

UNFAIR DISMISSAL DISPUTES

INTRODUCTION

Under Section 185 (a) of the Labour Relations Act (LRA) every employee has the right not to be unfairly dismissed.

AUTOMATICALLY UNFAIR DISMISSAL

Section 187 of the LRA lists the following reasons for dismissal that would make a dismissal automatically unfair –

- (a) For participating or supporting a protected strike;
- (b) For refusing to do work normally done by an employee who is on a protected strike; or is locked-out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) A refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
- (d) For any reason seeking to prevent an employee from exercising their rights under the LRA e.g. freedom of association;
- (e) For any reason relating to an employee's pregnancy or intended pregnancy;
- (f) For any reason amounting to grounds for unfair discrimination, unless the dismissal is based on the inherent requirements of the job or if the dismissal is based on age and the employee has reached the normal or agreed retirement age for persons employed in that capacity;
- (g) For any reason seeking to avoid the protection from dismissal given to employees in terms of section 197 (transfer of a business by one employer to another employer as a going concern) or 197A of the LRA (transfer of an insolvent business to a new employer to avoid the ending-up or sequestration of the business of the old employer); or
- (h) For any reason seeking to prevent an employee from exercising his/her rights under the Protected Disclosures Act 4 of 2000.

OTHER UNFAIR DISMISSALS

Section 188 (1) of the LRA states that a dismissal which is not automatically unfair is still unfair if the employer fails to prove –

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

MEANING OF DISMISSAL

Section 186 (1) of the LRA gives the following meaning to the term "dismissal" –

- (a) An employer has terminated employment with or without notice;
- (b) An employee employed in terms of a fixed term contract of employment reasonably expected the employer –
 - (i) 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, or

- (ii) To retain the employee on an indefinite basis, but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.
- (c) An employer refused to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment.
- (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.
- (e) An employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.
- (f) An employee terminated 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.

Section 198A(4) of the LRA has created a new type of dismissal known as "deemed dismissal". This is a dismissal by the temporary service provider to avoid the employee being deemed to be the employee of the client of a temporary service provider and to be employed on an indefinite basis by the client.

(NOTE: (e) and (f) above refer to circumstances where "constructive dismissal" may be claimed and is discussed in a separate information sheet.)

ONUS OF PROOF

Section 192 of the LRA states in subsection (1) – "In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal," and in subsection (2) "If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

DATE OF DISMISSAL

Section 190 (1) of the LRA states that 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.

However, subsection (2) reads that 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 notifies the employee of the intention not to review 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 reinstate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee.
- (d) If an employer terminates an employee's employment on notice, the date of dismissal is the date on which notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary.

NOTE: Where an employer employs less than 10 employees, if more than one employee is dismissed based on operational requirements, any one employee or any number of employees dismissed for that reason can, jointly or severally, refer the dispute to arbitration. The option remains for any of the employees referred to above to refer their dispute to the Labour Court for adjudication instead of referring it for arbitration.

WHEN TO REFER AN UNFAIR DISMISSAL DISPUTE

Section 191 (1) (a) and (b) of the LRA requires an employee disputing the fairness of a dismissal to refer the dispute in writing to a council, if the parties fall within the registered scope of the Bargaining Council, or the Commission, if no council has jurisdiction, within 30 days of 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.

(NOTE: This provision is to enable employers to provide for an internal appeal procedure in respect of the employer's initial decision to dismiss the employee. The LRA does not require the employee to follow that procedure once they have been dismissed by their employer. However, if they do accept the internal appeal procedure they have thirty (30) days from the date of the appeal decision in which to refer the matter to a Bargaining Council, or the Commission, whichever has appropriate jurisdiction.) Automatically unfair dismissed disputes are adjudicated by the Labour Court.

RELEVANT LEGISLATION/CODES/RULES

- Labour Relations Act 66 of 1995
- Employment Equity Act 55 of 1998
- Protected Disclosures Act 26 of 2000
- Schedule 8: Code of Good Practice: Dismissal
- Rules of Conduct of Proceedings before the CCMA