UNFAIR LABOUR PRACTICE DISPUTES

INTRODUCTION

Under section 185 (b) of the Labour Relations Act (LRA), every employee has the right not to be subjected to an unfair labour practice.

MEANING OF UNFAIR LABOUR PRACTICE

Section 186 (2) of the LRA states that the meaning of unfair labour practice is "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 reasons relating to probation), or training of an employee or provision of benefits to an employee;
(b) the unfair suspension of an employee or any other 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 of 2000…"

In addition, section 4(8) of the National 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.

PROMOTION / TRAINING

While promotion and training opportunities may fall within the employer's discretion, under unfair labour practice requirements, the employer will be tested as to whether such promotional and training opportunities have been afforded to employees against fair and objective criteria. Allegations of unfair discrimination relating to such disputes fall outside the jurisdiction of unfair labour practice determinations.

For example, an employee who currently does not meet the minimum requirements to be considered for a promotion opportunity may claim that they have been unfairly overlooked for training opportunities that would have enabled them to meet the minimum requirements for the promotion opportunity in question.

Alternatively, an employee may question why a fellow employee is promoted without the necessary minimum experience/qualifications, at his/her expense, when he/she is in possession of the minimum experience/qualifications required by the employer for the promotional opportunity in question. The employee will have to prove that an unfair labour practice has taken place.

DEMOTION

This principle must not be confused with demotion, a disciplinary action short of dismissal that, unless effected by mutual agreement, may constitute an unfair labour practice.

An unfair labour practice on the grounds of demotion will normally occur where the employer deliberately or mistakenly reduces the "perceived worth" of the job of the employee in question. This does not require the employer to formally change the employee's job title and salary.

The employee in question may find themselves in a scenario where the employer, in a process of restructuring the organisation, unilaterally removes the key responsibilities/status of the employee in question to the extent that the employee, and in many cases, fellow employees of the employee in question, perceive that the job the person held is now de-valued.

BENEFITS

Case law has made it clear that an unfair labour practice relating to benefits must not involve "mutual interest/remuneration disputes." Given that the LRA provides employees with the right to strike and employers with the recourse to lock-out over "mutual interest" disputes, providing employees with a right to arbitration in respect of such disputes under the heading of unfair labour practice would serve no purpose.

Benefits and an employer's unfair action may relate to several perks provided by the employer, which may potentially be randomly given to some employees and not others. For example, the tradition of "hourly paid" employees receiving different benefits from those of their "salary paid" colleagues might be a reason for referring a dispute.

This potential challenge must be differentiated from a challenge of equal pay for work of equal value, which clearly falls within the jurisdiction of the Employment Equity Act.

UNFAIR DISCIPLINARY ACTION SHORT OF DISMISSAL

Disciplinary action short of dismissal includes warnings, transfers, demotions, and suspensions issued to the employee by the employer. For such action to be fair, the employer needs to follow a fair procedure and show good cause. For example, where the employer intends to warn, demote, or suspend an employee, the employer should provide the employee with an opportunity to respond. Sanctions such as warnings and suspension (with or without pay) should be determined within a fixed and

reasonable time. It may be that the suspension of an employee with full benefits is justifiable prior to a disciplinary hearing and therefore would not be an unfair labour practice.

Employees facing disciplinary action short of dismissal are encouraged, if they feel such action is unfair, to challenge such action internally prior to exercising their statutory rights in respect of alleged unfair labour practice.

REFUSAL TO REINSTATE

For an unfair labour practice to have taken place, there must have been an agreement (verbal, written, individual or collective) which provides an explicit promise of reinstatement or re-employment of an employee subject to certain conditions, including time periods. Usually, these disputes arise out of retrenchments where an employee dismissed for operational requirements, i.e., a "no fault" termination, finds their old job filled by a new employee with the same or similar qualifications/experience.

NB! In an unfair labour practice dispute, the employee bears the onus of showing that the act or omission constitutes an unfair labour practice.

PROTECTED DISCLOSURES ACT

'Whistle blowers' are protected in terms of the Protected Disclosures Act 26 of 2000, from employers seeking to "discipline" employees who exercise their rights as 'whistle blowers'.

Clearly, employees in such circumstances retain a duty not to, in any random way and without just cause, undermine the good standing and reputation of their employer. This is a long-standing common law principle. However, the law regarding unfair labour practices protects employees exercising their rights in terms of the Protected Disclosures Act of 2000.

DISPUTE RESOLUTION

Employees may refer disputes about alleged unfair labour practices to the CCMA on an LRA 7.11 referral form, or where applicable, to a bargaining council for conciliation. The referral form can be downloaded from the CCMA Website (https://www.ccma.org.za/advicecategories/ccma-referral-forms/). If the dispute remains unresolved, the applicant(s) may refer the matter to arbitration.

Employees are encouraged to first attempt to resolve matters related to unfair labour practices internally. If this is not successful, a dispute may be lodged with the CCMA or the bargaining council that has jurisdiction.

All ULPs are conciliated first, and it is only if they remain unresolved that the matter can be referred to arbitration.

EXCEPTIONS:

(i) Section 191 (13) (a) of the LRA states that - "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."

(ii) In terms of section 191 (5A) of the LRA the bargaining council or the CCMA must commence arbitration immediately after certifying that the alleged unfair labour practice remains unresolved if the dispute concerns the unfair labour practice in relation to any reason relating to probation or where no party has objected to a con-arb process. The con-arb process is discussed in a separate information sheet.

DATE OF UNFAIR LABOUR PRACTICE

Section 191(1)(a) read together with subsection (b)(ii) requires an employee to refer a dispute in writing to a council or the Commission within –

"90 days of 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 on which the employee became aware of the act or omission".

REMEDIES

An arbitrator may determine any ULP dispute referred to the arbitrator, on terms that the arbitrator deems reasonable.

RELEVANT LEGISLATION / CODES / RULES

- Labour Relations Act 66 of 1995, sections 185
- Protected Disclosures Act 26 of 2000
- Rules for the Conduct of Proceedings before the CCMA
- National Minimum Wage Act 9 2018.