Termination of employment legislation digest

Country profile – South Africa

Last Updated in 2007 by Langelihle Dhlamini.

Sources of regulation

There are four sources of law that regulate the termination of the employment relationship in South Africa: the Constitution, legislation, the common law and collective agreements.

Art. 23 of the South African Constitution entrenches several fundamental rights concerning labour relations. These rights apply to legislation and to the common law. They are also capable of being made applicable to employers and employees in the private sector.

The constitutional right to fair labour practices includes the right not to be unfairly dismissed. Art. 39(1) of the Constitution requires the courts or arbitration tribunals to “consider international law” when interpreting the provisions of the Bill of Rights. The courts have had recourse to the ILO Termination of Employment Convention, 1982 (No. 158)\(^1\), and Recommendation, 1982 (No. 166), when interpreting the right not to be unfairly dismissed.

Two pieces of legislation apply to the termination of employment: the Labour Relations Act (LRA) (No. 66 of 1995) and the Basic Conditions of Employment Act (No. 75 of 1997) (BCEA).

The constitutional right not to be unfairly dismissed is given effect to by Chapter VIII of the LRA, which provides a remedy for unfair dismissals. Schedule 8 of the LRA contains a “Code of Good Practice: Dismissal”. The Labour Courts and the Commission for Conciliation and Arbitration must take this Code into account when determining the fairness of a dismissal.

The BCEA sets minimum terms and conditions of employment including the notice of termination and the payment of a severance allowance.

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\(^1\) Murray v Minister of Defence [2006], 27 ILJ 1607 (C); Avril Elizabeth home for the Mentally Handicapped v CCMA and Others [2006], 27 ILJ 1644 (LC); Fry’s Metal (Pty) Ltd v NUMSA and Others [2003], 24 ILJ 133 LAC.; Irvin and Johnson v CCMA and Others [2006], 27 935 (LAC).
In South African common law, a contract of employment is regarded as a species of lease. Accordingly, the common law rules on the cancellation of contracts of lease apply to termination of employment contracts.

Collective agreements are also a source of law regulating the individual employment relationship. The LRA provides a framework within which one or more trade unions and one or more employers or their organizations can collectively bargain to determine terms and conditions of employment. These agreements often include pre-dismissal procedures, periods of notice and post-dismissal procedures. Collective agreements may provide alternative procedures for processing unfair dismissal disputes.

**Scope of legislation**

The LRA which deals with the right not to be unfairly dismissed (sec. 185, LRA), applies to all employers and employees in both the public and the private sectors, with the exception of members of the defence force and the State intelligence agencies (sec. 2, LRA).

An “employee” is defined as “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration” (sec. 213, LRA). Section 200A of the LRA sets out the ‘presumption as to who is an employee.’ This is a guideline to assist in determining who is an employee. This presumption does not apply to persons earning more than a certain amount determined periodically by the Minister of Labour (sec. 6 (3), BCEA).

The scope of the BCEA, which deals with the minimum period of notice and severance pay, is similarly limited except that there is an additional general limitation of scope (regarding unpaid volunteers working for charitable organizations) and several specific limitations in respect of merchant seamen (only the provisions on severance pay apply). Moreover, the BCEA does not apply to persons undergoing vocational training to the extent their terms and conditions are regulated by other laws, and employees who work less than 24 hours a month are not covered by the notice and severance pay provisions (sec. 36, BCEA).

The consequence of limiting the scope of the LRA means that there is no statutory remedy for an unfair dismissal of an employee falling within the excluded categories. However, because art. 23(1)

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2 Buthelezi v Municipal Demarcation Board [2005], 2 BLLR 115 (LAC) – the Labour Appeal Court in this case held that an employer has no right to terminate a fixed term contract (even on due notice given), before the expiry of the term of the contract, unless the contract provides otherwise. This means if an employer decides to retrench such employees, he/she commits a breach of contract and is liable to that extent. Similarly, the employee will be liable for breach of contract if he/she terminates the contract before the expiry of the term of the contract.

of the Constitution entrenches the right to fair labour practices for “everyone”, the unfair dismissal of such an employee may found a constitutional claim.

Contracts of employment

The validity of a contract of employment is governed by common law rules of contract. There must be an intention to contract, i.e. to create obligations. But the fact that parties intend to enter into a contract does not mean that the contract is valid. The parties must have contractual capacity. The performance undertaken must be possible at the time of contracting. The contract itself, its performance and purpose must be lawful. Finally, there must be compliance with any constitutive formalities.

The contractual arrangements between the parties are, to an increasing extent, in the formal sector, being embodied in written documents. In most cases, however, this is not a legal requirement. Thus a contract of employment may be concluded orally or in writing; and expressly or by implication. However, certain limited classes of contracts of employment must be in writing, such as contracts of apprenticeship and articles of clerkship. The BCEA requires employers (except those who employ fewer than five employees and employees who work for less than 24 hours a month or are domestic workers) to produce written particulars of certain terms and conditions of employment (sec. 29). However, an unwritten contract is still valid.

The BCEA lays down a wide range of minimum standards (e.g. dealing with hours of work, overtime, leave, sick leave, work on Sundays and public holidays). However, the parties to a contract of employment have the freedom to agree to terms and conditions of employment which are more favourable than those laid down by legislation. They are also generally free to agree on matters which are not regulated by statute.

A contract of employment may be concluded for a definite or an indefinite period, and it can provide for full- or part-time work as well as temporary work. However, under the LRA an employer who fails to renew a fixed-term contract, when a “reasonable expectation” that it will be renewed is held by the employee, is deemed to have dismissed the employee.\(^4\)

The provisions of the BCEA are deemed to be included in all contracts of employment unless the terms of other laws, or the contract itself are more favourable (sec. 4). Moreover, the Minister of Labour may make a “sectoral determination” setting different minimum standards for specific sectors (sec. 55), and may deem categories of persons to be employees (sec. 83).

\(^4\) In SA Rugby (Pty) Ltd v CCMA and Others [2006] 1 BLLR 27 (LC), the Labour Court held that the onus is on the employee to prove that there was a reasonable expectation of renewal of the fixed-term contract on the same or similar terms. In this case the court could not accept that there was a dismissal because the employees were on three-month contracts, which were terminated, and they were claiming that they had a reasonable expectation of one-year contracts.
Termination of employment

The different ways in which a labour contract can come to an end are enumerated and regulated in part by the general law of contract (common law principles) and in part by specific statutory provisions of labour law. When a contract is entered into for a fixed period of time, it will automatically come to an end when the contract period expires. The parties to the contract can also agree on the automatic termination of the employment contract on the occurrence of a future event: for example, when the task or project for which the employee has been employed is completed. As a general rule, a contract of employment can also be terminated by mutual agreement of the parties. Moreover, the death (but not the illness) of the employee will lead to the end of the contract. However, in terms of common law, the death of an employer will not necessarily lead to the contract’s termination. A contract may also terminate by operation of law.

There is today a plethora of case law providing guidelines of circumstances in which dismissal would be considered an appropriate sanction.

Dismissal

“Every employee has the right not to be unfairly dismissed” (sec. 185, LRA). The LRA in section 186(1) defines dismissal and distinguishes between “automatically unfair dismissals” and “unfair dismissals” in sections 187 and 188. According to this legislation, any dismissal is unfair if it is based on an “automatically unfair reason”. A dismissal will also be unfair if it is not for a fair reason based on the employee’s conduct or capacity, or owing to the employer’s operational requirements, or if the correct procedures have not been followed. This is the case even if the dismissal complies with any notice period in a contract of employment or in legislation governing employment (sec. 188 of the LRA and sec. 2(1) of the Code of Good Practice, Schedule 8 of the LRA).

Automatically unfair dismissals

In regard to automatically unfair dismissals, the question of fairness is decided irrespective of whether the employer has lawfully terminated the contract of employment at common law. Sec. 187 of the LRA lists the automatically unfair reasons as follows:

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• dismissal based on membership in a union or a workplace forum, or participation in lawful union activities or workplace forum activities;

• an employer’s request that a person seeking employment shall not be or become a member of any trade union or workplace forum, or would have to give up such membership;

• dismissal based on participation in a strike in conformity with the LRA or the intention to participate in such a strike or to support it;

• dismissal based on the employee exercising a right under the LRA, or participating in any labour proceedings;

• an employer compelling an employee to accept a demand concerning a matter of mutual interest between the employer and employee;

• dismissal based on race, colour, ethnic or social origin, gender, marital status, family responsibilities, sexual orientation, religion, conscience, belief, political opinion, or disability, unless the reason for dismissal is based on an inherent requirement of the particular job;

• pregnancy or maternity; or

• dismissal based on age, unless the employee has reached the normal or agreed retirement age for employees in that capacity.

**Unfair dismissals**

Sec. 188 of the LRA stipulates that a dismissal is unfair where the employer fails to prove that the dismissal was effected for a fair reason. Fair reasons may be:

• connected with the employee’s conduct;

• connected with the employee’s capacity; (e.g. poor work performance, incompatibility\(^8\)) or

• based on the employer’s operational requirements.

**Substantive and procedural fairness**\(^9\)

Dismissal must be for a fair reason (substantive fairness) and in compliance with a fair procedure (procedural fairness), which includes taking account of the Code of Good Practice\(^10\). Participation in

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\(^10\) Schedule 8 of the LRA. This Code is drafted in general terms and is not intended to substitute “codes of discipline” which have been provided for in the applicable collective agreement, contract of employment or workplace forums. In assessing whether the employer has given effect to the underlying principles of the Code, the courts take into account the size and nature of the undertaking.
an illegal strike may also constitute a fair reason for dismissal. For a dismissal for operational requirements to be deemed a fair dismissal, the employer must, among other things, consult the affected employee\textsuperscript{11} and offer the employee a reasonable alternative to dismissal\textsuperscript{12}.

Sec. 189 of the LRA regulates dismissals on the grounds of the operational requirements of a business. Dismissals for economic, technological, structural or similar reasons are commonly collective dismissals.

Another principle that is applied in determining the fairness of a dismissal in South African law is that of consistency. This entails determining whether the employer has consistently applied the same standard in dealing with misconduct or breaches of his/her company code. Unjustified inconsistency on the part of the employer renders an employee’s dismissal substantively unfair\textsuperscript{13}.

**Notice and prior procedural safeguards**

An employer seeking to dismiss an employee must observe the minimum *notice periods* as prescribed, *inter alia*, by sec. 37 of the BCEA. According to this section, a party wishing to terminate a contract of employment must, during the first four weeks of employment, give the other party one week’s notice. For employment of more than four weeks, but less than a year, two weeks’ notice is required. For employment of more than a year (or more than four weeks for farm or domestic workers), the notice period is four weeks. An employer may make a payment in lieu of notice, but a contractual notice period required of an employee may not be longer than the period to be given to an employee. Collective agreements, but not individual contracts, may provide shorter notice periods than those stipulated by the BCEA.

Notice of termination may not be given while an employee is absent on leave, including sick leave; usually, it must be given in writing, except if an employee is illiterate. On termination of a contract of employment, the employer must furnish the employee with a certificate of service.

The Code of Good Practice appended to the LRA deals with some of the key aspects of individual dismissals for reasons related to “conduct” and “capacity” (sec. 1 of the Code). Termination of employment due to operational requirements, if they involve collective dismissals, is not regulated by the Code (sec. 7 of the Code).

Although special reference is made to probationary employees with regard to terminations on the grounds of “capacity”, the Code of Good Practice does not distinguish between temporary, casual or managerial employees.

\textsuperscript{11} Kruger v Jigsaw Holdings Ltd and Others [2006] BLLR 670 (LC)

\textsuperscript{12} SACCAWU and Others v Gallo Africa [2006] 1 BLLR 36 (LC)

The legislation provides consultation rights for trade unions, workplace forums and employees’ representatives when collective dismissals are contemplated. An employer is obliged to disclose in writing all relevant information for the purpose of consultation (e.g. reasons for dismissal, number of employees affected, period during which the proposed dismissals are to occur, proposed method of selecting employees for dismissal, assistance which may be rendered by the employer to the employees, possibilities of future employment and other alternatives to dismissals). The employer must also allow employees to respond, and in turn reply to the response of the workers’ representatives to these issues. If selection criteria for the dismissals have not been agreed to by the parties, the employer must follow fair and objective criteria. The employer’s failure to comply with these procedural requirements renders any dismissal unfair (sec. 189, LRA).

As far as misconduct is concerned, the Code of Good Practice demands that disciplinary rules should be adopted according to the size and nature of the employer’s business and should promote certainty and consistency. These rules should be clearly formulated and made available to all employees (sec. 3(1) of the Code).

In deciding on the imposition of a disciplinary penalty, all relevant facts should be taken into account, including the employee’s disciplinary record, length of service and personal circumstances. However, the procedure does not necessarily have to take on a formal nature (sec. 4(1) of the Code). In any case, the employee has to be informed of the allegations against him or her and has to be given a chance to respond (where necessary, with the assistance of trade union or employees’ representatives) (sec. 4 of the Code).

Sec. 3(4) of the Code states that generally it is not appropriate to dismiss an employee for a first offence. For a first infringement, the employee should receive a written warning (for more serious infringements, a final warning). Dismissal should be saved for cases of serious misconduct or repeated infringements of disciplinary rules which make a continued employment relationship intolerable. Gross dishonesty or wilful damage to property, wilful endangering of other persons, physical assault, and gross insubordination are examples of serious misconduct.

Disciplinary proceedings against a trade union representative should not be instituted without first informing and consulting the union (sec. 4(2) of the Code).

As far as incapacity is concerned, the legislation distinguishes between poor work performance, on the one hand, and ill health and injury, on the other.

With regard to poor work performance, the legislation further distinguishes between probationary employees and employees not on probation. A probationer should be given the proper instruction, training or counselling that he or she requires in order to render satisfactory service (sec. 8(1) of the Code). Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee (sec. 8(1) of the Code). After probation, an employee should not be dismissed for incapacity unless the employer has given the employee appropriate instruction, training or counselling, and, after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily (sec. 8(2) of the Code). The procedure leading to dismissal should include an
investigation to establish the reasons for the unsatisfactory performance and the employer should consider any available alternatives to dismissal (sec. 8(3) of the Code).

With regard to incapacity due to ill health or injury, the investigation conducted by the employer should establish the extent of the incapacity and the prognosis, and consider counselling or rehabilitation. The employer should also consider any available alternatives to dismissal (sec. 10 of the Code).

**Severance pay**

The LRA requires severance pay in the case of dismissal for economic reasons (sec. 196), unless the employer is exempted from this obligation by the Minister. A basic rate of at least one week’s wages per year of service is required by both the LRA and BCEA (sec. 41) but only for dismissals for operational requirements. This rate, which accords with current industry norms, may be adjusted by the Minister from time to time. It may also be improved on by collective agreement. Where a dispute over severance pay forms part of a dispute over unfair dismissal for economic operational reasons, it is determined as part of the latter dispute by the Labour Court (sec. 196, LRA)\(^{14}\).

**Avenues for redress**

The LRA establishes an independent, tripartite Commission for Conciliation, Mediation and Arbitration and a Labour Court (Chapter VII of the LRA). Sec. 191 of the LRA states that if there is a dispute about the fairness of a dismissal, the employee may refer the dispute in writing within 30 days of the date of the dismissal to a special bargaining council or to the Commission, if no council has jurisdiction. If the council or the Commission does not succeed in resolving the dispute through conciliation, it is referred to arbitration. No appeal is available against an arbitration award (sec. 143, LRA).

Automatically unfair dismissals should be referred to the Labour Court. The Director of the Commission may also refer other dismissals to the Labour Court where:

- the dismissal is for discriminatory reasons;
- it is a very complex case;
- there are conflicting arbitration awards that have to be resolved;
- it is in the public interest; or
- a question of law is involved

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The Labour Court also has jurisdiction with regard to disputes concerning dismissal as a consequence of operational requirements.

In any proceedings concerning any dismissal, the employee must establish the existence of dismissal and the employer must prove that the dismissal is fair (sec. 192, LRA).

In the case of dismissals adjudicated by the Labour Court, an appeal against the decision of the Court is possible. Appeals from the Labour Court will be heard by the Labour Appeal Court. However, no appeal to the Appellate Division of the Supreme Court of South Africa is possible.

Common law claims for breach of contract in the ordinary civil courts are also possible.

The primary remedy envisaged by sec. 193 of the LRA in cases of unfair dismissal is reinstatement or re-employment. Urgent interim relief (including temporary reinstatement) may also be available\(^\text{15}\) [P.A K Le Roux, *Contemporary Labour Law*, July 2006, vol 15, no.12, page 119, “Reinstatement and resolutive conditions.”]

Alternatively, the Labour Court or the arbitrator may order the employer to pay compensation to the employee (sec. 194 of the LRA deals with the limits on compensation for dismissals that are not automatically unfair, or not for operational requirements; the maximum amount is the equivalent of 12 months’ pay). Sec. 195 states that such an order or award of compensation is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment\(^\text{16}\).

### Further information

- ILO NATLEX South Africa
- South Africa Government Online
- South African Department of Labour
- SA ePublications (searchable collection of full-text electronic South African journals)
- Caselaw.co.za (online searchable database of CCMA Awards and labour court judgements)
- Constitutional Court of South Africa

\(^{15}\) The Office thanks Halton Cheadle for his comments on this section.