Labour law

Introduction

This Chapter covers laws in South Africa that directly affect the working conditions of employees as well as disputes in the workplace and ways of resolving these. We focus on the following laws, Regulations and Codes of Good Practice that affect employers and employees.

- Laws about terms and conditions of employment:
    - *Basic Conditions of Employment Act (No. 75 of 1997) (BCEA)*
    - *Occupational Health and Safety Act (No. 85 of 1993) (OHSA)*
    - Sectoral Determination 13: Farm Worker Sector
    - Sectoral Determination 7: Domestic Worker Sector
    - *National Minimum Wage Act (No. 9 of 2018)*
    - Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace
    - Code of Practice on the Protection of Employees During Pregnancy and After the Birth of a Child
- Disputes and ways of settling disputes:
    - *Labour Relations Act (No. 66 of 1995) (LRA)*
    - *Employment Equity Act (No. 55 of 1998) (EEA)*
- Employee social welfare and benefits:
    - *Unemployment Insurance Act (No. 63 of 2001)*
    - *Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993) (COIDA)*
    - *Skills Development Act (No. 97 of 1998)*
    - *Skills Development Levies Act (No. 9 of 1999)*
    - *Medical Schemes Act (No. 131 of 1998)*

The contract of employment

If you agree to work for someone, and that person agrees to pay you for this work, then you and the employer have entered into a **contract of employment**.

You are called the employee. The type of work that you must do, hours of work, wages, a place to live (where appropriate), and so on can all be part of your agreement with your employer. These are called terms and conditions of employment. They are **express** terms of the contract.

Even if you and the employer did not talk about terms and conditions of employment, for example, taking annual leave **in December**, and it is the custom that all employees take annual leave **over the December period,** then you can also take annual leave over this period. This is part of your contract, even if you did not talk about it. These are **implied** terms of the contract.

The law says that a contract does not have to be in writing. If two people speak and they agree about the contract, then this contract is called a verbal contract. A **verbal** contract is also legal and enforceable.

A **written** contract is better. If all the conditions of the contract are written on a piece of paper, and the employer signs the paper, then you have proof of what was agreed. This is useful if ever there is a dispute about what was agreed between you and the employer.

Section 29 of the *Basic Conditions of Employment Act* (BCEA) says that, except for employees working less than 24 hours per month, the employer must give employees certain particulars in writing about the job. These particulars include:

- A description of the job and the place of work
- The date on which the employment began
- The hours that the employee will be expected to work
- Ordinary and overtime rates of payment, including payment in kind (for example, accommodation) and its value
- Any deductions to be made
- How much leave the employee will get
- The notice period
- The name and address of the employer
- The date of payment

If an employee can't read, the particulars must be explained in a language the employee understands.

If you have a contract, but you do not do what was agreed in the contract, then you break the contract. The law says that if one person breaks a contract, then the other person can use the law to force that person to do what was agreed or they can stop and withdraw from the contract. Breaking a contract is also called a **breach of contract**. ***(See: S29(1)(a)-(p) of the BCEA for particulars of employment that must be provided in writing to employees when they start their employment with someone)***

A contract of employment must comply with terms and conditions of employment in the BCEA, Bargaining Council Agreement or collective agreement or Sectoral Determination (depending on what the employee is covered by), and any other laws which protect employees, such as the *Labour Relations Act* and the *Occupational Health and Safety Act*. If a contract breaks any of these protective laws, it is not enforceable unless the conditions are

'on the whole' more favourable to the employee. If an employee is covered by the BCEA, terms and conditions of employment in the BCEA override those in any contract of employment which are less favourable to the employee than those in the BCEA. In other words, the contract cannot be less favourable to the employee than the conditions laid down in the law. ***(See pg 437: Model contract of employment)***

How can a contract of employment be used?

Suppose the employer breaks a contract of employment. In that case, an employee can sue the employer in a civil court case for breach of contract or can refer the dispute to the Department of Employment and Labour (for example, if you have not been paid your annual leave or overtime payment). The employee (who earns less than the earnings threshold of R21 812 per month) can also refer a case to the CCMA in terms of Section 73A of the *Basic Conditions of Employment Act* (BCEA) regarding a failure to pay any amount owing to the employee in terms of a contract of employment, a Sectoral Agreement or a Collective Agreement. This involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.' ***(See pg 317: Minimum Wages; See pg 318: Enforcement and dealing with disputes about minimum wages)***

It is easier to prove that an employer broke a contract of employment if the contract is in writing. If the contract is verbal, it is always better to have witnesses. If you don't have witnesses, then it is the employee's word against the employer's word. ***(See pg 236: Civil claims)***

The employee is always entitled to at least the terms and conditions in the BCEA. If the breach of contract goes against a term or condition in the BCE, then the employee (who earns less than the threshold) can refer a case to the CCMA in terms of Section 73 A of the BCEA concerning a failure to pay any amount owing to the employee, in terms of a contract of employment, a Sectoral Agreement or a Collective Agreement.

The employee can also go to the Department of Employment and Labour and lay a complaint. The Department will investigate the complaint and if it is found that the employer has not followed the contract of employment or the BCEA, then the Inspector may issue a Compliance Order which tells the employer to comply with the BCEA.

Changing the contract of employment

A change in a contract of employment is like writing a new contract. An employer may not unilaterally change the terms and conditions of employment of an employee. This means changing the contract on their own without any form of consultation with the employee. An employer can change the contract after proper negotiation even if the employee does not agree to the changes. A change in a contract is like a new contract. To change the

contract, the employer must give notice of the proposed change to the employee and must attempt to negotiate the new terms and conditions with the employee.

If the employer and employee/s cannot agree on the changes in the contract, then the employer may decide to go ahead to introduce the changes. If the employee accepts the new conditions and goes on working, then the new conditions become part of the contract.

If the employee does not agree to the changes, then the following options will apply:

> **OPTION 1:** Refer a dispute to the CCMA or Bargaining Council in terms of section 64(4) of the *Labour Relations Act*. The **employee can ask the CCMA to issue a notice to instruct the employer** to not proceed to change the terms of employment or to reinstate the previous terms of employment which applied before the change took place. The employer must comply with this notice within 48 hours of receiving it, failing which the employees (there must be two or more) or trade union may embark on a protected strike.
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> **OPTION 2:** Refer a dispute to the CCMA or the Bargaining Council (if one is in that industry) for conciliation. If conciliation fails, then that employee and other employees covered by the dispute may go on strike after giving the employer 48 hours' notice of the strike. Remember, individual employees may not strike but can only do so as a collective group. Employees are entitled to go on strike after following the correct procedures, even if they do not belong to a trade union.
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> **OPTION 3:** If the employee refuses to accept the changes, and the employer then dismisses the employee, it might well be anautomatically unfair dismissalin terms of Section 187 of the LRA. This is because an employer is not able to unilaterally amend the contract of an employee or employees and the 'employee has been dismissed because of their refusal to accept a matter of mutual interest between them and the employer.'
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> **OPTION 4:** Where an employer can justify the need to change the terms and conditions of employment and there is no agreement between the employer and the affected employee even though consultations have taken place, then the employer has the right to consider possible retrenchments if the employee is not prepared to accept the reasonable offer of alternative terms of employment, instead of being retrenched. This should be the last resort and cannot be based on arbitrary reasons. For example, if a change to the contract could prevent a business from closing then this would be seen as a justifiable reason.
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> - If the employer wants to change the terms of an employment contract and can justify the need to do this but is unable to negotiate these changes with the employee in consultations in terms of Section 189 of the LRA, then the employer could approach this as a possible retrenchment in terms of

Section 189 of the LRA and dismiss the employee for refusing to accept a reasonable alternate offer to that of retrenchment.

- Finally, the employer could engage in a lock out after failed Conciliation at the CCMA, to pressure employees to accept the new terms and conditions of employment.
- If the employee was forced to resign, or was retrenched or dismissed as a way to get the employee to accept the changes, it will be considered an automatically unfair dismissal. Employers may not use the threat of dismissal to force an employee to agree to a new contract.

NOTE

The National Minimum Wage Act (NMWA) states that it is an unfair labour practice for an employer to unilaterally change wages, hours of work, or other conditions of employment if this is a result of the implementation of the national minimum wage. If there is a collective agreement, the employer must negotiate with the trade union(s) concerned before changing the terms and conditions of employment that form part of that collective agreement.

OPTION 5: Where a registered trade union has signed a collective agreement with the employer and where the employer changes this agreement without the agreement of the union, the union and its members can go to the CCMA or the Bargaining Council (if this applies) to claim that the employer has broken the Collective Agreement. This referral of the dispute will be in terms of Section 24 of the LRA and will ask for an arbitrator to decide whether the employer has breached the collective agreement.

Types of contracts

There are two types of contracts:

1. Indefinite (permanent)
2. Fixed-term (temporary)

INDEFINITE CONTRACTS

FULL-TIME CONTRACT OF EMPLOYMENT

Most employment contracts are indefinite contracts. This means that when an employee starts working for the employer, no one knows when the contract will end, but it is expected that the employment will continue until the employee reaches the retirement age of the company. An indefinite contract can only be ended in the following ways:

- By dismissal or termination of the contract of employment as a result of the misconduct of the employee, or the incapacity of the employee or on account of retrenchment
- When the employee reaches the normal retirement age laid down by the company or the industry
- By the death of the employee
- By the employee or employer giving notice to terminate their contract

PART-TIME CONTRACT OF EMPLOYMENT

This section only applies to 'part-time' employees where the employer employs less than ten employees and does not apply during the employee's first three months of continuous employment.

Part-time employees are permanent employees who work less than the 'normal' working hours (between 40 to 45 hours per week), depending on what the norm is for an industry in terms of a wage regulating measure, bargaining council agreement, collective agreement or according to the standard contract of employment of the employer's other employees.

The threshold between full-time and part-time work is usually 30 to 35 hours per week. For example, a part-time contract could apply to a domestic employee who works one day per week for five different employers. So, a part-time employee can be permanent part-time or fixed-term part-time. For example, it could be an employee who works 20 hours a week on a fixed-term contract for 3 months; or it could be an employee who works 20 hours a week for an indefinite period which means they are permanent.

Section 198© of the LRA requires a part-time employee who earns under the *Basic Conditions of Employment Act* (BCEA) threshold of R21 812 per month and who works for a period of more than three months, to be treated equally ('on the whole no less favourably') as a full-time employee if they are doing the same or similar work in the same workplace unless different treatment is justified. A justifiable reason for different treatment may include:

- Seniority
- Experience or length of service

- Merit
- The quality and quantity of work performed

Equal treatment to a comparable full-time employee also means providing:

- The same or similar skills training and development
- Receiving a written contract of employment
- Protection under the LRA and BCEA as long as they work more than 24 hours a month
- Opportunities to apply for vacancies in the same company
- Entitlement to be paid severance payment if the contract is terminated after twenty-four months.

FIXED-TERM CONTRACTS

This does not apply to employers employing fewer than ten employees, or where the employee earns above the BCEA threshold of R21 812 per month, or where the employer employs less than 50 employees and has been in business for less than 2 years.

If the employee and the employer both agree at the start of the contract that the contract is going to end within a fixed period or when certain work is completed, then it is a fixed-term contract.

A fixed-term contract means a contract of employment that terminates:

- When a specific event happens, for example, a person is employed to perform a specific job for a company event
- When a specified task or project is completed, for example, a person is employed for a 3-month fruit harvesting season
- On a fixed date, for example, if a person is employed for 3 months to stand in for someone who is on pregnancy leave

The law provides various conditions and limitations on fixed-term contracts. Section 198B of the LRA aims to ensure fair and equal labour practices by employers and to avoid exploitation of temporary employment by employers using fixed-term contracts to get around having to provide benefits that only apply to permanent employees.

Contract employees and **seasonal employees** are two kinds of employees with fixed-term contracts.

It often happens, particularly on farms, that the employer goes to other areas to get people to work on the farm on a temporary basis. The employees then leave their homes and go to work on this farm. These employees may be referred to as **contract employees**. Usually, the farmer and these employees have a fixed-term contract for

a specified time. If an employee has a contract with the farmer, then the conditions of that contract are the conditions of employment.

If the contractor earns under the BCEA threshold of R21 812 per month, the contract is more than three months, and there is not a 'justifiable reason' for the temporary nature of the contract, then the conditions of the contract may not be less favourable than those of permanent employees who perform similar work. If employees work on a fixed-term contract, for three months or longer, they may not be treated on the whole less favourably than permanent employees.

Some farms have times when extra employees are needed. These times are called seasons. If an employee only works on the farm for a season, then they are called a **seasonal employee**. The seasonal employee knows when the contract starts and when the contract ends. This is a fixed-term **contract**.

LENGTH OF A FIXED-TERM CONTRACT

A fixed-term contract of employment can be renewed at the end of the contract if there is a 'justifiable reason' for the renewal of the contract for a temporary period. For example, if workers are contracted for 3 months to complete the harvest on a farm and then the harvest continues beyond the 3-month contract, then the fixed-term contract of an employee can be renewed as this is a justifiable reason. Justifiable reasons include:

- Replacing another employee who is temporarily absent from work (parental leave)
- A temporary increase in work volume, which is not expected to go beyond 12 months (seasonal increases in workload)
- A student or recent graduate who is employed to do training or get work experience
- Exclusive work on a specific project that has a limited or defined duration
- A non-citizen who has been granted a temporary work permit
- Seasonal work
- An official public works scheme or similar public job creation scheme
- The position is funded by an external source for a limited period
- The employment of a person beyond the normal or agreed retirement age

A fixed-term employee who is employed for more than 3 months (without a justifiable reason) and who earns below the earnings threshold of R21 812 per month in the BCEA, will be regarded as a permanent employee and termination of the fixed-term contract will constitute a dismissal. The

employee may then apply to the CCMA or Bargaining Council (in terms of Section 186 of the LRA), alleging "reasonable expectation" for renewal of a fixed-term contract.

As a permanent employee, an employee may not be treated less favourably than any other permanent employee doing the same or similar work. They should be given the same work opportunities as permanent employees.

For fixed-term employees (including seasonal employees), the employer must pay employees according to the terms of the contract for the full contract time, even if there is no more work for the employees to do. If an employee's contract is for one year, then the employer must pay the employee for the full year, unless the contract ends because of the employee's fault or unless the contract includes a term that provides for 'early termination' of the fixed term contract. If the fixed term contract is to be terminated early before the end date of the contract, this still needs to be done using proper procedures, for example retrenchment consultations, if these apply. If the contract is for one season, then the employer must pay the employee for the whole season in terms of the provisions in the contract unless early termination takes place in terms of normal practices provided for in the Code of Good Practice: Dismissal as contained in the LRA.

The employer cannot stop the fixed-term contract earlier than the contracted period unless the contract makes provision for this and the employer follows a fair process in terms of the law.

RENEWING A FIXED-TERM CONTRACT

If an employer offers to renew an employee's fixed-term contract, then it must be done in writing, and reasons must be given for the renewal.

CREATING A 'REASONABLE EXPECTATION' OF PERMANENT EMPLOYMENT

If an employer creates a reasonable expectation of permanent employment to a fixed-term employee and then terminates the contract without following the correct legal procedures, the employee can make a claim to the CCMA for unfair dismissal, alleging "reasonable expectation" for renewal of their fixed-term contract. The CCMA will decide if the employee had good reason to expect a renewal of a fixed-term contract based on all the surrounding circumstances.

Case law on fixed-term contracts and 'reasonable expectations'

In *Ntsoko v St John the Baptist Catholic School* (2019) 28 CCMA, the employee was employed as an educator at the school in terms of four fixed-term

contracts, the first of which was signed in February 2015 and the last on 31 October 2017. The contract was to run from 1 January to 31 December 2018. On 15 November 2018, the employee was advised that his fixed-term contract would not be renewed for 2019. The employee claimed he had formed a reasonable expectation that his contract would be renewed and wanted to challenge this decision. He referred a dispute to the CCMA relying on Section 186 of the LRA. The CCMA found that the nature of the employee's work was not of a limited or definite duration. The employer had failed to provide any justifiable reason for employing the employee on a fixed-term contract. The employee was, therefore, a permanent employee of the employer.

FIXED-TERM CONTRACTS AND SEVERANCE PAY

An employee on a fixed-term contract who is employed for longer than 2 years is entitled to severance pay on termination of employment or alternative employment, if possible. Severance pay includes one week's compensation for each completed year of the contract. Severance pay is made in cases where employers terminate an employee's employment based on operational requirements such as retrenchment.

EXCLUSIONS FROM THE PROVISIONS OF FIXED-TERM CONTRACTS

The provisions on fixed-term contracts DO NOT apply to employers in the following cases:

- If an employee earns above the legal earnings threshold which is R261 748 per year (or R21 812 per month) before income tax, pension, medical aid, etc. This threshold changes from year to year, so remember to check for the correct amount from April 2026.
- Employers with less than 10 employees
- Start-up companies with less than 50 employees if they have been in operation for less than two years
- Specific fixed-term contracts permitted by law, sectoral determination or collective agreement

CASUAL EMPLOYEES

A casual employee is employed for a short period and works for parts of the week, for example, a domestic employee who only comes in one day a week for 5 hours. If an employee works more than 24 hours a month, they qualify for proportional rights such as annual leave and sick leave and are covered by all the provisions in the BCEA. They should also get written particulars of employment when they start the job. If the employee works more than 24 hours in a month, they become entitled to

one day of annual leave for every 17 days worked and one day of sick leave for every 26 days worked.

Casual employees do not have much legal protection under the BCEA. Chapter 2 of the BCEA regulates working time but doesn't protect employees who work less than 24 hours a month. However, casual employees are protected under the *Labour Relations Act* (*LRA*) where they can refer an unfair dismissal to the CCMA.

'ZERO-RATED' CONTRACTS

A 'zero-rated' contract is an agreement between two parties where an employee is asked to perform work with no set minimum number of hours. The contract states what the employee will earn for the work they do and possibly how they will be offered work.

In the case of a 'zero-rated' contract, employees are only paid for work they have done, and the contract is offered without guaranteeing the employee actual working hours. The working hours are controlled by the employer, who will offer work when it is available. With 'zero-rated' contracts, employees are dependent on the employer and may go for months without being called to work, which prevents them from earning a salary even though they are employed.

However, in terms of Section 9A of the BCEA, an employee earning under the BCEA threshold who works for less than four hours on any day must be paid for four hours of work on that day. This payment will be at the normal minimum hourly rate of pay. The BCEA provides maximum working hours that an employee can work but does not provide for minimum working hours. However, Section 29(1) of the BCEA requires employers to provide employees with their ordinary working hours and days of work, what they will be paid and the frequency with which they will be paid. So, 'zero-rated' contracts may not comply with Section 29 of the BCEA.

VOLUNTEERS

The *Basic Conditions of Employment Act* (BCEA)(*Section* 3(1)(*b*)) specifically excludes "unpaid volunteers working for an organisation serving a charitable purpose" from the BCEA. The *National Minimum Wage Act* (NMWA)(*Section* 3) also excludes a person who works for another person but does not receive any remuneration for their services. These laws therefore exclude a volunteer from being seen as an employee, and they are excluded from the rights included under the BCEA and NMWA.

However, if a volunteer regards themselves as being an employee, for example, if they receive an allowance from the organisation they work for, then there are different tests to determine whether there is an employment relationship.

The *Code of Good Practice: Who is an employee* has a list of factors to determine whether someone should be considered an employee. Both the LRA (Section 200A) and the BCEA (Section 83A) presume a person is an employee if the following factors are present:

- How the person works is controlled by another person
- In the case of a person who works for an organisation, the person is seen as being part of that organisation
- The person is economically dependent on the other person for whom they work or provide services to
- The person's working hours are fixed and the person is paid a fixed remuneration.

These factors only apply if a person earns below the BCEA earnings threshold which is R261 748 per year (R21 812 per month). The Courts have dealt with cases where individuals in volunteer positions claimed they were employees. They found that both parties must have a clear intention to create a legally enforceable employment contract either orally or in writing. In deciding whether there is an intention, the courts look at the following:

- The documents that were signed to identify whether it is a volunteer or employment relationship
- Whether an organisation normally enters into employment contracts with a specific type of person (within its organisation) claiming to be an employee
- Whether there is any contractual arrangement, regardless of the form

The nature and terms of the relationship must be clearly set out in an agreement to avoid any uncertainty and disputes at a later stage.

Differential wage

If the employer tells an employee to do someone else's job in a higher category of pay than the employee's own job, then the employee should get the higher wage if they perform this work for an extended number of days. ("Equal pay for work of Equal value').

An employer can ask an employee to do work below their own pay category, but the employee should not get paid less than their own normal wage and also provided the employer is not doing this to make the employee's life at work intolerable.

Section 6 – particularly subsection 4 – of the *Basic Conditions of Employment Act* (BCEA) deals with equal pay for equal work, with grievances for unfair discrimination being an option if a commissioner or the courts deem the employee to be correct.

Bonus pay

Bonus pay' means money paid to employees which is over and above their wages and overtime money. The law does not say that an employer must pay a bonus to employees although some Bargaining Council Agreements do. This is 'extra' money. It is usually paid out at the end of the year, for example, for good performance during the year, or for targets reached in the production of goods. Bonuses should always be paid equally and fairly to employees with similar productivity – with no preference being given to certain employees. Bonus pay must be paid if:

- An employer gave a bonus to the employees at the end of every year in the past, the employer created an 'expectation' in the employees that they will get a bonus every year. And it has become the custom to get the bonus. The employees then have a right to demand the same bonus every year. If the employer suddenly decides not to give a bonus, the employees can claim the bonus as a custom and practice.
- It says in a contract of employment or a collective agreement that the employee will get a bonus. The employer must pay the bonus as agreed (unless it depends on the employee doing something that the employee did not do).

Long service awards

The law does not say that employers must pay long service money to employees who have worked for a long time for the same company. If the employee retires, it is up to the employer to decide whether to give any long service money to the employee.

Job references

A job reference letter is a letter from an ex-employer saying whether the employer thought the employee was a good employee or not. The *Basic Conditions of Employment Act* (BCEA) says employees are entitled to a written certificate of service when the employee stops working for that employer. The **certificate of service** sets out the full name of the employer and the employee, the job/s that the employee was doing, the date that the employee began working, the date that the employee ended work, and the wage at the time that the job ended, including payment in kind. ***(See pg 315: Written particulars in a contract of employment and payslips (for details on what has to be included on the Certificate of Service)***

Laws about terms and conditions of employment

There are different laws about conditions of employment. Employees' terms and conditions of employment may be covered by:

- Centralised collective agreements, like Bargaining Council Agreements, under the *Labour Relations Act* (where applicable) ***(See pg 320: Collective agreements)***
- Sectoral Determinations under the *Basic Conditions of Employment Act* (BCEA), or Wage Determinations under the *Wage Act* (where applicable) ***(See pg 301: Sectoral determinations)***
- Special exceptions to centralised collective agreements, Sectoral Determinations, or the BCEA, made by the Minister of Employment and Labour (called deregulation) ***(See pg 345: Deregulation)***
- Workplace-based collective agreements under the BCEA ***(See pg 320: Collective agreements)***
- An individual agreement between an employee and employer – the contract of employment ***(See pg 281: The contract of employment)***
- *Basic Conditions of Employment Act* ***(See pg 302: Summary of provisions in the BCEA)***
- *National Minimum Wage Act* ***(See pg 317: Minimum wage)***

The *Merchant Shipping Act* covers conditions of employment for employees who are at sea within South Africa's territorial waters while members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service are covered by different laws. The *Occupational Health and Safety Act* gives employees rights to health and safety at work. ***(See pg 355:The Merchant Shipping Act; See pg 346: Occupational Health and Safety Act)***

Wage regulating measures

Collective agreements, Bargaining Council Agreements (BCAs), Wage Determinations and sectoral determinations (S/WDs), which regulate terms and conditions of employment, are commonly called wage regulating measures. They contain different conditions of employment for different employees in different sectors. In other words, all these agreements and determinations talk about a period of notice, but in one wage determination, the notice period may be one week, while in another, it may be two weeks. Below is a list of the more common aspects relating to conditions of employment that appear in all wage regulating measures:

- **Area and scope:** defines the geographical area where the BCA or S/WD applies and describes the type of work covered by the BCA or S/WD

- **Definitions:** defines the different categories of employees, including casual employees
- **Remuneration:** describes minimum wages for different categories of employees and includes monies received by the employee, excluding ex gratia payments or bonuses paid at the discretion of the company
- **Payment of remuneration:** how and when employees should be paid their wages
- **Deductions:** from an employee's wage
- **Hours of work and pay:** this includes public holidays, Sundays, etc
- **Annual leave and sick leave**
- **Piece work and commission work:** Piece work means that an employee is paid for the number of items produced and not for the hours worked
- **Termination of contract of employment:** how much notice an employer must give or be given
- **Prohibition of employment:** for example, pregnant women and children may not be allowed to do certain work
- **Dispute resolution:** the Labour Relations Act allows employees and employers to collectively agree to dispute resolution procedures that differ from those in the Act.

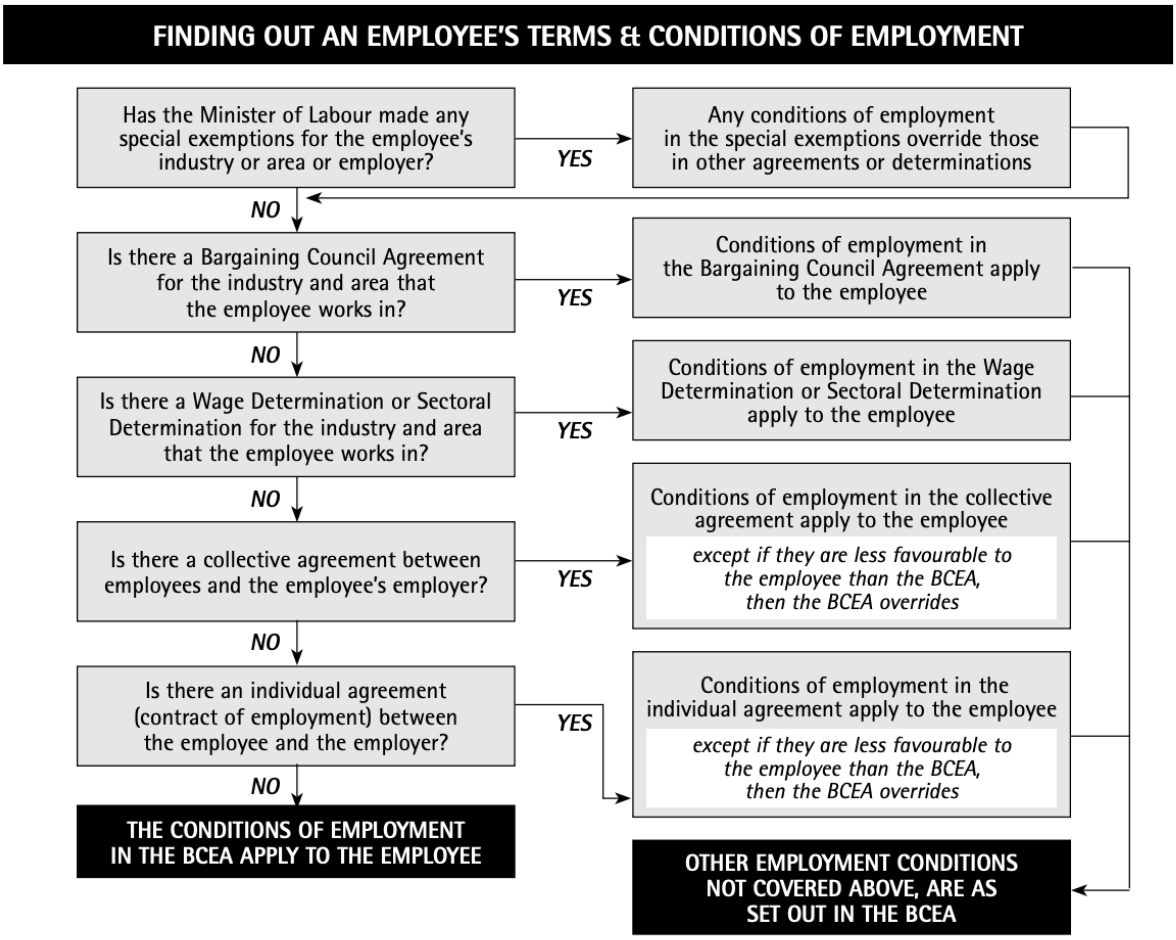
If there are any particular terms or conditions of employment that are not specified by a Bargaining Council Agreement or a Sectoral Determination, then those terms or conditions of employment in the *Basic Conditions of Employment Act* will apply to employees.

How do you know which law applies to an employee?

All employees will fall under one of the above laws about conditions of employment. Many employees fall under more than one of these laws.

The laws work in order of priority. For example, if a Bargaining Council Agreement (or other centralised collective agreement) covers the work done by an employee, then that Agreement applies to that employee. If there is no Bargaining Council Agreement, then you must see whether a Sectoral Determination or Wage Determination applies. If no Bargaining Council Agreement or Sectoral/Wage Determination applies, then the *Basic Conditions of Employment Act* (BCEA) will apply unless they are specifically excluded by the BCEA.

An individual contract of employment may override the *Basic Conditions of Employment Act* provided it is more advantageous for the employee and provided it does not affect certain 'core' rights that are identified in the BCEA. These core rights which cannot be changed by agreement, include normal working hours, regulations applying to maternity leave, sick leave and annual leave, and the prohibition against the employment of children amongst others.



Basic Conditions of Employment Act (BCEA)

Who is covered by the Basic Conditions of Employment Act?

All employees are covered by the *Basic Conditions of Employment Act (No. 75 of 1997)* except the following:

- Members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service
- Unpaid voluntary employees who work for a charitable organisation
- Employees who work for an employer for less than 24 hours a month
- Employees on vessels at sea where the *Merchant Shipping Act* (1951) is applicable

Certain special provisions apply to companies employing fewer than ten employees.

PEOPLE EARNING ABOVE A CERTAIN AMOUNT

If a person is earning a gross salary of more than R261 748 per year (or R21 812 per month) (referred to as the BCEA earnings threshold which increases at different intervals), then the following sections of the BCEA **will not** apply to them:

- Section 9: Limitations on ordinary hours of work
- Section 10: Overtime work and payment
- Section 11: Compressed working week
- Section 12: Averaging of hours of work
- Section 14: Provision of meal intervals
- Section 15: Daily and weekly rest period
- Section 16: Pay for work on Sundays
- Section 17: Night work
- Section 18(3): Public holidays (where an employee may work on a public holiday on which they would not have ordinarily worked) ***(See pg 302: Summary of provisions in the BCEA).***

PART-TIME, CASUAL AND TEMPORARY EMPLOYEES

A **part-time employee** is permanently employed but only works part of a working day or working week. A **casual employee** is employed on a short-term basis but only works part of a working week. If they work less than 24 hours in a month the BCEA does not apply to them. An employee who works more than 24 hours during any month is now fully covered by the provisions of the BCEA including provisions for leave and sick pay, overtime and public holiday and Sunday rates.

A **temporary employee** is not permanently employed but only works for a specific length of time or until a specific job is completed. This is often referred to as a 'fixed-term contract' of employment.

An employer may try to circumvent a permanent contract of employment by taking on an employee in a 'fixed-term' capacity, but if the employee meets the definition of what an employee is, the CCMA will offer protection against unfair dismissal should this be required. An employer may try to avoid giving an employee a permanent contract of employment by continuously renewing their fixed-term contract but if an employee works for more than 3 months and earns below the earnings threshold in the BCEA of R21 812 per month, then the contract is seen to become permanent unless there is a justifiable reason to continue with the fixed-term contract. ***(See pg 287: Fixed-term contracts; See pg 358: Who is an employee?)***

In most cases, part-time, casual and temporary employees will be entitled to the same benefits as other employees, but on a pro-rata basis. They are excluded from some provisions of the BCEA, for example, they are not entitled to Family

Responsibility Leave unless they work on the contract for more than four months and at least four days a week.

Generally, the temporary or casual employee will be entitled to one day annual leave for every 17 days worked and one day sick leave for every 26 days worked for the same employer.

PIECE WORK

Piece work means that an employee is not paid according to the hours that they work. The employee is paid for the number of items produced. For example, seasonal farm employees may be paid for the amount of fruit they pick, provided they earn at least the minimum hourly or daily wage laid down for that industry or sector.

FREELANCE OR OUTSOURCING

An employer may pay someone who is not an employee in the company to do work. This person is not an employee but is running their own small business and is often referred to as an independent contractor. The contractor is generally paid for producing an agreed level of work or providing a service and is not supervised or controlled by the employer. The independent contractor is not covered by the BCEA.

EXAMPLE

Sakumsi cuts patterns for dresses. He pays Trevor to sew the pieces together. Trevor works from his house. Trevor is not employed by Sakumsi, and Sakumsi does not have to make sure that Trevor's pay and working conditions are according to the BCEA.

Temporary Employment Services (TES)

Temporary employment services (TES) are commonly called labour brokers who supply labour to businesses. TES are regulated mainly by the *Labour Relations Act* (LRA) and the *Basic Conditions of Employment Act* (BCEA). The LRA defines a TES as *a person who, for reward, procures for or provides to a client, the services of employees who it remunerates.*

The LRA (Section 198) states the following regarding employees of the TES:

- The employee must earn below the BCEA threshold of R261 748 per year or R21 812 per month

- The employee only works for a client for less than 3 months
- The employee works for a client as a substitute for an employee who is temporarily absent from work
- The employee works for a client to perform a category of work that is seen to be a temporary service by a Bargaining Council or a Sectoral Determination

If a TES employee works for a client for more than 3 months and earns under the BCEA earnings threshold of R21 812 per month, they are seen to be an employee of the client and are entitled to the same terms and benefits as the client's permanent employees. This means there is joint and several liability which both the employer and the TES provider (labour broker) take on after the 3-month window period. This means that both the employer or the TES provider can be taken to the CCMA if equal treatment is not applied or if the employer fails to apply the terms of the BCEA, for example, paying overtime or Sunday rate of pay or treating the employee unfairly.

Section 198(4a)(a) provides that an employee can bring a claim against a TES, the client of the TES, or both the TES and the client if the TES contravenes the *Basic Conditions of Employment Act* or a Sectoral Determination or a collective agreement (in a bargaining council).

Variation of basic conditions

Certain rights in theBasic Conditions of Employment Act (BCEA)are fundamental and will not be able to be varied in terms of Section 49 of the BCEA. (These include the prohibition on employing child labour/reduction in protection for night work / the reduction in annual leave to less than two weeks / the reduction in entitlement to maternity leave / the reduction in entitlement to parental leave, adoption leave or commissioning leave / or reduction in entitlement to sick leave).

In collective agreements, for example, Bargaining Council Agreements, employees may agree to conditions that are different to conditions in the BCEA, as long as the agreement is consistent with the purpose of the BCEA and does not give them less protection than they had under the BCEA, nor reduce an employee's annual leave (to less than 2 weeks), nor remove maternity leave or sick leave. ***(See: S49(1) (a)–(f) of the BCEA).***

Employees may be covered by the BCEA, but have terms and conditions of employment which vary from those in the BCEA. The BCEA allows for the following ways of varying basic conditions of employment:

- The individual employment contract between an employee and employer (although the scope for variation by this method is extremely limited)
- Collective bargaining and agreement at a bargaining council

- Sectoral Determinations
- The labour minister can make special exceptions

So, an employee who is covered by the BCEA has the conditions of employment as specified in the Act, unless:

- The employee has an individual agreement (employment contract) with the employer, which is more favourable than the terms of the BCEA
- The employee is part of a collective agreement which has been agreed with a Trade Union and the employer
- There is a Sectoral Determination (like a Wage Determination) or a Ministerial exemption which overrides the conditions in the BCEA. ***(See pg 296: Finding out an employee's terms and conditions of employment)***

Individual contract of employment

The contract may have different conditions to those in the BCEA, as long as they are more favourable to the employee than the BCEA. The BCEA sets out the minimum conditions of employment. Any contract of employment must at least comply with all its provisions. If a contract breaks any part of the BCEA, (and a variation order has not been obtained from the Department of Employment and Labour), it is not enforceable, and the BCEA conditions override the conditions in the contract. ***(See pg 281: The contract of employment)***

Collective bargaining

The *Basic Conditions of Employment Act* (BCEA) and the *Labour Relations Act* (LRA) aim to promote collective bargaining, and therefore allow variation of certain specified conditions through collective bargaining between an employer and employees who work for that employer. They can reach a collective agreement.

A collective agreement under the BCEA may have different conditions to those in the BCEA as long as they are more favourable to the employee than the BCEA.

If an agreement breaks any part of the BCEA, it is not enforceable, and the BCEA conditions override the conditions in the agreement.

There are also centralised agreements (Bargaining Council Agreements) under the LRA. In centralised collective bargaining, employees may agree to conditions that are different from BCEA conditions. This may be because in exchange, they gained something else they wanted more. ***(See pg 320: Collective agreements)***

Sectoral Determinations

The *Basic Conditions of Employment Act* (BCEA) provides for the establishment of an Employment Conditions Commission. They investigate conditions in a particular industry or sector and make recommendations to the Minister of Employment and Labour. When the Minister approves a recommendation from the Commission, this is published in the Government Gazette as a Wage determination or Sectoral determination. ***(See pg 324: Summary of the Sectoral Determination for farm workers; See pg 335: Summary of the Sectoral Determination for domestic workers)***

Ministerial exemptions

The Minister of Employment and Labour may override the provisions of the BCEA for particular groups of employees.

Prohibited employment

CHILD LABOUR

- Children below the age of 15 years are not permitted to work.
- Children between the ages of 15 and 18 years may not perform work that places their well-being, education, or physical and mental health at risk.

The Department of Employment and Labour and the state prosecutor will be primarily responsible for enforcing the rules about child labour. To employ children is a criminal offence and comes with a jail sentence of up to 6 years.

FORCED LABOUR

No one may force employees to work (for example, to redo and perform work because the employee made a mistake and produced unacceptable work). This is a criminal offence.

Enforcement of the Basic Conditions of Employment Act (BCEA)

The Department of Employment and Labour is responsible for enforcing the BCEA. The department appoints inspectors who have wide powers to make sure employers obey the Act.

An employee whose employer is not obeying the BCEA can complain to the Department of Employment and Labour or the CCMA in terms of Section 73A of the BCEA.

If the complaint is to the Department of Employment and Labour, a labour inspector will investigate. An inspector no longer needs to get a written undertaking from an employer who they believe is defaulting and can now issue a compliance order which is enforceable through the Labour Court.

The inspector may issue a 'compliance order' to employers who do not obey the BCEA. If the employer ignores the compliance order, the Department of Employment and Labour must refer the matter to the Labour Court to force the employer to obey. Employers are also entitled to appeal against compliance orders to the Director General of Labour or the Labour Court.

If an employee and employer are in a dispute about a matter covered by the *Labour Relations Act* and they are busy trying to resolve the dispute at the Commission for Conciliation, Mediation and Arbitration (CCMA), then the CCMA can also order the employer to pay money or for example, annual leave that is owed to the employee in terms of the employee's BCEA rights. For example, if a dismissal is being contested at the CCMA, the CCMA will be able to order an employer to pay outstanding leave owed to the employee.

The law is made like this just to simplify procedures and to avoid the matter having to go to both the Department of Employment and Labour and the CCMA (and possibly the courts).

Employees can also make their own civil case in the Magistrate's Court and the Small Claims Court to get money that is owed to them.

Summary of provisions in the Basic Conditions of Employment Act (BCEA)

WORKING TIMES AND PAY

- The maximum hours of work is 45 hours **per week** for ordinary pay. ***(See: Section 9 of the BCEA)***
- The maximum length of a working day is 9 hours if the employee works a 5-day week, but 8 hours a day if the employee works a 6-day week. Where the working week is compressed (squashed) into fewer days, then shifts of longer hours may be introduced with the employee's consent. For example, an employee can agree to work shifts of 12 hours over 4 working days, where overtime is only paid once more than 45 hours have been worked in that week.
- Overtime is voluntary and can only be worked where agreed to by the employee. No employee may work more than 10 hours of overtime per week, (subject to the

provisions of the applicable Sectoral or Bargaining Council Agreement). For example, farm workers may work up to 15 hours of overtime in any week in terms of the Farm Worker Sectoral Determination. Overtime must be paid per hour of overtime worked, at a rate of one and a half times the employee's ordinary hourly wage. In addition, no employee may work more than 3 hours overtime in any day (including overtime on that day).

Even though overtime is voluntary, if the employee agreed in the original contract to work overtime when necessary, then reasonable overtime must be worked. If the employee refuses to work overtime, then they are in breach of the contract and the employer can take disciplinary action against the employee.

The employer can also agree by way of a Collective Agreement covering the employee to work up to 15 hours overtime during a week as against the normal ten hours.

NOTE

While individual overtime is voluntary (subject to an agreement), a collective or joint refusal by a number of employees to work normal overtime will probably constitute a strike or industrial action. This could be a protected strike if the dispute process in the Labour Relations Act has been followed.

SUNDAY WORK

Payment for Sunday work must be the greater of:

- Either double the normal hourly rate for the amount of Sunday hours worked, OR
- One full day's pay, even if the employee only worked three hours that Sunday.

If it is normally part of an employee's normal shift and job to work on a Sunday, then they must be paid at a rate of time and a half their normal hourly rate instead of double time.

Paid time off: An employer and employee can have an agreement that allows the employer to give the employee who works on a Sunday paid time off. The paid time off must be given to the employee within one month of the

employee becoming entitled to it unless there is an agreement in writing which extends this period.

Calculating overtime hours on Sunday: Any time worked on a Sunday by an employee who does not ordinarily work on a Sunday is not used when calculating an employee's ordinary hours of work but the overtime hours are taken into account when calculating the total overtime worked by the employee during that week. For example, if an employee has already worked 5 hours overtime for the week, they may not work more than another 5 hours on the Sunday because the total number of overtime hours allowed per week is 10 hours.

Shift spread over Sunday and another day: If a shift worked by an employee falls on a Sunday and another day, for example, Monday, the whole shift is regarded as being worked on the Sunday, provided the majority of hours worked, fall on the Sunday. However, if the bigger portion of the shift was worked on Monday, then the whole shift is regarded as being worked on Monday. So if the employee starts work at 20h00 on Sunday evening and works through to 06h00 on Monday morning, the majority of hours falls on the Monday and Monday rate of pay will apply.

Limitations on using Sundays to make up working hours: If an employee is contracted to work 45 hours per week, but has only worked 40 hours for the week for whatever reason, the employer cannot demand that they work 5 hours on the Sunday to make up their normal time.

PUBLIC HOLIDAYS

Employees are entitled to be paid for **public holidays** that fall on a day that they normally would have worked – even though they will be off and not working on the public holiday.

An employee can agree to work on a public holiday, but this is voluntary.

If an employee does agree to work on a public holiday, which would have been a normal working day, they must get paid double the daily rate of pay, or they must be paid double the normal hourly rate for the amount of hours worked on the public holiday, whichever is the greater (if they work ten hours on a public holiday, they must be paid 10 x 2 = 20 hours or double the normal daily rate of pay, whichever is the greater).

Where a public holiday falls on a Sunday, the following Monday is regarded as a public holiday. The public holidays are:

- 1 January - New Year's Day

- 21 March - Human Rights Day
- Variable - Good Friday
- Variable - Family Day
- 27 April - Freedom Day
- 1 May - Workers' Day
- 16 June - Youth Day
- 9 August - National Women's Day
- 24 September - Heritage Day
- 16 December - Day of Reconciliation
- 25 December - Christmas Day
- 26 December - Day of Goodwill

Shift spread over a public holiday and another day: If a shift worked by an employee falls on a public holiday (e.g.Tuesday) and another day (e.g. Wednesday), the whole shift is regarded as being worked on the public holiday (e.g. Tuesday) if the majority of the hours worked, falls on the Tuesday. But if the bigger portion of the shift was worked on the other day (e.g. Wednesday), the whole shift is regarded as being worked on the other day (e.g. Wednesday).

Night shifts on public holidays: With night shift employees, part of the work may be done on an ordinary day and part on a public holiday (after midnight). The whole shift will be regarded as worked on the public holiday, except if the hours worked before midnight are greater than the hours worked after midnight.

Exchanging a public holiday for another day: This can only be done by agreement with the employee. The permission to exchange is not regulated in the BCEA but rather in the *Public Holidays Act*, and, therefore, has nothing to do with the payment for the public holiday. The Public Holidays Act states that, by agreement with the employee, a public holiday may be exchanged for another day.

NIGHT WORK

Night work after 6 p.m. and before 6 a.m. is voluntary. employees must be paid an extra 'night work allowance' or have their normal working hours reduced. Transport must be available for the employees to get from their homes to work and back. The law is unclear as to who must 'provide or pay' for such transport, but at least there must be transport available so that the employee can get home at late or early hours.

Health and safety requirements for night work

In terms of s17(3) of BCEA, an employer who wants an employee to work regularly after 23:00 and before 06:00 the next day must do the following:

- Inform the employee in writing or verbally (if the employee can't read) in a language that the employee understands of any health and safety hazards linked to the night work
- Inform the employee of their right to have a medical examination
- If the employee asks for a medical examination, this must be done before the employee starts the shift or within a reasonable time of starting the shift. Medical examinations should continue at appropriate intervals while the employee is doing this work
- The employer should transfer the employee to a suitable day shift within a reasonable time if the employee suffers from health conditions associated with working night work and if it is practical for the employee to be transferred to day work

FLEXIBILITY IN WORKING HOURS

The BCEA allows for some flexibility in the arrangement of working hours by agreement between the employer and employees (collective agreement) or one employee (individual agreement):

- **Compressed working week by collective or individual agreement:** Employees can work up to 12 hours of normal work on any day without receiving overtime pay. But, the employees may still not work more than 45 normal hours per week and may not work more than 5 days in a week. Any time worked beyond 45 hours in the week as part of a Compressed Working Week, should be paid at overtime rates of time-and-a-half.
- **Averaging of working hours by collective agreement only:** Averaging means employees can agree to work longer normal daily working hours than the BCEA usually allows if they get the same number of extra hours worked, off at a later time. This would for example mean that employees could agree to work longer hours in one week for normal pay if they work reduced hours for normal pay the following week. However, the employees may still not work more than an average of 45 ordinary hours per week during this period of up to four months. The agreement cannot go on for longer than 4 months. Where reference is made to a collective agreement, then this agreement should be made through the employees' trade union.

WORKING SHORT-TIME

Short-time means a temporary reduction in the number of ordinary hours of work owing to operational reasons such as reduced orders or profits. An employee is classified as being on short-time if the following applies:

- It is for a temporary period and there is only a limited amount of work available for an employee
- The employee still has a contract of employment with their employer
- The employee expects to return to full-time employment with the same employer

Short-time is an alternative to retrenchment. If for some reason there is less work available but the same number of employees to do it, short-time means that the work can be shared equally amongst employees.

Short-time cannot be imposed unilaterally by the employer because it means changes will be made to employees' working hours and remuneration. The employer must notify and consult with employees or union representatives before introducing short-time. This consultation must be undertaken as part of a Section 189 (Retrenchment) consultation process and is normally introduced for a temporary period, as an alternative to retrenchment.

Provision for short-time may also be included in the contracts of employment or a collective agreement if it is a custom and practice of the company to do so and employees are aware of this and agree to it.

Short-time has always been regarded as a temporary measure, such as work being reduced to three days a week for a limited period, with the understanding that normal hours of work will resume in the near future.

How are employees selected to work short-time?

When an employer selects employees for short-time work, they should apply the same criteria as they would for retrenchment. For example, this could be the *Last in First Out* principle or a combination of skills depending on operational needs. The criteria used for short-time should be reasonable and applied in a fair manner and should not discriminate against employees on grounds included in the *Employment Equity Act*. Employers should explain to the affected employees the reason for the short-time and also keep them informed of the situation during the time they are working short-time. Short-time may also be introduced as an outcome of a retrenchment consultation process.

How are employees paid if they are on short-time?

Employees only get paid for the time worked. Ordinary deductions may be aligned to the change in payment. Where employees belong to a pension fund, the employer should engage with the fund in order not to prejudice the future of the employee's contribution and benefits. Deductions should be made with the written consent of the employee.

Can employees claim UIF while on short-time?

Employees can claim unemployment benefits based on receiving a reduced income due to short-time. They will not qualify for the full payout of UIF benefits but a portion of this depending on the extent of the short-time.

PAYMENT IN KIND

Wages can be paid partly in kind if the law provides for this. Payment in kind means that an employer pays an employee their wage by giving them housing, use of land or food, as well as money.

However, this can only be done if the Minister of Employment and Labour decides that payment in kind should apply to a certain sector. The Minister will also decide what formula to use to determine the value of the payment in kind.

In the event of a strike, an employer may not withhold payment in kind and is obligated to ensure its continuation. An employer should then claim back from the employees after agreement has been reached. The Labour Court may be approached in the event of a dispute.

DEDUCTIONS

Deductions from wages (other than those required by law) are not permitted without the written consent of the employee.

The **deductions required by law** that an employer makes from the wages of an employee are as follows:

- Unemployment Insurance Fund (UIF)
- PAYE (tax)
- Any deduction ordered by a court

The **lawful deductions** that an employer can make from the wages of an employee, if the employee instructs the employer in writing to make the deduction, are as follows:

- Trade union subscriptions

- Medical aid contributions
- Pension or provident fund
- Money to pay back a housing loan or other loan from the employer - The maximum amount that can be deducted to pay the employer for accommodation, food or transport should not exceed 10% of an employee's wages
- Money for food and accommodation - The maximum amount that can be deducted from an employee's wage for accommodation is 10% of their wages; and 10% of their wages for food.

Deductions can be made up to 25% of the employee's wage for loss or damages suffered at work as a result of the employee's negligence or misconduct, provided the employee has been given a hearing to explain the facts and has agreed in writing to the deduction. (Section 34 of the BCEA)

Often, employers also make **unlawful deductions** from employees' wages. Examples are when:

- The employer says there were shortages in a till and the employee has to pay back the shortages
- The employee breaks something at work
- The employee owes the employer money but did not agree that the amount owing should be deducted
- The employee is off sick and the employer deducts money for the days not worked

If an employer wants to deduct a fine from an employee's wage, to compensate the employer for loss or damage, the employer can only deduct the fine if:

- The loss/damage happened during the 'course and scope of employment'
- The employee was at fault
- A fair hearing was held to give the employee a chance to state their case
- The employer does not deduct more than the actual value of the loss or damage
- The total amount deducted is no more than 25% of the employee's wages
- The employee gives consent in writing ***(See pg 416: Problem 1: Money is deducted from an employee's wages)***

DAILY AND WEEKLY REST PERIODS

- No employee's hours of work may be spread over more than 12 hours per day. ('Spread over' means from the start of work to the end of work, including any breaks for meals or rest and any overtime.)

- A rest period of 1 hour is required after every 5 hours worked. This can be reduced to 30 minutes if the employee and employer agree in writing
- Every employee is entitled to a daily rest period of 12 hours from the end of work on one day to the start of work on the following day. This rest period can be reduced to 10 hours if an employee lives on the premises and gets a meal break of at least 3 hours (this may be relevant to domestic employees, caretakers, farm workers, and so on)
- Every employee is entitled to a weekly rest period of 36 continuous hours. For many employees, this is over the weekend
- An agreement in writing between the employer and employee may reduce the meal interval to not less than 30 minutes or do away with a meal interval if the employee works less than 6 hours on a day

The agreement can also provide for a rest period of at least 60 consecutive hours (hours in a row) every two weeks.

The BCEA makes no provision for tea intervals although it is common for the employer to grant one or two tea intervals per shift. These intervals are normally deemed to be 'paid time.'

LEAVE

Leave can be annual (yearly) leave, sick leave, maternity leave, parental leave, commissioning parental leave, adoption leave, family responsibility leave, or unpaid leave.

ANNUAL LEAVE

- Every employee is entitled to 21 consecutive days paid leave per year. This is the equivalent of three weeks off, and for the employee who works 'a five-day week,' this leave amounts to fifteen working days. An employee who normally works six days every week is entitled to eighteen working days leave, which is also twenty-one consecutive days of leave.
- The employee is entitled to take 21 days all in one go but can choose to use the annual leave to take occasional days off work. The employer then deducts these days of occasional leave that an employee took during the year from the annual leave days.
- Annual leave must be taken within 6 months of the end of an annual leave cycle (a year's work).
- If the employee is off work on any other kind of leave, these days do not count as part of annual leave. Another way of saying this is that annual leave cannot be taken at the same time as sick leave, family responsibility leave or maternity leave.

- If the leave period covers a public holiday, then the public holiday does not count as part of the employee's leave and the employee should be given an extra day's leave. (Paid public holidays are: 1 January New Year's Day, 21 March Human Rights Day, Good Friday, Family Day, 27 April Freedom Day, 1 May Employees' Day, 16 June Youth Day, 9 August National Women's Day, 24 September Heritage Day, 16 December Day of Reconciliation, 25 December Christmas Day, 26 December Day of Goodwill.)
- Annual leave cannot be taken at the same time as the notice period
- Leave pay is not a bonus on top of normal pay. It simply means that an employee gets a holiday every year, and gets normal pay for those days. If an employee doesn't take leave, or all the leave, the employer will not pay out leave pay instead of leave unless specified through agreement.
- If an employee leaves a job without having taken all the leave that is due to them, the employee must be paid for the days of leave that they have not taken unless this has been specified in the contract of employment or company policy. This is called pro-rata accrued annual leave pay. **(See pg 417: *Problem 2: Employee wants to claim notice pay and leave pay*)**

SICK LEAVE

- A permanent employee is entitled to paid sick leave of 30 days over any 3-year cycle (36 days if the employee works a 6-day week). This amounts to a 6-week period over 3 years and may not be broken down into two weeks per year. During the first 6 months that an employee works for an employer, they get 1 day paid sick leave for every 26 days worked. Once all these paid sick leave days are used up, the employer does not have to pay the employee when they are off sick.
- Only an employee who works more than 24 hours during any month earns sick leave, and this is on the basis of one day's leave for every 26 days worked.
- Seasonal or temporary employees are entitled to 1 day's sick leave for every 26 days worked over the first 6-month cycle.
- Employees who are sick for more than 2 days or are sick on two separate occasions within an 8-week cycle may be required to produce a doctor's certificate. If an employee lives on the premises and it is difficult for him/her to get to a doctor (for example, in rural areas), the employee does not have to produce a certificate unless the employer gives the employee reasonable assistance to get the certificate.
- Sick leave pay is not a bonus on top of normal pay. It simply means that if an employee is genuinely sick and has to take time off work, the employer must pay the employee up to a certain number of days. For example, if a waitress

in a restaurant only takes 3 days sick leave this year, the employer does not owe her the money for the remaining sick leave days at the end of the year.

PARENTAL LEAVE

An employee who is a parent of a child but who is not the primary carer is entitled to 10 consecutive days' parental leave following the birth of their child. For example, if a child is born on a Tuesday, the parent may take leave from that Tuesday until the following Thursday. This leave applies regardless of gender, so it includes parents in same-sex relationships. Parental leave is unpaid (like maternity leave), but employees can claim benefits from the UIF if they have been employed for at least 13 weeks before claiming the benefit.

COMMISSIONING PARENTAL LEAVE

This type of leave refers to surrogate motherhood. The commissioning parent who will primarily be responsible for looking after the child (primary commissioning parent), will be entitled to commissioning parental leave. If there are two commissioning parents, they can choose: if one takes commissioning parental leave, the other can take normal parental leave. The one who takes commissioning parental leave will be entitled to 10 consecutive weeks' commissioning parental leave. The other parent would be entitled to 10 consecutive days' normal parental leave.

Leave can start on the date of the birth of the child.

This leave is unpaid (like maternity leave), but employees can claim benefits from the UIF if they have been employed for at least 13 weeks.

FAMILY RESPONSIBILITY LEAVE

Every employee with more than 4 months of service with an employer, and who works more than 4 days a week, is entitled to 3 days paid family responsibility leave per year. This can be taken if a direct family member dies, (this includes a wife or husband or a life partner, the employee's parent, child, adopted child, grandchild or brother or sister) or if the child is ill. A total of three days is allocated for this kind of leave and not three days for each event.

An employee may break these days up, e.g an employee may take half a day off to attend to a child that may be sick at school. Additionally, family responsibility leave allowance lapses at the end of the financial year and is not automatically carried over.

MATERNITY LEAVE

This period of maternity leave is unpaid, and the employee can, if she wishes, go on maternity leave four weeks before the expected date of birth, and stay off work for up to another three months after the child is born.

Maternity Leave is unpaid, though the mother is entitled to claim Maternity Benefits from UIF for up to four months of such leave, subject to the employee having worked for thirteen weeks.

ADOPTION LEAVE

This leave applies to the adoption of a child that is below the age of two. A single adoptive parent is entitled to 10 consecutive weeks' adoption leave. If there are two adoptive parents, only one would be entitled to 10 consecutive weeks' adoption leave. However, the other adoptive parent would be entitled to 10 consecutive days of normal parental leave. It is up to the adoptive parents to decide who takes adoption leave and who takes parental leave.

Leave can start on the day that the adoption order is granted, or the day that a competent court places the child in the care of a prospective adoptive parent.

This leave is unpaid (like maternity leave) but employees can claim benefits from the UIF if they have been employed for at least 13 weeks.

Any leave taken by a mother due to the illness of the baby, following soon after its birth, will be considered maternity leave rather than family responsibility leave.

If the mother wants to come back to work earlier than six weeks after her child has been born, she can do this, provided a doctor has given a certificate saying that this is safe for the mother to do. ***(See pg 387: Maternity benefits)***

UNPAID LEAVE

An employer may agree to let an employee take extra days of annual leave, or the employee may be sick for longer than the paid sick leave. Then the employer does not have to pay the employee for these days and this is known as Unpaid Leave.

ABSENT WITHOUT LEAVE

If an employee takes leave without getting permission from the employer and is not sick, the employer does not have to pay the employee for the time taken off. If the employee takes off many days in a row without permission

and without communicating with the employer (normally more than 4 consecutive days), the employer may presume that the employee has deserted (left without giving notice) their employment. The employer will be entitled to hold a hearing and consider the dismissal of the employee who has deserted employment and after this they may employ someone else to do the job.

In this case the employer may dismiss the employee and will not be required to give the employee notice. But if the employee returns, they will have to indicate why they did not communicate with the employer during the extended period of absence and to provide proof of a valid reason for the prolonged absence. The employer will need to consider these facts.

Employers should, in cases of extended absenteeism, always attempt to genuinely contact the employee, should always hold a disciplinary hearing in their absence and should focus the need of replacement on a business imperative based on objectifiable facts.

NOTICE

- During the first six months of employment, employees will be entitled to at least 1 week's notice of the termination of their services
- After the first six months, but during the first year of employment, employees will be entitled to 2 week's notice
- If they have worked for more than one year, employees are entitled to 4 week's notice
- If an employment contract has a longer period of notice than the BCEA, the longer notice must be given and it must be the same for both the employee and the employer
- Notice works both ways! If an employee resigns without giving the employer the correct amount of notice, for example, one week, the employer can claim one week's pay from the employee. ***(See pg 360: Dismissals)***
- Notice must be in writing, which will include written communication via social media, such as Whatsapp
- Neither the employer nor the employee can give notice while the employee is on annual leave.
- Farm workers and domestic workers who have been employed for more than 6 months are entitled to 4 weeks' notice ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***

All employees are entitled to a written **certificate of service** when the employee stops working for that employer. The certificate of service sets out the full name of the employer and the employee, the job/s that the employee was doing, the date

that the employee began working, the date that the work ended, and the wage at the time that the job ended, including payment in kind.

WRITTEN PARTICULARS IN A CONTRACT OF EMPLOYMENT AND PAYSLIPS

Except for **employees who work less than 24 hours a month**, when the job starts, the employer must give the employee **written particulars** about the job, including:

- A description of the job
- The hours that the employee will be expected to work
- Ordinary and overtime rates of payment, including payment in kind and its value
- Any deductions to be made
- How much leave the employee will get
- The notice period

This document is like a contract of employment, but the employee doesn't have to sign it. If an employee can't read, the particulars must be explained in a language the employee understands.

The BCEA says an employer must hand the employee their wages with certain details on a payslip, including:

- The period for which the employee is being paid
- The number of overtime hours worked
- The number of hours worked on a Sunday or public holiday
- The wages due to the employee (both normal and overtime)
- The amount and reason for any deductions made for tax, pension, UIF and so on
- The actual amount paid

The BCEA says the employers must keep the following records:

- The time worked by each employee
- The wages paid to each employee

The BCEA (Sections 28 and 29) says an employer who employs less than 5 employees does not have to give the employee detailed information about their wages when they are paid.

PROHIBITION OF VICTIMISATION AND EXPLOITATION

An employer may not victimise or discriminate against, an employee who refuses to do something that is against the BCEA. For example, if an employee says she cannot work overtime because her baby is sick at home, the employer cannot dismiss her,

because the BCEA says that an employer cannot make an employee work overtime without the employee's consent.

PREGNANCY IN THE WORKPLACE

The Code of Practice on the Protection of Employees During Pregnancy and After the Birth of a Child was issued under Section 87(1) (B) of the BCEA.

Many women work during pregnancy, some even working right up until they give birth and returning while breastfeeding their children. The purpose of this Code is to provide guidelines to both employers and employees on the possible hazards and the steps that should be taken to protect the working environment and the health of a pregnant employee, after birth and during breastfeeding.

The provisions in the BCEA on Parental Leave entitle a mother to take up to four months maternity leave and to claim maternity benefits from UIF. A mother is prevented from returning to resume work after giving birth to her child for a period of six weeks after the child's birth, unless she has a medical certificate from a medical practitioner authorising the early return to work.

S26(1) of the BCEA prohibits employers from requiring pregnant mothers and breastfeeding mothers to perform work which is hazardous to the mother and the child. Each workplace is different with respect to the chemical and biological hazards that may affect them. Employers should take the following steps to protect pregnant and breastfeeding women in the workplace:

- Not allow them to perform work that is hazardous to her health and the health of the unborn child
- Assess and control any risks
- Identify, record and review potential risks and protective measures to put in place at work
- List alternative risk-free jobs
- Advise employees to notify them when they are pregnant and inform them of hazards linked to the job
- Encourage employees to notify them immediately they know they are pregnant so that the employer can identify risks and take preventative measures
- Keep a record of each pregnancy
- Evaluate the employee's position in the workplace, including a medical doctor's examination of the employee's physical condition, the job done by the employee; workplace practices and potential workplace exposures that may affect them

- If there are potential risks, find ways to reduce the exposure and provide training to the employee on how to prevent any exposure to hazards
- Make adjustments to the employee's station if required and, if possible, or transfer the employee to safe alternative work
- Allow employees to attend ante and post-natal classes
- Allow breastfeeding mothers to breastfeed for 30 minutes twice per day or express milk daily for the first 6 months of the child being born

Minimum wages

The *National Minimum Wage Act* (NMWA) provides for a minimum wage for all employees except members of the South African Defense Force, The National Intelligence Agency and the South African Secret Service. The NMWA does not apply to a volunteer who performs work for another person and who is not paid for their services.

The national minimum wage is reviewed at regular intervals, often annually, by the National Minimum Wage Commission, which makes recommendations to the Minister of Employment and Labour regarding any adjustments to the national minimum wage.

Any increase to the minimum wage normally applies from the 1st of March every year.

Summary of provisions in the National Minimum Wage Act (NMWA)

WHAT IS THE MINIMUM WAGE?

The current minimum wage is R28.79 per hour and is reviewed at different times. The same minimum wage applies equally to farm employees and domestic employees whether they are working in an urban or rural area and includes a gardener, driver for a household, or caretaker of children, disabled or elderly.

Employees on an expanded public works programme are entitled to a minimum wage of R15.83 per hour (a programme providing public or community services through a labour-intensive programme and which is funded by public resources).

The prescribed minimum wages do not include benefits such as transport, meals, accommodation allowances and so on, unless the Minister makes a determination that these benefits may be included for a specific group of employees.

MINIMUM WAGES IN DIFFERENT SECTORS

Sectoral Determination 9 (SD9): Wholesale and Retail Sector - this provides its own regulation on minimum wages and depends on the job category. The lowest minimum wage for the Wholesale and Retail Sector is R28.79 per hour.

Sectoral Determination 1 (SD1): Contract Cleaning Sector – provides a minimum rate of R31.69 in metropolitan areas and R28.79 in certain rural areas.

Learnership programmes - The NMWA provides minimum wages relating to employees who are part of a learnership programme. However, the minimum wage is determined per week and depends on the number of credits already earned by the learner

CAN AN EMPLOYER REDUCE A SALARY TO THE MINIMUM WAGE?

If an employment agreement already exists between an employer and employee and provides for a salary higher than the prescribed minimum wage, the employer cannot unilaterally reduce this. On the other hand, if the employment contract provides for less than the prescribed minimum wage, the employer must increase the employee's salary to be in line with the minimum wage.

It is an unfair labour practice for an employer to unilaterally change an employee's hours of work or other conditions of employment in implementing the national minimum wage.

Enforcement and dealing with disputes about minimum wages

Disputes around minimum wages can be referred to the CCMA or the Department of Employment and Labour. A dispute cannot be referred to both. This only applies to employees who earn below the BCEA earning threshold of R261 748 per year or R21 812 per month. Employees who earn above the threshold can claim in either the Labour Court, High Court, Magistrates Court or Small Claims Court, depending on the jurisdictional requirements for each of these courts.

REFERRING THE DISPUTE TO THE CCMA:

The BCEA provides that any employee (defined in S1 of the BCEA or S1 of the NMWA) may refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically go to arbitration on the same day. No legal representation is allowed in these disputes. This process involves

sending the CCMA Referral of Dispute Form 7:11 to the employer and then the CCMA and ticking Section 73A under 'Nature of Dispute.'

This provision only applies to employees who earn below the BCEA earning threshold of R261 748 per year or R21 812 per month. Employees who earn above the threshold can claim in either the Labour Court, High Court, Magistrates Court or Small Claims Court depending on the jurisdictional requirements for each of these courts.

REFERRING THE DISPUTE TO THE DEPARTMENT OF EMPLOYMENT AND LABOUR:

A dispute regarding minimum wages can also be referred to the Department of Employment and Labour. Inspectors can get a written undertaking from employers to pay the minimum wage or they can issue compliance orders to employers for non-enforcement instructing them to pay the minimum wage. Both the compliance orders and written undertakings may be made into arbitration awards by the CCMA. If the award is not complied with, the employee can apply to the CCMA to certify the award and it may be enforced as if it were an order of the Labour Court.

An employee can refer a dispute about minimum wages to either the CCMA or the Department of Employment and Labour but not to both.

PENALTIES FOR FAILING TO COMPLY WITH THE NATIONAL MINIMUM WAGE ACT

An employer may be issued with a fine if an employee is paid less than the prescribed minimum wage. This fine may be either one of the following (whichever is the higher amount):

- Twice the value of the amount the employee is paid below the prescribed minimum wage. For example, an employer pays an employee R5 less than the prescribed minimum wage. This means that the fine will be twice that amount, which is R10.
- Twice the employee's monthly wage. For example, if an employee earns R900 per month, the fine can be R1 800.

EXEMPTIONS FROM PAYING THE MINIMUM WAGE

NMWA provides for an employer to apply for exemption from paying the national minimum wage.

Collective agreements

Collective bargaining is where employees, normally represented by a trade union and employer/s negotiate with each other about terms and conditions of employment to reach a collective agreement. The collective agreement may have different conditions to those in the *Basic Conditions of Employment Act* (BCEA).

A collective agreement overrides any individual contract of employment. Collective agreements can be of two kinds:

- The BCEA allows variation of certain specified conditions in the BCEA through collective bargaining between a group of employees represented by a registered union working for the same employer (usually at one workplace) and the employer
- The *Labour Relations Act* allows centralised collective bargaining between groups of employees in the same industry or sector and employers in that industry or sector. They draw up a Bargaining Council Agreement, which businesses covered by that agreement in that sector have to follow
- The Act also allows for a Collective Agreement to be entered into within an organisation between a registered trade union and the employer

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Workplace-based collective agreements

A group of employees working for the same employer who join a Trade Union (usually at one workplace) and the employer, negotiates and makes a collective agreement. The collective agreement covers terms and conditions of employment for employees working for that employer.

The BCEA says what things employees and employers are free to make collective agreements about. For example, employees and their employer cannot collectively agree that child labour will be allowed. Certain core rights can only be altered if they are deemed to be more favourable than what the law allows. These include normal working hours (45 hours) maternity leave, night work provisions etc.

A workplace-based agreement may have different conditions to those in the BCEA, as long as they are more favourable to the employee than the BCEA. The BCEA sets out the minimum conditions of employment. If an agreement breaks any part of the BCEA, it is not enforceable and the BCEA conditions override the conditions in the agreement.

If the collective agreement does not cover certain terms and conditions of employment, then those terms and conditions in the BCEA apply to the employees.

Notice to terminate a collective agreement must be given in writing. Employers should always be wary about terminating collective agreements as this may be deemed under law to be a unilateral alteration of a working condition which is considered an unfair labour practice.

A collective agreement can be made mandatory and applicable for all employees in a bargaining unit (in other words, non-union members) if the registered trade union is a majority union and the agreement specifies those employees to be covered by such agreement.

ENFORCEMENT OF A WORKPLACE-BASED COLLECTIVE AGREEMENT

> If you are helping an employee with a problem which is covered by a collective agreement under the BCEA, then you refer the problem to the CCMA or Bargaining Council if you have failed to solve the problem with the employer on your own. If there is disagreement over an interpretation of a collective agreement or how it is being applied, then this can also be referred to the CCMA or appropriate bargaining council for conciliation and final arbitration in terms of Section 24 of the *Labour Relations Act.*

Bargaining Council Agreements

A Bargaining Council Agreement is the outcome of centralised collective bargaining under the *Labour Relations* Act (LRA).

A Bargaining Council Agreement sets out terms and conditions of employment for a particular industry in a particular area. The conditions in the collective agreement may be better for employees than those in the *Basic Conditions of Employment Act* (BCEA), or employees may agree to conditions less favourable than the BCEA provided they do not affect certain core rights and the agreement is better for the employees concerned. ***(See Section 49 of the BCEA)***

HOW ARE BARGAINING COUNCIL AGREEMENTS MADE?

> Bargaining Councils are permanent structures. They are made up of representatives of employers on the one hand and of trade unions on the other. The LRA sets out conditions for setting up Bargaining Councils. The two parties to a Bargaining Council negotiate together to make a Bargaining Council Agreement, which is reported in the Government Gazette.

A Bargaining Council may ask the Minister of Employment and Labour in writing to extend a collective agreement to any non-parties to the agreement, who are within the 'scope' of the council.

If there is no Bargaining Council in a sector, unions or employer organisations can apply to establish a Statutory Council under the LRA. For a Statutory Council to be introduced, the unions in that sector must represent 30% or more of employees in the sector, and the employers' organisation must represent 30% or more of employers in the sector. Statutory Councils can negotiate education and training, benefit funds and dispute resolution in the sector. In Statutory Councils, employers are not forced to negotiate over wages and conditions of employment.

A Statutory Council may become a Bargaining Council later. At present, only three Statutory Councils have been created: they are the Statutory Council of the Printing, Newspaper and Packaging Industry of South Africa; the Statutory Council for the Fast Food, Restaurant, Catering and Allied Trades (SCFFRCAT) and the Statutory Council for the Squid and Related Fisheries of South Africa.

ENFORCEMENT OF A BARGAINING COUNCIL AGREEMENT

It is an offence for employers or employees working in a particular industry and are not to obey the terms of the Bargaining Council Agreement. Any problems with any of the working conditions in the Agreement must be referred to the Bargaining Council for investigation. The Bargaining Council's agents have powers of inspection similar to Labour Inspectors in terms of the BCEA. Such agents can provide Compliance Orders where employers are in breach of the council agreement. ***(See pg 418: Problem 3: Employee is paid below the minimum wage)***

SETTLING DISPUTES UNDER A BARGAINING COUNCIL

The Bargaining Council also plays a role in settling disputes, such as unfair labour practices or unfair dismissals in a particular industry. Disputes must be referred to the relevant Bargaining Council for conciliation if a Bargaining Council exists in the sector. The Council appoints conciliators to act as conciliators to try to help the two parties negotiate a solution. If the conciliation does not resolve the dispute, either of the parties may refer the matter for arbitration to the Bargaining Council, which has its own accredited arbitrators. The Bargaining Council dispute resolution procedure is similar to the CCMA dispute resolution procedure. A Bargaining Council or CCMA Arbitrator may make an award ordering the employer to pay unpaid annual leave for example, an amount owing, or make an appropriate award. ***(See pg 370: Solving disputes under the LRA)***

Sectoral determinations

A sectoral determination controls the terms and conditions of employment for employees in a particular sector. It may set minimum wages in sectors, regulate payment in kind, regulate pension and medical aid schemes, prohibit or regulate piecework, set minimum standards for housing for employees who live on the employer's premises, and so on. Sectoral determinations will be set in sectors where there is no centralised collective bargaining and which require detailed and specific regulations (e.g. the agricultural sector). Sectoral determinations may have different conditions to those in the Basic Conditions of Employment Act (BCEA). The conditions in the Sectoral Determinations will override the conditions in the BCEA.

How are Sectoral Determinations made?

The Basic Conditions of Employment Act (BCEA) provides for the establishment of an Employment Conditions Commission, which investigates conditions in a particular industry or sector. Meetings are held to discuss the establishment of a sectoral determination. Anyone interested in having a say in a particular industry can attend these meetings which are advertised in the government gazette.

When the Employment Conditions Commission has heard all the information, it makes recommendations to the Minister of Employment and Labour. Once the minister approves the recommendations, they are published in the Government Gazette as a wage determination or sectoral determination.

Enforcement of a Sectoral Determination

It is the Department of Employment and Labour's job to make sure that all employers and employees obey the conditions of employment laid out in sectoral determinations and wage determinations. If you are helping an employee who is covered by a sectoral determination or wage determination, you may refer a breach to the CCMA in terms of Section 73A of the BCEA or refer the problem to the Department of Employment and Labour if you have tried and cannot solve the problem with the employer on your own. ***(See pg 317: Problem 3: Employee is paid below the minimum wage)***

Alternatively, a breach of the Sectoral Determination could be referred to the CCMA as part of an Unfair Dismissal claim made at the CCMA or can be referred to the CCMA in terms of

Section 73A(1) for payment to be made. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

Settling disputes under a Sectoral Determination

It is the Department of Employment and Labour's job to help with settling of disputes.

Summary of the Sectoral Determination for Farm Workers

The employment conditions of farm workers are regulated by Sectoral Determination 13(SD13) and the *Labour Relations Act* (LRA). This is a summary of the provisions contained in SD13.

(See the website: www.labour.gov.za; click on Sectoral Determination 13 for the full version).

NOTICE PERIOD AND TERMINATION OF EMPLOYMENT

Any party to an employment contract must give written notice, except when an illiterate employee gives it, as follows:

- One week – if employed for 6 months or less
- Four weeks – if employed for more than 6 months

Notice must be explained verbally by or on behalf of the employer to a farm worker if they are not able to understand it. If the farm worker lives in accommodation provided by the employer, then the employer must give him/her one month's notice to leave the accommodation or allow the employee to remain in the home until the contract of employment ends.

The farm worker is allowed to keep livestock on the premises for a period of one month or until the contract of employment could lawfully have been terminated. The farm worker who has standing crops on the land is allowed to tend to those crops, harvest and remove them within a reasonable time after they become ready for harvesting unless the employer pays the farm worker an agreed amount for the crops.

All money that is owed to the farm worker, for example, wages, allowances, pro rata leave, paid time-off not taken, and so on, must be paid to the employee if the employee leaves the farm.

PROCEDURE FOR TERMINATING EMPLOYMENT

A farm worker's contract of employment may not be terminated unless a valid and fair reason exists and a fair procedure is followed. If an employee is dismissed without a valid reason or without a fair procedure, the employee can refer the case to the CCMA. This should be done within thirty days of being dismissed from the farm.

If a farm worker cannot return to work because of a disability, the employer must investigate the nature of the disability and decide whether or not it is permanent or temporary. The employer must try to change or adapt the duties of the employee to accommodate the employee as far as possible. But, if it is not possible for the employer to change or adapt the duties of the farm worker then the employer can terminate their services for what is called "Incapacity."

The *Labour Relations Act* sets out the procedures that must be followed when a person's services are terminated.

WAGE/REMUNERATION/PAYMENT

All farmers have to pay their employees a minimum wage. Wage rates are normally adjusted every year.

The current minimum wage is R28.79 per hour.

Farmers who can prove that they cannot afford the minimum wage can apply to the Department of Employment and Labour for a variation or exemption from this requirement. The Department will consider variations only where the farmer can give good financial reasons for this.

Additional payments (such as for overtime or work on Sundays or Public holidays) are calculated from the total remuneration.

TRANSPORT ALLOWANCE

The Sectoral Determination does not regulate transport, so it is open to negotiation between the parties. However, the allowance cannot exceed 10% of the employee's remuneration.

HOURS OF WORK

NORMAL HOURS (EXCLUDING OVERTIME)

A farm worker cannot work more than:

- 45 hours per week
- 9 hours per day for a five-day work week
- 8 hours a day for a six-day work week

EXTENSION OF ORDINARY HOURS OF WORK

Ordinary hours of work can be extended by written agreement but by no more than 5 hours per week for a period of up to four months. The ordinary hours of work should be reduced by the same number of hours during a quiet period in the same twelve-month period. A

Averaging of working hours during season time

Averaging means employees can collectively agree to work shorter or longer hours than the Sectoral Determination allows. Any agreement to work longer hours means employees must get the same number of extra hours off at a later time.

Any agreement regarding longer or shorter working hours must be in writing and should be done with the support of a trade union where possible.

Farm workers can agree to work up to 50 hours a week for their ordinary wages but this can only go on for four months. However, if the parties want to extend this arrangement, they can agree in writing to do this and they must then notify the Department of Employment and Labour of this agreement so that a 'Variation Order' is made by the Department of Employment and Labour. In return, normal working hours must be reduced by the same amount (in other words to 40 hours) during the quiet periods.

The employer must pay the farm worker the wage they would have received for their normal hours worked. If hours have been extended and not reduced at a later stage, then the hours must be paid as overtime.

OVERTIME

A farm worker may not work more than:

- 15 hours of overtime per week, and
- 12 hours spread over any day, including overtime

Overtime is paid at one and a half times the employee's normal wage or an employee may agree to take paid time off on the basis of one and a half hours off for every overtime hour worked.

DAILY AND WEEKLY REST PERIODS

A farm worker is entitled to a daily rest period of 12 consecutive hours (hours in a row) and a weekly rest period of 36 consecutive hours, which must include Sunday, unless otherwise agreed.

The daily rest period can be reduced to 10 hours if the parties agree and if the employee lives on the premises and takes a meal interval that lasts for at least 3 hours.

The weekly rest period can by agreement, be extended to 60 consecutive hours every two weeks or be reduced to 8 hours in any week if the rest period in the following week is also extended.

NIGHT WORK

- Night work means work performed after 8 p.m. and before 4. a.m.
- Night work can only happen if the farm worker has agreed to this in writing. The employee must be compensated for night work by an allowance of at least 10% of the ordinary daily wage.

MEAL INTERVALS

A farm worker is entitled to a one-hour break for a meal after five hours work of continuous work. The interval may be reduced to 30 minutes by agreement. When a second meal interval is required because of overtime worked, it may be reduced to not less than 15 minutes. If an employee has to work through their meal interval, then they must be paid for this.

WORK ON SUNDAYS

Farm workers should be paid for work on Sundays as follows:

- One hour or less: Double the wage for one hour
- Longer than one hour but less than 2 hours: Double the wage
- Longer than two hours but less than 5 hours: The normal daily wage
- Longer than 5 hours: Either:
    - Double the wage for the hours worked, or
    - Double the daily wage, whichever is greater

A farm worker who does not live on the farm and works on a Sunday must be regarded as having worked at least two hours on that day.

PUBLIC HOLIDAYS

Farm workers are entitled to all the public holidays in the *Public Holidays Act*, but the parties can agree to other public holidays. Work on a public holiday is voluntary which means a farm worker may not be forced to work.

The official public holidays are: New Years Day, Human Rights Day, Good Friday, Family Day, Freedom Day, Employees Day, Youth Day, National Woman's Day, Heritage Day, Day of Reconciliation, Christmas Day, Day of Goodwill.

Where the government declares an official public holiday at any other time then this must be granted. The days can be exchanged for any other day by agreement.

If the employee works on a public holiday, which would ordinarily have been a normal working day, they must be paid double the normal daily wage. If on a Saturday, then they must be paid the normal daily wage plus the normal hourly rate for each hour worked on that public holiday.

ANNUAL LEAVE

Full-time farm workers are entitled to 3 weeks leave per year. If the parties agree, they can take leave as follows: 1 day for every 17 days worked or one hour for every 17 hours worked.

The leave must be given not later than 6 months after completing 12 months of employment with the same employer. The leave may not be given at the same time as sick leave, nor at the same time as a period of notice to terminate work.

SICK LEAVE

During the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.

During a sick leave cycle of 36 months, an employee is entitled to paid sick leave that is equal to the number of days the employee would normally work during a period of 6 weeks.

The employer does not have to pay an employee if the employee has been absent from work and does not produce a medical certificate stating that they were too sick or injured to work:

- For more than two days in a row
- On more than two occasions during an 8-week period

MATERNITY LEAVE

A farm worker is entitled to up to 4 consecutive months of maternity leave. The employer does not have to pay the employee for the period for which she is off work due to her pregnancy. However, the parties may agree that the employee will receive part of her whole wage for the time that she is off, and the mother is able to claim from the UIF for maternity leave benefits.

PARENTAL LEAVE

In terms of Section 25A of the BCEA, an employee who is a parent of a child will be entitled to 10 consecutive days' unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born or, if the child is adopted,

the date the adoption order was granted or the adoptive child was placed in the care of the parents, whichever comes first.

The 10 consecutive days of parental leave are calendar days, not working days. An employee must notify the employer in writing of the date on which they intend to start their parental leave and return to work after parental leave. This notification must at least be given 1 month before the birth of the child or whenever it is practical to do so.

An employee who contributes to the UIF may apply for parental benefits from the Department of Employment and Labour.

FAMILY RESPONSIBILITY LEAVE

Employees who have been employed for longer than 4 months and for at least 4 days a week are entitled to take 3 days of paid family responsibility leave during each leave cycle in the following circumstances:

- When the employee's child is sick
- If one of the following people dies:
    - the employee's husband/wife/life partner
    - parent/adoptive parent
    - grandparent
    - child
    - adopted child
    - grandchild
    - brother or sister

Employees need not take a whole day off and can request half days off or any shorter period. Again, the granting of this leave is at the employer's discretion.

ADOPTION LEAVE

Adoption leave applies to the adoption of a child who is below the age of 2 years. A single adoptive parent is entitled to 10 consecutive weeks' unpaid adoption leave. If there are two adoptive parents, only one would be entitled to 10 weeks' adoption leave. However, the other adoptive parent would be entitled to 10 consecutive days of normal parental leave. It is up to the adoptive parents to decide who takes adoption leave and who takes normal parental leave.

Leave starts on the day that the adoption order is granted or the day that a court places the child in the care of an adoptive parent. An employee who contributes to the Unemployment Insurance Fund can apply for adoption benefits from the Department of Employment and Labour.

COMMISSIONING PARENTAL LEAVE

Commissioning parental leave refers to surrogate motherhood. In terms of Section 25© of the BCEA, the parent who will primarily be responsible for looking after the child (primary commissioning parent) will be entitled to 10 consecutive weeks of unpaid commissioning parental leave. If there are two commissioning parents, they can choose: if one parent takes commissioning parental leave, the other can take normal parental leave. The other parent would be entitled to 10 consecutive days' normal unpaid parental leave. An employee who contributes to the UIF may apply for Commissioning Parental benefits from the Department of Employment and Labour.

DEDUCTIONS FROM REMUNERATION

An employer is not allowed to deduct any monies from the employee's wages without their written permission.

Section 8 of SD13 states that an employer may not make any deductions from a farm employee's wages, except:

- A deduction of up to 10% of the employee's wage for food
- A deduction of up to 10% from the employee's wage for accommodation where the farm employee lives
- A deduction of up to 10% to repay a loan made by the employer to the farm employee
- A deduction of an amount which the employee has asked the employer to pay to a third party (for example, a pension fund or medical aid fund)
- A deduction of any amount which the employer is required to make by law or in terms of a court order (such as a garnishee order) or arbitration award

An employer can make a deduction in respect of accommodation and food if:

- The food or accommodation is provided free of charge to the farm employee
- The food or accommodation is provided consistently as part of a condition of employment
- No additional deduction is made by the employer for food, accommodation, water and electricity

So, an employer can deduct 10% for accommodation, 10% for food and 10% for any loan – a maximum of 30%. The employer can deduct an additional 25% of the employee's wages to pay for "loss and damage' but only if the correct procedures have been followed.

Where 10% is deducted for accommodation, no further deductions can be made for electricity.

Communal living - If more than 2 employees live together in accommodation, the maximum deduction that an employer can make is 25% of the minimum wage for an individual employee. For example, if the minimum wage is R4 953, the maximum deduction that can be made in total from the employees is 25% of the minimum wage, which is R1 238 per month. If 3 employees are living together in a hous,e this amounts to R412 per employee per month. This amount should not be higher than 10% of the employee's wage. If an employee is paid the minimum wage of R4 953, then 10% of the employee's wage is R495. The amount of R412 is therefore lower than 10% of the employee's wage and would be a legal deduction for accommodation.

OTHER ISSUES

Other issues that are not dealt with in the Sectoral Determination include:

- Probationary periods
- Right of entry to the employer's premises
- Afternoons/weekends off
- Pension schemes
- Medical aid Training/school fees
- Funeral benefits/saving accounts

These can all be negotiated between the parties and included in the contract of employment

PROHIBITION OF EMPLOYMENT

No one under the age of 15 can be required or permitted to work.

OTHER CONDITIONS OF EMPLOYMENT

There is no provision which prevents other conditions of employment from being included in a contract of employment but any new conditions may not be less favourable than those set by the Sectoral Determination.

GENERAL ADMINISTRATIVE REQUIREMENTS

The Sectoral Determination states that farmers must comply with the following administrative processes:

- Provide employees with a pay slip, which should be kept for a period of 3 years
- Provide employees with an employment contract (*See: www.labour.gov.za for more information*)

NOTE

Farm workers are also covered by the Labour Relations Act, and have a right to belong to unions and to organise with other employees. Union organisers have to negotiate access to the farms with the farmers. If the farmer refuses, the matter can be taken up with the Department of Employment and Labour or the Commission for Conciliation, Mediation and Arbitration.

A union which has signed up approximately 30% of employees in an organisation or a farm, as its members, is entitled to have access to the farm or the establishment to hold meetings and to run union business and to have paid stop orders implemented in respect of that employer. If this is a problem, the matter can be referred to the CCMA in terms of Section 12 of the Labour Relations Act. Also, a thirty per cent representation of a farm entitles the trade union to 'stop order facilities' on the farm in terms of Section 13 of the Labour Relations Act.

EXAMPLE: FARM WORKER CONTRACT OF EMPLOYMENT

Name of employer .....

Address of employer.....

Name of employee .....

1. COMMENCEMENT OF EMPLOYMENT

   Employment started/will start on .....
   and continue until terminated in terms of this contract.

2. PLACE OF WORK .....

3. JOB DESCRIPTION

   Job title: .....
   Duties: .....

4. HOURS OF WORK

   4.1 Normal working hours will be..... hours per week, made up as follows:
   Monday/Tuesday/Wednesday/ Thursday / Friday ..... a.m. to p.m.
   Meal intervals will be from: ..... to.....
   Other breaks: .....
   Saturdays: ..... a.m. to p.m
   Meal intervals will be from: ..... to.....

Other breaks: .....

Sundays:..... a.m. to p.m

Meal intervals will be from:..... to .....

Other breaks: .....

4.2 Hours of work will be extended by not more than 5 hours per week during ..... and reduced by the same hours during .....

4.3 Overtime will be worked as agreed from time to time and will be paid at the rate of one and a half times of the total wage as set out in clause 5.1 and 5.2 of this contract.

5. WAGE

5.1 The employees wage shall be paid either in cash or electronically into a bank account on the last working day of every week/month and shall be: R .....

5.2 The employee shall be entitled to the following allowances/other cash payments in kind:

5.2.1 Accommodation per week/month to the value of R .....

5.2.2 Food per week/month to the value of R .....

5.3 The following deductions are agreed upon: R .....
R .....

5.4 The total value of the above remuneration shall be : R .....
(the total of clauses 5.1 to 5.2.2 – change or delete clauses as needed)

5.5 The employer shall review the employee's salary/wage on or before 1 March of every year.

6. TERMINATION OF EMPLOYMENT

Either party can terminate this agreement with one week's notice during the first six months of employment and with four weeks' notice thereafter. Notice must be given in writing except when it is given by an illiterate employee. In the case where the employee is illiterate notice must be explained orally by or on behalf of the employer.

On giving notice the employer is to provide the employee who resides in accommodation that belongs to the farmer, accommodation for a period of a month. The employer is also obliged to allow the employee who has standing crops on the land a reasonable time to harvest the crop or the farmer may pay the employee an agreed amount for that crop.

7. SUNDAY WORK

Any work on Sunday will be by agreement between parties and will be paid according to the Sectoral Determination.

8. PUBLIC HOLIDAYS

Any work on holidays will be by agreement and will be paid according to the Sectoral Determination.

9. ANNUAL LEAVE

The employee is entitled to three weeks paid leave after every 12 months of

continuous service. Such leave is to be taken at times convenient to the employer and the employer may require the employee to take their leave at such times as coincide with that of the employer.

10. SICK LEAVE

10.1 During every sick leave cycle of 36 months the employer will be entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

10.2 During the first 6 months of employment the employee will be entitled to one day's paid sick leave for every 26 days worked.

10.3 The employee is to notify the employer as soon as possible in case of their absence from work through illness.

10.4 A medical certificate is required if absent for more than 2 consecutive days or if absent on more than two occasions during an 8 week period.

11. MATERNITY LEAVE

(Tick the applicable clauses in the space provided)

The employee will be entitled to ..... months maternity leave without pay, OR

The employee will be entitled to ..... months maternity leave on pay

12. FAMILY RESPONSIBILITY LEAVE

The employee will be entitled to three days family responsibility leave during each leave cycle if they work on at least 4 days a week and provided the employee has been employed for longer than four months.

13. PARENTAL LEAVE

The employee will be entitled to 10 consecutive days' (calendar days) unpaid parental leave during each cycle, starting on the day that the child is born, or if the child is adopted, the date the adoption order is granted or the adoptive child is placed in the care of the parents, whichever comes first.

14. ACCOMMODATION

(Tick the appropriate box)

14.1 The employee will be provided with accommodation for as long as the employee is in the service of the employer, which shall form part of their remuneration package.

14.2 The accommodation may only be occupied by the employee and their immediate family, unless by prior arrangement with the employer

14.3 Prior permission is necessary for visitors who wish to stay the night. This will not apply to members of the employee's direct family if they are visiting.

15. CLOTHING

(delete whichever is not applicable)

..... sets of uniforms/protective clothing

..... sets of boots

will be supplied to the employee free of charge by the employer and will remain the property of the employer.

16. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

.....

17. GENERAL

Any changes to the written contract will only be valid if agreed by both parties.

.....

EMPLOYER

..... Date: .....

EMPLOYEE (Signed in acknowledgement of receipt)

Summary of the Sectoral Determination for Domestic Workers

Working conditions of domestic workers are regulated by Sectoral Determination 7 and the *Labour Relations Act*. ***(See pg 301: Sectoral Determinations)***

NOTICE PERIOD AND TERMINATION OF EMPLOYMENT

Any party to an employment contract must give written notice as follows (except when an illiterate employee gives notice):

- One week – if employed for 6 months or less
- Four weeks – if employed for more than 6 months

Notice must be explained verbally by or on behalf of the employer to a domestic employee if they are not able to understand it.

If the domestic worker lives in accommodation provided by the employer then the employer must give them one month's notice to leave the accommodation or until the contract of employment could lawfully have been terminated.

All money that is owed to the domestic worker, for example, wages, allowances, pro rata leave and paid time-off not taken, must be paid.

An employer who has to dismiss an employee due to a change in their economic, technological, or structural set-up (called operational requirements in the Sectoral Determination) is responsible for paying severance payment to the employee.

PROCEDURE FOR TERMINATING EMPLOYMENT

A domestic worker's contract of employment may not be terminated unless a valid and fair reason exists and a fair procedure is followed. If an employee is dismissed without a valid reason or without a fair procedure, the employee can refer the case to the CCMA for Unfair Dismissal within thirty calendar days of their termination.

If a domestic worker cannot return to work because of a disability, the employer must investigate the nature of the disability and decide whether or not it is permanent or temporary. The employer must try to change or adapt the duties of the employee to accommodate the employee as far as possible. But, if it is not possible for the employer to change or adapt the duties of the domestic employee then the employer can terminate their services.

The *Labour Relations Act* sets out the procedures that must be followed when a person's services are terminated.

WAGE/REMUNERATION/PAYMENT

All employers of domestic workers throughout South Africa have to pay their employees a minimum wage of R28.79 per hour

GUARANTEED MINIMUM RATE

Some domestic workers might work less than 4 hours per day. If this is the case, they should be paid for 4 hours worked.

ANNUAL INCREASE

Wages are normally increased every year and the new wage increases are published by the Department of Employment and Labour.

CALCULATING THE MINIMUM WAGES

Employers who cannot afford to pay the minimum wage can choose to reduce the number of hours to be worked instead of retrenching the employee. However, it is against the law to pay less than the minimum hourly rate. If an employer pays more than the prescribed hourly rate, they cannot reduce the rate to make it the same as the minimum wage because it will be an unfair labour practice.

EXAMPLE

CALCULATING A DOMESTIC WORKER'S WAGE

Sarah is a domestic worker who works 6 hours a day from Monday to Friday for an employer who lives in Soweto. What is the minimum rate that Sarah can be paid according to the Sectoral Determination for domestic workers?

6 hours per day x 5 days = 30 hours worked per week

(She must be paid at the minimum wage rate)

30 hours per week x R28.79 = R827.40 per week

Additional payments (such as for overtime or work on Sundays or Public holidays) are calculated from the total remuneration.

TRANSPORT ALLOWANCE

The Sectoral Determination does not regulate transport, so it is open to negotiation between the parties.

HOURS OF WORK

NORMAL HOURS (EXCLUDING OVERTIME)

A domestic worker may not work more than:

- 45 hours per week
- 9 hours per day for a 5-day work-week
- 8 hours a day for a 6-day work-week

OVERTIME

Overtime is voluntary and a domestic worker may not work more than:

- 15 hours of overtime per week, and
- 12 hours on any day, including overtime.

Overtime is paid at one and a half times the employee's normal wage, or an employee may agree to take paid time off.

DAILY AND WEEKLY REST PERIODS

A domestic worker is entitled to a daily rest period of 12 consecutive hours (hours in a row) and a weekly rest period of 36 consecutive hours, which must include Sunday, unless otherwise agreed.

The daily rest period can be reduced to 10 hours if the parties agree and if the employee lives on the premises and takes a meal interval that lasts for at least 3 hours.

The weekly rest period can by agreement be extended to 60 consecutive hours every two weeks or be reduced to 8 hours in any week if the rest period in the following week is also extended.

STANDBY

Standby means any period between 8 p.m. and 6 a.m. when a domestic worker might need to be at the workplace and is allowed to rest or sleep but must be available to work if necessary.

This may only be done if the parties have agreed in writing and not more than 5 times per month.

An employer must pay a domestic worker for any time worked in excess of three hours during any period of stand-by. The employee must be paid at the normal overtime rate or given paid time off.

NIGHT WORK

- Night work means work performed after 6 p.m. and before 6. a.m.
- Night work is allowed only if the domestic worker has agreed to this in writing. The employee must be compensated by an allowance of at least 10% of the ordinary daily wage.

MEAL INTERVALS

A domestic worker is entitled to a one-hour break for a meal after five hours of continuous work. The interval may be reduced to 30 minutes by agreement. When a second meal interval is required because of overtime worked, it may be reduced to not less than 15 minutes. If an employee has to work through their meal interval, then they must be paid for this.

WORK ON SUNDAYS

Work on Sundays is voluntary, and a domestic worker cannot be forced to work on a Sunday.

A domestic worker who works on a Sunday must be paid double the daily wage.

If the employee ordinarily works on a Sunday, they should be paid one and a half times the wage for every hour worked, with a minimum of the normal rate for the full day. If the parties agree, the employee can be paid by giving them time off of one and a half hours for each overtime hour worked.

PUBLIC HOLIDAYS

Domestic workers are entitled to all the public holidays in the *Public Holidays Act* but the parties can agree to other public holidays. Work on a public holiday is voluntary which means a domestic worker may not be forced to work. The official public holidays are:

- New Years Day
- Human Rights Day
- Youth Day
- National Woman's Day

- Good Friday
- Family Day
- Freedom Day
- Workers' Day
- Heritage Day
- Day of Reconciliation
- Christmas Day
- Day of Goodwill

Where the government declares an official public holiday at any other time then this must be granted. The days can be exchanged for any other day by agreement.

If the employee works on a public holiday, they must be paid double the normal day's wage or, if it is greater, double time for each hour worked on that public holiday.

ANNUAL LEAVE

Full-time domestic workers are entitled to 3 weeks leave per year. If the parties agree, they can take leave as follows: 1 day for every 17 days worked or one hour for every 17 hours worked.

The leave must be given not later than 6 months after completing 12 months of employment with the same employer. The leave may not be given at the same time as sick leave, nor at the same time as a period of notice to terminate work.

SICK LEAVE

During the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.

During a sick leave cycle of 36 months, an employee is entitled to paid sick leave that is equal to the number of days the employee would normally work during a period of 6 weeks.

The employer does not have to pay an employee if the employee has been absent from work:

- For more than two days in a row, or
- On more than two occasions during an 8-week period and does not produce a medical certificate stating that they are too sick or injured to work. The certificate can be from a doctor, a traditional healer or a qualified nurse.

MATERNITY LEAVE

A domestic worker is entitled to up to 4 consecutive months maternity leave. The employer does not have to pay the employee for the period for which she is off work due to her pregnancy. However the parties may agree that the employee will receive part of her whole wage for the time that she is off. The mother can also claim maternity benefits from UIF for the full four months.

PARENTAL LEAVE

In terms of section 25A of the BCEA, an employee who is a parent of a child and not the designated Carer of the Child, will be entitled to 10 consecutive days' unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born, or, if the child is adopted, the date the adoption order was granted or the adoptive child was placed in the care of the parents, whichever comes first.

The 10 consecutive days of parental leave are calendar days, not working days. An employee must notify the employer in writing of the date on which they intend to start their parental leave and return to work after parental leave. This notification must at least be given 1 month before the birth of the child or whenever it is practical to do so.

An employee who contributes to the UIF may apply for parental benefits from the Department of Employment and Labour.

FAMILY RESPONSIBILITY LEAVE

Employees who have been employed for longer than 4 months and for at least 4 days a week are entitled to take 3 days of paid family responsibility leave during each leave cycle in the following circumstances:

- When the employee's child is sick
- If any one of the employee's relations dies: a spouse or life partner; a parent, adoptive parent or grandparent; a child, adopted child or grandchild; a brother or sister

DEDUCTION FROM THE REMUNERATION

An employer is not allowed to deduct any monies from the employee's wages without their written permission.

There can be a deduction of no more than 10% for accommodation if the accommodation:

- Is weatherproof and generally kept in good condition
- Has at least one window and door, which can be locked
- Has a toilet and bath or shower, if the domestic employee does not have access to any other bathroom.

OTHER ISSUES

Other issues that are not dealt with in the Sectoral Determination include:

- Probationary periods
- Right of entry to the employer's premises
- Afternoons/weekends off

- Pension schemes
- Medical aid
- Training/school fees
- Funeral benefits/saving accounts

These can all be negotiated between the parties and included in the contract of employment.

PROHIBITION OF EMPLOYMENT

No one under the age of 15 can be required or permitted to work.

OTHER CONDITIONS OF EMPLOYMENT

There is no provision which prevents other conditions of employment from being included in a contract of employment but any new conditions may not be less favourable than those set by the Sectoral Determination.

GENERAL ADMINISTRATIVE REQUIREMENTS

The Sectoral Determination states that employers must comply with the following administrative processes:

- Provide employees with a written contract of employment
- Payment must be made by cash in a sealed envelope or EFT deposit into the employee's bank account, and must include a detailed payslip. The employer must keep copies of these payslips for 3 years.

(See www.labour.gov.za and click on Sectoral Determination for Domestic Workers for more information.

EXAMPLE: DOMESTIC WORKER CONTRACT OF EMPLOYMENT

Name of employer .....

Address of employer.....

Name of employee .....

1. COMMENCEMENT OF EMPLOYMENT
   Employment started/will start on .....
   and continue until terminated in terms of this contract.

2. PLACE OF WORK .....

3. JOB DESCRIPTION

Job title: .....

Duties: .....

4. HOURS OF WORK

4.1 Normal working hours will be .....hours per week, made up as follows:

Monday/Tuesday/Wednesday/Thursday/Friday..... a.m. to p.m.

Meal intervals will be from: ..... to.....

Other breaks: .....

Saturdays: ..... a.m. to p.m

Meal intervals will be from: ..... to.....

Other breaks: .....

Sundays:..... a.m. to p.m

Meal intervals will be from: ..... to.....

Other breaks: .....

4.2 Hours of work will be extended by not more than 5 hours per week during ..... and reduced by the same hours during .....

4.3 Overtime will be worked as agreed from time to time and will be paid at the rate of one and a half times of the total wage as set out in clauses 5.1 and 5.2 of this contract.

4.4 Standby will only be done if agreed from time to time whereby an allowance will be paid per standby shift.

5. WAGE

5.1 The employee's wage shall be paid in cash on the last working day of every week/month and shall be: R .....

5.2 The employee shall be entitled to the following allowances/other cash payments in kind:

5.2.1 Accommodation per week/month to the value of R .....

5.2.2 Food per week/month to the value of R .....

5.3 The following deductions are agreed upon: R .....

R .....

5.4 The total value of the above remuneration shall be : R .....

(the total of clauses 5.1 to 5.2.2 – change or delete clauses as needed)

5.5 The employer shall review the employee's salary/wage on or before 1 November of every year.

6. TERMINATION OF EMPLOYMENT

Either party can terminate this agreement with one week's notice during the first six months of employment and with four weeks notice thereafter. Notice must be given in writing except when it is given by an illiterate employee. In the case where the employee is illiterate notice must be explained orally by or on behalf of the employer.

On giving notice the employer is to provide the employee who resides in accommodation that belongs to the employer accommodation for a period of one month.

7. SUNDAY WORK

Any work on Sunday will be by agreement between parties and will be paid according to the Sectoral Determination.

8. PUBLIC HOLIDAYS

Any work on holidays will be by agreement and will be paid according to the Sectoral Determination.

9. ANNUAL LEAVE

The employee is entitled to three weeks paid leave after every 12 months of continuous service. Such leave is to be taken at times convenient to the employer and the employer may require the employee to take their leave at such times as coincide with that of the employer.

10. SICK LEAVE

10.1 During every sick leave cycle of 36 months the employer will be entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

10.2 During the first 6 months of employment the employee will be entitled to one day's paid sick leave for every 26 days worked.

10.3 The employee is to notify the employer as soon as possible in case of their absence from work through illness.

10.4 A medical certificate is required if absent for more than 2 consecutive days or if absent on more than two occasions during an 8 week period.

11. MATERNITY LEAVE

(Tick the applicable clauses in the space provided)

- The employee will be entitled to ..... months maternity leave without pay, OR
- The employee will be entitled to ..... months maternity leave on pay

12. PARENTAL LEAVE

An employee is entitled to 10 consecutive days' (calendar days) unpaid parental leave during each leave cycle. Parental leave can start on the day that the child is born, or, if the child is

adopted, the date the adoption order is granted, or the adoptive child is placed in the care of the parents, whichever comes first.

13. FAMILY RESPONSIBILITY LEAVE

The employee will be entitled to three days family responsibility leave during each leave cycle if he/she works on at least 4 days a week and has worked more than four months for the employer.

14. ACCOMMODATION

(*Tick the appropriate box*)

14.1 The employee will be provided with accommodation for as long as the employee is
- in the service of the employer, which shall form part of their remuneration package.

14.2 The accommodation may only be occupied by the employee and their immediate
- family, unless by prior arrangement with the employer

14.3 Prior permission should be obtained for visitors who wish to stay the night. However,
- where members of the employee's direct family are visiting, such permission will not be necessary.

15. CLOTHING

(*insert whathever is applicable*)

Sets of uniforms/protective clothing will be supplied to the employee free of charge by the employer and will remain the property of the employer.

16. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

17. GENERAL

Any changes to the written contract will only be valid if agreed by both parties.

..... Date .....

EMPLOYER

..... Date: .....

EMPLOYEE (Signed in acknowledgement of receipt)

Deregulation

Deregulation means removing laws and regulations so that there is less restriction and 'red-tape' for people who want to operate in an area. For example, where an industry applies for exemption from a Bargaining Council Agreement or Wage Determination, or where areas are designated as “industrial hives’ where wage regulating measures don’t apply.

Deregulation can have a positive effect, for example, the lifting of regulations that control the granting of hawkers' licenses so that more people can work as hawkers or street traders because the laws about getting a hawker's license aren't so strict. Deregulation is controlled by the Department of Employment and Labour whose role is to ensure that any form of deregulation will not have a negative impact on people in the workplace.

Other laws that apply to terms and conditions in the workplace

Employment Equity Act (EEA)

The *Employment Equity Act No. 55 of 1998* aims to create an environment of equality and non-discrimination in the workplace. It states grounds for non-discrimination in the workplace, including:

- Race
- Gender
- Sex
- Pregnancy
- Marital status
- Ethnic origin
- Social origin
- Colour
- Sexual orientation
- Age
- Disability
- Religion
- Conscience
- Belief
- Culture
- Language
- Birth
- Family responsibility
- HIV status
- Political opinion

The EEA is important because it includes three grounds for non-discrimination that are not included in the Constitution or the Equality Act: family responsibility, HIV status and

political opinion. A case can be referred to the Labour Court if an employee believes that an employer is discriminating against him or her on any of these grounds in order to:

- Demote or not promote the employee
- Block the employee from having access to training and development
- Make an unfair distribution of employee benefits to the employee

The EEA also sets out regulations on affirmative action in the workplace to create equal opportunities for all employees and for people applying for jobs. It says that an employer who employs over 50 people must take steps to include and advance previously disadvantaged groups (black people, women and the disabled) in their workforce. This involves setting up an Employment Equity Committee which works to improve equal opportunity in the company, promote equal opportunity and remove unfair discrimination.

So, when a company makes new appointments or promotes staff, it must give 'preferential treatment' to properly qualified people who are from one of these previously disadvantaged groups (female, black or disabled). In other words, formal qualifications or relevant experience are not the only reasons for deciding whether a person is suitable for a job or not.

The EEA covers everyone except the South African National Defence Force (SANDF), the National Intelligence Agency (NIA) and Secret Services.

The Occupational Health and Safety Act (OHSA)

The *Occupational Health and Safety Act No. 85 of 1993* gives employees specific rights in health and safety at work. It gives health and safety guidelines for the workplace to employers and gives inspectors wide powers to ensure that these are being implemented.

WHO DOES THE OHSA COVER?

The Act excludes employees in mines and on ships, where other laws apply. The OHSA covers all other employees, including farm workers, domestic workers and state employees.

THE EMPLOYEE'S DUTIES

Employees must take reasonable precautions for their own health and safety at work. They must follow precautions and rules about safety and health. They must report any unsafe circumstances or accidents as soon as possible to the safety representative.

Anyone who acts recklessly or damages any safety measures can be charged, and a claim for damages can be brought against them.

THE EMPLOYER'S DUTIES

The employer must make sure that the workplace is safe and healthy, and must not allow any employee to do potentially dangerous work. The employee must know what the dangers of the work are.

The **general duties** of the employer are to:

- Choose safety representatives
- Consult with the employees' trade union about the safety representatives
- Inform employees of the dangers in the workplace
- Reduce any dangers to a minimum before issuing protective clothing
- Issue protective clothing where necessary
- Give necessary training to employees who use dangerous machines or materials, to make sure they know the safety precautions
- Prevent employees from using or working with dangerous materials or machines, unless all the necessary safety rules have been followed
- Ensure that dangerous machines are in good working order and are safe to work with
- Make sure that dangerous machines carry warnings and notices
- Make sure that someone who knows the work is supervising the operations to ensure the safety of the employees
- Keep the workplace open so that employees can escape from danger if necessary
- Not move any evidence of an accident before an inspector has given permission, unless someone has been badly injured and needs treatment

The chief inspector can ask any employer for a **report** of the safety precautions.

An employer **cannot take action** against any employees who do the following:

- Give information about their conditions at work or that the Act says they have to give
- Give evidence in court
- Respond to any request of an inspector
- Refuse to do anything that is against the law

REPORTING ACCIDENTS OR INCIDENTS

The employer must keep a report of all accidents and safety or health incidents in the workplace. The employer must report certain accidents or incidents to the safety representative and to the Department of Employment and Labour.

SAFETY REPRESENTATIVES AND SAFETY COMMITTEES

The employer must appoint one safety representative for every 20 employees. There must be at least one representative for every 50 employees. The employer must explain to the employees' organisation what responsibilities the safety representatives will have and how the representatives will be selected.

In every workplace where there are two or more safety representatives, there must also be a safety committee. This committee must meet at least every three months. The committee must deal with all safety and health issues that affect employees. The safety committees have certain functions and powers. You can find out more about these in the Act or by contacting the Department of Employment and Labour.

ENFORCEMENT OF THE OHSA

OHSA falls under the administration of the Department of Employment and Labour. Inspectors from the Department have wide powers to search the workplace, question people, ask for explanations from an employer, and so on.

An inspector can fine a person for breaking the Act. If that person wants to appeal against the inspector's decision, they can appeal to the chief inspector. They can appeal against the chief inspector's decision in the Labour Court.

If an employee is hurt at work as a result of the employer not following a safety regulation, then that employer can be fined up to R1 million and/or two years in prison.

Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

The *2022 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* replaces the previous Code of Good Practice on Handling Sexual Harassment in the workplace.

WHO DOES THE CODE APPLY TO?

The Code applies to all employers (including trade unions) in all sectors, including the informal sector. It also applies to anyone having dealings with an employer, for example, customers, clients, suppliers and volunteers.

All employees are covered as well as unpaid volunteers, job seekers, job applicants and trainees. It also applies not only to the physical workplace but also to those who work remotely, travel to work with transport provided by the employer, those in training or staying in accommodation provided or paid for by the employer. It places

obligations on employers and trade unions to prevent harassment, take disciplinary and other action when it happens, and provide various types of assistance to victims of harassment.

TYPES OF HARASSMENT

The Code includes:

- Physical harassment (physical attacks or threats)
- Verbal bullying (threats, shaming, hostile teasing, insults, constant negative judgement, constant criticism, racist, sexist or LGBTQIA+phobic language)
- Psychological abuse (emotional abuse)
- Online harassment, including cyber-bullying
- Harassment, teasing and insults based on someone's race, sex or sexual orientation
- Bullying (use of power in the workplace)
- Intimidation that could cause someone to feel afraid they will be harmed
- Mobbing which is harassment by a group of people targeted at one or more individuals
- Any actions that can create a barrier to equity and equality in the workplace

WHAT IS HARASSMENT?

Harassment exists when conduct (of an employer, employee, customer, etc.) is:

- Unwanted
- Creates a hostile working environment that is physically, emotionally or psychologically unsafe and affects employee well-being or mental health
- Is related to one of the prohibited grounds in the EEA

The test for harassment is an objective one. If all these factors are present, then harassment is established, and it will be up to the harasser to defend the allegation. A defence could be that the alleged harassment is not discrimination or that it was justified in the circumstances. If a person is found guilty of harassment, they could pay compensation, fines or even imprisonment.

VICARIOUS (INDIRECT) LIABILITY OF EMPLOYERS

Employers are also vicariously (indirectly) liable for the wrongful acts of their employees if these are committed in the course and scope of employment, unless it can prove that it has taken all reasonable steps to prevent this happening. So, for example, if an employee experiences harassment while travelling with work colleagues, the employer could be jointly liable for that.

AWARENESS AND INTENTION

An incident of harassment is seen from the perspective of the person who is laying the complaint. This means that even if the harasser wasn't aware or didn't have the intention to harass someone, it can still be unwanted and grounds for a complaint. The test is whether a reasonable person would have known that the conduct was harassment.

UNREASONABLE COMPLAINTS

The Code allows for an employer to show that the complainant's perception is 'not consistent with societal values reflected in the Constitution'.

RACIAL, ETHNIC OR SOCIAL ORIGIN HARASSMENT

Racial harassment is a form of unfair discrimination. The test for racial harassment is whether, on a balance of probabilities, the conduct complained of was related to race, ethnic or social origin or a characteristic associated with such a group.

If a complaint of racial harassment is made, the employer must take the following factors into account:

- Was the conduct persistent and harmful
- Was the language or conduct abusive, demeaning, or humiliating, and did it offend the dignity of the person or create a hostile working environment
- Was the language or conduct directed at a particular employee(s)
- Was the language or conduct insulting, abusive or derogatory
- The extent of the abuse or humiliation to a person's dignity
- The impact of the conduct

WHAT MUST THE EMPLOYER DO IN CASES INVOLVING HARASSMENT?

Employers are required in terms of the Code to adopt a zero-tolerance approach to harassment. It needs to do the following:

- Develop a harassment policy in consultation with employees and their representatives that includes steps to be taken to prevent harassment and actions to follow if there is a complaint of harassment
- Provide training and awareness for employees, including:
    - Informing them of the harassment policy
    - Making the reporting mechanisms clear
    - Making the harassment policy available on all the company platforms
    - Creating ongoing awareness about the duty to report harassment

- Establish a committee that will investigate claims of harassment and provide them with relevant training

HARASSMENT POLICIES AND PROCEDURES

The Code requires the employer to adopt a Harassment Policy and says what should be included in this policy, for example:

- That harassment constitutes unfair discrimination, that it infringes the rights of the complainant and that it represents a barrier to equity in the workplace;
- That harassment in the workplace will not be permitted or condoned;
- Complainants have the right to follow the procedures in the policy, and appropriate action must be taken by the employer;
- That it will constitute a disciplinary offence to victimize or retaliate against an employee who, in good faith, lodges a grievance of harassment.

The policy should also outline the steps and procedures to be followed by a complainant who wants to lodge a harassment complaint or grievance. The Code sets out the procedures that should be followed when a complaint of harassment is made.

PROCEDURES FOR DEALING WITH COMPLAINTS OF HARASSMENT

The Code says the following procedures should be included in the policy:

Reporting harassment: Conduct involving harassment must immediately be reported to the employer. 'Immediately' means as soon as is reasonably possible in the circumstances and without delay, taking into account the nature of harassment (as a sensitive issue), the fear of a negative response, and the positions of the complainant and the alleged harasser in the workplace. The employer must:

- Consult the parties
- Take steps to address the complaint
- Take steps to stop the harassment

IMPLEMENTING FORMAL PROCEDURES WITHOUT THE CONSENT OF THE COMPLAINANT

The Code says that a complainant can choose to follow a formal procedure or an informal procedure. If the complainant chooses NOT to follow a formal procedure, the employer should still assess the risk to other people in the workplace. The employer must take into account all relevant factors, including:

- How serious the alleged harassment was, and

- Whether the alleged harasser has a history of harassment

If the employer believes after a proper investigation that there is a serious risk of harm to the people in the workplace, they can choose to follow a formal procedure, regardless of what the complainant wants. The complainant must obviously be informed of this.

WHEN IS AN EMPLOYER LIABLE IN A CASE OF HARASSMENT?

If an employer is liable for harassment this could have severe financial implications.

Section 60 of the EEA says that if an employee, while at work, engages in any conduct that goes against the Act (for example, harassment), then the conduct must immediately be brought to the attention of the employer.

The employer must consult all relevant parties and take necessary steps to stop the conduct. If the employer fails to take the necessary steps and it is proved that the employee is guilty of harassment, then the employer could be vicariously liable for the conduct.

However, if the employer can prove that they did everything reasonably possible to create an environment free of harassment, for example, by adopting a harassment policy and communicating this to the workplace, then these actions could shift the liability of the employer.

COMMON LAW

An employer can be liable in terms of the common law if they do not provide a safe working environment. In the *Media 24 Ltd and another v Grobler* case, the court held that the employer has a legal duty to take reasonable steps to prevent sexual harassment of its employees in the workplace and is obliged to compensate **the victim for harm caused because of this.**

The court also said that if a person gets Post-Traumatic Stress Syndrome arising out of or in the course of employment, the victim would have to claim compensation under the COIDA and would not be able to proceed with a civil claim against the employer.

WHAT IS THE ROLE OF A TRADE UNION IN DEALING WITH HARASSMENT IN THE WORKPLACE?

Management has certain obligations in terms of the Code which the trade union needs to see are enforced. These include to:

- **Adopt a Harassment Policy in line with the 2022 Code:** The Code does not say how a policy should be adopted, but certainly it should be done in

consultation with union representatives and employees. The failure to adopt a workplace policy could impact the employer's liability in the future.

- **Communicate the policy to employees:** An employer must communicate the policy effectively to employees. The employer must, therefore take active steps to provide education and training on harassment and people's rights and obligations in the workplace.
- **Conduct investigations:** When management is informed of a harassment complaint, it must:
    - Consult all relevant parties
    - Take necessary steps to address and eliminate the harassment; these steps include informing the complainant that they can follow formal or informal procedures to deal with the complaint
    - Offer the complainant advice, assistance and counselling
    - Advise the complainant of the procedures to follow whether this is in an informal or formal way
- **Create an environment that is free of harassment:** Management, together with the union, must aim to create an environment that is free of harassment by having a Harassment Policy; communicating the policy to employees, and dealing effectively - in terms of the policy - with cases brought to its attention. This obligation also means implementing formal procedures where the risk is serious to other employees (even where the complainant has no wish to proceed with action).

SEXUAL HARASSMENT

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is defined in the Code of *Good Practice on the Prevention and Elimination of Harassment In The Workplace* 2022 as *unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace* and takes into account the following factors:

1. Was the conduct on prohibited grounds (sex, gender or sexual orientation)?
2. Was it unwelcome? Ways to show behaviour is unwelcome include verbal and non-verbal actions like walking away or not responding to the harassor.
3. What was the nature and extent of the sexual conduct? The conduct can be physical, verbal or non-verbal:

a. Physical includes unwelcome physical contact ranging from touching to sexual assault and rape as well as strip search by or in the presence of the opposite sex.
b. Verbal includes unwelcome suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and sending sexually explicit text by electronic means or otherwise.
c. Non-verbal includes unwelcome gestures, indecent exposure and displaying or sending sexually explicit pictures or objects.

The conduct can also be victimisation, where a person gets victimised for failing to respond to sexual advances and the intention is to humiliate them, or sexual favouritism – 'rewards' for sex.

4. What was the impact on the employee? This is a subjective test and involves looking at the effect of the action on the victim's dignity. It takes into account the circumstances of the employee and the positions of power between the victim and the alleged harasser.

SEXUAL HARASSMENT AS A FORM OF UNFAIR DISCRIMINATION

The Code says that sexual harassment is a form of unfair discrimination and that harassment on the grounds of sex and/or gender and/or sexual orientation is prohibited.

TEST FOR SEXUAL HARASSMENT

The Code defines which factors must be taken into account when deciding whether an action constitutes unwelcome conduct. It gives guidelines as to what constitutes sexual harassment and explains what is understood by the 'nature and extent' of the conduct **(See pg 349: *definition of 'unwelcome conduct'*).**

When it comes to the impact of the conduct, the code says the conduct must be an impairment of the employee's dignity. The relevant considerations here are the circumstances of the employee and the positions that the employee and the alleged harasser hold in the organisation. When assessing the impact of the conduct, the test is a subjective one where the focus is not only on the actions that constitute sexual harassment, but more substantially on the effects and the circumstances surrounding these actions. So, it requires the employer to look at the psychological impact of the sexual conduct on an employee and not only at how an objective person might judge the action.

Digital harassment is also conduct that can constitute sexual harassment.

Cases involving sexual harassment must be dealt with in terms of the company's harassment policies and procedures.

The Merchant Shipping Act

The *Merchant Shipping Act No. 57 of 1951* (MSA) says that the *Labour Relations Act* and the *Wage Act* apply to all employees at sea. It says that if there is conflict between the provisions of the MSA and the provisions of a Bargaining Council Agreement or Wage Determination, the provisions of the Agreement or Determination will apply.

The MSA covers employees who are at sea within South Africa's territorial waters. If employees at sea are outside the territorial waters of South Africa, then an Agreement or Determination will apply to employees who:

- Are employed on a ship that is registered in South Africa
- Even if the ship is not registered in South Africa, are employed on a ship which spends all its time working between ports in South Africa

Disputes and ways of settling disputes

What is a dispute?

A dispute is any serious disagreement between two parties. For example, there could be a dispute over a problem of discipline in the workplace, over complaints (also called 'grievances') that employees have, or over dismissals. There can also be disputes over wages and other working conditions.

So, there are different kinds of disputes. You can have a **dispute about making new rights**, for example, employees wanting to get paid higher wages or the employer bringing in a new pension or provident fund scheme to which employees must belong. These disputes are also called **disputes of interest**. These disputes are often handled by a union and are the subject of negotiation and possible industrial action (strike action) where agreement cannot be reached. The *Labour Relations Act* describes structures and processes which can be used to resolve disputes of interest. The Act also governs the procedures for taking industrial action.

There are also **disputes over rights that already exist** in a contract, a law, an agreement or in custom and practice. These kinds of disputes are called **disputes of rights**. They usually

involve an unfair dismissal (for example, retrenching employees without consulting with the employees), unfair discrimination or an unfair labour practice (such as 'removal of benefits'). The *Labour Relations Act* sets out how disputes over rights in the workplace must be handled, and the *Employment Equity Act* sets out how discrimination will be dealt with in the workplace. ***(See pg 357: Labour Relations Act; See pg 345: Employment Equity Act)***

A dispute of right can also happen when an employer or employee doesn't obey a term or condition of a wage regulating measure, for example, the *Basic Conditions of Employment Act*, a Bargaining Council Agreement (or other collective agreement), Wage Determination, Sectoral Determination, or a ministerial exemption. ***(See pg 294: Laws about terms and conditions of employment)***

EXAMPLE

An example of a dispute of right is where an employer doesn't pay an employee the correct leave pay or where an employee is dismissed without the employer following a fair procedure. Enforcement and disputes about terms and conditions of employment that fall under these laws should be dealt with by the relevant Bargaining Council or the Department of Employment and Labour.

DISPUTES OF INTEREST

The *Labour Relations Act* (*LRA*) sets out structures and processes which can be used to resolve disputes of interest. The outcome of disputes of interest will depend on the relative strength of employees and employers. Each party may use different strategies to win what they want.

Employees can take **industrial action** over disputes of interest, like strikes, work stoppages and go-slows once they have complied with prescribed dispute procedures. Employees cannot strike over disputes of rights under the LRA (e.g. unfair labour practices and unfair dismissals). Disputes of right are referred to arbitration at the CCMA or the Bargaining Council.

The LRA governs the procedures that must be followed before industrial action can be taken by employees (strikes) or by the employer (lock outs).

DISPUTES OF RIGHT

WHERE THERE IS NO BARGAINING COUNCIL

If it is a dispute about **enforcing** a right under the *Basic Conditions of Employment Act* (*BCEA*), a Sectoral Determination or a Wage Determination

or the *Occupational Health and Safety Act*, then a complaint can be sent to the CCMA in terms of Section 73A of the BCEA or to the Department of Employment and Labour.

The complaint to the Department of Employment and Labour can include a request for a 'compliance order' which is issued by an inspector of the Department. ***(See pg 301: Enforcement of the BCEA; See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination; See pg 346: The Occupational Health and Safety Act)***

If it is a matter of **enforcing** a right or a **dispute of rights** under the *Labour Relations Act (LRA)* (for example, an alleged unfair dismissal) where no bargaining council exists in that sector, then the matter should be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. If the dispute concerns a dismissal, it must be referred within 30 days of the date of dismissal. If it concerns an Unfair Labour Practice, then the dispute must be referred within 90 days of the alleged unfair practice occurring. ***(See pg 370: Solving disputes under the LRA)***

If conciliation fails, then refer the dispute to arbitration within 90 days of receiving the certificate of failed conciliation from the CCMA. The CCMA will hear disputes over a BCEA issue if it is related to a matter that is being arbitrated by the CCMA (for example, a claim of unfair dismissal is before the CCMA, together with a claim for unpaid leave pay).

WHERE THERE IS A BARGAINING COUNCIL

If it is a dispute of rights (for example, Unfair Dismissal) under a Bargaining Council Agreement, then the problem should be referred to the Bargaining Council for enforcement or conciliation. If conciliation fails, then refer the dispute to arbitration within 90 days of receiving the certificate of failed conciliation from the Bargaining Council.

The Labour Relations Act (LRA)

The *Labour Relations Act (No. 66 of 1995)* governs how employers and employees should deal with each other and what rights trade unions and employer organisations have in the workplace. It is not about terms and conditions of employment.

The LRA deals with the rights of individuals regarding fairness, bargaining and dispute resolution, and the rights and obligations of trade unions.

WHO IS COVERED BY THE LRA?

Except for members of the South African National Defence Force, National Intelligence Agency and Secret Service, all employees are covered by the LRA. So this includes farm employees, domestic employees and public sector employees (such as teachers, nurses, police, etc, who work for the state).

An independent contractor is not defined as an 'employee' and is therefore excluded from the LRA and BCEA provisions.

WHAT DOES THE LRA COVER?

The LRA covers things like:

- Rights of employees to form and join a union
- Rights of employers to form and join an employers' organisation
- The rights of trade unions in the workplace
- Collective bargaining
- Bargaining councils and statutory councils
- The establishment of workplace forums, which allow employees to participate in management decisions at work
- Fair and unfair labour practices
- Procedures that must be followed for dismissals to be fair
- Dispute resolution structures and procedures, including the Commission for Conciliation, Mediation and Arbitration
- Industrial action

Who is an employee?

According to the *Labour Relations Act*, an employee meets one or more of the following standards:

- The person's hours are subject to control
- The person forms part of the organisation
- The person has worked for an average of 40 hours or more over the last three months for that company
- The person is economically dependent on the company to whom the services are rendered
- The person is provided with the tools for the completion of the work by the employer, or
- The person only has one employer to whom their services are rendered

The criteria for an 'employee' are set out in Section 200A of the LRA, and are 'indicators' of an employment relationship rather than that of an 'independent contractor'. They apply to people earning below the earnings threshold (R21 812 per month) prescribed in the *Basic Conditions of Employment Act.*

Unfair Labour Practices

The *Labour Relations Act* (LRA) prohibits unfair labour practices. An unfair labour practice is any unfair act or omission at the workplace, involving:

- Unfair conduct of an employer relating to the promotion, demotion or probation of an employee
- Unfair conduct relating to the provision of training of an employee
- Unfair conduct relating to the provision of benefits (for example, pension, medical aid, etc) to an employee
- Unfair suspension of an employee or disciplinary action against an employee (short of a dismissal) (for example, a final written warning or unfair suspension)
- The refusal to reinstate or re-employ a former employee in terms of any agreement (for example, following a retrenchment)
- An occupational setback in contravention of the *Protected Disclosures Act (No. 26 of 2000)* because an employee has made a protected disclosure defined in that Act. For example, an employee is denied overtime because they made a disclosure in terms of the *Disclosure of Information Act.*

References to unfair discrimination against an employee in the LRA have been transferred to the *Employment Equity Act (No. 55 of 1998)* (EEA), so 'unfair discrimination' in the workplace is no longer defined as an unfair labour practice in the LRA. The EEA lists the grounds for non-discrimination in the workplace and describes the steps that a person can take if they believe they have been discriminated against on any of the listed grounds. ***(See pg 345: Employment Equity Act)***

WHAT STEPS CAN BE TAKEN IF AN UNFAIR LABOUR PRACTICE IS COMMITTED?

Disputes over alleged unfair labour practices must be referred within 90 days of the alleged unfair labour practice being committed (or of the employee becoming aware of the Unfair Labour Practice). The referral must be to the CCMA or Bargaining or Statutory Council. ***(See pg 370: Solving disputes under the LRA)***

Dismissals

What is a dismissal?

Dismissal means that:

- An employer terminates a contract of employment with or without notice:
    - **With notice** means the employer tells the employee to leave work after working for the required term of notice as prescribed in the contract of employment. The employee gets paid for the time they worked, plus any leave pay (if this is owed)
    - **Without notice** means the employee leaves immediately and is not paid out notice. Dismissal without notice is called '**summary dismissal**'. Whilst summary dismissal might take place where an employee is guilty of a very serious act (for example theft), it will still be procedurally unfair if a fair hearing has not been held before the dismissal
    - Where notice is to be paid, the notice pay must be what is prescribed as notice in the contract of employment, for example, 1 week's pay instead of 1 week's notice. The payment must include the value of payment in kind if this applies to a particular sector. Employees must therefore get wages for the hours worked, plus any leave pay plus payment in lieu of notice. If the employee has been summarily dismissed (with fair reasons and following a fair hearing), this means the employee has to leave immediately, and the employer does not have to make any payment in lieu of notice
- A contract employee whose fixed-term contract is suddenly ended or renewed on less favourable terms, where the employee expected the contract to be renewed because it has often been renewed before or because an expectation exists that the employment will be ongoing.
- A woman who is not taken back into her job after her maternity leave
- An employer dismisses a number of employees for some reason (for example, for being on strike) and offers to re-employ one or more but not all.
- An employee who was forced to walk out or resign because the employer made the working environment impossible to tolerate. This is called 'constructive dismissal.'
- The employee leaves their work (with notice or without notice) because a new employer has taken over the business and is not paying the employee the same wages, and conditions of employment are not the same as they enjoyed before.
- Employees have been **retrenched**. The employer must pay the employee severance pay of at least 1 week's remuneration for every full year that the employee worked for the employer. The payment must include the value of payment in kind. So the

employee must get wages for the hours worked, plus any leave pay, plus notice or payment in lieu of notice, plus severance pay.

Employees in these circumstances are entitled to fair dismissal reasons and fair dismissal procedures under the LRA. An employee could claim unfair dismissal through the CCMA or relevant Bargaining Council or Statutory Council.

Automatically unfair dismissals

The LRA defines certain dismissals as 'automatically unfair'. An automatically unfair dismissal must be referred to the CCMA or Bargaining Council for conciliation. If the dispute is not resolved at conciliation, then the matter automatically goes to the Labour Court for adjudication. The following reasons for dismissal are invalid and any dismissal will be regarded as 'automatically unfair' if the employee is dismissed for:

- Exercising any of the rights given by the LRA or participating in proceedings in terms of the Act.
- Taking part in lawful union activities (i.e. organising members in the trade union)
- Taking part in a legal strike or other industrial action or protest action
- Refusing to do the work of someone who was on strike
- Being pregnant, or any reason related to pregnancy
- Refusing to accept a change in working conditions, unless this is part of genuine consultations in terms of Operational Restructuring of the organisation
- Reasons that are due to arbitrary discrimination (except that an employer may retire someone who has reached the normal or agreed retirement age, or if the reason is based on an inherent requirement of the job, for example, being able to speak a certain language in order to do the job properly)
- A reason related to a transfer following a merger of the company with another organisation
- Where the employee is dismissed following a disclosure made by him in terms of the *Disclosure of Information Act*.

When is a dismissal fair or unfair?

The *Labour Relations Act (LRA)* has a *Code of Good Practice for Dismissals* that employers must follow. The 'fairness' of dismissal is decided in two ways – *substantive fairness and procedural fairness.*

SUBSTANTIVE FAIRNESS

Was there a 'fair' reason to dismiss the employee?

Was dismissal appropriate under the circumstances? In other words, did the punishment fit the crime?

The employer must have a proper and fair reason for dismissing the employee. A 'fair' reason can be one of these:

- **Misconduct** – the employee has done something seriously wrong and can be blamed for the misconduct. ***(See pg 364: Dismissal for misconduct)***
- **Incapacity** – this includes poor performance where the employee does not do the job properly, or the employee is unable to do the job due to illness or disability, or a lack of skills or training. ***(See pg 365: Dismissal for incapacity)***
- **Retrenchment or redundancy** – the employer is cutting down on staff or restructuring the work and work of a particular kind has changed. ***(See pg 367: Retrenchment or redundancy dismissal)***

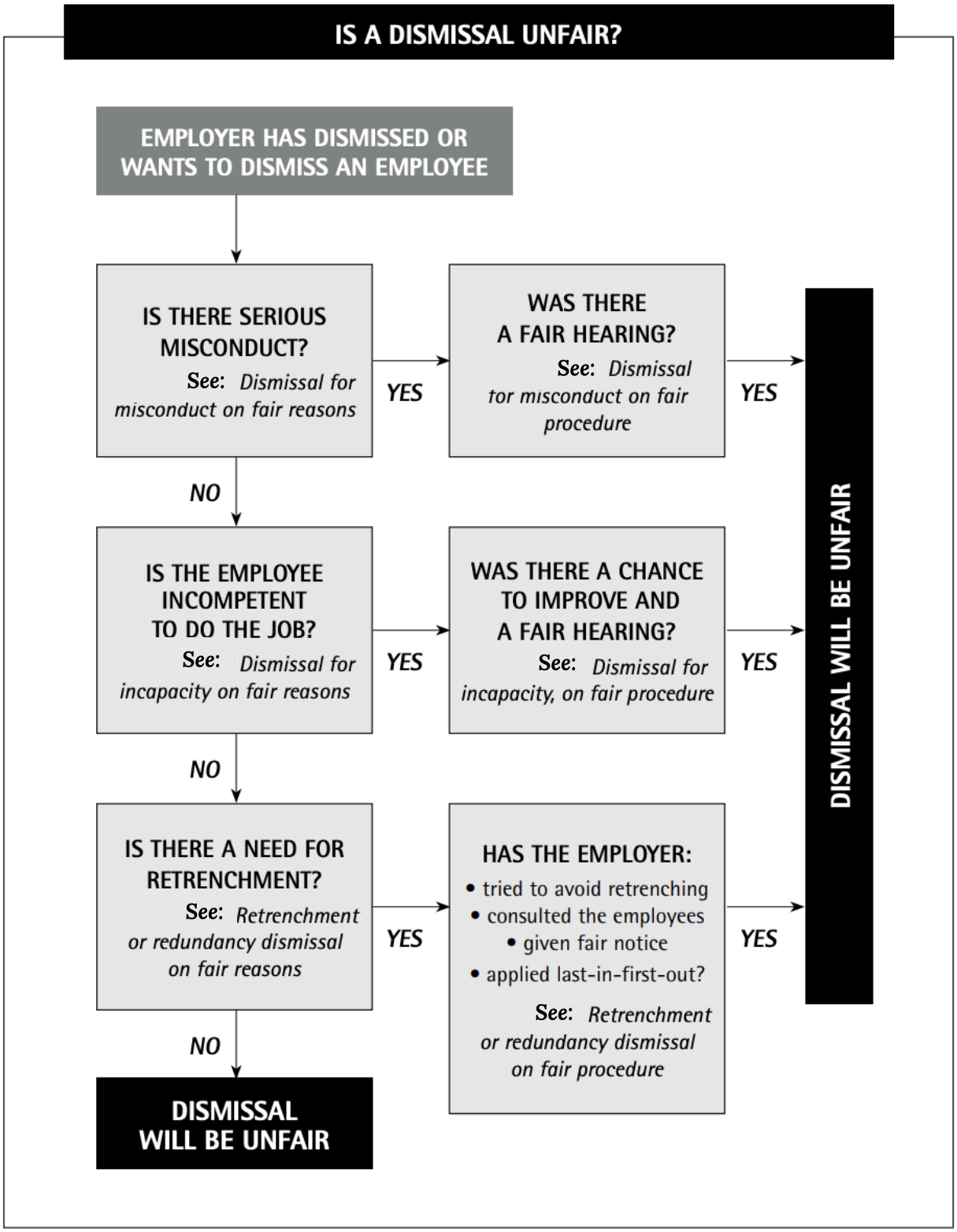
PROCEDURAL FAIRNESS

Was a fair procedure followed before the employee was dismissed?

The employee must always have a fair hearing before being dismissed. In other words, the employee must always get a chance to give their side of the story before the employer decides on dismissal.

The employee must also be allowed to bring any witness (a witness who can provide supporting evidence, etc.), have the meeting conducted in a language which they are comfortable in, and should be allowed representation by a fellow employee if they feel that it is necessary. A shop steward may be asked to go with the employee in the hearing. Unless by agreement, an external union official or person is not ordinarily allowed to attend the internal disciplinary hearing.

If an employee feels a dismissal was unfair, either substantively or procedurally, then this can be referred to the CCMA for conciliation and thereafter arbitration, if this is necessary. The referral of the dispute must be made within 30 days of the date of dismissal. Other aspects of a fair procedure are explained under the different reasons for dismissal. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 423: Problem 6: Employee is dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)***


IS A DISMISSAL UNFAIR?
EMPLOYER HAS DISMISSED OR WANTS TO DISMISS AN EMPLOYEE
IS THERE SERIOUS MISCONDUCT?
See: Dismissal for misconduct on fair reasons
YES
WAS THERE A FAIR HEARING?
See: Dismissal for misconduct on fair procedure
YES
NO
IS THE EMPLOYEE INCOMPETENT TO DO THE JOB?
See: Dismissal for incapacity on fair reasons
YES
WAS THERE A CHANCE TO IMPROVE AND A FAIR HEARING?
See: Dismissal for incapacity, on fair procedure
YES
NO
IS THERE A NEED FOR RETRENCHMENT?
See: Retrenchment or redundancy dismissal on fair reasons
YES
HAS THE EMPLOYER:
• tried to avoid retrenching
• consulted the employees
• given fair notice
• applied last-in-first-out?
See: Retrenchment or redundancy dismissal on fair procedure
YES
NO
DISMISSAL WILL BE UNFAIR
DISMISSAL WILL BE UNFAIR

Dismissal for misconduct

FAIR REASONS

Employers are encouraged to adopt clear rules of conduct that are known to all employees. Some rules may be so well established or obvious that everyone can be expected to know them, for example, that violence at work is not acceptable.

Dismissals for misconduct will only be fair if:

- The employee broke a rule of conduct in the workplace
- The rule was reasonable and necessary
- The employee knew of the rule or should have known of the rule
- The employer applied the rule consistently (there are no other employees who have been allowed to get away with this misconduct)
- It is appropriate to dismiss the employee for this reason, rather than taking less serious disciplinary action or imposing a lesser penalty such as a final warning

Corrective or progressive discipline must be used for misconduct. Corrective discipline aims to correct the employee and help them overcome the problem. Progressive discipline can get stronger every time the employee repeats the misconduct.

Employees should not be dismissed for a first offence, unless it is very serious, such as gross insubordination or dishonesty, intentional damage to the employer's property, putting others' safety at risk, or physical assault of a co-employee.

Employees can be dismissed for misconduct if they go on strike without following the procedures. The employer should contact a trade union official and tell the official of the planned dismissals and try to give employees an ultimatum with enough time to consider the ultimatum.

Before deciding to dismiss the employee for misconduct, the employer must consider the following:

- The employee's circumstances (for example, length of service, previous disciplinary record, personal circumstances)
- The nature of the job
- The circumstances in which the misconduct took place

FAIR PROCEDURES

Employers must keep records for each employee, which say what offences an employee committed, what disciplinary action was taken, and why the action was taken.

If there is repeated misconduct, the employer should have warned the employee. A final warning for repeated misconduct or serious misconduct must be given in writing.

For a serious disciplinary matter, there must be a fair hearing:

- If the employee is a shop steward, the employer must first inform and consult the union before initiating the disciplinary hearing
- The employee must know in advance what the charges are against them
- The employee must be given enough time to prepare for a hearing (approximately 1 or 2 working days)
- The employee must be present at the hearing and be allowed to state their case
- The employee must be allowed to be represented at the hearing by a shop steward or co-employee of their choice
- The employee must be allowed to see documents and cross-examine evidence used against them
- The employer should bring all witnesses against the employee to the hearing
- The employee should have a chance to cross-examine witnesses called against them
- The employee should be allowed to call witnesses
- The employee must be given reasons for any decisions taken
- The chairperson of the hearing should be impartial and unbiased against the employee charged with misconduct

Sometimes, if the employer has only a very small business, there might be some leniency as to how the employer meets all these requirements.

Dismissal for incapacity

FAIR REASONS

A dismissal for incapacity can be for:

- Poor work performance
- Physical disability or ill health

- Incompatibility, or where the employee is unsuitable to continue in the position
- Inability of the employee to be at work due to domestic, transport or personal problems.

When deciding whether a dismissal for incapacity was fair or not, the following must be considered:

- Whether the employee failed to work to a required standard
- Whether the employee was aware of the standard
- Whether the employee was given a fair chance to meet the standard
- Whether the employee has received counselling, guidance, and assistance to meet the standard
- Whether dismissal is the appropriate outcome for failing to meet the standard
- Whether the incapacity is serious and what the likelihood is of an improvement
- Whether the employee could be accommodated in an alternative position should one be available

FAIR PROCEDURES

Dismissals for poor performance will only be fair if the employer:

- Has given the employee proper training, instructions, evaluation, guidance and advice
- Assessed the employee's performance over a reasonable period of time
- Investigated the reasons for continued poor performance
- Investigated ways of solving the problem without resorting to dismissal
- Gave the employee a chance to be heard before deciding to dismiss
- Considered employing the employee in an alternate and appropriate position should one be available

Dismissals for (temporary/permanent) ill health or disability will only be fair if the employer:

- Investigated the degree and duration of the injury or incapacity
- Considered ways of avoiding dismissal, for example, getting a temporary employee until the sick employee is better
- Tried to find alternative work for the employee to do
- Tried to adapt the work so that the employee could still do it
- Gave the employee a chance to be heard before deciding to dismiss

How badly ill or disabled the employee is (degree of incapacity) and for how long they are likely to remain ill or disabled (duration of incapacity), as well as the reason for the incapacity, will be considered when deciding whether the dismissal is fair or not. More effort is expected of the employer if the employee was injured or got sick because of their work. ***(See pg 434: Problem 18: Employee is injured on duty and loses the job)***

Retrenchment or redundancy dismissal

FAIR REASONS

An employer is allowed to retrench employees for 'operational requirements' based on the employer's 'economic, technological, structural or similar needs'.

EXAMPLES

ECONOMIC REASON: *The employer says the business is losing money.*

TECHNOLOGICAL REASONS: *The employer is getting a machine to do work that employees did by hand before, or the employer's new machines need different skills to operate them than the existing employees' skills.*

STRUCTURAL REASON: *The employer is restructuring the business by combining two departments so has no further need for two Heads of Departments.*

FAIR PROCEDURES

When an employer considers retrenchment, they must consult:

- Whoever a collective agreement says must be consulted, for example, a trade union, or if there is no trade union:
- The workplace forum, or if none exists:
- The union, or if none exists:
- The employees themselves

The employer must issue a written notice in terms of Section 189 of the *Labour Relations Act* inviting the other party to consult with it and make all the relevant information available in writing at the consultations, including:

- Reasons for the proposed retrenchment
- Alternatives to retrenchment considered including redeployment

- Proposed number of employees to be retrenched
- How it will be decided which employees to retrench
- When the dismissals will take place
- Severance pay to be paid to any employee retrenched
- What other help the employer will give to the employees who will be retrenched
- Possibilities of future re-employment for these employees
- Number of employees employed by the employer
- Number of employees the employer has retrenched during the past 12 months

The employees who are being consulted must be allowed to have their say and make suggestions on any of these issues. If the employer rejects what the employees say, they must give reasons in writing if the employees have submitted their representations in writing.

The consultation process is a 'joint consensus-seeking' process. In other words the parties try and reach an agreement on the different issues, such as:

- Whether retrenchment is justified and ways to avoid retrenchment
- Ways to reduce the number of people retrenched
- Ways to limit the harsh effects of retrenchment
- The method and criteria for selecting employees to be retrenched; if there is no agreement, the employer must use fair and objective criteria
- Severance pay: employees can negotiate for higher severance pay than the *Basic Conditions of Employment Act* prescribes (which is 1 week's pay for every completed year of continuous service)

If employees and the employer cannot agree, disputes over the procedures for retrenchment can be referred to the CCMA for conciliation and thereafter the Labour Court. If the retrenchment involves a single employee, or where the employer employs fewer than ten employees, the employee can challenge the fairness of the dismissal at the CCMA rather than the Labour Court, if they wish to do this. A dispute about the amount of severance pay, is finalised at the CCMA by arbitration. Section 189A of the *Labour Relations Act*, has special provisions for retrenchments in companies that employ more than fifty employees and where the proposed number of employees to be retrenched is more than a specified limit. This is referred to as 'Large Retrenchments.'

The provisions can be used by either party to help them reach an agreement. The provisions allow for an outside facilitator from the CCMA to help facilitate the process and the right to strike over retrenchments as a final resort. ***(See pg 422: Problem 5: Retrenchment)***

What steps can be taken if there is an unfair dismissal?

If an employee thinks that the dismissal was unfair, in other words that the employer didn't follow fair procedures or there is not a 'good reason' for the dismissal, then the employee can try to challenge the dismissal. If a dismissal is found to be unfair, the employee will be able to get reinstated or re-employed, or get compensation money.

Reinstatement means the employee gets the job back as if they were never dismissed. Re-employment means the employee gets the job back, but starts like a new employee.

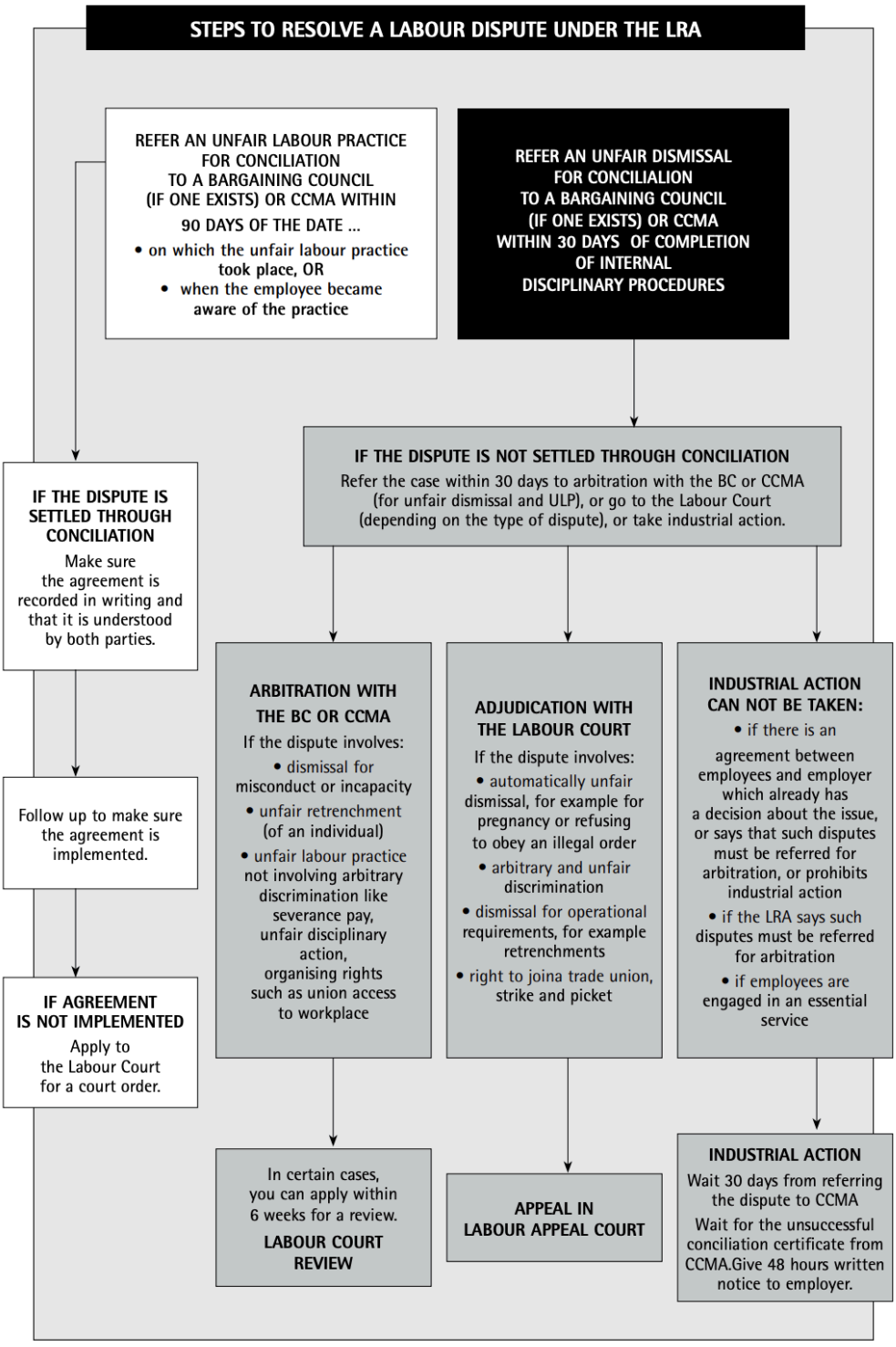
The employee is likely to get compensation if:

- The employee does not want the job back
- The circumstances surrounding the dismissal would make the relationship between employee and employer intolerable
- It is not reasonably practical for the employer to take the employee back
- The dismissal is unfair merely because the employer failed to comply with a fair procedure, but there was a good reason for dismissal (procedural or substantive unfairness)
- The dismissal was grossly unfair, yet they still returned to their old job, and back pay is awarded

The employee can get up to 12 months' wages as compensation for an unfair dismissal relating to misconduct, incapacity or operational requirements. If it was an automatically unfair dismissal, the employee could get up to 24 months' wages as compensation.

The *Labour Relations Act* sets out the procedures to be followed to resolve disputes over unfair labour practices and unfair dismissals. The steps are summarised in the chart below. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 423: Problem 6: Employee is dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)***

Solving disputes under the LRA



Conciliation by the CCMA or Bargaining Council

Conciliation is a process to bring the two sides in a dispute together after they have reached a deadlock. In conciliation, an independent and neutral third party is used to mediate between the two sides. Under the *Labour Relations Act*, the conciliator/ mediator is a commissioner from the CCMA or Bargaining Council.

HOW TO REFER THE DISPUTE TO THE RIGHT BODY

Find out whether there is a Bargaining Council covering the sector that the employee works in. If there is a Bargaining Council, phone that Council and find out the steps you should take to refer the matter for conciliation. If there is no Bargaining Council, the dispute must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. Do the following:

- Fill in form LRA 7.11. The application can be done online on the CCMA website: https://cmsonline.ccma.org.za/Defaiult.aspx
- Send a copy of the form to the employer, by e-mail, fax, registered mail or personal delivery. If the application was done online it will be sent to the email address of the employer
- Send a copy to the CCMA, by e-mail, fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example, a fax transmission slip, registered mail slip, or affidavit confirming personal delivery of form LRA 7.11. If the application was done online it will automatically be sent to the CCMA

If the employee does not want conciliation and arbitration (known as 'Con-Arb) to take place on the same day with the same commissioner, they must note this in the appropriate space on the dispute Form 7.11. ***(See pg 455: LRA Form 7.11)***

APPLYING FOR CONDONATION IF THE REFERRAL IS LATE

If more than 30 days have passed since the dismissal (or 90 days if it is an unfair labour practice) took place, the employee will have to apply for condonation, which is like an extension of the deadline and an application for late submission. If a Bargaining Council will deal with the matter, they will need to make an application for condonation and submit this application together with the LRA 7.11 form.

If the CCMA deals with the matter, the employee can apply for condonation in form LRA 7.11, or the CCMA will ask them to fill in condonation forms if they didn't do it on form LRA 7.11. If the application is late, the CCMA will not process the referral if

the employee has not made an application for condonation together with the referral of LRA 7.11 form.

Condonation may be granted if the employee can give good reasons for being late with the application. When applying for condonation the employee should focus on the following:

- 'Degree of lateness' of the application (how many days/weeks/months late is it) and an explanation of why the application is late
- The prejudice to the parties
- The likelihood of success of the case
- The measure of 'public interest' that applies if the case goes ahead (only if this is appropriate)

Application for condonation must be in the form of an affidavit. ***(See pg 974: Affidavits)***

THE CONCILIATION MEETING

The commission will arrange a venue and time for the conciliation, and will inform both parties. At the conciliation meeting, the commissioner meets with the two parties to the dispute to find ways to settle the dispute to everyone's satisfaction. The meeting is conducted in an informal way and the commissioner can meet the parties together or separately, as often as is needed. The commissioner has the power to subpoena any person to attend the meeting.

The commissioner must try to resolve the dispute within 30 days of it being referred to the CCMA or Bargaining Council. The employee/s and employer are free to agree to any solution to settle the dispute at a conciliation meeting.

A certificate will be issued by the commissioner at the end of the meeting to say whether the dispute has been settled or not. If 30 days have expired from the date of referral to the CCMA and no resolution has been made, the employee can ask for a Certificate of Non-Resolution from the CCMA and to proceed to fill in an application form for Arbitration.

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN A CONCILIATION MEETING?

Employees can be represented by a co-employee, or a trade union office bearer or official. If the dispute does not concern alleged unfair dismissal for misconduct or incapacity either party can be represented by an attorney.

The employer can be represented by an employee of the business (like the Human Resources Manager) or by a representative of an employer's organisation, but not an attorney.

SUCCESSFUL CONCILIATION

If the conciliation is successful, an agreement is reached which both parties must follow. If they do, the matter is resolved and ends here.

WHAT HAPPENS IF THE CONCILIATION AGREEMENT IS NOT COMPLIED WITH?

If either party breaks the agreement, the other party may apply to the CCMA to have the agreement made into a court order. These are the steps to follow:

- Obtain the application forms from the Registrar of the Court and fill them in. Attach a copy of the agreement and an affidavit to the application. The affidavit must state:
    - When the dispute was referred for conciliation
    - When the conciliation meeting was held
    - When the agreement was made
    - What happened after the agreement was made
    - Whether demands have been made
    - Whether the employee has kept their part of the agreement
- Serve the application on the employer
- File the application with the Registrar of the Court together with proof that you have served notice on the employer

UNSUCCESSFUL CONCILIATION

If the two parties cannot reach an agreement, or the employer refuses to attend the conciliation meeting, the commissioner will issue a certificate stating that the matter has not been resolved. The certificate will be sent to both parties by the commissioner's office. Either party can then refer the matter for arbitration to the CCMA or adjudication at the Labour Court, depending on the nature of the dispute.

Disputes over these matters are referred to the **CCMA or Bargaining Council for arbitration:**

- Claims for Unfair Discrimination if the employee earns under the threshold prescribed in the BCEA
- Unfair labour practices that do not involve discrimination
- Dismissals for acts of misconduct (the employer says the employee did something wrong)
- Dismissals for incapacity (the employer says the employee can't do the work properly)
- Severance pay
- Disputes concerning organisational rights for a trade union

- Alleged unfair retrenchment where the retrenchment involved an individual employee.
- Breach of a collective agreement
- Disputes over the granting of organisational rights

Disputes over these matters are referred to the **Labour Court for adjudication**:

- Disputes that involve discrimination, where the employee earns above the earnings threshold (R21 812 per month) laid down in the BCEA.
- Retrenchments
- Automatically unfair dismissals ***(See pg 361: Automatically unfair dismissals)***

If the parties believe that it is going to be too expensive to take the matter to the Labour Court, they can agree to have the matter arbitrated by the CCMA or Bargaining Council, even if the matter falls within the jurisdiction of the Labour Court.

Arbitration by the CCMA or Bargaining Council

WHAT IS ARBITRATION?

Arbitration means the two sides (or parties to the dispute) agree to use a third party to settle a dispute. A third party is someone who is not from the union or employer's side. **The arbitrator acts as judge to decide the dispute.** Under the LRA, the arbitrator is a commissioner from the CCMA or Bargaining Council. After hearing what both parties have to say, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

HOW TO REFER A CASE FOR ARBITRATION

If there is a Bargaining Council that regulates the sector that the parties work in, then the matter must be resolved according to the rules of that Council. Contact the relevant Council to find out what to do if the employee wants to refer the matter to arbitration. In some cases, even though there is a Bargaining Council, the arbitration may be done by the CCMA.

To refer the matter to the CCMA for arbitration:

- Fill in form LRA 7.13. This can be done online through the CCMA website: https://cmsonline.ccma.org.za/Default.aspx
- Send a copy of the form to the employer, by e-mail, fax, registered mail or personal delivery. If the form is completed and submitted online, it will

automatically be sent to the email address that has been provided for the employer

- Send a copy to the CCMA, by e-mail, fax, registered mail or personal delivery. Attach proof that you have sent a copy to the employer, for example a fax transmission slip, registered mail slip, or affidavit confirming personal delivery. If the application was done online, it will automatically be sent to the CCMA
- This referral form LRA 7.13 must be sent to the CCMA or the Bargaining Council within 90 days of receiving the certificate from the CCMA indicating that conciliation has not been successful

THE ARBITRATION HEARING

The CCMA or Bargaining Council will appoint a commissioner to arbitrate, will set the time and venue, and inform both parties. The arbitration hearing is relatively informal and the commissioner will encourage the parties to focus on the merits of their cases, and to avoid legal technicalities.

After hearing evidence from both parties under oath, the commissioner can make a ruling that is legally binding and must be accepted by both parties.

If the commissioner decides that the employer was wrong or unfair, the commissioner can order the employer to take certain steps or to pay compensation. ***(See pg 460: Checklist to prepare for an arbitration)***

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN AN ARBITRATION PROCEDURE?

Employees can only be represented by a fellow employee, an attorney (where the case does not involve misconduct or incapacity dismissal), a union official or union office bearer. Employers can only be represented by an attorney where the dispute is not a misconduct or incapacity dismissal, an employee of the business, or a representative from an employer's organisation.

In cases involving dismissal for misconduct or incapacity, attorneys are not allowed unless the commissioner specifically allows this.

Legal aid will only be granted to an employee in cases where the LRA allows for attorneys to be present, and cases where the commissioner specially allows attorneys. ***(See pg 257: Applying for legal aid)***

ARBITRATION APPEALS

There is no appeal against an arbitration award.

But either party may request the Labour Court to review the arbitrator's decision, if they think:

- The arbitrator exceeded their powers
- There was something legally wrong in the proceedings
- The arbitrator did not consider relevant issues in accordance with the law.
- They must ask for a review within 6 weeks of receiving the arbitration decision.

Adjudication by the Labour Court

WHAT IS ADJUDICATION?

Adjudication is a formal court judgement, that is legally binding on all parties.

The Labour Courts are set up under the LRA and are based at the High Court in each province. The Labour Court has the same status as the High Court.

HOW TO REFER A CASE FOR ADJUDICATION

If a case goes to the Labour Court for a court judgement (adjudication), phone the Registrar of the nearest Labour Court to get the necessary referral forms. The judge will hear evidence from both sides and make a judgement.

WHO CAN REPRESENT EMPLOYEES AND EMPLOYERS IN A LABOUR COURT CASE?

Employees and employers are entitled to be represented by a attorney in Labour Court cases. Legal aid may be granted to pay for the employee's attorney. ***(See pg 257: Applying for legal aid)***

ADJUDICATION APPEALS

A Labour Appeal Court can hear appeals and has the same status as the Supreme Court of Appeal. If either party does not agree with the decisions of the Labour Court, they can appeal to the Labour Appeal Court.

Taking industrial action

Industrial action is used where employees want new or better conditions at the workplace and wish to use strike action in a 'dispute of interest' which involves creating new terms and conditions of their employment. Stayaways, strikes, work stoppages, go-slows, work-to-rule, and union bans on overtime, and lock-outs, are all forms of industrial action. Industrial action can be protected (legal) or unprotected.

Protected industrial action complies with the rules and procedures set out in the *Labour Relations Act (LRA)*. If the industrial action complies with the law, then employees may not be dismissed by their employer for taking such action. In this situation, the striking employees are protected from being dismissed, unless they misconduct themselves in the period of the strike and are dismissed for misconduct.

Unprotected industrial action does not comply with the rules and procedures set out in the LRA. The courts are not sympathetic towards employees who go on an unprotected strike. If an employer dismisses employees who go on an unprotected strike, it is not likely that the court will help these employees.

When is industrial action not permitted?

Industrial action is not permitted when:

- The employers and employees have entered into a collective agreement that prohibits strikes or lock-outs around the issue being disputed
- The employers and employees have entered into an agreement that regulates the issue being disputed
- The law or the collective agreement says that the issue being disputed should be resolved through arbitration or the labour court. For example, the LRA says that unfair dismissals and unfair labour practices must be referred to arbitration or the Labour Court. **Employees cannot strike over unfair dismissal or unfair labour practices. Strikes over retrenchments are legal if the correct consultation processes have been followed.**
- There has already been arbitration about the issue, and an arbitration decision was made which regulates the issue.
- Employees are employed in an **essential service** or a maintenance service. An essential service is where the life, safety, or health of another person will be endangered if work is interrupted to go on strike. A maintenance service is where

machinery or the factory will be damaged if work is interrupted. In these cases, disputes must go to arbitration. Parliament and the South African Police Services are classified as essential services in the LRA. There is an Essential Services Commission that decides which other employees provide an essential or maintenance service, and so may not go on strike.

Although employees in essential services may not go on strike, the LRA provides other ways for them to resolve disputes. In most cases, where the parties are unable to reach an agreement around their dispute, either party may refer the dispute to compulsory arbitration by the Commission for Conciliation, Mediation and Arbitration or the relevant Bargaining Council.

In all other cases, employees have the right to strike, and every employer has the right to lock-out, provided they follow the correct procedures first. This includes the right to strike over wages and conditions of employment, and to strike in solidarity with other legally striking employees.

What procedures must be followed before industrial action is protected?

- If employees are planning to strike in solidarity with other employees in another company who are legally striking (a secondary strike), the employees must give their employer 7 days' notice in writing.
- If the employees are not part of a collective agreement with an alternate dispute resolution procedure, the dispute must be referred to the CCMA or the relevant Bargaining Council after the opposing party has received a copy of the Referral of Dispute Form (LRA 7.11).

In order for other strikes or lock-outs about disputes to be protected, employees or the employer must follow these steps:

- If the employees are part of a collective agreement that has a dispute resolution procedure, then that procedure must be followed.
- Otherwise, the dispute must be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant Bargaining Council. The CCMA or Bargaining Council must try to settle the dispute within 30 days of receiving the dispute. If conciliation is successful, it means both parties are satisfied, and no industrial action will be taken.
- If conciliation within 30 days is unsuccessful, the parties must wait until the CCMA or Bargaining Council sends or provides them a certificate that states that the dispute has not been resolved. Only then can either party take further steps towards industrial action.

- In the case of a proposed strike, the employees must give the employer at least 48 hours' written notice that they intend to take industrial action. If the employer is the state, the employees must give at least 7 days' notice. This notice must be specific about the time of the strike and what form the strike will take.
- In the case of a proposed lock-out, the employer must give the employees at least 48 hours written notice that it intends to lock the employees out.

If the employer locks employees out without following the procedures, the employees can immediately go on strike without following the procedures. If employees go on strike without following the procedures, the employer does not have to follow procedures to lock them out.

Where the employer illegally locks out the employees, a claim for compensation should be made against the employer because of this illegal lockout.

If an employer unilaterally changes conditions of employment

If an employer makes changes to employees' conditions of employment without negotiating with employees, employees can refer a dispute to the CCMA or Bargaining Council in terms of Section 64(4) of the LRA. They can then give the employer 48 hours' notice to restore the status quo (to take things back to what they were,) failing which they can go on a 'protected' strike.

When referring the dispute to the CCMA or Bargaining Council and giving notice to the employer, employees can demand:

- That the employer does not implement the changes if the employer still plans to change their conditions, OR
- That the employer restores their original conditions of employment if the employer has already changed their conditions

The employees can demand that the changes should be delayed until the matter has been addressed by the CCMA.

The employer must comply with the demand within 48 hours of receiving the Referral of Dispute notice. If they fail to do so, the protected strike may begin.

Employee's and employer's rights in protected industrial action

- A court order cannot stop protected industrial action unless it is deemed to be in the 'public interest' to do so. But an employer can ask the Labour Court to stop a

solidarity or ‘secondary’ strike if it is unrelated to the ‘primary’ (first) industrial action.

- The employer may not discipline, victimise, intimidate or dismiss employees who take protected industrial action or who are being locked out, nor those who refuse to do the work of another employee who is on a protected strike. Disciplinary action might be taken if the striking employees are responsible for misconduct or breaking the picketing rules during the strike.
- The employer can dismiss or take disciplinary action against employees for misconduct while taking industrial action, for example for violence or if they vandalise the employer's property. The employer cannot claim damages for lost production during the protected industrial action. (The employer **can** claim damages if the industrial action is unprotected!)
- The employer does not have to pay employees while they are on strike or legally being locked out. But employees who receive payment in kind (things like housing, electricity, water or food instead of money) can ask the employer to give them this part of their pay, and the employer cannot refuse. When the strike or lock-out is over, the employer can claim the value of the payment in kind made during the strike or lock-out back from the employees. This must be done through the Labour Court. The money cannot be deducted from the employees' pay without a court order or the employees' permission.
- An employer is entitled to recruit temporary (scab) labour while employees are on strike or when the employees are locked out by the employer where the lock out was introduced, only after the employees had gone on strike. If the employer locks out employees who have already started a strike, then the employer can use strike breakers to replace the strikers for the period of the strike.
- In exceptional circumstances, the employer can retrench employees on strike. The employer must follow the procedures for retrenchment. If the employer then employs other employees in place of the retrenched employees, the employees can take the dispute to the Labour Court, where the lockout is in response to a strike. If the employer did the lockout first, then they cannot employ temporary replacement labour.

Trade unions

Employees can organise themselves into employee organisations called trade unions. A trade union is controlled, run and paid for by its members. Organised employees in factories elect shop stewards and committees to represent them and report back to them in the workplace. The shop stewards and employees discuss the problems in the workplace, and the shop stewards take the employees' problems to the management.

WHAT ARE THE AIMS OF TRADE UNIONS?

- To **negotiate** with employers for proper working conditions
    - For decent wages and conditions of work
    - For recognition by the employer of the unions and shop stewards in the workplace
- To **protect** employees:
    - From unfair dismissal and unfair labour practices
    - From discrimination and abuse
- To **educate** employees:
    - On their rights and how to enforce these rights
    - On how to carry out their tasks in the trade union
- To **represent** employees:
    - To the employers and other authorities
    - To get benefits
- To take **legal action** when necessary

PAYING UNION SUBSCRIPTIONS

When an employee joins a union, they will be asked to pay a subscription fee every month to become a member. These fees are also called 'subs'. The union uses the 'subs' to pay for its expense, such as salaries for union staff, office rental, transport for union staff, etc.

THE RIGHT OF EMPLOYEES TO FORM, JOIN AND TAKE PART IN TRADE UNIONS

The Constitution and the *Labour Relations* Act say that employees have the right to form and join trade unions. This right is called **freedom of association**. Employers are not allowed to make it a condition of employment that an employee must or must not belong to a trade union. It is the employee's choice. An employee also cannot be victimised because they are a member of a trade union. This means the employer cannot treat the employee unfairly or badly because the employee is a trade union member.

TRADE UNION RIGHTS IN THE WORKPLACE

A registered union that has less than 50% membership of the workforce but which is sufficiently representative (around 30% of the membership of the workforce as members) can apply for these organisational rights:

- Access to the workplace for union office bearers and officials to hold meetings, etc
- To ballot its members

- To provide stop-order facilities for the deduction of 'subs' or trade union subscriptions

This percentage of membership (30%) is commonly regarded as being 'sufficiently representative' and entitles the trade union to be granted stop-order facilities.

A registered union that has a majority (more than 50%) of the employees as members at a workplace can apply for the above rights as well as the following:

- Election of shop stewards/employee representatives
- Disclosure of information/the employer must give the union any information that is relevant for meetings and negotiations
- Time off for a representative to undertake trade union duties or have training

The union applies to the employer for these rights. Within 30 days the employer must meet the union. They make a collective agreement about these rights. The union can ask the CCMA to intervene if the employer refuses. The CCMA will try to mediate and if that fails, will conduct an advisory arbitration. This advisory arbitration award does not have to be complied with by the parties, but the parties should consider the advice of the commissioner.

Unions that belong to Bargaining Councils or Statutory Councils automatically have these rights, even if they don't have many members at the workplace.

The CCMA is now required to consider the composition of the workforce, extending its parameters to include Temporary Employment Employees and any other in atypical working conditions.

Social services and benefits in the workplace

Unemployment Insurance Fund

The government has established the Unemployment Insurance Fund (UIF) to provide short-term relief to employees when they become unemployed or have reduced employment, or are unable to work because of illness, maternity or adoption leave and also to provide relief to the dependants of a contributor who has died. If an employee becomes unemployed, the UIF will pay the employee for a maximum period of 12 months, subject to UIF credits accumulated by the employee, while that employee is unemployed. Employees, companies and the state contribute to this fund.

There are five kinds of benefits covered by UIF:

1. Unemployment benefits

2. Sick benefits
3. Maternity benefits
4. Parental / Adoption benefits
5. Dependent's benefits

For more information on the UIF, look up the Department of Employment and Labour website: www.labour.gov.za

WHO IS A CONTRIBUTOR TO THE UIF?

All employees who work for more than 24 hours per month must contribute to the Fund. It is illegal for employers not to make deductions from the employee's earnings. Even people earning high salaries (unless they are earning commission only) must contribute to the Fund, regardless of how much they earn. The Fund sets a ceiling amount of R261 748 per year (or R21 812 per month). Any employee who earns above this threshold will only contribute up to this amount. If they become unemployed, they will receive benefits at the level of the ceiling.

EXAMPLE

Vernon is a company administrator, and he earns R30 000 per month. The current threshold for UIF is R21 812, so Vernon will pay 1% of R21 812, and the company will pay 1% of R21 812 every month on his behalf to the UIF. If Vernon becomes ill and wants to claim Illness Benefits, the UIF will only pay him a percentage of R21 812 (not of his current salary). The actual amount he will be paid will depend on the number of days he has been contributing to the Fund.

WHO IS NOT COVERED BY UIF?

Certain employees do not contribute to the Fund, and they therefore cannot claim from the Fund if they are unemployed. The following people are not covered by UIF:

- Employees who work less than 24 hours per month
- Employees who receive payment under a learnership agreement negotiated under the *Skills Development Act (No. 97 of 1998)*
- National and provincial government employees (public servants)
- People whose earnings are calculated on a commission basis
- Foreign contract employees (unless they have permanent residence) ***(See pg 75: Immigrants and migrants)***

HOW DO EMPLOYEES BECOME CONTRIBUTORS TO UIF?

In terms of the Act, all employers have to become registered with the UIF and make a declaration of all their employees to the UIF. Whenever there is a change of staff, for example, new appointments made, or contracts terminated, employers must inform the UIF of these changes. So, there are two very important things an employer must do when employing an employee:

- Send details of the employee to the UIF
- Deduct UIF contributions from the employee's wage and send these plus the employer's own contributions to SARS (or the UIF if not registered with SARS for PAYE, e.g. in the case of a domestic employee). ***(See pg 430: Problem 13: Employer does not register employee with the UIF)***

HOW MUCH DO EMPLOYEES CONTRIBUTE TO THE FUND?

Every week (or month, if the employee is paid monthly), the employer deducts 1% of each employee's wages for UIF. This works out to 1c for every R1 the employee earns. The employer also pays 1% of the employee's wage. So, for every cent the employee pays to UIF, the employer pays the same. The company then pays all these contributions to the South African Revenue Services (SARS) (if the company is registered with SARS for tax purposes (PAYE) or for Skills Development Levies (SDL)) or to the UIF using their online portal.

The *Unemployment Insurance Contributions Act* says all employers have to submit their UIF payments together with their payments of PAYE and SDL before the 7th of each month. This is all written on one form called the EMP 201 return form (the form used to submit returns to SARS). ***(See pg 382: Unemployment Insurance Fund [UIF])***

Where employers are not required to register with SARS for PAYE or SDL purposes, they must pay the UIF contributions to the Unemployment Insurance Fund using the UF 3 return form.

HOW MUCH DO PEOPLE GET PAID WHEN APPLYING FOR BENEFITS?

In the case of unemployment, illness, adoption and dependants benefits, benefits will be paid for a maximum of 12 months or for the number of days credits that the person has built up during the 4 years leading up to the application for benefits. Credits are given to employees as they work and contribute to the Fund. Employees can earn credits in the following way: for every 4 days that an employee works and contributes to the Fund, they receive 1 day's credit. So, to qualify for the full 12 months credits the employee must work and have been contributing to the Fund for at least 4 years and not have claimed any days benefits during that period (except maternity benefits).

Maternity benefits will be paid at a flat rate of 66% of the earnings threshold in the BCEA (R21 812 per month)

The employee is regarded as having contributed to the Fund from the first day of employment to the day that the services are terminated. A notice period worked before termination of service is also regarded as a period employed.

WHEN IS A CONTRIBUTOR NOT ENTITLED TO RECEIVE BENEFITS?

An employee who has been a contributor to the Fund is not entitled to receive benefits if the contributor:

- Is receiving a monthly state pension
- Is receiving payment from the compensation fund for illnesses or injuries that caused the temporary or total unemployment of the contributor
- Is receiving benefits from any other scheme established by a Bargaining Council
- Fails to comply with the provisions of the law
- Has been caught working and collecting benefits or has committed fraud (offence)

TYPES OF UIF BENEFITS

UIF pays five kinds of benefits:

1. Unemployment benefits
2. Illness benefits
3. Maternity benefits
4. Adoption benefits
5. Dependant's benefits

UNEMPLOYMENT BENEFITS

These benefits are for employees who lose their jobs because they have been dismissed or retrenched, or when the employees' contract expires. If an employee resigns from the job or absconds from work, then they will not qualify for benefits unless the employee can prove it was a constructive dismissal. To get unemployment benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund and money has been deducted from their salary for UIF every month.
- The claim must be made within 12 months of becoming unemployed
- The claim must be made on the proper form
- The employee has been unemployed for more than 14 days

- The services of the employee were terminated (dismissal or retrenchment or insolvency of the employer) by the employer, and the employee did not resign or abscond (unless they can prove it was constructive dismissal)
- The employee is registered as a work seeker with an employment office in terms of the *Skills Development Act*, 1998 (the employee must be capable of and available for work)

Benefits will be paid for a maximum of 12 months or for the number of days credits that the person has built up during the 4 years leading up to the application for benefits. Credit is accumulated by the employee of one day benefit for every four days worked. The employee must report at times and at places that the claims officer determines to sign the unemployment register, and they must undergo training and vocational counselling if the claims officer tells them to do this. If the contributor refuses to do this without a good reason, they will not be entitled to benefits.

Employees who leave to go and study or to go on a pension cannot claim UIF because they are not available for work. Employees who go on a company, Bargaining Council or civil pension can claim UIF as long as they say they are still available, able and willing to work.

Employees who work for reduced hours or short time can claim UIF benefits for the lost hours. For example, if an employee has been temporarily put on short-time because the employer has run into financial problems and there is less work available, they can claim for the reduced hours from UIF, provided the remuneration being earned in the week, is less than the amount of the benefit they could receive.

ILLNESS BENEFITS

Employees can claim **additional sick leave and illness** benefits if they are off work because of illness for more than 7 consecutive days. Benefits are paid from the date on which the employee stopped working because of illness and may be up to 365 days, subject to the number of credits earned by the employee prior to the illness.

To get illness benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund, and money has been deducted from their salary for UIF every month
- The employee must have been sick for more than 7 days
- The claim must be made within 6 months of the illness

- The claim must be made on the proper form, which includes completing a medical certificate by the doctor or recognised homeopath

If the employee has been paid by the employer during the period of illness, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

Benefits can be paid up to a maximum of 365 days, subject to the credits earned by the employee prior to their illness.

MATERNITY BENEFITS

Maternity benefits can be paid to a contributor who is pregnant. Section 25 of the *Basic Conditions of Employment Act* says a pregnant woman can take maternity leave at any time from 4 weeks before the expected date of birth, and she may not work for six weeks after the birth. Benefits are paid at a flat rate of 66% of the employee's wage for a maximum of 121 days or 17.32 weeks in any period of 4 years. If an employee has applied for maternity benefits this does not affect her right to claim unemployment benefits. To qualify for maternity benefits, the mother must have contributed to the fund for at least 13 weeks before applying for maternity leave.

To get maternity benefits the employee must satisfy the following conditions:

- The employee has been contributing to the fund for at least thirteen weeks before claiming maternity benefits, and money has been deducted from her salary for UIF every month
- The claim must be made at least 12 months after becoming due (or on good cause shown)
- The claim must be made using the proper form

If there is a miscarriage or a stillborn child, then benefits are paid for a maximum of 121 days after the miscarriage/stillbirth.

If the employee has been paid by the employer during the period when she was off on maternity leave, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

ADOPTION BENEFITS

A person who legally adopts a child less than 2 years old and who leaves work to look after that child can now claim adoption benefits from the Fund from the date of adoption.

Only one of the adoptive parents can apply for benefits.

Benefits are paid from the date on which the Court grants an order for adoption. To get adoption benefits, the employee must satisfy the following conditions:

- The employee has been contributing to the fund and money has been deducted from their salary for UIF every month
- The child must be adopted in terms of the *Child Care Act of 1983*
- The period not working must be spent caring for the child
- The adopted child must be below 2 years old
- The claim for benefits must be made within 12 months of the order of adoption being issued
- The claim must be made using the proper form
- Only one claimant may claim Adoption Benefits in terms of the fund

If the employee has been paid by the employer during the period when they are off caring for the adopted child, then the benefits paid by the Fund will be the difference between what the employer paid and the benefit that the employee would have been entitled to.

DEPENDANT'S BENEFITS

If an employee dies while working, the dependants can claim the dependant's benefits from the Fund. A dependant can be:

- The employee's wife/husband/life partner
- Any dependant child under 21 years old if there is no surviving spouse (husband or wife) or if the surviving spouse/life partner has not made an application for the benefits within 18 months

To get dependant's benefits, the employee must satisfy the following conditions:

- The employee must have been contributing to the fund and money must have been deducted from their salary for UIF every month
- The claim for benefits must be made within 18 months of the death of the employee
- The claim must be made using the proper form

If the surviving spouse or life partner does not claim within 18 months, then a dependant child can apply for the benefits, provided that the claim is made within 14 days after the 18 months has expired (during which the spouse should have applied).

Benefits can be paid up to 365 days in any period of 4 years, depending on the number of credits an employee has earned.

The benefits that are paid are equal to the unemployment benefits that would have been paid if the person was still alive.

HOW DO EMPLOYEES CLAIM UIF BENEFITS?

CLAIMING UNEMPLOYMENT BENEFITS

1. **Register for UIF within 12 months after becoming unemployed at the employment office closest to where the employee lives.**
2. **Sign the unemployment register** (this is called '**signing on**'). Usually, you must sign this register at the employment office every 4 weeks or whenever told to do so by the UIF clerk. If you miss signing, the benefits could be delayed for a long time, as you will have to re-register. If you are ill on one of the signing dates, you must bring a doctor's letter the next time. ***(See pg 430: Problem 14: Failing to sign the unemployment register)***

   You must say that you are available to work, or else benefits will not be paid out. If you are offered work, then you must be available to work. Sometimes, employees are told to go to different companies and ask for work. They get a form that the companies must fill in and sign showing that they have no jobs available.
3. You should start getting money within 8 weeks after applying for benefits. After that, you should get money every 4 weeks or so, until all the benefits are used up. Only the employee who has applied for benefits can collect the money from the employment office. When you go to collect your benefits you must take your ID book with you. Benefits will be paid into the beneficiary's account. ***(See pg 429: Problem 12: Application for UIF benefits is too late)***

CLAIMING ILLNESS BENEFITS

An employee will not get illness benefits:

- If the claims officer decides that the employee's illness arises from their own misconduct

- For as long as the employee unreasonably refuses or neglects to undergo treatment or to carry out the doctor's instructions. The claims officer decides whether the employee's refusal or neglect is unreasonable

To apply for illness benefits, you must submit your claim at the employment office closest to where you live within six months of being released from work. If you are too ill to go to the UIF office, a friend or family member can bring you the form to sign. ***(See pg 386: Illness benefits)***

Illness benefits are claimed on **FORM UF86.** The doctor who is treating you must complete paragraph 15 of this form. This is a medical certificate. The rest of the form is completed by people working at the employment office. If you are also unemployed, in other words, you have also lost your job, you must tell the claims officer that you are unemployed. But if you still have a job and are on unpaid sick leave, then you only need FORM UF86.

Once the application for illness benefits is approved, the employment office will send **FORM UF87** to you. This form must be signed by the doctor as soon as possible. You then fill in the rest of the form and return it to them. No illness benefits will be paid until you have returned the completed FORM UF87. You will only be paid for the period the doctor books you off work.

If you are dismissed when you are ill and the doctor has laid you off for less than 6 months, the balance can be claimed as unemployment benefits.

Illness benefits are not paid for the first week off work. But if the illness lasts longer than seven days and illness benefits are paid, then you will receive benefits for any period in the first seven days for which you did not get normal wages.

Illness benefits can be paid in one lump sum or in several payments. The amount will be paid into a bank account.

CLAIMING MATERNITY BENEFITS

Employees apply for maternity benefits in the same way as for illness benefits. You must submit your claim within 12 months.

If you are pregnant and want to apply for maternity benefits you must go to the nearest employment office yourself and make the application. If you are too ill, you can organise for someone else to go in your place.

When you register for maternity benefits you will get **FORM UF92**. This form must be filled in by a doctor. You must take the form back to the employment office.

Staff at the employment office may ask you to go to the doctor again or to visit the employment office at certain times. You must do what they ask, or you may not be able to claim.

Maternity benefits will be paid into a bank account.

On **FORM UF95** you can apply for further benefits after your baby is born. This form must be signed by the doctor who delivered the baby. An employee can get these benefits even if the baby was stillborn. If you are also unemployed, then you must tell the claims officer. But if you are on unpaid maternity leave, you will only need to fill in forms UF92 and UF95.

Benefits are paid at a flat rate of 66% of your wage (which is capped at the BCEA earnings threshold of R21 812 per month). ***(See pg 387: Maternity benefits)***

CLAIMING ADOPTION BENEFITS

Adoption benefits will not be paid if an application is not made within 12 months of the order of adoption being issued.

An employee should take the following documents to the employment office to apply for adoption benefits:

- The employee's child's birth certificate
- The order of adoption of the child.

Adoption benefits will be paid into a bank account. Payments are paid out until all the benefits are used up. ***(See pg 388: Adoption benefits)***

CLAIMING DEPENDANT'S BENEFITS

Dependant's benefits can be claimed by the husband/wife or life partner of the deceased employee and any minor children of the employee.

The application for benefits must be made within 6 months of the death of the contributor or for the dependent within 2 weeks after the 6 months if the surviving spouse did not claim any benefits.

The surviving spouse or life partner must complete **FORM UF126** when applying for dependant's benefits. They must take the following documents to the Department of Employment and Labour office when applying for benefits:

- Identity document
- A certified copy of the death certificate
- A certified copy of the marriage certificate

If these documents are lost, then the wife/husband or life partner should make a statement at the employment office.

A child or wife/husband of the deceased employee must complete **FORM UF127** when applying for benefits. Any dependant who wants to claim dependant's benefits must take the following documents to the employment office:

- If the dependant is a child, certified copies of the birth certificate, or if the dependant is a husband or wife, the marriage certificate
- A certified copy of the death certificate of the contributor

The employment office will give the dependant **FORM UF128**. This form must be filled in by the last employer of the deceased employee. The child or dependant must then take the form back to the employment office.

Remember that **only one person** can claim dependant's benefits. The wife or husband of the employee who died is given preference.

The money for dependant's benefits is paid in one lump sum in the beneficiary's bank account. The amount that is paid will be the same as the total unemployment benefits that the deceased employee could have drawn at the time of the death. ***(See pg 384: How much do employees get paid when applying for benefits?)***

If an employee dies after claiming all the UIF that is owed to them, there will be no money left for dependant's benefits.

HOW TO GET COPIES OF BIRTH, MARRIAGE AND DEATH CERTIFICATES

Go to your local Home Affairs office and request the certificate you require. Don't forget the following information:

- What type of certificate you want
- Full name and identity number of person
- Date and place of birth/marriage/death
- For birth certificates, full names of parents and their identity numbers
- For marriage certificates, full names of both husband and wife and identity numbers

WHAT IF THE UIF BENEFITS ARE USED UP AND THE EMPLOYEE IS STILL UNEMPLOYED?

If you are still unemployed by the time your UIF benefits have been used up, then you can apply for an extension of unemployment benefits. For an extension of ordinary benefits, you must apply on form UF139. You must write down on this form

details of where you have tried to find work. The form must be handed in at an employment office. If you have received illness benefits, you can apply for an extension of illness benefits on form UF140. This includes a medical certificate to be completed by the doctor.

The UIF treats all applications for extension of benefits on merit. This means they decide whether they think you have good reasons to get more benefits. There is no automatic right to an extension. Extension benefits are not easy to get. Three years is the maximum time for which normal benefits are paid out. But it helps to prove that:

- You are still actively seeking work (show letters of refusal by employers).
- You depend for the necessities of life on the UIF benefits; a list of expenses such as rent receipts, food bills, water and electricity bills and schooling fees should be drawn up.
- You have been working for more than 4 years and have gained the maximum number of credits for which normal benefits are paid out. Twelve months is the maximum time for which normal benefits are paid out.

WHAT IF THE APPLICATION FOR NORMAL BENEFITS IS REFUSED?

If an application is refused the applicant will be sent a registered letter informing them of the decision of the UIF. The letter sets out the reasons for the refusal. You can appeal against the refusal.

UIF APPEALS

If your application for UIF benefits has been turned down you or your representative must write to the **Regional Appeals Committee** within 3 months (or 90 days) of being told that benefits will not be paid out.

What must be included in the appeal?

- Name and address of the person appealing
- Identity number
- Date of applying for benefits
- The office where the application was made
- The date on which the claims officer gave the decision
- The details of the claims officer's decision and why the employee wants to complain
- The reasons for the appeal

All this information must be set out in a statement which the **employee must sign**.

Address the letter to the Regional Appeals Committee of the Provincial Office of the Department of Employment and Labour.

FURTHER APPEALS

If the Regional Appeals Committee again refuses the employee's application, then the employee can appeal again to:

The National Appeals Committee
Unemployment Insurance Board
PO Box 1851
Pretoria 0001

TERMINATION OF BENEFITS

Benefits stop if:

- The full amount has been paid out
- You stop signing the register
- You find work; in this case you must inform staff at the employment office immediately if you find work; if you carry on accepting benefit payments, you will have to pay back the amount received. This is called **fraud**.

Compensation Fund

The Compensation Fund provides compensation for employees who get hurt at work, or sick from diseases contracted at work, or for death as a result of these injuries or diseases.

The Compensation Fund is covered by the *Compensation for Occupational Injuries and Diseases Act (No. 130 of 1993)* (COIDA) and the *Compensation for Occupational Injuries and Diseases Amendment Act (No. 61 of 1997)*. The Compensation Commissioner is appointed to administer the Fund and approves claims of employees. Where an employee is entitled to receive compensation from the Compensation Fund, the Fund, and not the employer, will pay the employee.

(*Go to the Department of Employment and Labour website for more information on the Compensation Fund:* [*www.labour.gov.za*](http://www.labour.gov.za))

When can an employee claim compensation?

- Employees can claim if they are injured in an accident 'in the course and scope of duty' (in other words, while they are doing their work).
- Employees can claim if they get a disease caused by the work (an occupational disease).
- If an employee dies from the accident or disease, their dependants can claim.

Employees who are drivers or who have to be transported as part of their work may be involved in motor vehicle accidents while working. Motor vehicle accidents at work are covered by the *Road Accident Fund Act*. The accident must be reported to the Compensation Commissioner, and will follow the normal Compensation procedure, but the money will be paid by the Road Accident Fund. ***(See pg 397: Motor vehicle accidents while working)***

Who can claim compensation from the Fund?

Any person who is employed or being trained by an employer, and is injured or gets sick on or because of the job can claim compensation. The following employees cannot claim compensation from the Fund:

- Members of the South African National Defence Force and South African Police Services (they have their own fund)
- Out-employees to whom employers give articles to be made up or to wash or clean. Then they are not working under the control of the employer
- Employees who work outside South Africa for longer than 12 months at a time, unless there is a special agreement with the Commissioner

The Act says an employer has to pay compensation to the injured employee for the first 3 months from the date of the occupational injury. Thereafter, the Compensation Fund will pay. The Compensation Fund will repay the employer for the money that was paid.

Who contributes to the Fund?

Employers pay into the Compensation Fund once a month based on a maximum amount of earnings currently of R597 328 per employee per year. Employees do not pay anything to the Fund, so employers cannot deduct money from employees' wages for this. The following employers do not have to pay into the Fund:

- National and provincial state departments
- Certain local authorities
- Employers who are insured by a company other than the Compensation Fund. For example, many employers in the construction industry are insured by Federated Employers Mutual Assurance.

These employers are still covered by the Act and claims are made to and decided by the Commissioner. The only difference is that the payouts are made by the insurance fund of the employer (not by the Compensation Fund).

You can claim if:

- You were injured on duty
- You lost a family member who died on the job
- You are an employee employed by a temporary employment services provider

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When will the Fund not pay compensation?

- No payment is made for claims that are made more than 12 months after the accident or death, or more than 12 months after the disease is diagnosed
- If an employee is off work for 3 days or less, this is not covered by the Compensation Fund. It may be covered by the employee's medical aid or sick fund
- No payment is made if the employee's misconduct caused the accident unless the employee was seriously disabled or died from the accident
- There may be no payment if the employee unreasonably refuses to have medical treatment, for as long as the employee refuses
- When an employee is an 'outsourced employee'

Occupational diseases and injuries

DISEASES

Occupational diseases are illnesses caused by substances or conditions that the employee was exposed to at the workplace. Schedule 3 of the *Compensation for Occupational Injuries and Diseases Act* sets out the working conditions and diseases caused by these conditions that are covered by the Compensation Fund. An employee can claim compensation if exposed to these working conditions and then getting the related disease.

If a disease is not listed, then employees can claim compensation only if they can prove that the disease was caused by conditions at work and not by some other

factor. Medical evidence and reports will have to be submitted to the Commissioner. It may also take some time for a disease to become obvious, and in such cases, employees can claim compensation if they are no longer at a workplace so long as it falls within the time limits for lodging claims. ***(See pg 436: Problem 20: Employees develop an occupational disease)***

The Commissioner will approve or reject the claim. Only if the Commissioner approves the claim will you get compensation (for temporary or permanent disability), and your medical expenses will be paid. If the disease gets worse after a period of time, you can apply to have your compensation increased.

INJURIES

Injuries covered by the *Compensation Act* are only those that occur as a result of or at work. Compensation is paid for temporary and permanent disabilities that lead to a loss of earnings.

MOTOR VEHICLE ACCIDENTS WHILE WORKING

If motor vehicle accidents happen while employees are doing their jobs, then they can get compensation from the Compensation Fund. But if they are injured in a motor vehicle accident caused by someone else's negligent or unlawful driving, even if this is on the job, they can also make a third-party claim from the Road Accident Fund. The money received from the Compensation Fund will be taken off the third-party payment. For example, if the Road Accident Fund agrees to pay damages of R15 000, but the Compensation Fund has already paid R10 000, then the employee will only get R5 000 damages from the Fund.

Employees cannot sue their employer for damages if they are injured on the job. But if the employer caused injury to employees while they were NOT on the job, then the employee could sue them.

What types of compensation payments are made?

Compensation is paid for getting injured at work or for diseases caused by work. These are the main types of compensation payments:

- For temporary disability (the employee eventually recovers from the injury or illness)
- For permanent disability (the employee never fully recovers)
- For death
- For medical expenses
- Additional compensation

Compensation is always worked out as a percentage of the wage the employee was earning at the time the disease or injury was diagnosed. If the employee is unemployed by the time a disease is diagnosed, the wage they would have been earning must be calculated.

The Compensation Fund does not pay for pain and suffering, only for loss of movement or use of your body.

TEMPORARY DISABILITY

Temporary disability means the employee does eventually get better. If an employee is off work for 3 days or less, no compensation will be paid (the employee can claim sick leave from the employer). If the employee is off for more than 3 days, the employee gets compensation which also covers the first 3 days. Temporary disability can be total or partial:

- **Total disability** means the employee is unable to work for a while. The employee will get 3/4 (75%) of the normal monthly wage as compensation.
- The formula is:

  (*monthly wage x* 75) ÷ 100, *if the employee is paid monthly*

  (*for weekly paid employees, multiply the weekly wage by* 4.3 *to get the monthly wage*)

- **Partial disability** means the employee can go to work, but on light duty for fewer hours. If the employee earns less doing the lighter work, they will get 3/4 of the difference between the normal and reduced monthly wage.

EXAMPLE

Thembiso's wages are R2 000 per week. What would his Compensation be for a temporary total disability?

Multiply weekly wage by 4.3: R2 000 *x* 4.3 = R8 600 *per month*

Monthly wage x 75 ÷ 100: R8 600 *x* 75 ÷ 100 = R6 450

Thambiso would get R6 450 per month from the Compensation Fund for Total Temporary Disability.

For an occupational disease, use the wage at the time of the diagnosis and not at the time when the employee first got exposed to the disease. If the employee is now unemployed, use the wage that they would probably have earned if still employed.

Compensation for temporary disability will be paid for up to 12 months. If the condition of the employee has not improved after 12 months, the commissioner may agree to continue payments for up to 24 months. After 24 months, the Commissioner may decide that the condition is permanent and grant compensation on the basis of permanent disability. The Commissioner also pays all medical accounts, including medicine for which accounts must be submitted. ***(See pg 432: Problem 16: Employee does not get the correct amount of compensation money)***

PERMANENT DISABILITY

Permanent disability means that an employee never fully recovers from the injury or sickness. A permanent disability can completely prevent an employee from working, or it can just inconvenience an employee. The most serious is called 100% disability, and least serious is called 1% disability. A doctor must write a medical report about the disability. The Commissioner, with the help of a panel of doctors, works out the degree of disability. The degrees of disability are set out in Schedule 2 of the *Compensation for Occupational Injuries and Diseases Act*. Some examples are:

- Loss of two limbs: 100%
- Total loss of sight: 100%
- Loss of hearing in both ears: 50%
- Loss of sight in one eye: 30%
- Loss of one whole big toe: 7%
- Loss of one other toe: 1%

Compensation for permanent disability is paid either as a monthly pension or as a lump sum:

- If the injury is measured as more than 30%, the employee gets a pension
- If the injury is 30% or less, the employee gets a lump sum.

The formula for the **monthly pension** is:

[monthly wage x (75 ÷ 100)] x (percentage disability ÷ 100)

This amount will be paid once a month for the rest of the employee's life.

EXAMPLE

Joe lost one of his hands while pushing some poles through a saw. At the time of his accident, he was earning R8,000 per month.

The percentage of disability for loss of a hand is 50%. Calculate the amount Joe would be compensated by the Compensation Fund as follows:

Monthly wage x (75 ÷ 100) x (percentage disability ÷ 100)

R8 000 x (75 ÷ 100) x (50 ÷ 100)] = R 6,000 x (50 ÷ 100) = R3 000

Joe will get R3,000 per month for the rest of his life.

The formula for the **lump sum** is:

(monthly wage x 15) x (percentage disability ÷ 100)

This amount will be paid once only and there will be no further payments.

EXAMPLE

Freddie lost an eye while working in a factory. Before the accident, he got R8 000 a month. What compensation should he get for his permanent disability? The percentage of disability for the loss of one eye is 30%. Freddie will get a lump sum because his injury was 30% or less. To work out the lump sum:

(Monthly wage x 15) x (percentage disability ÷ 100)

(R8,000 x 15) x [(30 ÷ 100)] R120 000 x (30 ÷ 100) = R36 000

Freddie will receive R36 000 as a lump sum payment

DEATH BENEFITS

Compensation can be claimed by the widow or dependants if an employee dies as a result of a work-related accident or disease. Claimants for death benefits must submit copies of the following documents:

- Marriage certificate or proof that the couple lived as husband and wife
- Birth certificates or baptismal certificates of children (for proof of children)
- The death certificate
- Declaration by the widow/er (form W.C.L 32)

- The employer's report of the accident or disease Funeral accounts (form W.C.L 46)
- A special Compensation Form must be filled in, giving details of income and property

WHO CAN CLAIM COMPENSATION WHEN AN EMPLOYEE DIES IN THE COURSE AND SCOPE OF DUTY?

- The widow/er:
    - Lump sum payment: 2 x monthly pension of employee (the pension is the amount the employee would have been paid if he/she had been 100% disabled)
    - Monthly pension for life: 40% x monthly pension of employee, paid every month
- Each child under the age of 18 years (including illegitimate, adopted and step-children) is entitled to:
    - 20% x monthly pension of the employee, paid every month until the child is 18 years old
    - The pension can continue for longer if the child is mentally or physically handicapped
- Other dependants, if there is no widow/er or children (parents, sisters, brothers, half-sisters, etc.):
    - Full dependants: get the same as the widow
    - Partial dependants: get a lump sum that is worked out according to the degree of dependence
- The person who pays for the funeral expenses gets paid expenses up to R18 251.

NOTE

The total monthly pension per family cannot be more than the pension the deceased employee would have received if they were 100% disabled (i.e. 75% of the monthly wage).

MEDICAL EXPENSES

All the medical expenses of an employee will be paid for a maximum of two years from the date of the accident. This may include a reasonable amount required for transportation.

ADDITIONAL COMPENSATION

If an employee is injured, dies or contracts an occupational disease because of the negligence of the employer, or a defect in machinery or equipment, the employee can get extra compensation for temporary or permanent disability. Any employee who is under 26 years old at the time of an injury or disease will get extra compensation. An application for additional (increased) compensation must be made on a **Form W930** within 24 months of the injury. The Commissioner can extend the period if good reasons exist.

Steps to claim disability

1. The employee must inform the employer, supervisor or foreman of the accident, injury or disease verbally or in writing.
2. The employer must report the accident or disease to the Compensation Commissioner within 7 days for an injury and within 14 days after gaining knowledge of an alleged occupational disease. The employer must report it, even if they do not believe the injury or disease is work-related. If the employee is unemployed by the time a disease is diagnosed, the employee can send forms directly to the Commissioner.
3. Part of the form must be given to a doctor to complete, to check that the injury or disease falls under the Compensation Fund.
4. The doctor must send a First Medical Report **(W.CL.4)** detailing the disease or seriousness of the injury and the likely period the employee will be off work. This must be done within 14 days of seeing the employee.
5. The employer must send the First Medical Report to the Commissioner.
6. If the employer refuses to complete and send the form, the employee or a representative may send a form directly to the Commissioner. The Commissioner will instruct the employer to fill in the right form.
7. The doctor must also send Progress Medical Reports **(W.CL.5)** monthly while treatment is carried on. If the employee's condition has not improved after 24 months, the Commissioner may decide that the condition is permanent and grant compensation for permanent disability.

8. The doctor must send in a Final Medical Report, stating either that the employee is fit to return to work or that the employee is permanently disabled.
9. The doctor submits this form to the employer, who sends it to the Commissioner. Anyone else can send the medical reports to the Commissioner, as long as the claim number is on the form.
10. The employer sends in a Resumption Report **(W.CL.6)** to the Commissioner, when the employee starts work again or is discharged from hospital. The employer also fills in this form to claim back the compensation money the employer paid to the employee during the first 3 months they were off work.

How is the compensation money paid?

The compensation office waits until it has all the forms, and only then does it pay. ***(See pg 431: Problem 15: Long delay in paying compensation)***

TEMPORARY DISABILITY

The compensation office will pay the employer who gives it to the employee.

PERMANENT DISABILITY

Lump sum: The payment gets sent to the employer, who will pay the employee what is owed.

Pension: This is paid out monthly for the rest of a person's life. The disabled employee can decide where the compensation office must send the pension, for example, to a bank account. Pensions are always back-paid to the date of the accident.

If employers do not send in the forms or the claims take long, employees must contact the nearest employment office and report it.

Objections and appeals

- If an employee disagrees with the decision of the Commissioner, he/she may lodge an objection to the decision within 90 days from the date they became aware of the decision.
- The objection must be done on form **W929** and sent to the Commissioner.
- The commissioner may call a formal hearing to review the decision at which the employee can be represented by a legal representative, trade union official or family member. The employee can call evidence, including expert evidence.

- After the representations are made, the Commissioner will make a final decision.
- If the employee is still not satisfied they can take the decision of the Commissioner on review to the High Court. It is advisable to seek legal assistance with the application. ***(See pg 435: Problem 19: Employee's compensation has been refused)***

Employee's tax

What is employees' tax?

Employees' tax is the tax that employers must deduct from the income of employees (salaries, wages, bonuses, etc.) and pay over to SARS every month.

WHAT IS PAYE?

> PAYE stands for Pay As You Earn. PAYE is the tax that is deducted by an employer from an employee's income where their income is higher than the tax threshold.

When must an employee pay tax?

Every employee who earns more than a certain amount (known as the "threshold") in a year of assessment must pay income tax. The threshold amount for the 2025/2026 year of assessment is R95 750 if you are under 65 years, R148 217 if you are between 65 and 75 years, and R165 689 if you are older than 75 years.

For example, if you are 66 years old, you can earn up to R148 217 for the tax year without having to pay tax; if you are 55 years old and you earn R95 750 in the tax year, you will also not have to pay tax because you are earning below the tax thresholds. Once you earn more than these amounts, you will be taxed either according to the PAYE tax tables based on what you earn.

A year of assessment for an individual consists of twelve months starting on 1 March and ending on the last day of February of the following year.

How much tax do you pay?

This depends on:

- How much you earn (including overtime, bonuses and fringe benefits and before deductions)

- Your age (whether you are under 65 or over 65)
- Whether you are a member of an officially recognised pension fund or pay towards a retirement annuity fund. The amount you pay into a pension scheme or a retirement annuity fund can be DEDUCTED from your wage before tax is calculated. This means you will pay less tax because the tax is worked out on a lower income. Contributions to a Provident Fund cannot be deducted

After the deduction for a pension or a retirement annuity fund, the rest of your wage is taxed according to different rates. The rate you pay depends on how much you earn, and is calculated from tax tables issued by the South African Revenue Services (SARS). The tax tables will determine what rate of tax you will have to pay.

What information must you give to employers?

When you become employed you must fill in an **IRP2 form**. The tax deducted depends on the information that you fill in on this form.

If you are over 65 years old, you must notify your employer. Also, tell the employer if you pay towards a retirement annuity fund, because you will then pay less tax.

If you do not fill in an IRP2 form at all, the employer will tax you at the highest possible rate.

Rebates

A rebate is an amount of money taken off the tax **after** your tax rate has been worked out. This means the tax you pay is lower. You can get different types of rebates. There is a primary rebate and an age rebate (if you are over 65 years old).

Tax on bonus pay and retrenchment pay

Bonus pay is always added to the wage and then the whole amount is taxed. So, the income that is taxed is higher than the normal wage, and the tax you pay will also be higher.

Part-time work and casual work

PAYE must be deducted at a rate of 25% in respect of all employees who:

- Work for an employer for less than 22 hours per week, OR

- Work for an employer for an unspecified period.

Examples include:

- Casual commissions paid, for example, spotters fees
- Casual payments to casual employees for irregular/occasional services
- Honoraria paid to office bearers of organisations/clubs

The following people are exempt from this:

- If an employee works regularly for less than 22 hours per week and provides the employer with a written undertaking that they do not work for anyone else, then they will be regarded as being in standard employment and tax must be deducted according to the normal weekly or monthly tables.
- An employee who is in standard employment (in other words, who works for one employer for at least 22 hours per week).
- Pensions paid to pensioners

Tax assessments

Once a year, your employer must issue you with an IRP5 tax certificate that shows the total wages that you earned and the total tax that was deducted. If you are younger than 65 years and you earn more than R95 750 per year, you have to pay income tax. If you are 65 years or older but younger than 75 years, you only pay tax if you earn more than R148 217 per year. If you are 75 years or older, you only pay income tax if you earn more than R165 689 per year. These figures apply for the 2025/2026 tax year.

If you earn more you qualify for tax and usually it is deducted by your employer and paid over to SARS.

If you earn less than R1 million a year, you will have to pay a fixed percentage and not have to submit a tax return, provided certain criteria are met. Check the SARS website for more information: www.sars.gov.za

If you earn more than R1 million a year the SARS assesses your earnings when you fill in a 'tax return'. You fill in a tax return form and send it with the IRP5 to the SARS.

Assessment means checking up on the tax you pay to make sure you haven't paid too much or too little tax.

Pension and provident funds

The main aim of a pension or provident fund is to provide benefits for its members when they retire from employment. The fund also usually pays benefits when a member dies while still working, is unable to work because of illness, or is retrenched.

The main difference between a pension fund and a provident fund is that if a **pension fund member** retires, the member gets one-third of the total benefit in a cash lump sum, and the other two-thirds is paid out in the form of a pension over the rest of the member's life.

A **provident fund member** can get the full benefit paid in a cash lump sum. Pension funds also offer better tax benefits to employees. An employee's contributions to a pension fund are deductible for tax, while contributions to a provident fund are not.

There are advantages and disadvantages to both types of funds. It will depend on a person's own financial needs. However, one of the strongest arguments in favour of provident funds and the lump sum payment concerns the means test used to work out whether a person qualifies for a state old age pension.

Usually, if a person receives a private pension, that person is disqualified from receiving a state old-age pension. If a person gets a lump sum payment then that person may also qualify for a state pension in some cases.

How does a pension or provident fund work?

If it is a workplace pension fund, money goes into the fund through contributions from employers and employees. An employee cannot get money back from a fund except as benefits according to the fund rules. Employees can also invest privately in their own pension or provident funds where there is no workplace pension or provident scheme in place.

Types of funds and benefits

Different workplace funds have different kinds of benefits, for example:

- **Withdrawal benefits:** paid to employees who resign or are dismissed (employee gets own contributions only)
- **Retrenchment benefits:** paid to employees who are retrenched

- **Retirement benefits:** paid to employees when they retire at 60 (women) 65 (men) (amount paid out depends on how long employee was contributing)
- **Insured benefits:** including benefits paid to an employee who is disabled and benefits paid to the dependants of an employee who dies.

Not all funds provide all these benefits. To understand how any fund works, the member must read the rules of the fund.

Bargaining Council funds

A pension or provident fund may be established by a Bargaining Council Agreement. The Bargaining Council Agreement will lay down the rules for the pension or provident fund. Usually, all employees who fall under a Bargaining Council Agreement have to become members of any fund set up by that Bargaining Council, unless their employer has de-registered from the fund and set up their own fund.

Bargaining Council funds do not allow an employee to withdraw benefits if they leave one company to go and work for another company in the same industry. Usually, an employee can only withdraw benefits after a year of leaving the company, if they are still unemployed or was re-employed outside the industry. If the employee is re-employed in the same industry before one year is up, then contributions carry on as if there was no change in job.

Complaints about payments from pension funds

Any person who has a complaint about benefits from a pension fund can make a complaint to the Pension Funds Adjudicator. ***(See pg 449: How to write a complaint to the Pension Funds Adjudicator)***

The Pension Funds Adjudicator

The law says you must first send your complaint in writing to the pension fund or to the employer. The pension fund or employer then has 30 days to reply to the complaint. If they don't reply, or if you are not satisfied with the reply, then you can send an official complaint to the Pension Funds Adjudicator. Include your letter to the pension fund or employer, and their reply. After you have made a complaint to the Pension Funds Adjudicator, the adjudicator gives the pension fund 30 days to reply. Once the Adjudicator has received the pension fund's reply, they will look at the facts and decide who is right. ***(See pg 450: How to write a complaint to the Pension Funds Adjudicator)***

The Pension Funds Adjudicator does not deal with government pension funds. If a person who works for the government has got a complaint about a government pension then they must send their complaint to the Public Protector. ***(See pg 63: Problem 2: Making a complaint to the Public Protector)***

There is no charge to make a complaint with the Pension Funds Adjudicator.

WHO CAN MAKE A COMPLAINT TO THE PENSION FUNDS ADJUDICATOR?

The following people can make a complaint to the Pension Funds Adjudicator:

- A member or former member of a pension fund
- A beneficiary of a fund or a former beneficiary of a fund (a beneficiary is someone who is written down in your pension fund agreement to get the money from your pension fund, for example, your family if you die)
- An employer who participates in a workplace fund
- A board or board member of a fund
- Any person with an interest in a complaint

TIME LIMITS

You must get your complaint to the Pension Funds Adjudicator within 3 years of the problem arising.

The Two-Pot Retirement System

The two-pot retirement system was introduced on the 1st September 2024.

The system allows employees to access certain funds from their retirement fund before retirement if they need to, and without needing to resign and leave their jobs. It tries to create a balance between a person's immediate financial needs and long-term retirement savings.

All retirement contributions made by employees after the 1st September 2024 will be split with one-third of contributions going to a 'savings pot' and two-thirds going to a 'retirement pot.'

Under this Two-Pot system, employees can access funds accumulated in their 'savings pot' before retirement, but the funds in the 'retirement pot' will continue to remain untouched until retirement. The employee will not be able to access these funds before they retire from their job.

WHAT WAS THE PROBLEM WITH THE OLD PENSION PROVISIONS?

Before the introduction of the new 'two-pot' system, the rules on retirement meant that your contributions to a retirement fund would be 'locked in' until you reached the retirement age (typically 55 years), except if you died or were permanently disabled before this age, or if you resigned from your job. The result of this was that many employees chose to resign from their jobs so that they could have immediate access to their retirement savings. This meant there would be no 'retirement benefits,' or limited retirement benefits remaining when they finally retired.

The two-pot system aims to help South Africans manage their finances and give them some flexibility with the money they have saved for retirement. It allows them to withdraw a certain amount every year for emergencies while at the same time protecting most of the savings for retirement. It also protects people by preventing them from cashing out their full pension savings when they change jobs leaving nothing for retirement.

HOW DOES THE TWO-POT RETIREMENT SYSTEM WORK?

The system means that from 1 September 2024, any new retirement contributions that you make into your retirement fund will be split into two pots: **a savings pot** and **a retirement pot**. One-third of your pension contributions go into the savings pot and two-thirds go into the retirement pot. All your existing retirement savings up to 31 August 2024 will be kept in a **vested pot**.

THE SAVINGS POT

One-third of your pension contributions from 1 September 2024 will go into your savings pot. In addition, a once-off amount of 10% of your savings up to 31 August 2024 (which is kept in your vested pot) will be paid to your savings pot to create an opening balance that you can draw from.

The system allows you to withdraw cash from your savings pot once a year. The minimum withdrawal amount is R2 000. Withdrawals from the savings pot will be included in your gross income and will be taxed with your PAYE tax deductions.

The importance of the savings pot is that you will be able to access funds in your savings pot before retirement and without needing to resign from your job.

Any withdrawals from your savings pot are taxed at your personal tax rate and you will also pay a transaction fee. If you owe SARS any money, this will automatically be deducted before you receive funds.

THE RETIREMENT POT

Two-thirds of your pension contributions from 1 September 2024 will go into your retirement pot. This amount remains 'locked in' and saved until you retire. When you retire, under the two-pot retirement system, you can withdraw one-third of your retirement pot, and the remaining balance will be paid as fixed monthly payments.

This system aims to balance immediate financial needs with long-term financial security and protecting retirement savings.

To summarise: you will be able to use your savings pot before retirement as a 'rainy day' fund, but you will only be able to access the retirement pot when you retire.

THE VESTED POT

All your existing retirement savings up to 31 August 2024 will be kept in a vested pot. You cannot make any additional contributions to the vested pot unless you were contributing to a retirement fund and you were 55 years old on 1 March 2021.

Ten percent (up to a maximum of R30 000) of your existing savings in the vested pot will be moved into your savings pot (if you have retirement savings) as a once-off opening balance. For example, if you have R200 000 in your vested pot, 10% (or R20 000) will be moved into the savings pot to create a once-off opening balance. The vested pot then reduces to R 180 000 but you can use the R20 000 in the savings pot for emergency drawdowns according to the two-pot rules.

You will not be able to withdraw from the vested pot until you retire (or if you die or are permanently disabled before retirement age, or if you resign from your job). However, when you retire, you can withdraw the full amount (or whatever the rules of your pension fund state). In other words, the same rules that applied to your retirement fund before the two-pot system was introduced will continue to apply to funds in the vested pot.

NOTE

If you retire and the total amount of your vested pot and retirement pot is less than R165 000, you will be able to withdraw the full amount from both pots.

Medical aid schemes for employees

A medical aid scheme helps members to pay for their health needs, such as nursing, surgery, dental work and hospital accommodation. It is a type of insurance scheme. For this service, members and their employers pay regular contributions to the scheme. The law says that medical aid schemes must pay for medical expenses such as hospital, doctor and dentist bills, medicines and other medical services like special dentistry and physiotherapy. Some schemes offer more than this.

Advantages and disadvantages of Medical Aid Schemes

The **advantages** of a medical aid scheme are that:

- It protects employees if they suddenly have to pay large, unexpected medical costs, and they don't have to delay their medical treatment because they don't have any money
- Employees get better medical care because they are looked after by private doctors, clinics and specialists instead of overcrowded public hospitals

The **disadvantages** of a medical aid scheme are:

- It is expensive and fees are always increasing
- If an employee has dependants in rural areas it does not help to have medical aid because there are no private healthcare facilities
- There are often many hidden costs in the schemes and the scheme might only pay a small percentage of the costs and the employee has to pay the rest
- Some schemes set limits for benefits, for example, a scheme could set a limit of R720 per year for medicines prescribed by a doctor for a single member. If the member needs to buy more than R720 worth of medicines in a year, they will have to pay for any costs of medicines above this limit.
- Some medical costs are completely excluded from medical aid schemes. Employees must then pay for these costs themselves even though they are paying into the medical aid fund every month.

Medical Schemes Act

The *Medical Schemes Act No. 131 of 1998* made the following changes to medical aid schemes:

- There must be standard-rate fees for people to join medical aid schemes regardless of their health or age
- There can be no discrimination on grounds of peoples' health, for example, refusing to allow a person to join a medical aid scheme because they are HIV-positive, or because they have asthma or diabetes
- The definition of dependants includes spouses (husband or wife) and natural and adopted children

This means that people living with HIV or AIDS can no longer be turned away from medical aid schemes on grounds of their medical condition. The minimum medical benefits included for HIV-related illnesses include hospital admissions as well as necessary medical treatment. The treatment for people with AIDS-related illnesses also continues until death.

The Act also sets out a complaints procedure for people who have a complaint against a medical aid scheme.

Skills Development Act

The *Skills Development Act (No. 97 of 1998)* was passed to develop and improve the skills of people in the workplace. The Act does the following:

- Provides a framework for the development of skills of people at work
- Builds these development plans/strategies into the national qualifications framework
- Provides for learnerships that lead to recognised occupational qualifications
- Provides for the financing of skills development using a levy-grant scheme and a National Skills Fund

The following institutions are established in terms of the Act:

- National Skills Authority
- National Skills Fund
- Skills Development levy-grant scheme
- SETAs

- Labour Centres
- Skills Development Planning Unit

Sector Education and Training Authorities (SETAs) have been established for all the sectors in South Africa for example, for agriculture, construction, wholesale/retail, etc.

SETAs are required to develop sector skills plans for a specific sector and to implement the plans by establishing learnerships, allocating grants, and monitoring education and training in the sector. Learnerships can lead to a qualification registered by the South African Qualifications Authority (SAQA).

The National Qualifications Framework (NQF)

The NQF is a plan for education and training. The aim is for people to continue accumulating qualification credits as they learn and work. The Skills Development Act defines the following structures to implement the NQF:

- **South African Qualifications Authority (SAQA):** Responsible for overseeing the development and implementation of the NQF. SAQA establishes National Standards Bodies, Standards Generating Bodies and Education and Training Quality Assurers.
- **National Standards Bodies (NSB):** Set standards about what needs to be learnt in a particular field of learning. SAQA has established 12 fields of learning, such as Agriculture, Communication, and Manufacturing each with its own sub-fields
- **Standards Generating Bodies (SGBs):** Develops standards called unit standards and qualifications in a particular sub-field of learning.
- **Education and Training Quality Assurers:** Anyone who wants to provide education and training will have to be approved by an Education and Training Quality Assurer. ETQ Assurers will issue qualification certificates to learners.
- **Sector Education and Training Authorities (SETAs):** Each economic sector has a SETA. There are 21 SETAs that cover all work sectors in South Africa, including government sectors. Employers choose which SETA their business falls under. The SETA for each sector must develop and implement a sector skills plan, including approving workplace skills development plans, promote learnerships, act as the Education and Training Quality Assurer, and pay out Skills Development Grants.

The Skills Development Levy-Grant Scheme

The Skills Development Levy was established under the *Skills Development* Act. A levy is an amount of money that employers have to pay to the South African Revenue Service (SARS)

for skills development of employees. If employees undergo training then the employer can claim this amount back from the relevant SETA.

PAYING THE SKILLS DEVELOPMENT LEVY

An employer must pay a skills development levy every month if:

- The employer has registered the employees with SARS for tax purposes (PAYE), and/or
- The employer pays over R500 000 a year in salaries and wages to their employees (even if they are not registered for PAYE with SARS)
- An employer must pay 1% of the total amount paid in salaries to employees (including overtime payments, leave pay, bonuses, commissions and lump sum payments)

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

HOW ARE THE LEVIES USED?

The levies paid to SARS are put in a special fund. 80% of the money from this fund will be distributed to the different SETAs with 10% of this going towards paying SETA administration. The other 20% will be paid into the National Skills Fund. The SETAs will then pay grants to employers who appoint a Skills Development Facilitator. The National Skills Fund will fund skills development projects that don't fall under the SETAs. Even if an employer's total salary bill is less than R500,000 and they don't have to pay the SDL, they can still claim from the SETA for training and development.

GETTING A SKILLS DEVELOPMENT GRANT

An employer can get money back from the SETA or the National Skills Fund to use on training and developing their own employees' skills.

An employer can get back up to 70% of the levies they paid to SARS from the relevant SETA. The grants that can be claimed back are:

- 20% of the levy in a Mandatory Grant
- 50% of the levy in Discretionary Grants for Learnerships, Skills Programmes, Apprenticeships, Workplace Experience Placements, Internships and Bursaries.

There are also benefits of tax rebates on registered learnership programmes.

The requirements to be able to claim SDLs are:

- Register as a Skills Development Facilitator (SDL)
- Submit a Workplace Skills Plan (WSP) indicating training planned for the next reporting period
- Submit an Annual Training Report (ATR) as proof of the training conducted during the previous reporting period

By submitting company reports on training, employers can also improve their BBBEE score.

Skills Development Facilitators

The *Skills Development Act* makes provision for the employment and use of a skills development facilitator by an employer. This person is responsible for developing and planning the skills development strategy of a business for a specific period.

The skills development facilitator must do the following tasks:

- Help the employer and employees to develop a workplace skills plan
- Send the workplace skills plan to the relevant SETA
- Advise the employer on how to implement the workplace skills plan
- Help the employer to draft an annual training report based on the workplace skills plan
- Advise the employer on the requirements set by the relevant SETA
- Serve as the contact person between the employer and the relevant SETA

An employer can appoint an employee or a formally contracted person from outside the business to perform the functions of a skills development facilitator.

Problems

1. Money is deducted from an employee's wages

Jerry is a cashier working for Speedy G. Every day, he cashes up the money in the till and if it is short he notes this in a book. At the end of the week, all these shortages are counted up and the total amount is deducted from Jerry's wages. Are these deductions correct?

WHAT DOES THE LAW SAY?

The law says that an employer cannot make deductions from the wages of an employee except in certain circumstances.

WHAT CAN YOU DO?

You can take the following steps:

1. Check whether the employee is covered by a Bargaining Council Agreement or Wage Determination, or other agreement about terms and conditions of employment. In this case, Jerry is covered by the Bargaining Council Agreement for the motor industry. This agreement says that these deductions are unlawful. ***(See pg 295: How do you know which law applies to an employee?)***
2. Contact the employer and ask them for the reasons for the deductions. Explain that such deductions are unlawful. Quote Section 49 of the BCEA.
3. Write a letter to the employer giving all the details of the deductions, the weeks, the amounts deducted, and the amount the employee is claiming.
4. If the employer does not pay back the amounts owing to Jerry, write a letter of referral to the Bargaining Council asking them to investigate the problem. Explain to them what steps you have already taken to try and sort out the problem. Alternatively, refer a dispute to the CCMA in terms of Section 73A of the BCEA for breach of Section 34 of the BCEA. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
5. Note that if losses are made to the employer because of the negligence or misconduct of the employee, a deduction of up to 25% of the employee's wage can be made to repay for the losses, provided the employee has agreed to this and provided the employee has had an opportunity to explain their conduct in a disciplinary hearing. ***(See pg 308: Deductions)***

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2. Employee wants to claim notice pay and leave pay

Faizel lost his job. He was dismissed without any notice and not paid in lieu of notice nor leave owing to him. He does not want to get his job back but wants to claim the notice and leave money that is owed to him.

- Faizel has a right to his notice and leave money if the dismissal was unfair. However, if an employee has been summarily dismissed for example, for misconduct, the employer doesn't owe notice or payment in lieu of notice. But in this case the employer will have to prove the dismissal was justified. In all cases, the employee is entitled to payment of any outstanding leave pay.
- The amount of notice and leave pay owing to him depends on which wage regulating measure he falls under. ***(See pg 295: How do you know which law applies to an employee?)***

- If Faizel was unfairly dismissed, he may be able to claim compensation from the employer. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

You can take these steps to claim the money owed:

1. Check which wage regulating measure protects the industry. Is it a Bargaining Council Agreement, Wage/Sectoral Determination or the BCEA and work out what is owed to Faizel for payment in lieu of notice and outstanding leave pay.
2. Send an email to the employer stating Faizel's claim. ***(See pg 444: Model letter of demand to employer for notice and leave pay)***
3. If the employer refuses to pay Faizel the money that is owed, refer him with a covering letter to the relevant Bargaining Council or Department of Employment and Labour.
4. Alternatively, refer the dispute to the CCMA in terms of Section 73A of the BCEA for non-payment of statutory leave and notice pay. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
5. Check on the Bargaining Council website to see if there are online options to submit a complaint. The complaint must say what the claim is and what steps have been taken to sort out the problem. If the employer is found guilty of not complying with the Bargaining Council Agreement or the BCEA, an inspector can order the employer to pay Faizel. If the employer refuses to pay him, the inspector can refer the matter to the Director General of Employment and Labour.
6. Faizel has the right to bring a private civil claim against the employer, either in the Small Claims Court or in the Magistrate's Court. ***(See pg 198: Small Claims Court; See pg 301: Enforcement of the BCEA (if he falls under the BCEA); See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination)***

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3. Employee is paid below the minimum wage

Thabiso is employed by Fix-it Tiles. The company makes plastic floor tiles. She thinks that they pay her less than the minimum wage, which the law says she should be paid. She wants to know if this is correct.

WHAT DOES THE LAW SAY?

Collective agreements, Bargaining Council Agreements, Sectoral Determinations and Wage Determinations may set out minimum wages. The *National Minimum Wage Act* lays down a national minimum wage. If the company is only covered by the BCEA, then it must pay the current national minimum wage. Thabiso has the right to claim the wages that she was promised when she started working for the company.

If this is lower than the national minimum wage, then she can claim for the minimum wage amount.

WHAT CAN YOU DO?

- Check which wage regulating measure protects the company that Thabiso works for, for example, a Bargaining Council Agreement or Wage Determination, BCEA. (See: How do you know which law applies to an employee?)
- Once you have established this, check whether there is a minimum wage for the industry. If so, find out what the minimum wage should be for Thabiso. If she is being underpaid according to a BCA or Wage Determination or in terms of the *National Minimum Wage Act*, you can either refer the case to the CCMA OR to the Department of Employment and Labour (or Bargaining Council if it applies). You cannot refer the case to both the CCMA and the Department.
- These are the different procedures you can follow:
    - First you need to contact the employer and ask for details on why Thabiso is being underpaid, as the law says that a minimum wage must be paid to her. If the employer carries on paying below the minimum wage and refuses to take any notice of your request, you can decide whether to go to the CCMA or the Department of Employment and Labour (or Bargaining Council).
    - Using the CCMA: The quickest way to deal with the problem of someone not being paid according to the NMWA, is to refer the dispute directly to the CCMA in terms of Section 73A of the BCEA. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'
- Section 73A of the BCEA says that an employee can refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee in terms of the BCEA or the NMWA, or in terms of a contract of employment, a Sectoral Determination or a collective agreement. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically be referred to arbitration. No legal representation is allowed in these disputes.
- This provision only applies to employees who earn below the BCEA earning threshold of R21 812 per month. Employees who earn above the threshold can make a claim against an employer for failing to pay them what is owed in either the Labour Court, High Court, Magistrates Court or Small Claims Court depending on the jurisdictional requirements for each of these courts.

- Using the Department of Employment and Labour (or Bargaining Council):
    - You can refer the problem in writing to the Bargaining Council (if it is a Bargaining Council Agreement) or to the Department of Employment and Labour in terms of the *National Minimum Wage Act*). The complaint must say exactly what the claim is and what steps have already been taken to sort out the problem.
    - Each Bargaining Council, as well as the Department of Employment and Labour, has its procedures for investigating complaints and enforcing rights. To report a complaint, go to the nearest Department of Employment and Labour and report the complaint. You will need to complete the relevant Labour Complaint Form. The Department of Employment and Labour will appoint an inspector to investigate the complaint. If the inspector finds the employer has not paid the minimum wage, they can get a written undertaking from the employer to pay the minimum wage, or they can order the employer to pay the employee by giving them a compliance order. Both the compliance order and the written undertaking can be made into an arbitration award by the CCMA. If the award is not complied with, the employee can apply to the CCMA to certify the award, and it can be enforced as if it were an order of the Labour Court.
- You can also use the Department of Employment and Labour Impimpa hotline to report the complaint. Using this hotline doesn't need data, airtime or a smartphone. The number to dial when reporting a complaint is 134305# and select the relevant job category. Then follow the prompts. ***(See pg 302: Summary of the provisions in the BCEA [if she falls under the BCEA]; See: Enforcement of the BCEA; See pg 321: Enforcement of a workplace-based collective agreement; See pg 323: Enforcement of a Sectoral Determination; See pg 318: Enforcement and dealing with disputes about minimum wages)***

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4. Dismissed employee wants the job back – how to apply for reinstatement or compensation

Maisie is dismissed from her job for ongoing lateness in arriving at work. She says the dismissal was unfair because she relies on public transport and she can't help it if the trains always run late. She wants to get her job back.

WHAT DOES THE LAW SAY?

The law says that a person who is constantly late for work without good reason can be dismissed on grounds of misconduct or incapacity (poor performance). Generally,

for late coming, Maisie should have received a verbal warning, a written warning and a final written warning before the decision was taken to dismiss her. If Maisie was dismissed for an unfair reason (substantive unfairness), she may be able to be reinstated or compensated. If she was dismissed for good reason but the employer didn't follow the proper procedures (procedural unfairness), it is more likely that she will be compensated but not reinstated. ***(See pg 362: Substantive fairness; See pg 362: Procedural fairness)***

WHAT CAN YOU DO?

Find out whether she does want to be reinstated in the same job or claim compensation for being unfairly dismissed. Sometimes, an employee who was unfairly dismissed does not want to be reinstated or claim compensation. The employee only wants to claim outstanding money for notice, leave and so on. ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***

The following is an outline of the procedure you can follow after the dismissal of an employee. It should be followed in all cases where an employee is dismissed and wants to be **reinstated** or at least **compensated**.

DETERMINE WHETHER HER DISMISSAL MAY HAVE BEEN UNFAIR

- Ask Maisie to **describe the events** leading up to dismissal. For example, How often was she late? What were her reasons? How did this impact on her job? Was there a hearing? etc. Make a note of all the important dates, for example, when (if at all) she received warnings, in particular note the date on which she was told that she was dismissed. ***(See pg 361: When is a dismissal fair or unfair?)***
- Ask her what reasons were given for her dismissal, if any. Who dismissed her?
- If she was dismissed for misconduct, ask her the following questions to establish the substantive and procedural fairness of the dismissal:
    - Did she know the consequences of being late?
    - Do all people who are late get treated in the same way?
    - What previous warnings of misconduct has she had? When were they given? Were they verbal or written? What were they for? Who handed out the warning(s)?
- If she was dismissed for incapacity (poor performance), ask her the following questions:
    - When she was late, what impact did this have on her performance at work?
    - Was she **counselled** that her lateness at work was unacceptable?

    - Was she given the chance to improve her performance?
    - Was she offered any alternative options, for example, starting work later and working during her lunch break? ***(See pg 365: Dismissal for incapacity)***
- Was she given a fair hearing before being dismissed? Ask the following questions:
    - Was she given proper notice of the hearing before being dismissed?
    - Was she told what the charges were against her?
    - Did she get a chance to prepare for the hearing?
    - Was she provided the opportunity of having a fellow employee with her in the hearing?
    - Was she provided a fair opportunity to present her side of her story and were these properly considered by an unbiased person? ***(See pg 362: Procedural fairness)***

If the answer to any of the above questions is 'NO', then the dismissal of Maisie may be unfair and she should be able to challenge it. If she still wants to get her job back, then you can take the next steps.

CHALLENGING THE DISMISSAL

Refer the unfair dismissal dispute to the relevant body for conciliation within thirty days of her dismissal:

- To the Bargaining Council if she is covered by a Bargaining Council Agreement
- If she is covered by a collective agreement, she must follow the dispute resolution procedure in the agreement
- Otherwise, refer the matter to the CCMA ***(See pg 370: Solving disputes under the LRA)***

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5. Retrenchment

A number of employees are retrenched from a large paper factory. They are unhappy about the way they were treated. Many of them have over ten years of service with the business.

WHAT DOES THE LAW SAY?

The *Labour Relations Act* says that a retrenched employee must be paid at least 1 week's wages for every full year that the employee worked for the employer.

This **severance pay** is money paid to an employee for losing a job, when the employee is not at fault. If employees were not paid severance pay or were paid too little, they have a clear right which must be enforced.

The LRA sets down rules for employers who want to retrench employees. If the employer does not follow these rules, then the employer can be guilty of an unfair dismissal on grounds of 'procedural unfairness.'

The Labour Court will not readily reinstate employees who were retrenched if the employer can show that it was absolutely necessary to retrench those employees. But if the employer did not follow the correct procedures, the Labour Court can order the employer to pay **compensation money** to the employees of up to 12 months payment. ***(See pg 367: Retrenchment or redundancy dismissal)***

WHAT CAN YOU DO?

Find out from the employees if they want their jobs back, get compensation for losing their jobs, or if they only want to claim severance pay. Consider all the guidelines for retrenchment given above. You may believe that the retrenchment was unfair, or that the procedure the employer used to retrench the employees was not correct.

The matter must first be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. ***(See pg 371: Conciliation by the CCMA or Bargaining Council)***

IF CONCILIATION IS UNSUCCESSFUL

If the employees want severance pay, then the case must be referred to the CCMA for arbitration.

If employees want compensation or to get their jobs back, then the matter must be referred to the Labour Court for adjudication. However, if the company employs fewer than ten employees or if only one person has been retrenched, the dispute can be referred for arbitration at the CCMA instead of the Labour Court. **(*See 374: Arbitration by the CCMA or Bargaining Council*; *See pg 376: Adjudication by the Labour Court*)**

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6. Employee dismissed for being under the influence of alcohol on duty (no previous record of alcohol abuse)

Smuts claims that he was dismissed for being under the influence of alcohol while he was on duty. He says this is unfair because he denies being under the influence of alcohol while he was on duty. He says he has no record of misconduct and especially not drinking. He

also says he was not given a hearing before being dismissed. He wants you to help him get his job back. When you telephone the manager Peter, he says that he has witnesses who saw Smuts under the influence of alcohol on duty. When you ask him why he did not give Smuts a disciplinary hearing, Peter says that there was no way he could have given Smuts a hearing – he was too under the influence at the time. Smuts admits that he had been drinking the night before, but he had not drunk anything on the day that he was dismissed.

WHAT DOES THE LAW SAY?

- Being under the influence of alcohol while on duty is an act of misconduct so proper disciplinary procedures must be used to work out whether the employee is guilty of being under the influence while on duty and to discipline the employee.
- To determine whether the employee was under the influence while on duty does not depend on the employer giving the employee a breathalyser test. This only measures the content of the alcohol in the blood. The breathalyser test does not say whether the employee was under the influence of alcohol. You can only work this out by observing the employee's behaviour, or through witnesses who observed the behaviour. The employee's behaviour will tell the employer whether the employee was too under the influence to carry out their job. The employer will have to say how the employee's behaviour showed he was too under the influence to carry on working. For example, did the employee smell of alcohol, could the employee walk straight, was the speech slurred, were the eyes bloodshot, how rational or irrational was the employee being, was the employee acting in a strange way, was the employee being aggressive, insolent or loud?
- Peter should not have dismissed Smuts without first applying corrective and progressive discipline to correct the problem. He should have first given him a warning (although being under the influence of alcohol while on duty might constitute a serious enough offence to justify misconduct depending on what the employee's responsibilities were). If the problem repeated itself the issue becomes one of incapacity, and a different procedure must be applied where he should have instituted other corrective measures, such as counselling.
- Peter also did not follow a fair procedure to dismiss Smuts, including giving him fair notice of a disciplinary hearing, and holding the hearing where witnesses could be called etc. ***(See pg 364: Dismissal for misconduct)***

WHAT CAN YOU DO?

This appears to be a clear case of unfair dismissal based on unprocedural grounds. Write to the employer demanding that Smuts be reinstated. ***(See pg 442: Model letter of demand to employer for reinstatement)*** If Peter does not respond to the letter and/or

continues to refuse to give Smuts his job back, you can refer an unfair dismissal dispute to the relevant body within 30 days of Smuts being dismissed:

- The Bargaining Council if Smuts is covered by a bargaining council agreement
- If he is covered by a collective agreement, follow the dispute resolution procedure in the agreement Otherwise refer the matter to the CCMA ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

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7. Employee dismissed for being under the influence of alcohol while on duty (Employee is suffering from alcoholism)

Manuel, an employee, is dismissed for being under the influence of alcohol while on duty. Bennet, the manager, tells you that this is not the first time that Manuel has been under the influence of alcohol while on duty. On at least 3 occasions in the past 3 months, they have found him passed out at his desk. He was given disciplinary warnings on all three occasions. Bennet says this is the 'last straw' and he does not want Manuel back.

WHAT DOES THE LAW SAY?

- If an employee is often under the influence of alcohol and cannot do the job, then they might be suffering from alcoholism. Alcoholism is a sickness, so if an employee is an alcoholic, then being under the influence of alcohol on duty is not misconduct but rather **incapacity** (in other words, the employee is incapable of doing the job properly)
- Alcoholism is recognised as an illness in terms of the *Unemployment Insurance Act*. This Act provides benefits for alcoholics who are unable to work because of their illness, as long as they agree to undergo treatment
- Before dismissing the employee for incapacity, the employer must counsel the employee and assist them with getting medical treatment if necessary
- Only if the employee's condition does not improve or the employee's ability to do the job properly does not improve, should the employer think of dismissing them
- The employer must still be able to prove that there was a fair reason and a fair hearing before the employee is dismissed. ***(See pg 361: When is a dismissal fair or unfair?)***

WHAT CAN YOU DO?

- Find out from Manuel whether it is true that he has been given warnings for being under the influence of alcohol on duty.
- Find out whether he received any counselling for 'persistent alcoholic tendencies'.
- Did Manuel have a hearing before being dismissed?
- If there was no counselling and no hearing before being dismissed, and the employer refuses to take Manuel back, then you should declare a dispute with the employer. Follow the normal steps for reinstatement to get his job back for him. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation)***

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8. Contract employees are dismissed before the contract is due to terminate

Joe and five other employees have been employed by a sub-contracting company. The employer (from the company) who hired them told the contracting employees the contract would run for 3 weeks. After two weeks, Joe and one other employee are paid for the work they have done and told that the firm no longer needs them for the third week.

WHAT DOES THE LAW SAY?

Joe and the other employees entered into a three-week contract and both parties are bound by this contract of employment. Joe and the other employee have been unfairly dismissed. They can challenge the dismissal in terms of the Labour Relations Act (LRA). ***(See pg 361: Automatically unfair dismissals)***

WHAT CAN YOU DO?

You can help Joe and his co-employee refer the case to the CCMA or a Bargaining Council for conciliation (mediation). **(See pg 369: What steps can be taken if there is an unfair dismissal?; See pg 370: Solving disputes under the LRA)**

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9. Contract employees are not paid overtime

Shezi is employed by a sub-contracting labour broking company. A labour broker ('temporary employment service') is someone who supplies labour to the farmer to assist with the picking or pruning requirements of the farm. The company has hired her services out to a farmer where she works as a picker. After two weeks of working on the farm, Shezi has not been paid for any of the overtime she has worked. When she asks the farmer for

her overtime money, he tells her he agreed to pay a flat rate to the sub-contractor and that he does not have to pay any overtime. He tells her to go to the sub-contractor. She goes to the sub-contractor, who tells her that the overtime has nothing to do with him – she must get payment from the farmer.

WHAT DOES THE LAW SAY?

Shezi is entitled to be paid overtime in terms of the *Basic Conditions of Employment Act* (BCEA). Shezi is employed by the Labour Broker, but the law says if the labour Broker does not comply with the BCEA, Shezi can claim the unpaid monies from either the labour broker or the farmer. She can choose to claim this either from the farmer or from the labour broker. The farmer must pay this overtime - he can either pay this to Shezi or to the sub-contractor, who must pay it to Shezi. If Shezi claims the money from the labour broker, he must pay her, and then he can claim the money from the farmer by reporting him to the Department of Employment and Labour. Alternatively, the employee can go to the CCMA in terms of Section 73A of the BCEA to claim unpaid monies in terms of the NMWA.

Section 73A of the BCEA says that an employee can refer a dispute to the CCMA if the employer fails to pay any amount owing to an employee in terms of the BCEA or the NMWA, or in terms of a contract of employment, a Sectoral Determination or a collective agreement. An employee can make an application to the CCMA for conciliation and if the dispute cannot be resolved, it will then automatically be referred to arbitration. No legal representation is allowed in these disputes. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

This provision only applies to employees who earn below the BCEA earning threshold of R21,198 per month. Employees who earn above the threshold can make a claim against an employer for failing to pay them what is owed in either the Labour Court, High Court, Magistrates Court or Small Claims Court, depending on the jurisdictional requirements for each of these courts.

WHAT CAN YOU DO?

You can write a letter to the farmer and the labour broker setting out Shezi's right to overtime pay in terms of the BCEA. If the farmer and the labour broker refuse to pay then Shezi can report either the labour broker r or the farmer to the Department of Employment and Labour or refer a dispute to the CCMA in terms of the *Minimum Wage Act. (Section* 73A). If Shezi makes a claim against the labour broker then the labour broker may pay Shezi and make a claim against the farmer.

10. Part-time employee is not paid sick leave

For the past year, Gadija has worked every Saturday and Sunday as a part-time shelf-packer for ShopFast. She works up to 20 hours on a weekend. She had a bad flu' over one weekend, informed her manager that she was too ill to work, and stayed in bed at home. Even though she provided a doctor's certificate, ShopFast refused to pay her for the days she was ill.

WHAT DOES THE LAW SAY?

Gadija is protected by the BCEA, which says that an employee who works more than 24 hours during any month earns one day sick leave for every 26 days worked. **(*See pg 311: BCEA – Sick leave*)**

WHAT CAN YOU DO?

Write a letter to the employer setting out the circumstances and stating what the law says about part-time employees and sick leave. Refer them to the relevant section in the BCEA. If the employer ignores the letter, refer the matter to the Department of Employment and Labour or to the CCMA in terms of the *Minimum Wage Act*, *Section* 73A. This process involves sending the CCMA Referral of Dispute Form 7:11 to the employer and then sending it to the CCMA and ticking Section 73A under 'Nature of Dispute.'

11. Fixed-term contract has not been renewed

For the past nine months, Thami has been employed on a three-month contract, which has been renewed twice. At the end of the third three-month period, he is told that the company will not be renewing the contract. However, the company employs someone else for the next three months to do the same job as Thami.

WHAT DOES THE LAW SAY?

Thami's contract is a fixed-term contract which is deemed to become permanent after three months unless there is a justifiable commercial reason for renewing the contract for another three-month period. For example, it could be that the specific project Thami was working on needs him to work on it for another three months to complete it. After this, the employer is not allowed to renew the contract again. If Thami continues working for the company, he will be entitled to a permanent contract of employment. In addition, the company has created a reasonable expectation that the contract will become permanent. By asking Thami to leave

because his contract is up, while replacing him with someone else, this means that Thami has been unfairly dismissed. This is an unfair dismissal, which is covered by the *Labour Relations Act (*LRA). Thami can challenge the dismissal in terms of the LRA. ***(See pg 361 : Automatically unfair dismissals)***

WHAT CAN YOU DO?

You can help Thami first by writing a letter to the employer stating that he believes he has been unfairly dismissed. If the employer refuses to reinstate him, then you can help Thami to apply for reinstatement or compensation through the CCMA or a Bargaining Council. ***(See pg 420: Problem 4: Dismissed employee wants the job back; See pg 369: What steps can be taken if there is an unfair dismissal?; See pg 370: Solving disputes under the LRA)***

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12. Application for UIF benefits is too late

Iris worked as a cook at the Late Nite Restaurant for 5 years. She paid into the Unemployment Insurance Fund (UIF) for 5 years. She is dismissed from her work on 5 February. On 30 March the following year, she goes to the Department of Employment and Labour to apply for unemployment benefits. Six weeks later they tell her that she will get no benefits because her application is too late. She comes to you for help.

WHAT DOES THE LAW SAY?

The *Unemployment Insurance Act* sets down very strict rules about time for applying for benefits. You get 12 months from the time that you stop working to apply for UIF benefits. ***(See pg 382: Unemployment Insurance Fund)***

WHAT CAN YOU DO?

You must first work out if Iris's application is late. First, take the date Iris was dismissed: 5 February. Then, take the date she made her application: 30 March (of the following year). Work out the number of months between these two dates. From 5 February to 30 March = 12 months 25 days.

According to the law, Iris is too late to apply for unemployment benefits. But the commissioner may accept an application after the 12-month period has expired when she can show just cause (very good reasons why she is late).

13. Employer does not register employee with the Unemployment Insurance Fund

Jack's employer did not register him as a contributor with the Unemployment Insurance Fund (UIF). This means he did not pay any contribution to the Fund.

WHAT DOES THE LAW SAY?

The law says all employers must register all employees with the Unemployment Insurance Fund as soon as they start working for them. An employer must also pay 2% of an employee's wage/salary to the Fund every month (1% is deducted from the employee's salary, and 1% is paid by the employer). ***(See pg 384: How do employees become contributors to UIF?)***

WHAT CAN YOU DO?

Jack's employer is legally obliged to register all his employees for UIF. Jack should report this to the nearest office of the Department of Employment and Labour and they will investigate the complaint and take action against the employer. The employer will have to make back payments to make up the money that should have been paid to the Fund.

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14. Failing to sign the Unemployment Register

Jack's application for unemployment benefits was accepted. When he receives the first cheque, he is told to come and sign the unemployment register every 4 weeks. He does this every month but misses one month. He is not paid for the time he did not sign the register. Is he entitled to get benefits for the time he did not sign the register?

WHAT DOES THE LAW SAY?

The law says that anyone who has applied for unemployment benefits must sign the register every 4 weeks to show that they are still unemployed and looking for work.

But if the employee can show that they were not able to sign for a good reason, for example because of being ill, and if the employee was unemployed during that period and available for work, then they should be paid for the period not signed.

If the employee was not able to sign because of being ill, they will have to produce a doctor's letter.

If the employee did not sign because they were away looking for work, this might not be accepted as a good enough reason not to sign. The employee will have to

re-register for UIF benefits and start all over again. ***(See pg 382: Unemployment Insurance Fund)***

WHAT CAN YOU DO?

You can write a letter of **appeal** to the Department of Employment and Labour office in your area.

If no money was paid out at all because the person did not sign the register more than once, you can send a letter to the regional appeals committee at the provincial office of the Department of Employment and Labour, asking them to investigate why no benefits were paid at all, and to pay out the money owing to the applicant.

(See pg 393: UIF appeals; See pg 446: Model letter of appeal against the refusal to pay UIF; See pg 447: Model letter to UIF because benefits have not been paid)

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15. Long delay in paying Compensation

Zama worked for a delivery firm. On his way to drop off an order, he was involved in a motor vehicle accident and suffered severe injuries in the accident. When he went back to work after being in hospital for 6 weeks his employer told him that there was no longer any work for him. It is now a year after the accident happened. Zama still has not received any compensation. His employer has not paid him anything since the date of the accident.

WHAT DOES THE LAW SAY?

Zama's accident happened during the 'course and scope of his duties' so he is covered by the Compensation Fund. ***(See pg 395: Who can claim compensation from the Fund?)***

The employer must report the accident to the Compensation Fund on FORM W.C.L. 2 as soon as it happens. The doctor must fill in FORM W.C.L. 4 after the first visit by the injured employee. ***(See pg 402: Steps to claim disability)***

An employer has to pay compensation (that the employee would normally receive from the commissioner) to the injured employee for the first 3 months from the date of the occupational injury. The Compensation Fund will repay the employer for the money that was paid.

The employer also owes Zama's wages, notice pay and any outstanding leave pay. The employer should also have followed certain procedures to dismiss him, and have had a good reason to dismiss him. ***(See pg 314: Notice; See pg 360: Dismissals)***

WHAT CAN YOU DO?

- Zama can claim the first 3 months' salary from his employer after suffering from the injury (the commissioner will repay this to the employer).
- If you are concerned that your employer did not report the case to the Compensation Fund Commissioner you can email a letter to them providing details of the name of the employee, the name of the employer, and the date of the accident. You can send the email to cfoutbound@labour.gov.za. ***(See pg 448: Model letter to Compensation Commissioner asking whether the accident was reported).***
- Always include the claim number in any correspondence if you have it. Also include a completed FORM W.C.L.3 which will save the employee time if the accident has not been reported. ***(See pg 459: Compensation Form WCL3)***
- If the employer did not report the accident, the Compensation Commissioner will send a W.C.L.3 form to you. The employee must complete this. The Compensation Commissioner will take action against the employer for not reporting the accident.
- If the accident was reported, send a letter to the Compensation Commissioner asking them why there has been such a long delay in paying out the compensation. Check that the commissioner has all the correct addresses. ***(See pg 449: Model letter to the Compensation Commissioner asking for reasons for the delay in paying)*** The Compensation Commissioner must tell you exactly what is causing the delay. They may ask you to send them a missing form or give them the correct address of the employee.
- You can try to get Zama's wages, notice pay and any outstanding leave pay from the employer. If this is not successful, you can lodge a complaint with the Department of Employment and Labour. ***(See pg 417: Problem 2: Employee wants to claim notice pay and leave pay)***
- Zama may have been unfairly dismissed and he should therefore take action against his employer. However, he has missed the deadline for lodging a dispute with the CCMA so he will have to apply for condonation to make a late application. ***(See pg 420: Problem 4: Dismissed employee wants the job back – how to apply for reinstatement or compensation; See pg 370: Solving disputes under the LRA; See pg 434: Problem 18: Employee is injured on duty and loses the job)***

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16. Employee does not get the correct amount of compensation money

An employee who was permanently disabled received a lump sum cheque from the Compensation Commissioner, but does not feel that she was paid the correct amount of compensation money.

WHAT DOES THE LAW SAY?

For all types of disability (temporary and permanent), there are certain ways of working out whether the compensation money has been correctly calculated. For permanent disabilities, a list of percentage disabilities says how much compensation will be paid for each form of disability. It is up to the Compensation Commissioner to decide what percentage disability the employee has, based on the medical reports from the doctor who treats the employee. ***(See pg 397: What types of compensation payment are made?)***

WHAT CAN YOU DO?

- Write a letter to the Compensation Commissioner asking them for the details of how they calculated the compensation money. Remember to include the claim number and all the important details about the claim, which you can find. ***(See pg 449: Model letter to Compensation Commissioner asking for reasons for the delay in paying)***
- Read What types of compensation payments are made? to calculate whether the compensation money was correctly calculated. If it seems that the doctor made a mistake with the percentage disability, the employee has a right to a second opinion from another doctor. This is called a re-assessment of the injury.
- The employee can get a **second opinion** from an independent doctor but the employee must pay this doctor.
- Send the second opinion to the Compensation Commissioner. They will assess it and decide whether to re-open the case. If the Compensation Commissioner decides that the employee should have got more money, the employee will be refunded.
- If the employee wishes to **object** to a decision of the Commissioner, an objection must be sent within 60 days of the Commissioner's decision. Include the claim number and all the details of the employee's claim as listed in the *Model letter to Compensation Commissioner asking for reasons for the delay in paying.*

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17. Injured employee is off work and is not getting paid

Bethuel was injured in an accident at work. He has not been paid for the past six weeks, and the doctor told him to rest for another two weeks. He comes to you with his problem because he says he and his family cannot survive without his weekly wage. Bethuel earns R2 000 per week.

WHAT DOES THE LAW SAY?

Bethuel has to stay completely off work, but he will be able to go back to work later. So he has a total temporary disability. The employer should pay Bethuel for the first 3 months from the date of his injury. This will be repaid to the employer out of the compensation paid to Bethuel. is the compensation money. ***(See pg 403: How is the compensation money paid?)***

WHAT CAN YOU DO?

- Write a letter to the Compensation Commissioner asking them about the delays in paying Bethuel his compensation or check the website under 'compensation fund claims status'. ***(See pg 449: Model letter to the Compensation Commissioner asking for reasons for the delay in paying)***
- Advise Bethuel's employer to pay him compensation for the first 3 months. Note that Bethuel gets compensation instead of his wages, not as well as his wages.
- Work out how much the Compensation money should be given that Bethuel is paid weekly. ***(See pg 398: Temporary disability)*** The formula for working out compensation is:
    - Multiply weekly wage by 4.3: R2 000 x 4.3 = R8 600 per month
    - Multiply monthly wage by 75 ÷ 100
    - R8 600 x 75 ÷ 100 = R6 450
- Bethuel will get paid R6 450 per month from the Compensation Fund for Total Temporary Disability. The employer should pay Bethuel this compensation amount for the first 3 months (he will get this back from the compensation paid out). The employer already owes Bethuel for the first month. If the employer refuses, report the matter to the Compensation Commissioner.
- The Commissioner will pay all doctor's and hospital bills and any medicines needed. If the employer has reported the accident properly, doctors and hospitals will send their accounts direct to the commissioner. If this has not happened, Bethuel must keep all slips and accounts. You can help him claim them back from the commissioner.

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18. Employee is injured on duty and loses the job

While working on a building site two weeks ago, Piet was standing on a ladder which slipped. He fell and broke both arms. This is only a temporary disability, but he cannot do any work until the broken arms have healed, which could be another 6 weeks.

When he telephones his employer, she tells Piet that his job has already been filled. The employer says she cannot wait for Piet to get better. Piet says this is unfair because the accident was not his fault. He comes to you for help.

WHAT DOES THE LAW SAY?

The employer can only dismiss Piet for a good reason and by following proper procedures. Piet has a right to be reinstated when he is well again. Piet can also claim Compensation because the accident happened while he was working. The employer should have reported the accident to the Compensation Commissioner. ***(See pg 360: Dismissals; See pg 394: Compensation Fund)***

If Piet stays off work for a long time and is unable to even do lighter work, then the employer can go through the correct dismissal procedures and dismiss Piet for incapacity because he is unable to do his job.

If an employee is **permanently disabled** as a result of an injury at work, this employee will never be able to perform their old duties again. If the employee can do light duties, then you should ask the employer to give the employee light duties. It may be very difficult for a permanently disabled employee to find work anywhere else.

WHAT CAN YOU DO?

Because the disability is only **temporary**, you should telephone the employer and ask her to employ the other person in Piet's place on a temporary basis only – until Piet recovers. If the employer dismisses Piet, you can refer the matter to the CCMA as a claim for unfair dismissal. ***(See pg 370: Solving disputes under the LRA)***

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19. Employee's compensation has been refused

The Compensation Fund office refused to pay any compensation to an employee. They gave no reasons for their refusal.

WHAT DOES THE LAW SAY?

Certain employers do not have to contribute to the Fund. So, their employees are not covered by the Fund. The Compensation Fund pays compensation for all accidents which happen 'in the course and scope of duty' but there are circumstances where the Compensation Commissioner will not pay compensation. ***(See pg 395: Who contributes to the Fund? See pg 395: Who can claim compensation from the Fund?)***

WHAT CAN YOU DO?

- Check that the employer was contributing to the Compensation Fund, that the employee was injured in her work and that she does not fall into any of the categories falling outside of the scope of the Compensation Fund.
- Write a letter to the Compensation Commissioner asking them for their reasons for refusing to pay compensation. ***(See pg 449: Model letter to Commissioner asking for reasons for the delay in paying)***
- If the employee wishes to **object** to a decision of the commissioner an objection must be sent to the Compensation Commissioner within 60 days of the decision. ***(See pg 403: Objections and appeals)***
- Remember to include all the necessary details of the employee as listed in *Model letter to the Compensation Commissioner asking for reasons for the delay in paying.*

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20. Employees develop an occupational disease

A number of employees working in an asbestos factory are suffering from similar physical conditions, which they believe is a result of working in an environment of asbestos. This is confirmed by the doctor who is attending to them. What help can they receive?

WHAT DOES THE LAW SAY?

Employees who suffer from sicknesses as a result of the work they do or the environment they have been working in are covered by the *Compensation for Occupational Injuries and Diseases Act* (for the non-mining industry) or the *Occupational Diseases Mine Employees Act* (for the mining industry). These are called occupational diseases. There is sometimes a long period between the exposure at work and the disease which makes it difficult to connect the disease with the work exposure.

WHAT CAN YOU DO?

Assist the employees with claiming compensation from the Compensation Fund. ***(See pg 394: Compensation Fund)***

Contract of Employment

EXAMPLE

. . . . . .
NAME OF THE COMPANY

hereafter called 'the Company'

. . . . . .
NAME OF THE EMPLOYEE + IDENTITY NUMBER

hereafter called 'the Employee'

It is hereby agreed that the Company will employ the Employee as a ..... Job grade..... in its Department
at a rate of R..... per day.

1. **DATE OF ENGAGEMENT**

   The date of commencement of employment is: . . . . . .

2. **PROBATION**

   During the first three months of employment, the employee will serve a probation period. Their performance and suitability for the position will be assessed during this time. If, during the first month of probation, the Employee's performance is regarded as being unacceptable despite attempts to counsel the employee, then the employee's contract may be terminated as per section three (3) below.

3. **TERMINATION OF EMPLOYMENT**

   The company and the employee may terminate this agreement on the following basis:-

   3.1 by giving one week's notice in writing during the first six (6) month period of employment;
   3.2 by giving two weeks' notice in writing where the employee has been employed for more than six (6) months but not more than one (1) year, and four weeks notice where employment has been longer than 12 months;
   3.3 either the company or the employee may summarily terminate this agreement without providing due notice, on any grounds considered appropriate under the law;
   3.4 by both agreeing to terminate;

3.5 where an employee is absent for four working days in a row and has not notified the company or given any indication that they intend to return, then the contract can be terminated immediately on grounds of desertion.

4. DUTIES

The employee must perform their duties as described in the job description as well as any tasks which they may reasonably be asked to do.

5. WAGES

The company shall pay the employee the rate indicated in this contract.

Payment shall be made every week in arrears. The company and the employee accept that the wage rate will only be reviewed once a year during OCTOBER and that this review will be based on the performance of both the company and the employee during the previous 12 month period.

6. WORKING HOURS AND FLEXIBILITY

6.1 The employee shall be required to work up to nine (9) hours per day (excluding meal breaks) and shall remain at work between the hours specified by management on any day. Normal working hours shall be from 07h00 until 17h00, Monday to Friday. It is accepted that start and finish times may be altered in line with operational requirements and as determined by the manager from time to time.

6.2 A fifteen (15) minute tea interval shall be granted not later than 10h00 (morning) and 15h00 (afternoon) daily and shall be taken as determined by management in keeping with the operational requirements of the department.

A lunch break of one (1) hour shall be taken between 12h00 and 13h00 daily. Meal intervals are not regarded as paid working hours.

The employee accepts that overtime and shift working, including weekend work, are an essential part of employment; the employee agrees to work overtime as may be reasonably required by the company. Where overtime is worked, the employee shall be paid at time and a half of the normal hourly wage.

6.3 Payment for overtime shall only be made where the employee works more than 45 hours in any pay week.

7. LEAVE PAYMENT

The employee shall be entitled to 15 working days leave after 12 months continuous employment calculated at 1,25 days for each completed month of service. An employee absent during the year without permission will have their leave calculated on the basis of pro rata leave for the period worked.

It is accepted that annual leave will be scheduled by the employer to meet its manning requirements and will normally be taken during the low season.

8. MEDICAL LEAVE

8.1 Where the employee is unable to work on the grounds of genuine medical incapacity which has not been caused by the employee's negligence or misconduct, then he/she is entitled to paid sick leave.

8.2 During the first 6 months of employment, the employee is entitled to one day sick leave for every completed 26 days of service. After the first six months of employment the employee is entitled to 30 days sick leave in any 36 month cycle.

8.3 The employee must hand in a medical certificate for any period of absence that is longer than 2 days. On the days when the employee is absent, they must notify the immediate supervisor by 09H00 regarding the reason for absence and how long the employee believes they will be absent.

8.4 The employee accepts that the company is dependent on the employee regularly attending work and if they are constantly absent because of illness then this will make the employee unsuitable for employment in the department and could result in the termination of their services on the grounds of incapacity.

8.5 The employee accepts that if necessary they will go for a medical test by a doctor appointed and paid for by the company. The results of the examination will be disclosed confidentiality to the company's medical officer.

8.6 The employee undertakes to bring to management's attention any disease, ailment or disability which they becomes aware of which could in any way impact on the health and safety of fellow employees, the provisions of the Health and Safety Act or their ability to properly perform the job.

8.7 **PARENTAL LEAVE**

The employee shall be entitled to 10 consecutive days unpaid parental leave when their child is born, commencing on the day the child is born if they are not the primary carer. The employee shall give one month's notice of the date on which leave will be taken.

9. FAMILY RESPONSIBILITY LEAVE

The employee who is employed on a contract longer than four months, for four days a week or more, shall be entitled to three days paid leave during every 12 months of service which

may be used:

9.1 When the employee's child is sick;
9.2 When one of the following persons die: spouse or life partner, parents, adoptive parents, grandparents, children, adopted children, grandchildren or siblings.

It is the responsibility of the employee to bring proof of the reason for leave. If no proof is given, then the leave taken will be unpaid and will be regarded as unauthorised leave which may result in disciplinary action.

10. UIF

The company and the employee will both contribute according to the provisions of the Act once the employee has provided a valid ID document to the employer.

11. COMPANY RULES AND REGULATIONS

The employee undertakes to read and follow the following policies and procedures as amended from time to time.

11.1. Company Disciplinary Code of Behaviour and the Disciplinary Procedure;
11.2. Company Grievance and Dispute Procedure;
11.3. Company regulations regarding Leave and Absence Procedures;
11.4. Company rules relating to Protective Clothing;
11.5. The Health and Safety regulations of the company.

12. DEDUCTIONS

The employee accepts that any outstanding loans owing to the company or taken from the company will be deducted from the employee's earnings or any leave entitlement or bonus accruing to the employee.

The employee also agrees that the company may make deductions of up to 25% (one quarter) of the employee's wages in terms of section 34 of the Basic Conditions of Employment Act to repay the company for the loss or damage caused by the employee's actions, provided this has been established during a disciplinary hearing.

13. ACKNOWLEDGEMENT

The employee acknowledges their appointment and that they fully understand the terms of such contract which have been explained to them and fully translated.

....

EMPLOYEE SIGNATURE SIGNED ON (DATE)

....

COMPANY REPRESENTATIVE SIGNED ON (DATE)

....
.

WITNESS/TRANSLATOR SIGNED ON (DATE)

(where appropriate)

ANNEXURE A:

JOB DESCRIPTION

1. Name .....

Physical Address .....

2. Company .....

3. Position.....

4. Key performance areas (the key elements of the employee's job that they will be measured against)
.....

5. Commencement date .....

6. Total cost to the Company.....

COMPLIANCE WITH SECTION 29 OF THE BCEA	
WRITTEN PARTICULARS OF EMPLOYMENT	**YES / NO**
Full name and address of employer	Yes
Name and occupation of employee	Yes
Brief description of the work	Yes
Place of work	Yes
Date on which employment began	Yes
Ordinary hours of work and days of work	Yes
Employee's salary	Yes
The rate of pay for overtime work	As provided in BCEA
Other cash payments	N/A
Any payment in kind	Yes
Frequency of remuneration	Yes
Deductions to be made	Yes
Leave to which employee is entitled	Yes
Period of notice required to terminate	Yes
Description of any council or sectoral determination	N/A
Any period of employment with a previous employer	N/A

Any other documents that form part of the contract	Yes
Where such documents are reasonably accessible	Yes

Letter of demand to employer for reinstatement

A dispute must be referred to the Commission for Conciliation, Mediation and Arbitration within 30 days of the dismissal, so get the letter requesting reinstatement to the employer immediately.

EXAMPLE

11 January 20...

The Manager
Mario's Upholstering
131 Main Street
Upington

Dear Sir

RE: MR ANDRE PIETERSON – TERMINATION OF SERVICES

On Monday 5th January 20... we spoke on the telephone regarding the dismissal of Mr Pieterson by yourself on the 4th January 20... I have now discussed the matter further with Mr Pietersen and he has asked us to write to you as follows.

Mr Pieterson advises us that he was taken by surprise by the termination of his services. In our telephone conversation about Mr Pieterson you told me that he had not been dismissed. You said there was a need to reduce staff so Mr Pieterson had been retrenched by the company. If this is the case then it appears that you have not complied with all the guidelines and standards regarding retrenchment as laid down by the Labour Relations Act.

You have not complied with the requirements for retrenchment in the following ways:

a. *by not giving Mr Pieterson reasonable notice of the need for the proposed retrenchment before the decision to retrench was taken*
b. *by not consulting with the employees or their representatives on the proposed need to retrench employees*
c. *by not taking all reasonable steps to avoid the retrenchment*
d. *by not applying fair and reasonable criteria in selecting staff to retrench*
e. *by not giving Mr Pieterson reasonable notice of your intention to retrench, so as to enable him to make alternative plans for employment.*

If the dismissal of Mr Pieterson occurred for reasons other than reduction of staff, we should like to draw the following points to your attention. At no time during the course of Mr Pieterson's employment with your company was dissatisfaction expressed concerning his work or conduct in the workplace. In

addition, Mr Pieterson was given no warning of your intention to dismiss him and he was not given the opportunity to state his own case or defend himself in a hearing.

In light of the above, Mr Pieterson submits that there was no sound, substantive reason for his dismissal and the procedures used to dismiss him were unfair. Your actions in dismissing him therefore constitute an unfair dismissal in terms of the Labour Relations Act. In the circumstances, your dismissal of Mr Pieterson is of no legal effect and he still regards himself as being in your employ. Mr Pieterson hereby tenders his services to you.

We therefore request, on behalf of Mr Pieterson, that you reinstate him in his previous job on the same terms and conditions as applied prior to his dismissal. Should you fail to confirm this in writing within seven days from the date of receipt of this letter, an application will be made to the Commission for Conciliation, Mediation and Arbitration for conciliation, without further notice to you.

However we hope the above action will not be necessary and we look forward to hearing from you before this time.

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter of demand to employer for notice and leave pay

This letter can be used as a model for any demand against an employer, for example, a claim for the right wages to be paid, and so on.

EXAMPLE

10 January 20...

Sew 'n Knit
15 Bell Arcade
Greytown

Dear Sir/Madam

RE: MR JAMES TYEKELO

We have been approached by Mr Tyekelo who was dismissed from his employment with you on 4 January. At the time of his dismissal he was earning R1000 *per week.*

Mr Tyekelo left your employment without being paid in lieu of notice and he was not paid out the pro-rata leave owing to him. He took leave last year in March. He wishes to claim the outstanding money which is calculated as follows:

- *One week's salary in lieu of notice:* R1000
- *Pro-rata leave pay (for 9 completed months service)* R1000 *x 3 weeks leave per annum as per contract* = R3000
- R3000 *(divided by 12 months)* = R250 *per month x 9 months worked* = R2250

Kindly forward the total amount of R2250 *being outstanding notice and leave pay to our office within 14 days of receipt of this letter failing which we shall refer the matter to the Department of* Employment and *Labour (or Bargaining Council if the employee is covered by a Bargaining Council Agreement) for investigation.*

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter to Department of Employment and Labour about a notice and leave pay claim

This letter can be used as a model for the referral of any complaint for investigation to the Department of Employment and Labour or to a Bargaining Council.

EXAMPLE

22 January 20...

The Labour Inspector Department of Employment and *Labour*
Durban

Dear Sir/Madam

RE: JAMES TYEKELO / SEW 'N KNIT

We have been approached by Mr Tyekelo, who was dismissed from his employment with Sew 'n Knit of 15 Bell Arcade, Greytown on 4 January 20….. He started working for Sew 'n Knit on 20 February 2005 and was paid a salary of R1 000 *per week at the time of his dismissal.*

According to Mr Tyekelo he was dismissed because he was late for duty on 28 December. He advises us that the reason he was late was because of a taxi boycott in the area where he lives and he had to wait for a bus to arrive to take him to work. It is clear that such circumstances are beyond the control of Mr Tyekelo who has no history of lateness.

Mr Tyekelo was dismissed without being given notice or paid in lieu of notice and he was not paid out the pro-rata leave owing to him. He last took leave in March. We do not believe that the circumstances justified summarily dismissing Mr Tyekelo.

He wishes to claim the outstanding money which is calculated as follows:

- *One week's salary in lieu of notice:* R1 000
- *Pro-rata leave pay (for 9 completed months service)* R1 000 *x 3 weeks leave per annum as per contract =* R3 000
- R3 000 *(divided by 12 months) = R250 per month x 9 months worked* R2 250

Please investigate Mr Tyekelo's claim for a total of R2 250 *and advise us of the outcome of your investigations.*

Yours faithfully

.....
B. CAROLUS (ADVISOR)

Letter of appeal against the refusal to pay UIF

Send this notice of appeal to the Regional Appeals Committee at the provincial office of the Department of Employment and Labour with a covering letter from the employee or advice office employee. Remember to fill in the details specific to your own case.

EXAMPLE

UIF APPEAL

1. *The appellant*: TAFENI JONGUMZI
2. *Appellant's address: c/o Claremont Advice Office PO Box 51, Claremont 4051*
3. *Identity number*: 3602125134189
4. *Name and address of employer: Claremont Municipality, PO Box 1711, Claremont 4051*
5. *Date of application for benefits: 31 August 20…*
6. *Address where application made: Department of Employment and Labour (Claremont)*
7. *Date when I heard of Claims Officer's decision: 18 October 20….*
8. *Claims Officer's decision: Benefits refused because I was not in employment for 13 weeks in the last year, and not unemployed due to illness for more than 2 weeks.*
9. *Reasons for appeal: I was employed at the Municipality from 11 November 2008 until 30 April 20… Application for benefits was made on 31 August 20…*

   Therefore I was in employment for more than 13 weeks in the year before applying for benefits. I was also already unemployed for more than two weeks due to illness when I applied for benefits.

   I am therefore entitled to UIF benefits.

.....
TAFENI JONGUMZI

Letter to UIF because benefits have not been paid

This letter can be used as a model for any complaint about benefits not being paid, including illness benefits, maternity benefits, and so on.

EXAMPLE

3 July 20…..

The Claims officer Department of Labour
Cape Town

Dear Sir / Madam

RE: MR JACK NAUDÉ – ID NO: 510707 0098 006

Mr Naudé registered for unemployment benefits on 16 April 20…

He stopped signing the register on 15 May 20…. as he was away in the Eastern Cape looking for alternative employment. We enclose for your reference two letters of refusal of employment. A month later he signed the register again. During the period he was not signing, he was still unemployed and available for work.

He has been paid unemployment benefits for the period that he signed. However no payments have been made to him for the period that he did not sign the register.

Kindly investigate the reasons why he has not been paid any further benefits. Please advise us what action Mr Naudé could take to be paid out his full benefits.

Yours faithfully

.....
P. ZUMA (ADVISOR)

Letter to Compensation Commissioner asking whether the accident was reported

EXAMPLE

25 March 20….

The Compensation Commissioner
PO Box 955
PRETORIA 0001

Dear Sir/Madam

ENQUIRY RE ACCIDENT REPORT

Name of employee: NTSHAKALA NGESI

Identity number: 400713 5086 084

Date of injury: 14 JANUARY 20…

Employer: GRANSTEEL CONSTRUCTION (PTY) LTD 61 MINES ROAD, RANDBURG

Mr Ngesi has approached us for assistance with his claim for Compensation.

Mr Ngesi was off duty from 14 January to 30 January 20… as a result of an injury sustained on duty and has not yet received compensation for this period.

Kindly advise us whether Mr Ngesi's accident was reported in terms of the Compensation Act. If it was reported, please give us the claim number. We enclose a completed FORM WCL3 in case this is needed. I look forward to hearing from you.

Yours faithfully

.....
R. GEORGE (ADVISOR)

Letter to Compensation Commissioner asking for reasons for the delay in paying

EXAMPLE

25 March 20…

The Compensation Commissioner Po Box 955
Pretoria 0001

Dear Sir / Madam

RE: DELAY IN PAYING COMPENSATION

Name of employee: MARY PIETERSE
Identity number: 751108 0098 004
Date of accident: 13 DECEMBER 20…
Claim number: 98/836172

The above-mentioned accident was reported to the Compensation Commissioner in January 20….

To date Ms Pieterse has not received any compensation for the time that she was off work.

Kindly advise us of the reasons for the delay and when she can expect to receive compensation.

Yours faithfully

.....
R. GEORGE (ADVISOR)

How to write a complaint to the Pension Funds Adjudicator

This is an example produced by the Pension Funds Adjudicator to show you how to write a complaint to them which includes all the information they need.

You can copy the way the complaint is written. But change everything that is in italics to put your own case details in instead. If there is something in the example which does not apply to your case, leave it out.

The person whose case you are dealing with is the complainant. The pension fund or the employer are the respondents. So the complaint is against the respondents.

Send a copy of the complaint to the respondents at the same time that you send it to the Pension Funds Adjudicator, so that the respondents have the same documents as the Pension Funds Adjudicator does.

REMEMBER

With your complaint to the PENSION FUNDS ADJUDICATOR *include:*

- *Copies of the letter to the pension fund/employer and their reply*
- *Proof that the complaint was first sent to the pension fund, for example, a registered letter slip or fax slip*
- *Any other papers, including letters, about the complaint*
- *The rules of the pension fund, if available*

Remember to send A COPY *of the complaint to the* RESPONDANTS, *so that they have the same documents as the Pension Funds Adjudicator.*

In the complaint between:

HENRIETTA SMITH (**Complainant)**

and:

CAPE FRIENDLY PENSION FUND (**First respondent)**

and

METAL SHOES (PTY) LTD (**Second respondent** [the employer – only if necessary]

COMPLAINT IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT 24 OF 1956

1. I am the complainant. My name is Henrietta Smith. I am an adult female, of 16 Wally Street, Kenilworth, Cape Town, and my telephone number is 021–761 3296.
2. The first respondent is the Cape Friendly Pension Fund, whose address is PO Box 2462, Observatory, Cape Town. The Principal Officer of the pension fund is Mr James Beckett. The telephone of the pension fund is 021–430 4214 and fax number is 021–430 4240.
3. The second respondent is Metal Shoes (Pty) Ltd, a company with its head office at 420 Voortrekker Road, Maitland, Cape Town. The telephone number of the second respondent is 021–053 6180 and the fax number is 021–053 6181.
4. I have sent a written complaint to the pension fund/employer in terms of Section 30A(1) of the Act on 22 February 20... I enclose a copy of that complaint marked 'A'.
5. The first respondent wrote back on 25 February 20... to say they would look into the matter. I enclose a copy of their reply marked 'B'. I received no further information nor reply from the first respondent.

As the respondent has not replied to the complaint within 30 days, the Pension Funds Adjudicator now has jurisdiction to deal with this matter.

PARTICULARS OF THE COMPLAINT

Under this heading you should explain what the complaint is about.

THE BACKGROUND

First give the history of your work with that employer and membership of the pension fund. Write down all the background.

EXAMPLES

I started work for the second respondent on 4 January 1974 as a messenger. I retired on 30 September 2014.

All the time I worked for the second respondent, I was a member of the first respondent, a defined benefit fund. I made regular contributions for my pension.

Or you might say:

I purchased an annuity with the Golden Retirement Annuity Fund, administered by Ace

Insurance Company, on 17 July 1979, and I contributed R150 monthly to this. At the date of retirement, I decided to get a 1/3 cash lump sum. I took the rest of my retirement benefit as a monthly pension.

EXPLAIN THE PROBLEM

The law says you can complain about:

- how the pension fund is run
- how the money is invested
- the rules of the pension fund

You must tell the Pension Funds Adjudicator if you think:

- the pension fund did something it was not allowed to do
- you lost money because of something the pension fund did
- you disagree with the pension fund about something that happened or about the rules
- the employer did not carry out its pension fund duties

Write what happened and also why you think the pension fund did something it was not supposed to do, why you think the pension fund caused you to lose money, what you disagree with the pension fund about, or why you think the employer did not carry out its duties.

EXAMPLES

These are some examples of things you may want to complain about. Maybe you think tha

- *The monthly pension was not calculated correctly*
- *You did not get an increase in the pension that you were supposed to get*
- *The pension fund left out some things when they worked out your benefits*
- *The employer took off money from the pension for a staff loan you had*
- *The pension fund discriminated against you: this means that they were not fair because they gave benefits to others that you did not get*
- *When the pension fund closed down or changed to a defined contribution pension fund it used the surplus unfairly*
- *You did not get a fair amount of money when you left the pension fund*
- *The board of the pension fund did not keep to its promises*
- *The pension fund used the rules in a way you disagree with*
- *The pension fund was unfair in deciding about early retirement or disability*

- *The pension fund gave death benefits unfairly*
- *The pension fund did not give you proper information so you made a bad decision*

Give as many details as possible about the case, and tell the Pension Funds Adjudicator exactly what happened from beginning to end. Remember the Pension Funds Adjudicator has never heard of your case before, and they know absolutely nothing about you or this complaint.

EXAMPLES

It doesn't help to write:

"I phoned Ace Insurance and they told me they had decided I did not qualify."

This does not help because it does not say who you spoke to at Ace, when you phoned Ace, who at Ace had decided and it does not really explain what was decided.

It would be better to say it like this:

"on Wednesday 4 February 20..., I phoned Ms Carelse, the Fund Manager at Ace Insurance. She told me that the board of trustees had met on 30 January 20.... They decided to refuse my application for early retirement made in terms of Rule 9.2 of the rules of the fund, because I did not qualify."

It doesn't help to write:

"In terms of the rules I am entitled to a gratuity of R100 000."

This does not say which rule, nor how you arrived at the figure you claim your client is entitled to.

It would be better to say:

"Rule 6.2 provides that on retrenchment an employee is entitled to her own contributions plus 20% of the employer's contribution plus 10% per annum interest. My own contributions totalled R..., and 20% of the employer's total contribution amounts to R.... So with interest I am entitled to R100 000. Instead on 6 February 20... I received a cheque for only R86 000 from the fund. A copy of the fund's statement is attached, marked 'C'."

When you have given the facts, you must set out your argument about why you think the fund was wrong. Say why you think you are right.

RELIEF

Don't forget to say what you think would help or solve the problem. This is called relief. Write down what you want the Pension Funds Adjudicator to do. The law says the Adjudicator can make any order about this complaint which a court can make.

So for example you could ask the Adjudicator to order the pension fund or employer to:

- Give you urgent or interim relief
- Give you information which you need
- Pay your contributions for a time
- Pay a certain pension amount
- Give some of the surplus to the provident fund
- Give you compensation money if the fund was wrong
- Change a decision of the fund trustees if it was not fair
- Pay costs
- Obey any law

Or ask the Adjudicator for:

- An order that says what your rights are if they are not clear
- An interdict to stop the fund from doing something

END THE COMPLAINT

Signed at Cape Town on this [date] day of [month] [year]

Complainant: .....

Address:.....

Tel. no: .....

Fax no: .....

Email: .....

LRA Form 7.11 Referring a dispute to the CCMA for resolution

LRA FORM 7.11

Section 135

REFERRING A DISPUTE TO THE CCMA FOR CONCILIATION

LABOUR RELATIONS ACT, 1995

This form assists a person or organisation to refer a dispute to the CCMA for conciliation. The CCMA will appoint a commissioner who must attempt to resolve the dispute through conciliation within 30 days. You can download the form off the CCMA website: **www.ccma.org.za** (click on ***Referral forms***)

NOTE: If you are covered by a bargaining council, a statutory council or an accredited agency you may have to take the dispute to that council or agency. Some councils and agencies are required by law to deal with certain disputes and parties must then refer disputes there, rather than to the CCMA. You may also need to deal with the dispute in terms of a private procedure if one applies.

An employer, employee, union, or employers' organisation may fill in this form. It should then go to the CCMA office in your province.

PROVINCIAL OFFICES OF THE CCMA:

CCMA EASTERN CAPE – PORT ELIZABETH
Registrar • Private Bag X22500 • Port Elizabeth 6000
Tel: (041) 505-4300 Fax: (041) 586-4585

CCMA EASTERN CAPE – EAST LONDON
Registrar • Private Bag X9068 • East London 5200
Tel: (043) 743-0826 Fax: (043) 743-0810

CCMA FREE STATE
Registrar • Private Bag X20705 • Bloemfontein 9300
Tel: (051) 505-4400 Fax: (051) 448-4468/9

CCMA GAUTENG – JOHANNESBURG
Registrar • Private Bag X096 • Marshalltown 2107
Tel: (011) 688-2200 Fax: (011) 688-2201/2/3

CCMA GAUTENG – PRETORIA
Registrar • Private Bag X176 • Pretoria 0001
Tel: (012) 392-9700 Fax: (012) 392-9701/2

CCMA KWAZULA-NATAL – DURBAN
Registrar • Private Bag X54363 • Durban 4000
Tel: (031) 362-2300 Fax: (031) 368-7387

CCMA KWAZULA-NATAL – PIETERMARITZBURG
Registrar • PO Box 72 • Pietermaritzburg 3200
Tel: (033) 345-9249 Fax: (033) 345-9790

CCMA KWAZULA-NATAL – RICHARDS BAY
Registrar • Private Bag 1026 • Richards Bay 3900
Tel: (035) 789-0357 Fax: (035) 789-1748

CCMA MPUMALANGA
Registrar • Private Bag X7290 • Witbank 1035
Tel: (013) 656-2800 Fax: (013) 656-2885

CCMA NORTH WEST
Registrar • Private Bag X5004 • Klerksdorp 2571
Tel: (018) 464-0700 Fax: (018) 462-4126

CCMA NORTHERN CAPE
Registrar • Private Bag X6100 • Kimberley 8300
Tel: (053) 831-6780 Fax: (053) 831-5948

CCMA LIMPOPO
Registrar • Private Bag X9512 • Polokwane 0700
Tel: (015) 297-5010 Fax: (015) 297-1649

CCMA WESTERN CAPE
Registrar • Private Bag X9167 • Cape Town 8000
Tel: (021) 460-0111 Fax: (021) 465-7193

Referring a dispute to the CCMA for conciliation

1. DETAILS OF PARTY REFERRING THE DISPUTE

Tick the box ☑

As the referring party are you:

☐ an employee ☐ a union official or representative

☐ an employer ☐ an employers' organisation's official or representative

If you are an employee fill in (a) below and if you are a union official or representative, an employer or an employers' organisation's official or representative fill in (b)

a) **If the referring party is an employee**

Name .....

Address .....

.....

Tel: ..... Fax: .....

If a union or employers' organisation is helping you with the dispute, give their details too. ➤

Alternative contact details of employee (for example, a relative or a friend):

Name .....

Address .....

.....

Tel: ..... Fax: .....

If more than one party is referring the dispute, write their details on a separate page and staple it to this form. ➤

b) **If the referring party is an employer, an employers' organisation or union**

Your contact details:

Name .....

Address .....

.....

Tel: ..... Fax: .....

Contact person .....

2. DETAILS OF OTHER PARTY (THE OPPOSITE PARTY)

Tick the box ☑

The other party is:

☐ an employee ☐ a union official or representative

☐ an employer ☐ an employers' organisation's official or representative

If more than one other party is referring the dispute, write their details on a separate page and staple it to this form. ➤

Name .....

Address .....

.....

Tel: ..... Fax: .....

Name of person dealing with the matter and other party's reference number (if known):

.....

3. NATURE OF THE DISPUTE

Describe the issues involved. The list on page 4 should help you. Your description will assist the CCMA in dealing with the matter. It is not meant to bind you. ➤

a) **The dispute is about:**

.....

.....

.....

.....

.....

.....

.....

CCMA Ref No:

.....

.....
.....
.....
.....
.....
.....
.....

Look at the list of disputes and their corresponding sections on page 6. If you are unsure which is the appropriate section, you may leave 3b blank.

b) The dispute relates to section ..... of the Labour Relations Act, 1995.

4. SPECIAL FEATURES (IF ANY)

I/we would like to bring the following special features of this dispute to the attention of the Commission:

Special features might be the urgency of a matter, the large number of people involved, important legal or labour issues, etc.

.....
.....
.....
.....
.....

Delete the box below if inapplicable:

Dispute about unilateral change to terms and conditions of employment [s 64(4)]

I/we require that the employer party not implement unilaterally the proposed changes that led to this dispute for 30 days, or that it restore the terms and conditions of employment that applied before the change.

Signed:..... (party referring the dispute)

5. DATE OF DISPUTE

The dispute arose on .....
Give the date, or approximate date

Give a description of the industry, service or public sector concerned (eg. the metal industry, tourist services, provincial hospital services, etc). This will help the CCMA choose a Commissioner with experience in the particular sector or area.

6. SECTOR AND AREA

The dispute exists in the following sector:

.....
.....
.....
.....

and in the following area:

Where did the dispute arise? Unually this will be the address of the workplace

.....
.....
.....
.....

7. RESULTS OF CONCILIATION

The outcome I/we would like:

Describe the outcome or result you would like from this conciliation. You are not bound by the proposals you make here.

.....
.....
.....
.....

Referring a dispute to the CCMA for conciliation

Proof that a copy of this form has been sent could be:

- *a copy of a registered slip from the Post Office*
- *a copy of a signed receipt if hand-delivered*
- *a signed statement confirming service by the person delivering the form*
- *a copy of a fax confirmation slip*

8. INFORMING THE OTHER PARTY

A copy of this form has been sent to the other party to the dispute.
Proof of this is attached to this form.

Signed at ..... on.....

.....
Party referring the dispute

CONCILIATION REFERRALS SECTION LIST	
LRA SECTION	**NATURE OF DISPUTE**
9.1	Freedom of association and general protections
16.6	Disclosure of information
21.4	Collective agreement on organisational rights
21.11	Withdrawal of organisational rights
22.1	Interpretation or application of organisational rights
24.2	Interpretation or application of collective agreement
24.6	Interpretation or application of agency or closed shop agreement
26.11	Non-admission as party to closed shop
45.1	Interpretation or application of ministerial determination
61.10	Interpretation or application of lapsed collective agreement
63.1	Interpretation or application of collective bargaining provisions
64.1 & 134	Any matter of mutual interest
64.2 & 134	Refusal to bargain
64.4	Unilateral change to terms and conditions of employment
69.8	Picketing
74.1	Disputes in essential services
86.4[b]	Joint decision-making (workplace forum)
89.3	Disclosure of information (workplace forum)
94.1	Interpretation or application of workplace forum provisions
191.1	Unfair dismissal
196.6	Severance pay
Sch 7, item 3.1	Unfair labour practices

For example, the contact details of a union or an employers' organisation which is helping or representing you.

Please indicate which number in this form your comments refer to.

ADDITIONAL INFORMATION

.....
.....
.....
.....
.....
.....
.....

Compensation Form WCL3

COMPENSATION FORM WCL3

Eisnommer/Claim number . . . . . .

KENNISGEWING VAN ONGEVAL EN EIS OM VERGOEDING
NOTICE OF ACCIDENT AND CLAIM FOR COMPENSATION
WET OP VERGOEDING VIR BEROEPSBESERINGS EN-SIEKTES, 1993 (WET No. 130 VAN 1993)
COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (ACT No. 130 OF 1993)
(Voorheen Ongevallewet, 1941) (Previously Workmen's Compensation Act, 1941)
[Artikel 38(1) – Reëls, vorms, en besonderhede van die Vergoedingskommissaris – Aanhangsel 14]
[Section 38 (1) and section 43 (1) – Commissioner's rules, forms and particulars – Annexure 14]

Hierdie vorm moet deur of namens beseerde werknemer/afhanklike ingevul en aan die Vergoedingskommissaris, Posbus 955, Pretoria 0001 gestuur word. / This form must be completed by or on behalf of the injured employee/dependants and sent to the Compensation Commissioner, PO Box 955, Pretoria 0001.

(DRUKSKRIF/BLOCK LETTERS)

1. WERKNEMER – EMPLOYEE:

Van/Surname. . . . . .

Voornaam/First names . . . . . .

Identiteitsnommer/Identity number. . . . . .Personeelnommer/Personnel Number. . . . . .

Woonadres/Residential address. . . . . .

. . . . . Poskode/Postal Code. . . . . .

Geboortedatum / Date of birth . . . . . Geslag / Sex. . . . . Getroud of ongetroud / Married or Single . . . . . .

Geroep/Occupation . . . . . .

2. WERKGEWER – EMPLOYER:

(i) Naam van werkgewer in wie se diens die ongeval plaasgevind het / Name of employer in who's service the accident occured . . . . . .

(ii) Adres/ Address. . . . . .

. . . . . Poskode/Postal Code. . . . . .

3. ONGEVAL – ACCIDENT:

(i) Wanneer en waar het die ongeval plaasgevind? / When and where did the accident occur? . . . . . Datum / Date . . . . . Tyd / Time . . . . . Plek / Place. . . . . .

(ii) Wat het die werknemer op daardie tydslip gedoen en hoe het die ongeval plaasgevind?/What was the employee doing at the time and how did the accident occur? . . . . . .

(iii) Gee 'n volledige beskrywing van die aard en omvang van die besering/Describe in detail the nature and extent of the injury . . . . . .

. . . . . .

(iv) Het iemand die ongeval sien gebeur? Indien ja, meld: / Did anybody see the accident happen? If so, specify: Naam/Name . . . . . Adres/Address . . . . . .

4. WERKNEMER SE VERDIENSTE TEN TYDE VAN DIE ONGEVAL – THE EMPLOYEE'S EARNINGS AT THE TIME OF THE ACCIDENT

	Per week R	Per maand/ month R
Bruto kontantverdienste (insluitende gemiddelde oortyd en/of kommissiebetalings van gereelde aard)/Gross cash earnings (including average overtime and/or commission of a regular nature)		
Toelaes van gereelde aard/Allowance of a regular nature		
(a) Bonusse (bv. 13de tjek)/Bonuses (e.g. 13th cheque)		
(b) Ander (spesifiseer)/Other (specify)		
Kontantwaarde van huisvesting/Cash value of quarters		
Kontantwaarde van voedsel/Cash value of food		

5. (a) As die ongeval die DOOD van die werknemer ten gevolge gehad het, moet onderstaande inligting betreffende sy afhanklikes, ten behoewe van wie die eis ingestel word, verstrek word/If the accident resulted in the DEATH of the employee, the following information relating to his dependants, on whose behalf the claim is made, should be given:

Volle naam Full name	Adres Address	Datum van geboorte Date of birth	Verwantskap met werknemer Relationship with employee

(b) In die geval van alle ANDER ongevalle, moet onderstaande inligting betreffende die naasbestaandes van die werknemer verstrek word./In the case of all OTHER accidents, the following information should be furnished in regard to next of kin of the employee.

Volle naam Full name	Adres Address	Verwantskap Relationship

6. Vergoeding ingevolge die Wet op Vergoeding vir Beroepsbeserings en -siektes, 1993 (voorheen Ongevallewet, 1941), word hierby geëis ten opsigte van die ongeval wat hierin beskryf is./Compensation in terms of Compensation for Occupational Injuries and Diseases Act, 1993 (previously Workmen's Compensation Act, 1941), is hereby claimed in respect of the accident described above.

Ek bevestig dat volgens my wete die inligting in hierdie vorm vervat korrek is,
I certify that the information in this form is to the best of my knowledge correct

DATUM/DATE: . . . . . .

. . . . . .
Handtekening van werknemer of persoon wat namens hom/haar optree
Signature of employee or person acting on his/her behalf

Checklists

Checklist for a labour problem

- Full name and address of the employee and if possible a telephone number.
- Full name, address and telephone number of the employer.
- Was there any written employment contract?
- The employee's wage at the time of the complaint.
- How long has the employee been working there?
- What work was the employee doing?
- What are the details of the employee's complaint?
- If the problem relates to a dismissal:When did the dismissal take place?Was the employee given notice of the dismissal or paid in lieu of notice?Does the employee want to return to their if the dismissal was unfair?

- When did the dismissal take place?
- Was the employee given notice of the dismissal or paid in lieu of notice?
- Does the employee want to return to their if the dismissal was unfair?
- Does the employee know whether the employer's company was a member of a Bargaining Council?
- Is the employee a member of a union? If so, get the union's name, address and telephone number.

Checklist to prepare for arbitration

Here is a checklist to help an employee prepare for an arbitration:

- Does the employee understand what arbitration means and what it entails?
- Have the employee and the employer agreed on the issue which the arbitrator will be asked to decide?
- Has the employee made copies of all necessary documents for the arbitrator to use at the hearing?
- Will the employee need the services of an interpreter? If so, have they made the necessary arrangements to get someone?
- Has the employee arranged for all witnesses to be present at the hearing?

Oral evidence from witnesses is often the best way of proving a case.

Checklist to prepare a claim for reinstatement

- Full name and address of the employee and if possible a telephone number.
- Full name and address of the employer.
- The employee's length of service.
- Employee's wage at the time of the dismissal.
- Was there any written employment contract?
- Was there any established disciplinary code/procedure?
- What was the nature of the employee's job and of the employer's business in general?
- Did the employee receive notice in writing?
- Get details of the employee's marriage, family situation, and dependants (ages of children, whether studying, working or unemployed).
- Is the employee a member of a union? If so, get the union's name, address and telephone number.
- Does the employee know whether the employer's company was a member of a Bargaining Council?

- What are the employee's prospects of finding another job?
- Does the employee have any other information or documents that might be relevant to the case?

Checklist for problems about UIF

- Name, address and identity number of the employee
- Was the employee a contributor to the UIF?
- Is the employee out of work, or without work because of being pregnant or illness or has the employee died and the dependants are claiming UIF death benefits?
- Was the employee registered by the employer with the Fund?
- Is the employee permanently resident in South Africa?
- Has the employee registered for benefits?
- Was the employee told that the benefits are used up?
- Is the employee still unemployed or sick?
- Have more than 12 months passed since the employee's contract was terminated?

Checklist for compensation problems

- What is the name of the employee?
- What is the address of the employee: at work and at home?
- What is the age of the employee?
- What is the name of the employee's employer at the time of the accident?
- What is the address of the employer?
- What work was the employee doing at the time of the accident?
- What was the date of the accident?
- Has the employee received any correspondence (letters or forms) from the compensation office?
- Give details of the accident.
- What is the name of the employee's doctor?
- What injuries did the employee suffer in the accident?
- How long was the employee off work as a result of the accident?
- Is the injury permanent or temporary?
- Can the employee still do some work or not, for example, light duties?
- Is the employee still having medical treatment or is the medical treatment finished?