factors need to be taken into account.
• Theft, team misconduct, breach of trust, dishonesty – theft causes an irreparable harm to the relationship of trust between the employer and employee and it is fair to dismiss such an employee. If an individual cannot be identified, a group may accordingly be dismissed
• Other forms of misconduct which include assault, damage to property, conflict of interest, intimidation, sexual harassment, drug abuse

Procedural fairness
The main principle is that the employer must give the employee an opportunity to be heard and to defend himself against the allegations. A checklist is necessary to follow;
• Did the employer conduct an investigation to determine whether there are grounds for dismissal?
• Did the employer notify the employee of the allegations in a form and language understandable?
• Did the employee get reasonable time to prepare?
• Was the employee allowed to state a case in response to the allegations?
• Was the employee allowed the assistance of a union representative or co-worker?
• Did the employer, after the hearing, communicate the decision taken and give the employee written notification thereof as well as reasons
• If the employee is dismissed did the employer remind him/her of any rights to refer the matter to the bargaining council or CCMA?

Dispute resolution for a dismissal based on misconduct
Employee must within 30 days refer the dispute for reconciliation to the bargaining council / CCMA. If the matter is not settled, it is set down for conciliation on which the commissioner makes an award. This reward will be reviewed by the labour court in limited circumstances.

b. Dismissal for incapacity
Incapacity is regulated in terms of S188 and is defined as;
• poor work performance either during or after probation
• ill health, or injury either temporary or permanent
It involves some sort of behaviour that is neither intentional nor negligent. Note that there is a fine line between incapacity and misconduct.

Poor work performance during probation
The Code: Dismissal compels the employer to provide assistance to an employee on probation before dismissal based on poor performance;
• evaluation, instruction guidance etc during the period
• the employer must make it clear what the performance standard is and where the employee falls short
• the employer must give the employee assistance and the opportunity to improve
• the employer should measure the progress and provide feedback
If dismissed during this period that employee should have the opportunity to respond to the allegations supported by a union representative or colleague

Poor work performance after probation
An employer should consider other ways short of dismissal for disciplining an employee for poor work performance. Before dismissal the employer must;
• Investigate the reasons for the unsatisfactory performance
• Provide appropriate evaluation, instruction, training, guidance or counselling
- Give the employee time to improve
- If the employee continues to perform unsatisfactorily they can then be dismissed for poor performance
- During the process the employee has the right to assistance by a colleague / union representative

**Ill health or injury**
The Code provides that an employer should attempt to accommodate an employee injured on duty and should adopt the most cost effective means to remove the hindrance to the person to enable them to perform which could include adapting the work place, changing working times and leave.

Substantive fairness in the case of the above would entail;
- Employer making an informed decision
- Determination as to whether the employee is capable of performing the work
- If the employee is not able;
  - Determine the extent to which the employee can perform
  - The extent to which the work circumstance might be adapted to accommodate the disability
  - Where this is not possible, the extent to which his duties should be adapted

Procedural fairness would entail;
- Employee gets the opportunity to respond and make suggestions
- The employer must consult with the employee
- The employer must consider available medical information
- The employer must accommodate the employee where reasonable

The employer should make all reasonable attempts to accommodate an employee that has been injured at work.

**Dispute resolution for a dismissal based on incapacity**
Employee must within 30 days refer the dispute for reconciliation to the bargaining council / CCMA. If the matter is not settled, it is set down for conciliation on which the commissioner makes an award. This reward will be reviewed by the labour court in limited circumstances.

c. **Dismissal for operational requirements**

**Definition of operational requirements**
Operational requirements are defined in the LRA which distinguished four broad categories;
- Economic needs
- Technological needs
- Structural needs
- Similar needs which include;
  - The employees conduct has led to a breakdown of trust in the relationship
  - The employees actions or presence has a negative effect on the business
  - The enterprise business conditions have changes resulting in a requirement to change the employee’s terms and conditions of employment.

Eccentric behaviour is permissible as long as it is not disruptive in the work place

**Substantive fairness**
There is a difficulty in ascertaining this considering the employer determines the economic, technological and structural requirements for the business. The courts no longer accept an employer’s explanation at face value and should determine whether the retrenchment has an economic rationale.
S189A now provides a definition for substantive fairness as follows;

- The reason for dismissal must be for operational requirements as defined
- This must be the real reason and not a cover-up for another issue
- The reason on which the dismissal is based must actually exist
- The reason must be justifiable and based on rational grounds
- An objective test must be applied when determining rationality
- There must be a proper consideration of alternatives
- The employer must show the dismissal was a last resort
- Selection criteria must be fair and objective

Procedural fairness in terms of S189

Courts look at retrenchment quite closely especially in terms of substantive and procedural fairness. The process by S189 is the basic process and it is compulsory for small and large firms to use this for small scale retrenchments. The requirements are as follows;

- Was there prior consultation? Consultation needs to take place at the earliest opportunity (NUMSA v Atlantis Diesel Engines) and should be undertaken when the possibility of retrenchments is foreseen.
- With whom did the employer consult? This should include the following as appropriate;
  - Person or group in a collective agreement
  - A workplace forum if there is no collective agreement
  - Alternatively a registered trade union whose members are likely to be affected
- How did the parties consult? A single meeting is insufficient and consultation means an attempt to reach consensus
- Did they attempt to reach consensus? There are six matters to reach agreement on appropriate measures to;
  - Avoid dismissals
  - Minimise the number of dismissals
  - Change the timing of dismissals
  - Mitigate the adverse effects of dismissals
  - The selection criteria and
  - Severance pay
- Did the employer disclose relevant details in writing – the other party is not unrestricted in its demands and in terms of S16(5) four categories of information need not be disclosed;
  - Is legally privileged
  - The employer cannot disclose without contravening a prohibition imposed on the employer by an order of court
  - Is confidential and if disclosed can cause substantial harm
  - Is private personal information relating to an employee unless that employee agrees
- Did the employees get a chance to respond?
- Did the employer consider all representations?
- Did the employer use fair and objective selection criteria? The code acknowledges LIFO but it can be applied discriminately e.g. by getting rid of a whole class of last appointed employees.
- Did the employer allow severance pay? Minimum is regulated by S41 of BCEA – 1 week per year of service. The employees demand for severance pay is not unlimited and a refusal to accept alternative employment can act against them.
Procedural fairness in terms of the S189A

This section applies to large scale retrenchments for big employers. The Act does not make provision for small employers and a big employer constitutes someone who employs more than 50 people. A large scale retrenchment is defined as:

- 10 employees dismissed where an employer employs up to 200 people,
- 20 to 300; 30 to 400; 40 to 500 and
- 50 employees where an employer employs more 500 people

The process in terms of S189 A provides that a facilitator may be used, the employer needs to abide by strict timetables and the workforce may chose the matter to go to the Labour court for arbitration or strike.

The employer can request the appointment of a facilitator which must be done within 15 days notice of the contemplated dismissal. The facilitator will chair meetings; set issues of procedure; arrange further meetings and direct the parties to engage with the presence of the facilitator. The facilitator’s decision is final and if appointed means the employer may not dismiss anyone inside 60 days. If no facilitator is appointed then only after 30 days before a dispute can be referred to the CCMA or a council.

Dispute resolution for a dismissal based on operational requirements

When dismissed the employee has 30 days to refer the matter for conciliation to the bargaining council or CCMA. If the matter is not reconciled the employees may embark on a strike or refer the matter to the Labour Court. The Labour court may make a ruling which can be appealed in the labour appeal court.

5. Other aspects of dispute resolution

The LRA is meant to expedite matters which the old LRA and common law did not in the areas of employment termination. Some areas in which issues are expedited are in;

- Prescription periods are shorter e.g. unfair dismissals must be referred to within 30 days
- The manner in which cases are referred is simpler
- The involvement of legal representatives is limited

a. Conciliation

In almost all cases of alleged unfair dismissal, the LRA requires that the matter must be referred to dispute resolution. If conciliation is unsuccessful, a dispute related to misconduct, incapacity or operational requirements must go for arbitration. Automatically unfair dismissals must go for adjudication to the Labour court.

b. Arbitration

- The LRA specifies when a dispute must go for arbitration or adjudication
- Arbitration can take place at a bargaining council level or the CCMA
- The award by the arbitrator is final and an award can only be taken on review

c. Reviews and appeals

A review in terms of the LRA has been given a wider context than that governed by common law. The test (from Sidamo and others vs. Rustenburg Plats) is “is the decision reached by the Commissioner, one that a reasonable decision maker would not reach”? i.e. if another person came to a different conclusion then the decision can be reviewed.

S167 allows for appeal to SCA, unless it is a constitutional matter. A review is the process is under scrutiny whereas an appeal is where the decision is under scrutiny.
d. Remedies
The primary remedy is reinstatement, except in the following instances when compensation will then be awarded:
- The employee does not wish to return to work
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable
- It is not reasonably practical to reinstate or re-employ
- The dismissal is unfair only because the employer did not follow a fair procedure

The LRA caps the amount of compensation to a maximum of 12 month’s salary for unfair dismissal, calculated at the rate of remuneration on the day of dismissal. For an automatically unfair dismissal it is capped at 24 months.

e. The common law dispute resolution route
In terms of the common law, if one of the parties failed to perform in terms of the contract of employment this would entail breach which would entitle the other party to either terminate the contract or enforce and seek damages.

An employee can thus seek redress either in the High Court or the Labour Court meaning the Labour Court does not have exclusive jurisdiction. This allows for forum shopping by both parties who can then see where they could maximise (minimise) their potential benefits. The LRA amendment bill will seek to change this giving the Labour court exclusive jurisdiction and also exclude those employees above a particular threshold.

6. Other ways of terminating the employment contract

a. Resignation by the employee
If the resignation is accepted an employer may elect to terminate immediately and then pay out the employee for the notice period.

b. Termination on completion of an agreed task or period
A fixed term contract automatically comes to an end when the condition is reached

c. Termination by mutual agreement

d. Termination on grounds of impossibility of performance
The death of an employee automatically terminates the employment agreement but not the death of an employer. The estate will be expected to pay the employee not unless the contract of employment was of a personal nature.

e. Termination as a result of insolvency of the employer
Insolvency results in the following:
- The contract is suspended from the date of sequestration for 45 days after the appointment of a trustee
- Under certain circumstances the employment contract may be terminated by the trustee or liquidator
- The employee need not render services
- The employee is entitled to severance pay and to claim damages suffered as a result of the termination.
f. **Termination as a result of retirement**

When an employee reached the mandatory age of retirement, the employer is entitled to demand retirement and this will not be viewed as discrimination based on age.
Chapter 9  Contextualisation of Collective Labour Law

1. Freedom of Association

a. Scope of freedom of association
Freedom of association is one of the basic tenets of labour law: freedom to associate with others and defend and protect their common interests. In the workplace it entitles employees to establish or join unions of their own choice and to participate in their lawful activities.
S23 of the Constitution specifically provides that;
- Workers have the right to form and join a trade union, to participate in the activities and programs of the union and to strike,
- Every employer has the right to form and join an employer’s association and to participate in the activities and programs thereof,
- Every trade union and employer’s association has the right to determine its own administration, programs, activities, to organise and to join a federation
- Every trade union, employer’s association and employer has the right to engage in collective bargaining
- National Legislation may recognise union security arrangements subject to the limitation clause of S 36

The LRA protects employees from infringement of the right to freedom of association – thus an employer may not require an employee to give up membership of a particular union. The right is limited in the cases of members of the security services and the army likewise managerial employees must balance this right against the common law requirement to act in good faith to their employers.

b. Infringements Allowed
The Constitution allows for union security arrangements contained in collective agreements or ‘closed-shop’ and ‘agency-shop’ agreements which infringe an employee’s right to freedom of association. The limits set by the Constitution are that such agreements must;
- Be contained in a collective agreement
- Comply with the general limitation clause of the Constitution.

An agency shop agreement is;
- Concluded by a majority union with an employer or employer’s association
- Concluded by way of collective agreement
- The employer must deduct an agreed agency fee from the employees identified in the agreement
  - It must deducted from those who are not members of the union but are eligible for membership
  - Objectors thereto (moral or conscientious) must pay but this must be handed over to DoL
  - Fees of non-union members cannot be higher than union member fees
  - Agency fees are paid to a separate account and can only be used for the benefit of employees
  - Fees may not be used for political purposes and only used for advancing the socio-economic interests of the employees
  - The employer may deduct agency fees from employees without authorisation

A closed shop arrangement is;
- Concluded by a majority union with an employer or employer’s association
- Concluded by way of collective agreement
- A ballot must be held before of the employees covered
• 2/3rds who voted must vote in favour
• Fees collected may not be used for political affiliation and can only be used to advance the socio-economic interests of the employees
• Employees already employed and conscious objectors may not be dismissed for refusing to join the union that is party to the closed shop agreement
• Closed shop agreements may be terminated if a majority of employees vote for this
• It is not unfair to dismiss an employee for refusing to join a union which is party to this agreement
• An employee may not be required to be a member of a majority union before the commencement of employment (i.e. post entry closed shop agreement)

2. Organisational Rights

a. Purpose of organisational rights
Organisational rights are provided to unions to enable them to function more effectively and build support and are only granted to registered trade unions. The LRA provides for five such rights
• Right of access to the premises of the employer (S12)
  o Enter premises to recruit and communicate with members
  o To hold meetings outside working hours
  o Let members vote in union elections and ballots
• Right to have membership fees deducted by way of stop order (S13)
  o Authorisation must be in writing
  o Employer needs to start as soon as possible and pay over the money not later than the 15th
  o An employee may revoke the stop order authorisation in writing to the employer and union
• The right to elect shop stewards (S14)
  o The number of shop stewards depends on the number of employees and determined on a sliding scale
  o They have a right to assist employees and monitor the employers compliance with the law
  o They are employed by the employer and not by the union
• The right of shop stewards to get time off for union activities (S15) and
  o Entitled to reasonable time off during working hours to attend to union matters
• The right to disclosure of information (S16)
  o The employer is not required to disclose information that is not relevant, not available, legally privileged, harm business interests and of a personal nature
  o The employer must divulge information to allow the union to do its work

Representivity is an important consideration in assessing the degree of organisational rights granted. A union having majority representation has access to all organisational rights. Unions having sufficient representation are only allowed partial rights.

b. Different levels of union representivity for different rights

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<th>Union has majority &gt;51%</th>
<th>Access to workplace</th>
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<td>Membership fees</td>
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<td>Elect shop stewards</td>
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<td>Leave for union activities</td>
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<td>Disclosure</td>
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<tr>
<th>Union is sufficiently represented – not defined but guidelines put it at ~30%</th>
<th>Access to workplace</th>
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<td>Membership fees</td>
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c. Acquisition of organisational rights

Through collective agreement
This can be the case even for trade unions that are not representative

Membership of a bargaining council
A registered trade union that is a party to a bargaining council automatically has the right of access to the premises and to deduct fees in respect of all those workplaces falling under the bargaining council. A union acquires these rights irrespective of being representative or not.

Strike action
A union may strike to achieve these rights even if they don’t meet the minimum requirements

Section 21 procedure
This requires that the union notifies the employer in writing that it seeks to exercise its organisational rights. Within 30 days they must meet to conclude a collective agreement. If they do not conclude then either party can refer the dispute to the CCMA for conciliation. If no conciliation reached, then the parties can process to arbitration or alternatively strike / lock out after serving appropriate notice.

d. Dispute resolution for organisational rights
Any dispute related to organisational rights can be referred to the CCMA for conciliation and if that fails then for arbitration.

3. Collective Bargaining
Neither the Constitution nor the LRA define collective bargaining but it is generally held to be negotiations between parties with the view to listen and consider the views of others in order to find common ground.

a. Duty to bargain?
The inclusion of a right to engage according to the Constitution is not a duty to bargain and nor does the LRA compel the parties to do this. However the LRA encourages collective bargaining by granting organisational rights and closed and agency shop agreements. Should an employer refuse to bargain, the Act allows for strike action. Refusal to bargain entails;

- The refusal to recognise a trade union as a bargaining agent
- The refusal to establish a bargaining council
- The withdrawal of recognition of a collective bargaining agent
- The employer’s resignation as a party to a bargaining council
- The employer disputing appropriate bargaining units, levels and topics

Disputes regarding a refusal to bargain must first be referred to the CCMA for an advisory award which provides guidance only and is not binding.
b. Bargaining agents
Collective bargaining occurs through bargaining agents who include employer associations and trade unions. A trade union is defined as an association of employees whose principal purpose is to regulate the relationship between employers and employees. A trade union need not be registered, but registration allows the right to:
- Conclude a collective agreement enforceable under the LRA
- Acquire organisational rights
- Be a member of a bargaining council, statutory council and workplace forum
- Conclude closed and agency shop agreements
A bargaining council’s functions are outlined in S28 of the LRA and is has three main functions:
- Conclude collective agreements
- Enforce collective agreements
- Prevent and resolve labour disputes


c. Levels of Bargaining
Collective bargaining can take place at plant, sector or industry level but the LRA encourages discussions as sector / industry level.

d. Disputes that the LRA requires a bargaining council to resolve
Disputes about freedom of association A bargaining council can only conciliate disputes, failing which they need to go to the Labour Court for adjudication
Disputes of interest in an essential service Bargaining council can conciliate and arbitrate
Disputes regarding severance pay Bargaining council can conciliate and arbitrate
Disputes about unfair labour practices Bargaining council can conciliate provided that the case does not involve discrimination which must then go to CCMA and then to Labour Court
Disputes that may lead to strike or lock-out Bargaining council can only conciliate
- Operational requirements
- Participation in unprotected strike
- Reasons related to closed shop
- Automatically unfair
Dispute based on misconduct or incapacity Bargaining council can conciliate and arbitrate by way of con-arb procedure


e. Collective agreements
Main goal is to reach consensus on issues and formalise their relationship via a collective agreements. The LRA has a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between one or more registered trade unions on the one hand and one or more employers or employers’ organisations on the other.

Three important elements define a collective agreement compared to other employer /ee relationships:
- It is in writing
- Only a registered trade union can be a party
- Must regulate an agreement between the parties
A collective agreement binds:
- The parties to the agreement
• Each party and other members insofar as it relates to them
• Members of registered trade union and employers for issues related to;
  o Terms and conditions
  o Relationships of employers to employees and vice versa
• Employees who are not members of registered unions are bound if;
  o They are identified in the agreement
  o The agreement expressly binds them
  o The union represents the majority of the workers

4. Workplace forums
To encourage participation workplace forums are introduced by the LRA which is an in-house institution promoting worker participation in decision making. Important differences include;
• Union is a juristic body a forum is not
• Union deals with wage related issues whereas a forum does not
• Union can embark on industrial action whereas a forum cannot
All employees may be members except for senior management. Only registered trade unions or unions representing the majority of a workforce can apply for the establishment of a forum.

a. What is consultation?
Consultation must take place before an employer implements a proposal and entails;
• Allowing the forum to make representations and alternative proposals
• Considering and responding to these and offer reasons why they disagree if applicable

b. What is joint decision making?
This requires the employer to consult and reach consensus with the forum

c. Matter for consultation
Proposals relating to the following unless managed under a collective agreement;
• Restructuring the workplace e.g. introduction of new technology
• Changes in the organisation of work
• Total or partial plant closure
• Merger and transfer of ownership if it impacts employees
• Retrenchments
• Exemption from any collective agreement or law
• Job grading
• Criteria for merit increases or payment of discretionary bonuses
• Education and training
• Product development plans and export promotion

d. Matters for joint decision making
Matters for joint decision making cannot be regulated by a collective agreement and include;
• Disciplinary codes and procedures
• Regulation of the work place
• Measures designed to protect and advance disadvantaged persons by unfair discrimination
• Changes of employer representatives on boards of employer controlled schemes with regards social benefits.
The employer is obliged to disclose all relevant information but not the following;

- Information that is legally privileged
- That the employer may not disclose without contravening a law or court order
- That is confidential and if disclosed may cause harm to the employee or employer
- Private personal information related to an employee

Disputes about information disclosure may be referred to the CCMA where if not successful then to arbitration.

Forums are not widely available because management see it as an inroad to management prerogative whereas unions see them as undermining the collective bargaining structures.
Chapter 10  Industrial Action

1. Introduction
The right to strike is provided for in the constitution but not expressly the right to lock out which is only provided for in the LRA. Neither the right to strike nor lockout is expressly provided for in the ILO conventions but only indirectly therein. Both methods are elements of collective bargaining but should only be used as a last resort.

2. Hurdles in the way of protected industrial action
Strikes and lockouts are not automatically protected and there are some hurdles to cross before they can be protected.

- To cross hurdle 1, their action needs to comply with the definition of a strike or lock out
- To cross hurdle 2, the parties must comply with the procedure defined in Section 64 of the LRA
- The parties must ensure that none of the prohibitions against industrial action as contained in S65 of the LRA are present in their dispute

a. Introduction Hurdle1: Definition of a strike or lockout

Outline of a hurdle
Actions falling outside the definition will not be protected and it stands on two legs
- Definition of a strike
- Definition of a lock out

Definition of a strike
Strike is defined as “...the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same or different employers...for the purpose of remedying a difference or resolving a dispute on a matter of mutual interest.”
Note three aspects;
- refusal to work; the refusal must be
  o in relation to work which employees are contractually obliged to perform
  o not contrary to the law or a collective agreement
  The action can be partial or complete; it can be a retardation or obstruction of work and can include a refusal to do overtime
- concerted action; that is by a group of people and constitute collective action directed at an employer or employers
- remedy a difference in respect of a matter of mutual interest – when there is no grievance or dispute there cannot be a strike. The concept of mutual interest is not defined but has been regarded as calculated to promote the well being of the trade concerned. These issues can be terms of condition of employment, SHE, disciplinary procedures etc. Political issues do not qualify.

Definition of a lockout
The right to strike is guaranteed by the Constitution but not the right to lock-out, only recourse to lock-out. A lock-out is defined as the exclusion by an employer of employees from the workplace for the purpose of compelling the employees to accept a demand in respect of a matter of mutual interest. Thus consists of two elements;
• Exclusion of the employees by the employer – this has the effect of not paying employees their wages in accordance with no work – no pay. The employer cannot exclude only one employee but a group thereof.
• The purpose must be to accept a demand on a matter of mutual interest. If it is not for this reason then it will not be a lock out but be a breach of contract.

b. Hurdle2: Procedural requirements for the protection of strikes and lock-outs in terms of S64

Outline of a hurdle
This hurdle stands on three legs as outlined below

The issue in dispute must be referred to conciliation
The issue in dispute must fall within the definition of a strike or lock-out – i.e. relate to a matter of self interest.
The LRA requires that the parties must try and resolve the issue – thus it must be referred to the bargaining council and if this does not exist then the CCMA for conciliation.

Certificate of outcome - within 30 days
The bargaining council / CCMA must attempt to resolve the dispute within 30 days of referral. If no resolution is reached, then a certificate is issued to this effect and the parties can then give notice of a lock-out or strike.

Prescribed notice
At least 48 hours must be given for written notice of the industrial action - strike or lock-out. For the State 7 days notice is required. There are some exceptions to this;
• If the parties are members of a bargaining council or concluded a collective agreement which provides for different procedures
• If an employer implements an unprotected lock-out and the employees strike in response
• A strike taking place after an employer has unilaterally changed conditions of employment
• If an employer refuses to bargain with a union in which case it must be referred to conciliation and then arbitration.

c. Hurdle3: Prohibitions and limitations of strikes and lock-outs in terms of S65

Outline of a hurdle
This hurdle relates to restrictions provided by S65 of the LRA. If a strike is so restricted and continues anyway, then it will be unprotected. It consists of six issues;

Where a collective agreement prohibits a strike or lockout
Where there has been prior agreement not to strike but this happens then this will be unprotected.

Where an agreement prescribes arbitration
It will be unprotected if a prior agreement prescribes arbitration

Where a dispute must be referred to the labour court for arbitration
There are two exceptions to this rule;
• For employees enforcing demands in terms of organisational rights, the LRA provides a choice between arbitration and striking. If they opt for striking then they forfeit the right to arbitration for one year
For large scale retrenchments, the union may either seek arbitration or strike action. If opting for strike action, then they can’t arbitrate.

Where employees are engaged in essential and maintenance services
Employees engaged in the provision of essential and maintenance services are prohibited from striking, which includes;
- A service whose interruption endangers life, personal safety or health of whole or part of the population
- The Parliamentary service
- The SAPS

Whether essential or not is determined by the Essential services committee and some examples include; air traffic controllers, municipal traffic police, supply and distribution of water, power, fire fighting and correctional services. However employees engaged in essential services can conclude collective agreements providing for the maintenance of certain minimum services – the maintenance service may not strike while the rest may.

Where an award or collective agreement regulates the dispute
LRA provides that no-one may take part in a strike / lock-out if that person is bound by an arbitration award. Strikes are also prohibited if parties are bound by a collective agreement that regulates the issue in dispute.

Where a determination regulates the issue
Parties bound by a determination made by the Minister may not strike

3. Secondary Strikes
For a secondary strike to be protected the LRA sets the following requirements;
- The primary strike must be protected – i.e. crossed all three hurdles above
- Strikers must give their employer seven days written notice – if the secondary strike is part of a strike for dismissals for operational reasons, then 14 days notice is required
- The harm to the secondary employer must not be more than what is required to make an impact on the primary employer – the LRA permits the Labour Court to consider the proportionality of the secondary strike. If the requirements are not met, the employer may approach the Labour Court for an interdict

4. Legal consequences of protected strikes and lockouts
If all the hurdles covered by the LRA have been crossed then the strike or lockout will be protected. Thus the union and employer will be entitled to the following;
- An employee may not be dismissed except for misconduct or operational reasons
- The employer’s or employee’s conduct does not involve delict or breach
- An employer may not discriminate against an employee due to his involvement in the strike
- No claims for compensation are allowed on the part of the employer / employee

a. Dismissal only for misconduct and operational requirements
If an employer dismissed employees who took part in a protected strike the dismissal is automatically unfair.
Dismissal may take place for unlawful conduct for which an employer may also lay charges / obtain an interdict or civil proceedings to recover losses. Employees also may be dismissed for operational reasons but this will be subject to scrutiny and procedures in terms of the LRA must be followed.

b. **Delict or breach of contract**
Under common law this would be the case for workers proceeding on a protected strike, however the LRA provides that no civil action may be taken. Furthermore the employer may not interdict anyone.

c. **Protection against discrimination**
No discrimination to strikers e.g. – bonuses to workers not on strike or the withdrawal of discretionary bonuses to strikers.

d. **Protection against claims for compensation by employers**
Employers and employees may not approach the labour court for compensation due to loss.

e. **Further consequences for employers and employees following protected strikes or lock outs**
- Consequence 1 – no work, no pay based on contractual arrangement between the parties. However if part of the remuneration package is the provision of life amenities these may not be withdrawn – for example, accommodation and meals
- Consequence 2 – replacement labour. Employers are permitted to use replacement labour, except in the case of a maintenance service. Employers may not use replacement labour for an offensive lock-out, but may for a defensive one.

5. **Consequences of unprotected strikes and lockouts**

a. **Consequences 1: interdict**
If the strike / lock out does not comply with S64 and 65 it will be unprotected and the Labour Court can grant an interdict restraining anyone from participation in the strike.

b. **Consequence 2: Compensation**
The Labour Court may order the payment of just and equitable compensation to employees or employers who suffered any loss as a result of the strike which must be proven. In deciding whether to grant the order, the Labour Court must have regard to;
- Whether attempts were made to comply with the provisions of S64 and S65
- The extent of the attempts
- Whether the strike / lock-out was pre-meditated

c. **Consequence 3: Dismissal**
The Code provides that participation in an unprotected strike amounts to misconduct and this does not necessarily justify dismissal. Dismissal will only be fair if substantively and procedurally fair.

**Substantive fairness**
This relates to whether there are fair and valid reasons and evaluated in the following light;
- The degree of seriousness of the failure to comply with the LRA needs to be considered
- Attempts to comply with the provisions of the LRA would not be construed as sufficient reason for dismissal
- Unjustified conduct by the employer e.g. a strike in response to an unfair bargaining tactic.
Procedural fairness

The Code sets out the procedure to be followed:

- Contact with the union – if strikers are union members the employers are required to contact an official before dismissing workers
- The employers must give the strikers an ultimatum before dismissal which must comply with the following requirements
  - Communicated to the strikers in a medium they understand and preferably their own language
  - The ultimatum must be clear and unambiguous
  - The time set out must be reasonable – i.e. provide them with time to meet and discuss and take rational decisions
  - If communicated to a collective bargaining representative within a reasonable time this will constitute sufficient notice.

If the strikers comply with the ultimatum, the employer may not take disciplinary action. If employees fail to respond to the ultimatum, dismissal is seen as procedurally fair.

6. Pickets

a. What constitutes a picket?

The right to picket is guaranteed by the Constitution and regulated by the LRA. The Code states that it is a peaceful method to encourage non striking workers and members of the public to oppose a lock-out or support a protected strike. The LRA prescribes circumstances under which it may take place and enjoy protection.

b. Requirements for protection of a picket

To enjoy protection a picket it must be in compliance with S69 of the LRA and must;

- Be authorised by a trade union – unauthorised unions may not picket. Authorisation must be formal and in writing.
- Must be for the purpose of peacefully demonstrating
- In support of any protected strike or in opposition to any lock-out

c. Where can a picket take place?

Any place where the public has access but outside the premises of the employer or, if allowed, on his premises. The CCMA may get involved to secure an agreement on the rules of access to the premises. An employer may not unreasonably withhold permission to picket and the code provides some of the following factors in determining whether it was reasonable;

- The nature of the workplace and the situation
- The number of employees proposed to take part on the premises
- The undertaking by the union to exercise control over the picket

If the CCMA allow picketing on the employers premises but he refuses, the trade union may refer the dispute to the CCMA for conciliation – failing that the Labour Court.

d. Picketing rules and conduct

The employer / employee must agree on the rules. If they fail, an approach may be made to the CCMA to attempt to secure an agreement, failing which the CCMA may establish rules. In terms of the Code: Picketing, the following must be done;

- A convenor, who is a member or official of the union, must be appointed to oversee the picket
- The convenor must have on hand S69 of the LRA
• The convenor must notify the employer, the responsible person in terms of public gatherings, the police and public officials.

The notice should contain:
• Confirmation that the picket complies with S69
• Name, address and number of the union and the convenor
• Details of the picket including the employer being picketed
• The date and location of the picket

The employer must provide the convenor with the contact details of the person representing him. The union must also appoint marshals for the picket.

e. Legal consequences of unprotected and protected pickets
A person taking part in a protects picket does not commit a delict, breach of contract and they are protected against criminal liability. No disciplinary action may be taking against employees participating in a protected picket but for those committing acts of misconduct action may be taken against them. Pickets in breach of 69(1) and (2) will be unprotected.

7. Protest Action
The LRA affords workers the right to take part in protest action as a form of industrial action. Protest action is to promote or defend the socio-economic interests of workers but action for political purposes is not sanctioned by the LRA. In order for protest action to be protected, the following is required:
• The employees must not be engaged in an essential or maintenance service
• The action must be called by a registered trade union or federation
• NEDLAC must be provide 14 days notice thereof, including the nature and reasons
• The matter giving rise to the protest action must have been considered by NEDLAC
• Employees may not act in breach or contempt of an order of the Labour Court

If the above are adhered to, employees will be protected in the same manner as for protected strikes. If the procedural requirements are not met, the action may be prohibited by interdict and damages claimed and they may be fairly dismissed.