

LABOUR RELATIONS ACT

66 of 1995

Relevant Extracts

[ASSENTED TO 29 NOVEMBER, 1995] [ENGLISH TEXT SIGNED BY THE PRESIDENT]
[DATE OF COMMENCEMENT: 11 NOVEMBER, 1996]
[UNLESS OTHERWISE INDICATED]

as amended by

Labour Relations Amendment Act, No. 42 of 1996
Basic Conditions of Employment Act, No. 75 of 1997
Employment Equity Act, No. 55 of 1998
Labour Relations Amendment Act, No. 127 of 1998
Labour Relations Amendment Act, No. 12 of 2002

ACT

To change the law governing labour relations and, for that purpose –
to give effect to section 27 of the Constitution;
to regulate the organisational rights of trade unions;
to promote and facilitate collective bargaining at the workplace and at sectoral level;
to regulate the right to strike and the recourse to lock-out in conformity with the Constitution;
to promote employee participation in decision-making through the establishment of workplace forums;
to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;
to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control;
to give effect to the public international law obligations of the Republic relating to labour relations;
to amend and repeal certain laws relating to labour relations; and
to provide for incidental matters.

Chapter I

PURPOSE, APPLICATION AND INTERPRETATION

Purpose of this Act

1. The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour

Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.

Exclusion from application of this Act

2. This Act does not apply to members of –

- (a) the National Defence Force;
- (b) the National Intelligence Agency; and
- (c) the South African Secret Service.

Interpretation of this Act

3. Any person applying this Act must interpret its provisions –

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the Republic.

Chapter II

FREEDOM OF ASSOCIATION AND GENERAL PROTECTIONS

Employees' right to freedom of association

4. (1) Every employee has the right –
(a) to participate in forming a trade union or federation of trade unions; and
(b) to join a trade union, subject to its constitution.
(2) Every member of a trade union has the right, subject to the constitution of that trade union –
(a) to participate in its lawful activities;
(b) to participate in the election of any of its office-bearers, officials or trade union representatives; and
(c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; and
(d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.

(3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation –

- (a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers or officials; and
- (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office.

Protection of employees and persons seeking employment

5. (1) No person may discriminate against an employee for exercising any right conferred by this Act.
(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following –

- (a) require an employee or a person seeking employment –
 - (i) not to be a member of a trade union or workplace forum;
 - (ii) not to become a member of a trade union or workplace forum; or
 - (iii) to give up membership of a trade union or workplace forum;
- (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
- (c) prejudice an employee or a person seeking employment because of past, present or anticipated –
 - (i) membership of a trade union or workplace forum;
 - (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;
 - (iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
 - (iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
 - (v) disclosure of information that the employee is lawfully entitled or required to give to another person;
 - (vi) exercise of any right conferred by this Act; or
 - (vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

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

Employers' right to freedom of association

6. (1) Every employer has the right –

- (a) to participate in forming an employers' organisation or a federation of employers' organisations; and
- (b) to join an employers' organisation, subject to its constitution.

(2) Every member of an employers' organisation has the right, subject to the constitution of that employers' organisation –

- (a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers or officials; and
- (c) if –
 - (i) a natural person, to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; or
 - (ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an office-bearer or official and, if elected or appointed, to hold office.

(3) Every member of an employers' organisation that is a member of a federation of employers' organisations has the right, subject to the constitution of that federation –

- (a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers or officials; and
- (c) if –
 - (i) a natural person, to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office;
 - (ii) a juristic person, to have a representative stand for election, and be eligible for appointment, as an office-bearer or official and, if elected or appointed, to hold office.

Protection of employers' rights

7. (1) No person may discriminate against an employer for exercising any right conferred by this Act.
(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following –

- (a) require an employer –
 - (i) not to be a member of an employers' organisation;
 - (ii) not to become a member of an employers' organisation; or
 - (iii) to give up membership of an employers' organisation;
- (b) prevent an employer from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
- (c) prejudice an employer because of past, present or anticipated –
 - (i) membership of an employers' organisation;
 - (ii) participation in forming an employers' organisation or a federation of employers' organisations;
 - (iii) participation in the lawful activities of an employers' organisation or a federation of employers' organisations;

- (iv) disclosure of information that the employer is lawfully entitled or required to give to another person;
- (v) exercise of any right conferred by this Act; or
- (vi) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employer in exchange for that employer not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 6, or this section, is invalid, unless the contractual provision is permitted by this Act.

Rights of trade unions and employers' organisations

- 8.** Every trade union and every employers' organisation has the right –
- (a) subject to the provisions of Chapter VI –
 - (i) to determine its own constitution and rules; and
 - (ii) to hold elections for its office-bearers, officials and representatives;
 - (b) to plan and organise its administration and lawful activities;
 - (c) to participate in forming a federation of trade unions or a federation of employers' organisations;
 - (d) to join a federation of trade unions or a federation of employers' organisations, subject to its constitution, and to participate in its lawful activities; and
 - (e) to affiliate with, and participate in the affairs of, any international workers' organisation or international employers' organisation or the International Labour Organisation, and contribute to, or receive financial assistance from, those organisations.

Procedure for disputes

- 9.** (1) If there is a dispute about the interpretation or application of any provision of this Chapter, any party to the dispute may refer the dispute in writing to –
- (a) a council, if the parties to the dispute fall within the registered scope of that council; or
 - (b) the Commission, if no council has jurisdiction.
- (2) The party who refers the dispute must satisfy the council or the Commission that a copy of the referral has been served on all the other parties to the dispute.
- (3) The council or the Commission must attempt to resolve the dispute through conciliation.
 - (4) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for

adjudication.

Burden of proof

- 10.** In any proceedings –
- (a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and
 - (b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter.

Chapter III

COLLECTIVE BARGAINING

Part A – Organisational Rights

Trade union representativeness

11. In this Part, unless otherwise stated, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace.

Trade union access to workplace

- 12.** (1) Any office-bearer or official of a representative trade union is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve their interests.
- (2) A representative trade union is entitled to hold meetings with employees outside their working hours at the employer's premises.
- (3) The members of a representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated by that trade union's constitution.
- (4) The rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work.

Deduction of trade union subscriptions or levies

- 13.** (1) Any employee who is a member of a representative trade union may authorise the employer in writing to deduct subscriptions or levies payable to that trade union from the employee's wages.
- (2) An employer who receives an authorisation in terms of subsection (1) must begin making the authorised deduction as soon as possible and must remit the amount deducted to the representative trade union by not later than the 15th day of the month first following the date each deduction was made.
- (3) An employee may revoke an authorisation given in terms of subsection (1) by giving the employer and the representative trade union one month's written notice or, if the employee works in the public service, three months' written notice.
- (4) An employer who receives a notice in terms of subsection (3) must continue to make the authorised deduction until the notice period has expired and then must stop making the deduction.
- (5) With each monthly remittance, the employer must give the representative trade union –
- (a) a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;
 - (b) details of the amounts deducted and remitted and the period to which the deductions relate; and
 - (c) a copy of every notice of revocation in terms of subsection (3).

Trade union representatives

- 14.** (1) In this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.
- (2) In any workplace in which at least 10 members of a representative trade union are employed, those members are entitled to elect from among themselves –
- (a) if there are 10 members of the trade union employed in the workplace, one trade union representative;
 - (b) if there are more than 10 members of the trade union employed in the work place, two trade union representatives;
 - (c) if there are more than 50 members of the trade union employed in the workplace, two trade union representatives for the first 50 members, plus a further one trade union representative for every additional 50 members up to a maximum of seven trade union representatives;

(d) if there are more than 300 members of the trade union employed in the workplace, seven trade union representatives for the first 300 members, plus one additional trade union representative for every 100 additional members up to a maximum of 10 trade union representatives;

(e) if there are more than 600 members of the trade union employed in the workplace, 10 trade union representatives for the first 600 members, plus one additional trade union representative for every 200 additional members up to a maximum of 12 trade union representatives; and

(f) if there are more than 1 000 members of the trade union employed in the workplace, 12 trade union representatives for the first 1 000 members, plus one additional trade union representative for every 500 additional members up to a maximum of 20 trade union representatives.

(3) The constitution of the representative trade union governs the nomination, election, terms of office and removal from office of a trade union representative.

(4) A trade union representative has the right to perform the following functions –

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;

(b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;

(c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to –

(i) the employer;

(ii) the representative trade union; and

(iii) any responsible authority or agency; and

(d) to perform any other function agreed to between the representative trade union and the employer.

(5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours –

(a) to perform the functions of a trade union representative; and

(b) to be trained in any subject relevant to the performance of the functions of a trade union representative.

Leave for trade union activities

15. (1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.

(2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.

(3) An arbitration award in terms of section 21 (7) regulating any of the matters referred to in subsection (2) remains in force for 12 months from the date of the award.

Disclosure of information

16. (1) For the purposes of this section, "representative trade union" means a registered trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

(2) Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14 (4).

(3) Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

(4) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

(5) An employer is not required to disclose information –

(a) that is legally privileged;

(b) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;

(c) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or

(d) that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.

(6) If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.

(7) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(8) The Commission must attempt to resolve the dispute through conciliation.

(9) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.

(10) In any dispute about the disclosure of information contemplated in subsection (6), the commissioner must first decide whether or not the information is relevant.

(11) If the commissioner decides that the information is relevant and if it is information contemplated in subsection (5) (c) or (d), the commissioner must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a trade union representative to perform effectively the functions referred to in section 14 (4) or the ability of a representative trade union to engage effectively in consultation or collective bargaining.

(12) If the commissioner decides that the balance of harm favours the disclosure of the information, the commissioner may order the disclosure of the information on terms designed to limit the harm likely to be caused to the employee or employer.

(13) When making an order in terms of subsection (12), the commissioner must take into account any breach of confidentiality in respect of information disclosed in terms of this section at that workplace and may refuse to order the disclosure of the information or any other confidential information which might otherwise be disclosed for a period specified in the arbitration award.

(14) In any dispute about an alleged breach of confidentiality, the commissioner may order that the right to disclosure of information in that workplace be withdrawn for a period specified in the arbitration award.

Restricted rights in the domestic sector

17. (1) For the purposes of this section, “domestic sector” means the employment of employees engaged in domestic work in their employers’ homes or on the property on which the home is situated.

(2) The rights conferred on representative trade unions by this Part in so far as they apply to the domestic sector are subject to the following limitations –

(a) the right of access to the premises of the employer conferred by section 12 on an office-bearer or official of a representative trade union does not include the right to enter the home of the employer, unless the employer agrees; and

(b) the right to the disclosure of information conferred by section 16 does not apply in the domestic sector.

Right to establish thresholds of representativeness

18. (1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.

Certain organisational rights for trade union party to a council

19. Registered trade unions that are parties to a council automatically have the rights contemplated in sections 12 and 13 in respect of all workplaces within the registered scope of the council regardless of their representativeness in any particular workplace.

Organisational rights in collective agreements

20. Nothing in this Part precludes the conclusion of a collective agreement that regulates organisational rights.

Exercise of rights conferred by this Part

21. (1) Any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by this Part in a workplace.

(2) The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union’s certificate of registration and must specify –

(a) the workplace in respect of which the trade union seeks to exercise the rights;

(b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and

(c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

(3) Within 30 days of receiving the notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement as to the manner in which the trade union will exercise the rights in respect of that workplace.

(4) If a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

(5) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on the other party to the dispute.

(6) The Commission must appoint a commissioner to attempt to resolve the dispute through conciliation.

(7) If the dispute remains unresolved, either party to the dispute may request that the dispute be resolved through arbitration.

(8) If the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner –

(a) must seek –

(i) to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace; and

(ii) to minimise the financial and administrative burden of requiring an employer to grant organisational

rights to more than one registered trade union;

(b) must consider –

(i) the nature of the workplace;

(ii) the nature of the one or more organisational rights that the registered trade union seeks to exercise;

(iii) the nature of the sector in which the workplace is situated; and

(iv) the organisational history at the workplace or any other workplace of the employer; and

(c) may withdraw any of the organisational rights conferred by this Part and which are exercised by any other registered trade union in respect of that workplace, if that other trade union has ceased to be a representative trade union.

(9) In order to determine the membership or support of the registered trade union, the commissioner may –

(a) make any necessary inquiries;

(b) where appropriate, conduct a ballot of the relevant employees; and

(c) take into account any other relevant information.

(10) The employer must co-operate with the commissioner when the commissioner acts in terms of subsection (9), and must make available to the commissioner any information and facilities that are reasonably necessary for the purposes of that subsection.

(11) An employer who alleges that a trade union is no longer a representative trade union may apply to the Commission to withdraw any of the organisational rights conferred by this Part, in which case the provisions of subsections (5) to (10) apply, read with the changes required by the context.

Disputes about organisational rights

22. (1) Any party to a dispute about the interpretation or application of any provision of this Part, other than a dispute contemplated in section 21, may refer the dispute in writing to the Commission.

(2) The party who refers a dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.

(3) The Commission must attempt to resolve the dispute through conciliation.

(4) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration as soon as may be practicable.

Chapter IV

STRIKES AND LOCK-OUTS

Right to strike and recourse to lock-out

- 64.** (1) Every employee has the right to strike and every employer has recourse to lock-out if—
- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and —
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that —
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless —
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
 - (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).
- (2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) (c) before notice is given in terms of subsection (1) (b) or (c). A refusal to bargain includes —
- (a) a refusal —
 - (i) to recognise a trade union as a collective bargaining agent; or
 - (ii) to agree to establish a bargaining council;
 - (b) a withdrawal of recognition of a collective bargaining agent;
 - (c) a resignation of a party from a bargaining council;
 - (d) a dispute about —
 - (i) appropriate bargaining units;
 - (ii) appropriate bargaining levels; or
 - (iii) bargaining subjects.
- (3) The requirements of subsection (1) do not apply to a strike or a lock-out if—
- (a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;
 - (b) the strike or lock-out conforms with the procedures in a collective agreement;
 - (c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;
 - (d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or
 - (e) the employer fails to comply with the requirements of subsections (4) and (5).
- (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1) (a) —
- (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
 - (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
- (5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.

Limitations on right to strike or recourse to lock-out

- 65.** (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—
- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
 - (d) that person is engaged in —
 - (i) an essential service; or
 - (ii) a maintenance service.
- (2) (a) Despite section 65 (1) (c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.
- (b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.
- (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out —
- (a) if that person is bound by —
 - (i) any arbitration award or collective agreement that regulates the issue in dispute; or
 - (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
 - (b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.

Secondary strikes

66. (1) In this section “secondary strike” means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.

[Sub-s. (1) substituted by s. 19 of Act No. 42 of 1996.]

- (2) No person may take part in a secondary strike unless –
- (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
- (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers’ organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and
- (c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.
- (3) Subject to section 68 (2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2).
- (4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2) (c) have been met.
- (5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.
- (6) The Labour Court must take account of the Commission’s report in terms of subsection (5) before making an order.

Strike or lock-out in compliance with this Act

67. (1) In this Chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this Chapter.

- (2) A person does not commit a delict or a breach of contract by taking part in –
- (a) a protected strike or a protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (3) Despite subsection (2), an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike or a protected lock-out, however –
- (a) if the employee’s remuneration includes payment in kind in respect of accommodation, the provision of food and other basic amenities of life, the employer, at the request of the employee, must not discontinue the payment in kind during the strike or lock-out; and
- (b) after the end of the strike or lock-out, the employer may recover the monetary value of the payment in kind made at the request of the employee during the strike or lock-out from the employee by way of civil proceedings instituted in the Labour Court.
- (4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.
- (5) Subsection (4) does not preclude an employer from fairly dismissing an employee in accordance with the provisions of Chapter VIII for a reason related to the employee’s conduct during the strike, or for a reason based on the employer’s operational requirements.
- (6) Civil legal proceedings may not be instituted against any person for –
- (a) participating in a protected strike or a protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.
- (7) The failure by a registered trade union or a registered employers’ organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.
- (8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.
- (9) Any act in contemplation or in furtherance of a protected strike or a protected lock-out that is a contravention of the Basic Conditions of Employment Act or the Wage Act does not constitute an offence.

Strike or lock-out not in compliance with this Act

- 68.** (1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction –
- (a) to grant an interdict or order to restrain –
- (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or
- (ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;
- (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to –
- (i) whether –
- (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
- (bb) the strike or lock-out or conduct was premeditated;
- (cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute;
- and
- (dd) there was compliance with an order granted in terms of paragraph (a);
- (ii) the interests of orderly collective bargaining;
- (iii) the duration of the strike or lock-out or conduct; and
- (iv) the financial position of the employer, trade union or employees respectively.

[Para. (b) substituted by s. 17 of Act No. 12 of 2002.]

- (2) The Labour Court may not grant any order in terms of subsection (1) (a) unless 48 hours’ notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if–

- (a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
 - (b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
 - (c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.
- (3) Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1) (a).
- (4) Subsections (2) and (3) do not apply to an employer or an employee engaged in an essential service or a maintenance service.
- (5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

Picketing

- 69.** (1) A registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating –
- (a) in support of any protected strike; or
 - (b) in opposition to any lock-out.
- (2) Despite any law regulating the right of assembly, a picket authorised in terms of subsection (1) may be held –
- (a) in any place to which the public has access but outside the premises of an employer; or
 - (b) with the permission of the employer, inside the employer's premises.
- [Sub-s. (2) amended by s. 20 of Act No. 42 of 1996.]
- (3) The permission referred to in subsection (2) (b) may not be unreasonably withheld.
- (4) If requested to do so by the registered trade union or the employer, the Commission must attempt to secure an agreement between the parties to the dispute on rules that should apply to any picket in relation to that strike or lock-out.
- (5) If there is no agreement, the Commission must establish picketing rules, and in doing so must take account of–
- (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised; and
 - (b) any relevant code of good practice.
- (6) The rules established by the Commission may provide for picketing by employees on their employer's premises if the commission is satisfied that the employer's permission has been unreasonably withheld.
- (7) The provisions of section 67, read with the changes required by the context, apply to the call for, organisation of, or participation in a picket that complies with the provisions of this section.
- (8) Any party to a dispute about any of the following issues may refer the dispute in writing to the Commission –
- (a) an allegation that the effective use of the right to picket is being undermined;
 - (b) an alleged material contravention of subsection (1) or (2);
 - (c) an alleged material breach of an agreement concluded in terms of subsection (4); or
 - (d) an alleged material breach of a rule established in terms of subsection (5).
- (9) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (10) The Commission must attempt to resolve the dispute through conciliation.
- (11) If the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

Chapter VIII

UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE

[Heading substituted by s. 39 of Act No. 12 of 2002.]

Right not to be unfairly dismissed or subjected to unfair labour practice

- 185.** Every employee has the right not to be –
- (a) unfairly dismissed; and
 - (b) subjected to unfair labour practice.

[S. 185 substituted by s. 40 of Act No. 12 of 2002.]

Meaning of dismissal and unfair labour practice

- 186.** (1) "Dismissal" means that –
- (a) an employer has terminated a contract of employment with or without notice;
 - (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
 - (c) an employer refused to allow an employee to resume work after she –
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or
 - (ii)

[Sub-para. (ii) deleted by s. 95 (4) of Act No. 75 of 1997.]

- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.
- (f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

[Para. (f) added by s. 41 (b) of Act No. 12 of 2002.]

- (2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
 - (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
 - (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
 - (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.
- [S. 186 amended by s. 41 (a) of Act No. 12 of 2002. Sub-s. (2) added by s. 41 (c) of Act No. 12 of 2002.]

Automatically unfair dismissals

187. (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

- (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
- (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
- (d) that the employee took action, or indicated an intention to take action, against the employer by –
 - (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act;
- (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
- (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

[Para. (g) added by s. 42 of Act No. 12 of 2002.]

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

[Para. (h) added by s. 42 of Act No. 12 of 2002.]

(2) Despite subsection (1) (f) –

- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
- (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

Other unfair dismissals

188. (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

- (a) that the reason for dismissal is a fair reason –
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

Agreement for pre-dismissal arbitration

188A. (1) An employer may, with the consent of the employee, request a council, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that employee.

(2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of–

- (a) payment by the employer of the prescribed fee; and
- (b) the employee's written consent to the inquiry.

(4) (a) An employee may only consent to a pre-dismissal arbitration after the employee has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.

(b) Despite subparagraph (a), an employee earning more than the amount determined by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act, may consent to the holding of a pre-dismissal arbitration in a contract of employment.

(5) In any arbitration in terms of this section a party to the dispute may appear in person or be represented only by –

- (a) a co-employee;
- (b) a director or employee, if the party is a juristic person;
- (c) any member, office bearer or official of that party's registered trade union or registered employers' organisation; or

(d) a legal practitioner, on agreement between the parties.

(6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142 (1) (a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the director for the purpose of this section, must be read as a reference to –

- (a) the secretary of the council, if the arbitration is held under the auspices of the council;
 - (b) the director of the accredited agency, if the arbitration is held under the auspices of an accredited agency.
- (8) The provisions of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.

(9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the employee.

(10) (a) A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.

(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission.
[S. 188A inserted by s. 43 of Act No. 12 of 2002.]

Dismissals based on operational requirements

189. (1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult –

- (a) any person whom the employer is required to consult in terms of a collective agreement;
- (b) if there is no collective agreement that requires consultation –
 - (i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum; and
 - (ii) any registered trade union whose members are likely to be affected by the proposed dismissals;
- (c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or
- (d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and

(3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –

- (a) appropriate measures –
 - (i) to avoid the dismissals;
 - (ii) to minimise the number of dismissals;
 - (iii) to change the timing of the dismissals; and
 - (iv) to mitigate the adverse effects of the dismissals;
 - (b) the method for selecting the employees to be dismissed; and
 - (c) the severance pay for dismissed employees.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to –
- (a) the reasons for the proposed dismissals;
 - (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
 - (c) the number of employees likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which employees to dismiss;
 - (e) the time when, or the period during which, the dismissals are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
 - (h) the possibility of the future re-employment of the employees who are dismissed;
 - (i) the number of employees employed by the employer; and
 - (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

(4) (a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any dispute in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed dismissals.

(6) (a) The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the employees to be dismissed according to selection criteria –

- (a) that have been agreed to by the consulting parties; or
- (b) if no criteria have been agreed, criteria that are fair and objective.

[S. 189 substituted by s. 44 of Act No. 12 of 2002.]

Dismissals based on operational requirements by employers with more than 50 employees

189A. (1) This section applies to employers employing more than 50 employees if –

- (a) the employer contemplates dismissing by reason of the employer's operational requirements, at least –
 - (i) 10 employees, if the employer employs up to 200 employees;
 - (ii) 20 employees, if the employer employs more than 200, but not more than 300, employees;
 - (iii) 30 employees, if the employer employs more than 300, but not more than 400, employees;
 - (iv) 40 employees, if the employer employs more than 400, but not more than 500, employees; or
 - (v) 50 employees, if the employer employs more than 500 employees; or
- (b) the number of employees that the employer contemplates dismissing together with the number of employees that have been dismissed by reason of the employer's operational requirements in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (a).

(2) In respect of any dismissal covered by this section –

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65 (1) (c), an employee may participate in a strike and an employer may lock out in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation.

- (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if–
- (a) the employer has in its notice in terms of section 189 (3) requested facilitation; or
- (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.
- (4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).
- (5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the Minister under subsection (6) for the conduct of such facilitations.
- (6) The Minister, after consulting NEDLAC and the Commission, may make regulations relating to –
- (a) the time period, and the variation of time periods, for facilitation;
- (b) the powers and duties of facilitators;
- (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
- (d) any other matter necessary for the conduct of facilitations.
- (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189 (3) –
- (a) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act; and
- (b) a registered trade union or the employees who have received notice of termination may either –
- (i) give notice of a strike in terms of section 64 (1) (b) or (d); or
- (ii) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191 (11).
- (8) If a facilitator is not appointed –
- (a) a party may not refer a dispute to a council or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189 (3); and
- (b) once the periods mentioned in section 64 (1) (a) have elapsed –
- (i) the employer may give notice to terminate the contracts of employment in accordance with section 37 (1) of the Basic Conditions of Employment Act; and
- (ii) a registered trade union or the employees who have received notice of termination may –
- (aa) give notice of a strike in terms of section 64 (1) (b) or (d); or
- (bb) refer a dispute concerning whether there is a fair reason for the dismissal to the Labour Court in terms of section 191 (11).
- (9) Notice of the commencement of a strike may be given if the employer dismisses or gives notice of dismissal before the expiry of the periods referred to in subsections (7) (a) or (8) (b) (i).
- (10) (a) A consulting party may not –
- (i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
- (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.
- (b) If a trade union gives notice of a strike in terms of this section –
- (i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23 (1) (d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;
- (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.
- (11) The following provisions of Chapter IV apply to any strike or lock-out in terms of this section:
- (a) Section 64 (1) and (3) (a) to (d), except that –
- (i) section 64 (1) (a) does not apply if a facilitator is appointed in terms of this section;
- (ii) an employer may only lock out in respect of a dispute in which a strike notice has been issued;
- (b) subsection (2) (a), section 65 (1) and (3);
- (c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the strike;
- (d) sections 67, 68, 69 and 76.
- (12) (a) During the 14-day period referred to in subsection (11) (c), the director must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any dispute, between the employer and the party who gave the notice, through conciliation.
- (b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of employees to strike on the expiry of the 14-day period.
- (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order –
- (a) compelling the employer to comply with a fair procedure;
- (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
- (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
- (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.
- (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158 (1) (a).
- (15) An award of compensation made to an employee in terms of subsection (14) must comply with section 194.
- (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189 (4) that has been the subject of an arbitration award in terms of section 16.

(17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the employee's services or, if notice is not given, the date on which the employees are dismissed.

(b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).

(18) The Labour Court may not adjudicate a dispute about the procedural fairness of a dismissal based on the employer's operational requirements in any dispute referred to it in terms of section 191 (5) (b) (ii).

(19) In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if—

(a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;

(b) the dismissal was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives; and

(d) selection criteria were fair and objective.

(20) For the purposes of this section, an "employer" in the public service is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).

[S. 189A inserted by s. 45 of Act No. 12 of 2002.]

Date of dismissal

190. (1) The date of dismissal is the earlier of—

(a) the date on which the contract of employment terminated; or

(b) the date on which the employee left the service of the employer.

(2) Despite subsection (1) —

(a) if an employer has offered to renew on less favourable terms, or has failed to renew a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;

(b) if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;

(c) if an employer refused to re-instate or re-employ the employee, the date of dismissal is the date on which the employer first refused to re-instate or re-employ that employee.

Disputes about unfair dismissals and unfair labour practices

191. (1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to —

(i) a council, if the parties to the dispute fall within the registered scope of that council; or

(ii) the Commission, if no council has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within —

(i) 30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

[Sub-s. (1) substituted by s. 46 (b) of Act No. 12 of 2002.]

(2) If the employee shows good cause at any time, the council or the Commission may permit the employee to refer the dispute after the relevant time limit in subsection (1) has expired.

[Sub-s. (2) substituted by s. 46 (c) of Act No. 12 of 2002.]

(2A) Subject to subsections (1) and (2), an employee whose contract of employment is terminated by notice, may refer the dispute to the council or the Commission once the employee has received that notice.

[Sub-s. (2A) inserted by s. 46 (d) of Act No. 12 of 2002.]

(3) The employee must satisfy the council or the Commission that a copy of the referral has been served on the employer.

(4) The council or the Commission must attempt to resolve the dispute through conciliation.

(5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved —

(a) the council or the Commission must arbitrate the dispute at the request of the employee if—

(i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;

(ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;

[Sub-para. (ii) substituted by s. 46 (e) of Act No. 12 of 2002.]

(iii) the employee does not know the reason for dismissal; or

(iv) the dispute concerns an unfair labour practice; or

[Sub-para. (iv) added by s. 46 (f) of Act No. 12 of 2002.]

(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is —

(i) automatically unfair;

(ii) based on the employer's operational requirements;

(iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or

(iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.

(5A) Despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns —

(a) the dismissal of an employee for any reason relating to probation;

(b) any unfair labour practice relating to probation;

(c) any other dispute contemplated in subsection (5) (a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

[Sub-s. (5A) inserted by s. 46 (g) of Act No. 12 of 2002.]

(6) Despite subsection (5) (a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering –

- (a) the reason for dismissal;
- (b) whether there are questions of law raised by the dispute;
- (c) the complexity of the dispute;
- (d) whether there are conflicting arbitration awards that need to be resolved;
- (e) the public interest.

[Sub-s. (6) substituted by s. 46 (h) of Act No. 12 of 2002.]

(7) When considering whether the dispute should be referred to the Labour Court, the director must give the parties to the dispute and the commissioner who attempted to conciliate the dispute, an opportunity to make representations.

(8) The director must notify the parties of the decision and refer the dispute –

- (a) to the Commission for arbitration; or
 - (b) to the Labour Court for adjudication.
- (9) The director's decision is final and binding.

(10) No person may apply to any court of law to review the director's decision until the dispute has been arbitrated or adjudicated, as the case may be.

(11) (a) The referral, in terms of subsection (5) (b), of a dispute to the Labour Court for adjudication, must be made within 90 days after the council or (as the case may be) the commissioner has certified that the dispute remains unresolved.

(b) However, the Labour Court may condone non-observance of that time-frame on good cause shown.

[Sub-s. (11) added by s. 25 of Act No. 127 of 1998.]

(12) If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure in terms of section 189 that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

[Sub-s. (12) added by s. 46 (i) of Act No. 12 of 2002.]

(13) (a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5) (b).

[S. 191 amended by s. 46 (a) of Act No. 12 of 2002. Sub-s. (13) added by s. 46 (i) of Act No. 12 of 2002.]

Onus in dismissal disputes

192. (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

Remedies for unfair dismissal and unfair labour practice

193. (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may –

- (a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;
- (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;

or

(c) order the employer to pay compensation to the employee.

(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee

unless –

- (a) the employee does not wish to be re-instated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be

intolerable;

(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

(3) If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

[S. 193 amended by s. 47 (a) of Act No. 12 of 2002. Sub-s. (4) inserted by s. 47 (b) of Act No. 12 of 2002.]

Limits on compensation

194. (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

[Sub-s. (1) substituted by s. 48 (a) of Act No. 12 of 2002.]

(2)

[Sub-s. (2) deleted by s. 48 (b) of Act No. 12 of 2002.]

(3) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(4) The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration.

[Sub-s. (4) added by s. 48 (c) of Act No. 12 of 2002.]