



# SOUTH AFRICA: A VERY BRIEF SUMMARY OF LABOUR LEGISLATION AND DISPUTE RESOLUTION MECHANISMS

## Background

Following the first democratic elections in 1994, a series of statutes regulating labour relations and employment were enacted. The most important of these were the Labour Relations Act 66 of 1995 (LRA) the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA). These statutes formed a detailed legal framework for the regulation of labour relations and employment law.

- **The LRA** covers both collective labour law and certain aspects of individual employment law. The LRA regulates organisational rights, collective bargaining (at enterprise level and sectoral level through registered bargaining councils) and strikes and lockouts. At the level of individual employment law, the LRA provides protection for employees against unfair dismissal and specific unfair labour practices (unfair suspension, unfair disciplinary action etc). It also provides for the mechanisms and institutions for the resolution of disputes. This includes the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA), bargaining councils, private agencies and labour courts.
- **The BCEA** provides a floor of minimum terms and conditions of employment. Minimum wages are determined by the National Minimum Wage Commission which sets a national minimum wage and can set minimum wages above that for sectors not regulated by sectoral collective bargaining through bargaining councils. Wages and other terms and conditions are otherwise determined by collective agreements at enterprise level or at a sectoral level through bargaining councils.
- **The EEA** prohibits unfair direct and indirect discrimination by employers against employees on a wide range of grounds. It also requires employers to implement affirmative action measures.

## The institutions

The LRA has established the following institutions relevant to dispute resolution:

- **The CCMA:** a dispute resolution body that resolves individual and collective disputes. The CCMA is a free service funded by the State. It provides conciliation and arbitration processes.
- **Bargaining councils:** registered sector level councils established by employer organisations and trade unions for sectoral level collective bargaining and providing compliance and dispute resolution services within their jurisdictions. Importantly (and unsuccessfully challenged in the courts) the Minister of Labour and Employment can extend bargaining council collective agreements to 'non-parties' in that industry if the bargaining council is sufficiently representative. The CCMA accredits bargaining councils to conduct their dispute resolution functions to ensure proper standards.
- **Private agencies:** the CCMA may accredit private agencies to conduct many of its statutory dispute resolution functions. Several private agencies have been accredited.
- **The Labour Courts:** these are specialist courts established by the LRA for the adjudication of employment and labour disputes. The Labour Court has the same status as a High Court. Appeals go to the Labour Appeal Court, which has the same status of the Supreme Court of Appeal. The only appeals permitted from the Labour Appeal Court are to the Constitutional Court. The Labour Court has an original jurisdiction to consider certain types of disputes, for example, those concerning the dismissal of strikers, as well as contractual disputes. It also

exercises a supervisory jurisdiction in that it can review and set aside arbitration awards issued by the CCMA, bargaining councils and private agencies. The ordinary civil courts retain their right to consider contractual disputes between employer and employee.

## **The Mechanisms to Resolve Disputes**

One of the objectives of the LRA is to attempt to ensure that labour disputes are addressed and resolved expeditiously. It prescribes that disputes that fall within its ambit must first be referred to conciliation (with few exceptions). If there is a bargaining council with jurisdiction over the dispute, the conciliation will be conducted by that council. If there is no bargaining council, the conciliation will be undertaken by the CCMA.

The LRA draws a distinction between disputes that can be the subject of a strike or a lockout and those that may be resolved through arbitration by arbitrators appointed by a bargaining council or the CCMA.

If conciliation fails to resolve a dispute, three possibilities arise, subject to the nature of the dispute:

- For most interest disputes, employees acquire the right to strike and employers acquire the right to lock out employees, provided that certain further simple procedural requirements are met. If employees comply with these requirements, employees are protected from dismissal for participating in the strike.
- For most rights disputes, parties may refer their disputes to arbitration at the CCMA, a bargaining council or a private agency.
- In respect of a limited number of rights disputes, parties may refer those disputes to the Labour Court. In some cases, employees may have a choice of routes to follow.

## **Overview of the nature of disputes**

By far the majority of disputes referred to dispute resolution institutions concern alleged unfair dismissal disputes or that an employee has been the subject of an unfair labour practice. The grounds on which an employer can fairly dismiss an employee are misconduct, an employee's incapacity (poor performance or ill health) or the employer's operational requirements. A fair procedure must also be followed prior to the dismissal. In certain cases, dismissals are regarded as being automatically unfair, such dismissals arising from anti-union discrimination or for participating in a protected strike. Unfair labour practice disputes are defined and include allegations of unfair suspensions, the unfair failure to promote an employee and unfair employer conduct relating to training or the provision of benefits.

Other types of disputes that may be the subject of arbitration or adjudication are those that deal with discrimination allegations, equal pay disputes, the interpretation of collective agreements and the granting of organisational rights and those that relate to whether or not a strike is protected. The latter type of dispute usually occurs when an employer approaches the Labour Court as a matter of urgency for an injunction against a strike on grounds that it is not protected.

Minimum pay disputes under the NMWU are referred to the CCMA.

The LRA has over the years been amended to extend extra protection to vulnerable employees. This includes employees of temporary employment services, part-time employees and people employed in terms of fixed-term contracts. A significant number of disputes involving the enforcement of these rights are being referred to the CCMA.

Halton Cheadle  
Tanya Venter  
06 August 2020