

UNFAIR LABOUR PRACTICE AND UNFAIR DISMISSAL DISPUTES



INTRODUCTION

Every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice.

WHAT IS AN UNFAIR LABOUR PRACTICE?

An unfair labour practice is an unfair act or omission that arises between an employer and an employee involving -

- unfair conduct of the employer relating to the promotion, demotion, probation (excluding dismissals) or training of an employee or relating to the provision of benefits to an employee;
- the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement;
- an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act of 2000 on account of an employee having made a protected disclosure as defined in that Act.

In addition, section 6 of the proposed minimum wage act, 2018, states that it is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage.

UNFAIR CONDUCT RELATING TO PROMOTION, DEMOTION, TRAINING OR BENEFITS

This usually involves cases where the employer deviates without good cause from its own promotion or training policy or where the employee alleges that the promotion, demotion or training is in itself unfair. For example, an employee, who does not meet the minimum requirements for the job, is promoted without justification at the expense of another employee who does meet the set requirements.

UNFAIR SUSPENSION AND UNFAIR DISCIPLINARY ACTION

Disciplinary action short of dismissal includes warnings, and suspensions. For such action to be fair, employers need to follow a fair procedure and show good cause. For example, where an employer contemplates the suspension of an employee, the employer should provide the employee with an opportunity to respond and should only suspend the employee for a fixed and reasonable period of time. Employees are encouraged to first challenge the fairness of warnings, transfers and suspensions internally before referring a dispute. There may be occasions where an employer uses a transfer as a form of punishment rather than operational reasons.

REFUSAL BY AN EMPLOYER TO REINSTATE OR RE-EMPLOY A FORMER EMPLOYEE IN TERMS OF ANY AGREEMENT

This type of unfair labour practice requires an agreement to have been in existence (verbal, written, individual or collective) which promises the reinstatement or re-employment of an employee subject to certain conditions. Usually these disputes arise

out of retrenchments. For example, where the employer retrenches employee Y and promises to re-employ him or her if there is a vacancy. A vacancy arises, but employee

Y is not re-employed. Employee Y can challenge this omission as an unfair labour practice.

UNFAIR TREATMENT CREATING AN OCCUPATIONAL DETRIMENT FOR AN EMPLOYEE WHO MADE A PROTECTED DISCLOSURE

This type of unfair labour practice applies if an employee makes a protected disclosure as set out in the Protected Disclosures Act 26 of 2000 and the employer responds by taking disciplinary or other action that is detrimental to the employee, against the employee. For example, Ms. T has reason to believe that her employer is committing a criminal offence such as dumping harmful substances into a river. She makes such a disclosure to an attorney. The employer hears about this and immediately suspends her from work. This suspension could be seen as an 'occupational detriment' linked to a protected disclosure, the fairness of which may be challenged.

WHAT IS A DISMISSAL?

A dismissal means that an employer has terminated the services of an employee for a number of reasons including –

- the termination of employment with or without notice;
- the non-renewal of a fixed term contract or the renewal thereof on less favourable terms;
- the failure to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract;
- a refusal to allow an employee to resume work after taking maternity leave;
- selective re-employment of one or more employees where a number of employees have been dismissed for the same or similar reasons;
- the employee terminated employment because the employer made continued employment intolerable (*see information sheet on constructive dismissal*);
- the employee terminated employment after a transfer in terms of section 197 or 197A (where one company buys or takes over another company and the new employer/company provided conditions of employment substantially less favourable; and
- to avoid the deeming provision as per section 198A (4) of the LRA. (*see the information sheet on unfair dismissal*)

WHAT IS AN AUTOMATICALLY UNFAIR DISMISSAL?

The following reasons for dismissals make them "automatically unfair" –

- dismissal for participation in or supporting, or indicating an intention to participate or support a lawful strike or protest action;
- dismissal for refusal to do work normally done by an employee on a lawful strike;
- a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
- dismissal because an employee exercised a right conferred by the LRA or participated in any proceedings in terms of the LRA;
- dismissal for reasons related to an employee's pregnancy;

- dismissal as a result of unfair discrimination;
- dismissal related to a transfer, or a reason related to a transfer as contemplated in section 197 or 197A of the LRA; and
- dismissal in contravention of the Protected Disclosures Act of 2000, by the employer, because of the employee having made a protected disclosure.

The LRA states that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements.

DISPUTES ABOUT UNFAIR LABOUR PRACTICES AND UNFAIR DISMISSALS

Employees may refer disputes about unfair labour practices and unfair dismissals on an LRA 7.11 application form to the CCMA or, where applicable, a Bargaining Council for conciliation. If the dispute remains unresolved, it can be referred to arbitration. The dispute can also be con-arb if there is no objection. Unfair labour practice and dismissals relating to probation are determined via con-arb. (*See information sheet on con-arb*).

If a dispute concerns an automatically unfair dismissal, or an unfair labour practice relating to an occupational detriment resulting from a protected disclosure, the matter may be referred to the Labour Court for adjudication, should the matter remain unresolved at conciliation.

WHEN TO REFER AN UNFAIR LABOUR PRACTICE OR UNFAIR DISMISSAL DISPUTE

Unfair labour practice: 90 days from the date of the act or omission which allegedly constitutes an unfair labour practice or, if it is a later date, within 90 days of the date which the employee became aware of the act or occurrence.

Unfair dismissal: 30 days from the date of dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.

Where an employee has not been able to refer his or her dispute in time, he or she may apply to have the late referral condoned (pardoned) by applying for condonation (*see information sheet on condonation*).

RELEVANT LEGISLATION

- Constitution of the Republic of SA Act 108 of 1996 as amended, s23
- Labour Relations Act 66 of 1995 as amended, sections 186, 187 and 198
- National Minimum Wage Act, (as proposed)