UNFAIR DISMISSAL DISPUTES

INTRODUCTION

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

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 of work that are substantially less favourable to the employee than those provided by the old employer.

Section 198A (4) of the LRA provides for a dismissal known as a "deemed dismissal". This is a dismissal by a temporary employment service (labour broker) to avoid the employee from being deemed to be an employee of the client of a temporary employment service and to be employed on an indefinite basis by the client. The test for a claim of this nature includes the following:

- The employee must not earn more than the threshold as annually determined by the Minister of Employment and Labour.
- The nature of the work provided to the client must be a temporary service (for a period not more than three months; doing the work of an employee of the client who is temporarily absent; or doing work for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council or a sectoral determination published by the Minister).

AUTOMATICALLY UNFAIR DISMISSAL

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

(a) participating in or supporting a protected strike;
(b) refusing, or indicating an intention to refuse, 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) refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer;
(d) dismissing an employee for taking action, or indicating an intention to take action, against the employer, by exercising any right provided by the LRA or participating in any proceedings in terms of the LRA;
(e) any reason relating to an employee's pregnancy or intended pregnancy;
(f) where the employer unfairly discriminated against the 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. Related to a transfer of a business by one employer to another employer as a going concern or a transfer of an insolvent business to a new employer to avoid the winding-up or sequestration of the business of the old employer; or
(g) Any reason seeking to prevent an employee from exercising his/her rights under the Protected Disclosures Act 4 of 2000.

A dismissal may be fair if the reason for the dismissal is based on the inherent requirement of the particular job, or if the dismissal is linked to the age of the employee, if that employee has reached the normal or agreed retirement age for persons employed in that capacity.

UNFAIR DISMISSAL DISPUTES

WHEN MAY A DISMISSAL BE FOUND TO BE UNFAIR?

In terms of section 188(1) of the LRA, 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.
(b) That the dismissal was effected in accordance with a fair procedure.

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

In terms of section 190 (1) of the LRA 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 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 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.

WHEN TO REFER AN UNFAIR DISMISSAL DISPUTE

Referral for conciliation

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: The LRA enables employers to provide for an internal appeal procedure regarding their initial decision to dismiss the employee. This procedure may also form part of a collective agreement entered into between the employer and one or more registered trade unions.

Where an internal appeal procedure is followed, the employee has 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.

Referral for con-arb – compulsory con-arb

Parties cannot object to the con-arb process in the following cases:

- dismissal for any reason relating to probation;
- any unfair labour practice relating to probation;
- any other dispute covered by section 191(5) (a) where there is no objection to con-arb by either party;
- a dispute relating to a compliance order referred in terms of section 69(5) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), where an employer wishes to dispute a compliance order issued against that employer by the Department of Employment and Labour related to alleged non-compliance with aspects relating to the BCEA; the National Minimum Wage Act 9 of 2018 (NMWA); the Unemployment Insurance Act 63 of 2001 (UIA); or the Unemployment Insurance Contributions Act 4 of 2002 (UICA); and
- claims for failure by an employer to pay any amount owing referred to in terms of section 73A of the BCEA (amount owing in terms of the NMWA, the BCEA, a contract of employment, a collective agreement, or a sectoral determination).

Referral for con-arb – optional

Disputes included in section 191(5)(a) which may be referred for con-arb –

- dismissals relating to the employee's conduct or capacity;

- dismissals where 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 [except automatically unfair dismissals];
- dismissals where the reason for dismissal is unknown; and
- unfair labour practice disputes.

Although not specifically listed in section 191(5)(a), a dismissal in terms of section 198A (4) (a dismissal 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) may be referred for a con-arb to the CCMA or a Bargaining Council.

A party that objects to con-arb may do so by delivering a written notice of objection to the CCMA and the other party at least 7 days before the date of the hearing, failing which, the application must include an application for condonation (CCMA Rule 17 read with Rules 9, 31, and 35). In such circumstances, only the conciliation is conducted.

Disputes that cannot be referred for con-arb

Disputes based on the employer's operational requirements, dismissals for participating in a strike that does not comply with the provisions of the LRA, automatically unfair dismissals, and dismissals because the employee refused to join, was refused membership of, or was expelled from a trade union party to a closed shop agreement may not be scheduled for con-arb.

Referral for arbitration or adjudication

Should those dismissal disputes that cannot be referred for con-arb (listed above) remain unresolved at conciliation, the employee may apply to the Labour Court for adjudication within 90 days of the date that the certificate was issued or the 30-day conciliation period has expired (it expires 30 days after the CCMA or council received the request for conciliation/con-arb). Both parties may agree in writing for the matter to be arbitrated by the CCMA.

Referral for arbitration or adjudication – retrenchment

For dismissals based on operational requirements (retrenchment), employees may elect to refer the dispute either to arbitration or to the Labour Court if: (a) the employer followed a consultation process with one employee only: (b) only one employee was retrenched; or (c) the employer employs less than ten employees, irrespective of the number of employees who are retrenched.

For dismissal disputes, other than automatically unfair dismissals and dismissal disputes heard as con-arb hearings, the employee has 90 days from the date that the certificate was issued or the 30-day conciliation period has expired to refer the unresolved dispute to arbitration.

The conciliation and arbitration application form can be downloaded from the CCMA Website (https://www.ccma.org.za/advicecategories/ccma-referral-forms/).

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 for the Conduct of Proceedings before the CCMA.