An employee must be given the opportunity to be assisted by a fellow employee in processing a dispute at the workplace. This fellow employee may be a trade union, staff association or works council representative. In certain circumstances, an employee should be entitled to be assisted by a person from outside the workplace. For example, who is able to assist the employee. A shop steward may be given the right to be represented by a union official in these proceedings.

Employers, employees and their organisations should attempt to deal with problems quickly and as close to their source as possible. This prevents conflict from having the space and time to escalate.

Employers, employees and their organisations must address the root causes of conflict, and not just the outward symptoms of the problems.

Employers, employees and their organisations must recognise the extent to which the nature of the dispute influences the suitability to different dispute resolving mechanisms. For example, a dispute over the interpretation or application of a party's right may be best suited to being resolved through some form of adjudication.

Employers, employees and their organisations must recognise the need for an effective dispute management system, to deal with all disputes that may arise.

3. THE FRAMEWORK FOR AN EFFECTIVE DISPUTES SYSTEM

Employers, employees and their organisations should attempt to use consensus seeking mechanisms to resolve all disputes at the workplace. This allows for a solution to be negotiated which is accepted by all parties and which received the necessary commitment to ensure effective implementation and a lasting solution to the problem. The process of achieving consensus may also often contribute to the growth of a constructive relationship between the parties.

It should be recognized that conciliation and other forms of facilitation are an integral part of the consensus seeking process in attempting to resolve disputes. Accordingly, if parties are unable to negotiate a solution through their own efforts, they should not automatically jump to a consideration of adjudication and industrial action alternatives as a means of resolving a dispute. It may be useful to involve an outside person as a conciliator or facilitator in order to assist the parties in attempting to achieve consensus.

In the event that consensus seeking mechanisms are not successful in resolving disputes, consideration then needs to be given to other options. This may require an identification of the nature of the dispute involved and the following distinction between disputes of right and disputes of interest may be useful.

3.3.1. A dispute of right may be described as a dispute arising from the breach of contravention of a law, contract of employment or collective agreement. For example, a dispute over the fairness of an employee's dismissal.

3.3.2. A dispute of interest on the other hand cannot be resolved through enforcing legal rights. The parties are, through negotiation, attempting to create a right by agreement with the other party. For example, a dispute over what next year's wages are going to be.

If the parties are unable to resolve a dispute through consensus, consideration should be given to referring disputes of rights to some form of adjudication.
This may be by a mutually agreed arbitrator or fact finder, depending on the issue involved, or the utilisation of dispute resolving mechanisms available in Labour legislation e.g. referring a dispute to the Industrial Court or to arbitration through the Commission.

3.5 Whilst it may be possible to resolve interest disputes through adjudication (e.g. the resolution of a wage dispute in an essential service through arbitration), consideration is often given to the use of lawful industrial action (strikes and lockouts) as a measure of last resort to resolve these disputes. This action should be regarded as lawfully sanctioned temporary applications of economic pressure in the collective bargaining process to resolve disputes. The purpose should not be to unnecessarily damage the organisation to the detriment of the parties.

4. TYPES OF DISPUTES

4.1 In implementing an effective dispute management system consideration must be given to disputes resulting from the following:-

4.1.1. disciplinary action;

4.1.2. individual grievances;

4.1.3 collective grievances;

4.1.4. Negotiation of collective agreement.

4.2 Disputes resulting from disciplinary action:

4.2.1. Fair and effective disciplinary procedures should be established at the workplace to ensure that discipline is handled in terms of a fair procedure and that the disciplinary decisions taken by management are fair. Consideration should be given to the Code of Good Practice: Termination of Employment in this regard.

4.2.2. If a dispute results from disciplinary action taken by an employer against an employee, the parties may agree to refer this dispute to some form of adjudication e.g. final and binding arbitration by an agreed arbitrator. If this is not agreed, the parties should utilise available mechanisms in the Industrial Relations Act for processing these disputes.

This may involve the referral of a dispute to conciliation through the Commission, and if that is not successful, to refer the dispute to the Industrial Court or to arbitration at an earlier stage, it dispenses with the need for the parties to process this dispute through conciliation and adjudication in accordance with the Industrial Relations Act.

4.3 DISPUTES RESULTING FROM INDIVIDUAL GRIEVANCES:

4.3.1. It should be recognized that, depending on the nature of the grievance, it may be appropriate to utilise informal mechanisms or a formal procedure to resolve a grievance. An employee should be under no pressure to accept one or other option, and the employee must be entitled to decide which option to use.

4.3.2. it may be sufficient for an employee to be able explain the nature of a grievance and to give the organisation or the person against whom the grievance has been lodged the opportunity to explain conduct or decisions taken. A grievance of this nature may for example be resolved by a person being given an opportunity to apologise for something and provide a commitment that it will not happen again.
4.3.3. a formal procedure resolving a grievance should be available and should:-

(a) specify to whom the employee should lodge the grievance;

(b) make reference to time frames to allow the grievance to be dealt with expeditiously;

(c) allow the person to refer the grievance to a more senior level within the organisation, if it is not resolved at the lowest level.

4.3.4. if a grievance is resolved, the terms of resolution should be recorded in a written agreement and signed by the parties to the agreement.

4.4 DISPUTES RESULTING FROM COLLECTIVE GRIEVANCES:

4.4.1 Structures should be established with an organisation to allow employee and employers to raise collective grievances. This may be through a system of regular meetings (e.g. monthly) between employer and employee representatives, including representatives from trade unions or staff associations. These negotiations forums should incorporate a disputes procedure to deal with issues that are not resolved through consensus.

This procedure may involve the formal declaration of a dispute followed by a number of compulsory meetings between the parties within an agreed time frame, failing which the parties would be free to utilise dispute resolving mechanisms available on labour legislation.

4.5. Disputes resulting from the negotiations of collective agreements:

4.5.1 Representatives of employers and employees may agree to negotiate on a regular basis (e.g. annually) over the terms and conditions existing at the workplace. The periodic review of wage increases may be a part of these negotiations. The structures and system referred to in clause 4.4. of this Code may be appropriate for dealing with disputes arising out of these negotiations.

4.6 In all types of disputes, if the dispute is not resolved at the workplace, the parties to the dispute should then utilise dispute resolving mechanisms provided for in labour legislation. In utilising these mechanisms, the date when the dispute is alleged to have arisen should normally be calculated from the time that workplace dispute resolving mechanisms have been exhausted.

INDUSTRIAL RELATIONS ACT

CODE OF GOOD PRACTICE: TERMINATION OF EMPLOYMENT 1. INTRODUCTION

1.1. This code is published in terms of Section 109 of the Industrial Relations Act.

1.2. This Code of Good Practice deals with some of the key aspects of termination of employment. It aims to summarise some of the provisions of the law and provide guidelines on applying the law.

1.3. This Code intends to assist-

1.3.1 employees and their staff associations and trade unions;
3.2 employers and their employer organizations; and

3.3 Conciliators, arbitrators and judges.

This Code has been drafted in accordance with the Employment Act and Industrial Relations Act and proposed 2002 amendments to those Acts. The Code will have to be checked once the proposed amendments are finalised, to ensure that the Code correctly reflects the law.

4. The guidelines in this Code may be departed from if there is good reason to do so. Anyone who departs from them must prove the reasons for doing so. The following kinds of reasons may justify a departure from the provisions of the Code. Note that this list is not exhaustive.

1.4.1. the size of the employer may justify a departure. For example, an employer with a small number of employees may not be required to comply with all the procedural requirements of this code, but that employer must, nevertheless, give an employee a fair opportunity to respond to any allegations before taking a decision affecting that employee's rights.

1.4.2. the nature of the employer's business may require stricter adherence to rules that may normally be the case. For example a single breach of health and safety rules in a dangerous working environment may justify more serious disciplinary action than may otherwise be the case.

1.4.3. collective misconduct may justify a departure from the ordinary procedural rules provided that the employees are given an opportunity to answer any charges against them.

1.5 To the extent that this Code advances an interpretation of the law that interpretation is the policy of the Minister and should be applied by conciliators and arbitrators unless that interpretation is reversed by a decision of the Industrial Court.

1.6 The provisions of this Code may be varied by a collective agreement provided that no

1.7. A key principle in this code is that employers and employees should treat one another with mutual respect, bearing in mind the objectives of both employment justice and the efficient operation of business. While employees should be protected from arbitrary or other unfair action, employers are entitled to satisfactory conduct and work performance from their employees.

2. DURATION OF EMPLOYMENT

2.1. The rules that regulate the termination of a contract of employment may depend on the duration of the contract. There are two kinds of agreed duration.

2.1.1. an agreement to work for a fixed term. A fixed term may be for a specified period (for example 6 months) or may be determined by a specified event (for example, the completion of building, a bridge or a road). A fixed term contract normally terminates automatically on the expiry of the period. Seasonal workers may be employed on a fixed term contract for a season, which normally terminates at the end of the season.

The failure to renew a fixed-term contract in circumstances when the employee reasonably expected continuity of employment may constitute a dismissal. For
example, if an agricultural worker has been employed each year on a fixed term contract for a harvesting season, and this has continued for several years, that employee may have a reasonable expectation of ongoing employment in the next season. In these circumstances, the employer’s failure to renew the employee’s contract may constitute a dismissal.

2.1.2. an agreement to work for an unspecified period of time (normally up and until retirement). This kind of contract continued until it is lawfully terminated.

This means that it must be terminated fairly and on proper notice by either of the parties or for other reasons e.g. by agreement, death of the employee etc.

3. GROUNDS FOR TERMINATION OF EMPLOYMENT

3.1. Agreement to terminate

If an employer and an employee agree to terminate the contract, the contract terminates in accordance with that agreement.

For example, a redundant employee may agree to voluntary retrenchment on an agreed package from a specified date.

3.2. Death or Sequestration

A contract of employment normally terminates after the death or sequestration of the employer or upon the death of the employee.

3.3. Retirement

3.3.1. Unless the contract of employment provides otherwise, a contract of employment normally terminates automatically when the employee reaches the agreed or normal age of retirement. In other words, it is an implied term of a contract that the contract terminates on retirement.

3.3.2. If no retirement date is agreed, the normal retirement age will be implied from the employer’s practice in the past and the practice in the industry. In most industries, the normal retirement age is between 60 and 65 years of age.

3.3.3 If the employee continues to work after reaching retirement age, the contract is extended and the normal rules of termination of employment apply, unless he employee and the employer agree to something different.

3.4. Resignation

3.4.1. If an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If the is no breach by the employer, the only way that the employee may terminate the contract lawfully is by getting the employer to agree to an early termination.

3.4.2. A material breach means a serious breach that goes to the core of the contract. The refusal to pay wages, verbal or physical abuse, sexual harassment and discrimination are conduct that amount to a material breach by the employer of the employment contract.
3.4.3. If an employee has agreed to work for an unspecified period of time, the employees may resign by giving a minimum of one week's notice of termination in accordance with the contract and the provisions of Section 33 of the employment Act, or without notice if the employer has materially breached the contract. See the examples referred to in clause 3.4.2.

3.4.4. If the employee is required to give notice but does not work the period of notice, the employee must pay the employer the basic wages that the employer would have paid if the employee had worked the notice.

3.5. Forced Resignation or Constructive Dismissal

3.5.1. If an employer makes continued employment intolerable, it may lead to the resignation of the employee. That resignation may amount to an unfair dismissal in terms of Section 37 of the Employment Act. Resignation in these circumstances is often referred to as constructive dismissal.

3.5.2. An employee may however not lightly resign and claim constructive dismissal. Even if an employee has been unfairly dealt with at work, the employee should normally utilise available mechanisms to deal with grievances. It is only if the employee can no longer reasonably be expected to continue in employment due to the conduct of the employer, that an employee will be entitled to resign and legitimately claim constructive dismissal.

3.6. Dismissals

3.6.1. If an employee is on a fixed term contract, the employer may only dismiss the employee before the expiry of the contract period if the employee materially breaches the contract. See clause 6.8. and for example of material breach. If there is no breach by the employee, the only way that the employer may terminate the contract is by getting the employee to agree to the early termination.

3.6.2. If a contract for an unspecified period, a dismissal is not unfair if it is affected for a fair reason and in accordance with a fair procedure, in addition to complying with any notice period required in a contract of employment or by legislation.

3.6.3. There are normally only recognised grounds of dismissal for a fair reason, namely:

(a) Misconduct;

(b) Incapacity, including poor work performance or ill health or injury; and

(c) Operational requirements.

3.6.4. This Code lays down guidelines for a fair procedure.

3.6.5. The onus of proving the fairness of a dismissal lies with the employer in terms of Section 42 of the Employment Act. This must be established on a balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. If the employer is unable to decide which is the more probable, the employee must be given the benefit of the doubt.
3.7 Certain Grounds of Dismissal are regarded as automatically unfair in terms of section 2 of the Industrial Relations Act. These include dismissals for lawfully striking, exercising a right in terms of that Act, pregnancy and unfair discrimination.

4. PROBATIONARY EMPLOYEES

4.1. An employee may be required to serve a period of probation to enable the employer to make an informed assessment of whether the employee is competent to do the job and is suitable for employment.

4.2. The period of probation should be of reasonable length having regard to how long it takes to determine the employee's competence and suitability for employment, in relation to factors such as the nature and complexity of the job, the standards required etc. The period may be extended by agreement, or if the employer, reasonably requires a further period of assess the employee's competence or suitability. The maximum period is three months provided that a longer period may be agreed in writing with employees engaged on supervisory, technical or confidential work. - see Section 32 of the Employment Act.

4.3. During the period of probation, the employer should meet with the employee at regular intervals for the purposes of monitoring and evaluating the employee's performance and suitability, and to provide guidance. This may include instruction, training and counselling to the employee during probation.

4.4. If during probation the employer has grounds to be concerned that an employee is not performing to standard or may not be suitable for the position, the employer should notify the employee of the concerns and give the employee an opportunity to respond to those concerns.

4.5. An employer or an employee may terminate a contract of employment during probation without notice in terms of Section 32 (1) of the Employment Act. An employee may not challenge the fairness of a dismissal during probation - see Section 35 (1) (a) of the Employment Act.

5. MANAGING DISCIPLE

5.1. All employers should adopt disciplinary rules that establish the standard of conduct required of their employee. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to the employees in a manner that is easily understood. Some rules or standards may be well established and known that it is not necessary to communicate them.

5.2. Discipline should be corrective. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them.

5.3. Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor infractions of work rules and discipline. Repeated misconduct will justify warnings, which may themselves be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissals should be reserved for cases of serious misconduct or repeated offences.
6. DISMISSALS FOR MISCONDUCT

6.1. Any person who is determining whether a dismissal for misconduct is unfair should consider-

6.1.1. whether the employee contravened a rule or standard regulating conduct relating to employment;

6.1.2. If a rule or standard was contravened, whether-

(a) the rule is a valid or reasonable rule or standard;
(b) the rule is clear and unambiguous

(c) the employee was aware, or could reasonably be expected to have been aware, of the rule of standard;

(d) the rule of standard has been consistently applied by the employer; and

(e) Whether dismissal is an appropriate sanction for the contravention of the rule or standard.

6.2. Although it is generally not appropriate to dismiss an employee for a first offence, dismissal may be justified if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Without being exhaustive, the kind of conduct described in Section 36 of the Employment Act constitutes fair reason for dismissal. This conduct includes dishonest acts, violence, threats or ill treatment towards the employer, wilful damage to property, breach of safety rules through imprudence or carelessness, wilful disclosure of confidential information and absence from work for more than 3 days in a period of 30 days without the permission of the employer or a medical certificate. Every case must be assessed on its own merits.

6.3. The employer should apply the sanction of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who in similar circumstances participate in the misconduct under consideration.

6.4. The procedure to be followed by an employer in processing a dismissal for misconduct is set out in clause 11 below.

7. MANAGING PERFORMANCE STANDARDS

7.1 An employer should stipulate the required standards of work. Some standards are self-evident or can be inferred from custom and practice. Others need to be stated in the contracts of employment or in applicable work schedules and brought to the specific attention of the employees.

7.2 The employer should give appropriate guidance, instruction or training, if necessary, to an employee before dismissing the employee for poor work performance. What is appropriate will depend on the circumstances of each case, and the employer is not normally obliged to retrain the employee in all the skills required to perform the job. In terms of Section 36 (a) of the Employment Act, a dismissal shall be fair if the work performance of the employee has after written warning, been such that the employer cannot reasonably be expected to continue to employ the employee. This does not however mean that the written warning will have to be given in all cases in order for a dismissal to be fair.
There should be an investigation to establish the reasons for the unsatisfactory performance.

If investigations reveal that all or part of the reason for the employee's poor performance is not the fault of the employee that would have a bearing on the fairness of any action taken against the employee.

The employee must be given a reasonable time to improve. What is reasonable will depend on the nature of the job, the extent of the poor performance, status of the employee, length of service, the employee's past performance record etc.

If the employee continues to perform unsatisfactorily, the employer must warn the employee that he or she may be dismissed if there is no improvement within a stipulated time.

An opportunity to improve may be dispensed if:

- the employee is a manager or senior employee whose knowledge and experience qualify the employee to judge whether the standards set by the employer are being met;
- the degree of skill required is sufficiently high that the potential consequences of a small departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify dismissal.

8. DISMISSAL FOR INCAPACITY: POOR WORK PERFORMANCE

Any person who is determining whether poor work performance justifies dismissal must consider:

- whether the employee failed to meet a performance standard;
- whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
- whether the performance standard is reasonable;
- the reasons why the employee failed to meet the performance standard;
- whether the employee was afforded a fair opportunity to meet the performance standard;
- whether dismissal is the appropriate sanction for not meeting the performance standard.

Although the employer has the managerial prerogative to set performance standards; the standards may not be unreasonable.

Proof of poor performance is a question of fact to be determined on a balance of probabilities.

This can difficult of the employee's tasks are not capable of precise measurement or evaluation. The burden of proof lies with the employer and that is why it is important for the employer to engage in a process of assessment and appraisal with the employee.

The procedure to be followed by an employer in processing a dismissal for poor work performance is set out in clause 11.
DISMISSALS FOR INCAPACITY: ILL HEALTH OR INJURY

1. Incapacity on the grounds of ill health or injury may be temporary or permanent.

2. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee.

3. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

4. The degree and cause of incapacity is relevant to the fairness of any dismissal. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

5. Particular consideration should be given to employees who are injured at work or who are incapacitated by work related illness. The duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

6. Any person determining whether a dismissal arising from ill health or injury is unfair must consider:

6.1. whether the employee is able to perform the work; and

6.2. if the employer is not capable-

(a) the extent to which the employee is able to perform the work;

(b) the extent to which the employee’s work circumstances might be adapted to accommodate disability, or if this is not possible, the extent to which the employee’s duties might be adapted; and

(c) the availability of any suitable alternative work.

9.7 The procedure to be followed by an employer in processing a dismissal for ill health or injury is set out in clause 11.

10. INCOMPATIBILITY

10.1. Incompatibility results from the unsuitability of an employee for work, and may be caused by the employee relating poorly with co - employees, clients or other persons who are important to the organisation.

10.2. Incompatibility is a special kind of incapacity: poor work performance and may constitute a fair reason for termination if it sufficiently impacts on work or the work environment.

The incompatibility of an employee must however not be confused with an organisation’s or other employee’s obligations to tolerate an acceptable range of behaviour and attitudes at the workplace.
10.3. The steps required in clauses 7.2 to 7.6, read with changes required by the context, apply in cases of incompatibility. In particular the employer must-

10.3.1 record the incidents of incompatibility that gave rise to concrete problems or disruption;

10.3.2 warn and counsel the employee before dismissal. This must include advising the employee of any acceptable conduct, who has been adversely affected by that conduct and what remedial action is proposed;

10.4. Before dismissing an employee for incompatibility, the employer should give the employee a fair opportunity to-

10.4.1 consider and reply to the allegations of incompatibility;

10.4.2 remove the cause for disharmony; and

10.4.3 propose alternatives to dismissal

10.5 The procedure to be followed by an employer in processing a dismissal for incompatibility is set out in clause 11.

11. FAIR PROCEDURE

11.1. This procedure applies if an employer is processing a dismissal for misconduct or incapacity: provided that it may be varied in appropriate circumstances. It would for example be appropriate to dispense with a hearing if the action to be taken is implemented with the consent of the employee concerned.

11.2. An investigation should be conducted by the employer to ascertain whether there are grounds for a hearing to be held.

11.3. If a hearing is to be held, the employer must notify the employee of the allegations using a form and language that the employee can reasonably understand.

11.4. The employee is entitled to a reasonable time to prepare for the hearing and to be assisted at the hearing by a fellow employee who may be a trade union representative.

Other forms of representation may be agreed through a collective agreement between the parties.

11.5. The hearing must be held and finalised within a reasonable time, and chaired by a sufficiently senior and impartial representative from management. This may require a manager from a different department or branch to chair the hearing, if for example all the managers from that part of the organisation were involved in the case.

11.6. The employee must be given a proper opportunity at the hearing to respond to the allegations, question any witnesses called by the employer and to lead witnesses if necessary.

11.7. If an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.
11.9. A trade union official should be entitled to represent a trade union representative or an employee who is an office - bearer or official of a trade union at a hearing held under this clause.

11.10. If the employee is dismissed, the employee must be given the reason for dismissal and notified of the right to refer a dispute concerning the fairness of the dismissal to the Commission.

11.11. In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre - dismissal procedures. For example, if the employee is in prison.

11.12. Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.

11.13. In cases of collective misconduct, it may be fair to hold a collective hearing if the same evidence applies to all the employees involved.

11.14. Employers should keep some form of a record of the internal proceedings. The draft form attached to this Code is suggested as a guide.

**12. UNPROTECTED STRIKES**

12.1. Participation in a strike that does not comply with the provisions of the Industrial Relations Act is serious misconduct that may justify dismissal. The fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -

12.1.1 the seriousness of the contravention of the Act and attempts made to comply with it;

12.1.2 whether the strike was in response to unjustified conduct by the employer, and whether the strike was the only reasonable option available to the employees concerned;

12.1.3 whether the parties have made genuine attempts to negotiate the resolution of the dispute giving rise to the strike;

12.1.4 the manner in which the employees have conducted themselves during the strike, and in particular, whether the strike was conducted in a peaceful manner or accompanied by violent behaviour; and

12.1.5 the impact of the strike on the employer’s business.

12.2. Prior to dismissal the employer must, at the earliest opportunity make a reasonable attempts to contact a trade union official to discuss the course of action it intends to adopt.

12.3. If dismissals are contemplated, the employer should issue to employees a written ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.
12.4. If the employer cannot reasonably be expected to extend these steps to the employees in question the employer may dispense with them.

12.5. The employer may not discriminate between striking employees by dismissing or reinstating only some of them without good reason. If however, the reason for the difference in treatment is based on grounds of participation in strike related misconduct such as picket violence or malicious damage to property, to other justifiable reasons, the different treatment may be fair.

13. REDUNDANCY

13.1. Redundancy means a dismissal arising from the job having fallen away due to the reorganisation of the business or the discontinuance or reduction of the business for economic, structural, technological or similar reasons. A dismissal in these circumstances is referred to as a retrenchment.

13.2. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for these reasons. As a general rule-

13.2.1 the reorganisation of the business arises from restructuring of the business as a result of a number of possible business related causes - such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business;

13.2.2 economic reasons are those that relate to the financial management of the enterprise;

13.2.3 technological reasons refer to the introduction of new technology which affects work relationship either by making existing jobs redundant or by requiring employees to adapt to new technology;

13.3. Because retrenchment is essentially a "no fault" dismissal and because of the adverse effects on the employees affected by it, there are particular obligations on an employer, which are directed toward ensuring that all reasonable alternatives to dismissal are canvassed and that the employees are treated fairly.

13.4. An employer who intends to retrench 5 or more employees (other than casual and seasonal employees and employees on contracts of less than 6 weeks), must give not less than 1 month’s written notice of the intention to the Commissioner and to any union or staff association with which it has a collective agreement. This notice must include the following information:

13.4.1 the number of employees likely to be become redundant;

13.4.2 the occupations and remuneration of the employees affected;

13.4.3 the reasons for the redundancies;

13.4.4 the date when the redundancies are likely to take effect;

13.4.5 the latest financial statements and audited accounts of the undertaking; and

13.4.6 in terms of section 40 (2) of the Employment Act, what other options have been considered to avert or minimise the retrenchment.

13.5. The employer should consult the employees to be effected and their trade union, with a genuine
attempt to achieve consensus on the following:

13.5.1 alternative to dismissals such as transfer to other jobs, lay - off etc;

13.5.2 criteria for selecting the employees for dismissal such as last - in - first _ out (LIFO), subject to special skills and other appropriate criteria.

13.5.3 steps to minimize the dismissals such as voluntary retrenchment packages, early retirement etc;

13.5.4 conditions under which dismissals take place, such as the timing, severance pay etc;

13.5.5 steps to avoid the adverse effects of the dismissals such as time off to seek work etc

13.6. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce through retrenchment is contemplated by the employer so that possible alternatives can be explored. The consultation process should allow the employees representatives to-

13.6.1 meet and report back to employees;

13.6.2 engage meaningful with the employer; and

13.6.3. request, receive and consider all relevant information which must be disclosed by the employer.

13.7. The more urgent need of the business to respond to the factors giving rise to any contemplated retrenchment, the more truncated the consultation process may be. Urgency should not however, be induced by the failure by the employer to initiate the consultation process as soon as a reduction of the workforce was contemplated. The parties who are required to consult must meet as soon as frequently as may be practical during the process.

13.8. Selection criteria for retrenchment should be agreed with the employee representatives, failing which the criteria used by the employer must be fair and objective. The principle, commonly known as 'first in last out' may be applied in respect of each category of employee if practical, provided that the employer should take into account-

13.8.1 the need for the efficient operation of undertaking; and

13.8.2 the ability, experience skill and occupational qualifications of each employee affected by the redundancy.

13.9. Retrenched employees may be given preference if the employer again hires employees with comparable qualifications, subject to-

13.9.1 the employees having expressed a desire to be re - hired; and
14. SEVERANCE PAY

If an employee's service are terminated in the circumstances contemplated in Section 34(1) of the Employment Act, the employee is entitled to a service allowance amounting to 10 working days' wages for each completed year of continuous employment with the employer in excess of one year.

14.1 In calculating the amount of the service allowance to which an employee is entitled, any employment prior to the 1 June 1968 shall be disregarded.

14.2 Even if there is no legal obligation to pay severance pay, an employer may consider paying severance pay to an employee in appropriate circumstances, e.g. the employee's employment has terminated as a result of no wrong doing on the employee's part, such as the employer's death or ill-health.

Details of these arrangements may be covered in a collective agreement between parties.

CODE OF GOOD PRACTICE:

TERMINATION OF EMPLOYMENT

MODEL HEARING FORM

(TO BE COMPLETED BY THE MANAGER CONDUCTING THE HEARING)

1. Name of Employee

2. Name of Chairperson

3. Summary of allegations against employee:

4. Date and Time of Hearing:

5. Persons present at enquiry (excluding witnesses) and their designation:

6. (a) Employee does/does not wish to have a representative present (delete whichever does not apply).

   Name of representative to be inserted in 6 above.

7. (b) Employee does/does not wish to have an interpreter (delete whichever does not apply).

   Name of interpreter to be inserted in 6 above.

8. Brief summary of employee's response to allegations:
9. Main points of evidence (state names and designations of witnesses giving this evidence) 

10. Manager's findings, based on the evidence presented:

11. Relevant factors to be taken into account in deciding on the appropriate sanction

12. Outcome of hearing:

13. Manager's Signature: ........................................... Date: ......................................

14. Employee's Signature: ........................................... Date: ......................................

(TO BE COMPLETED WITHIN 5 WORKING DAYS OF ACTION HAVING BEEN TAKEN, BY AN EMPLOYEE WHO WISHES TO APPEAL)

I wish to appeal against the outcome of the enquiry for the following reasons:

.................................................................
In terms of this appeal, I ask that the following action be taken

Employee's Signature: ........................................Date:

Received by Manager: ........................................Date:

(TO BE COMPLETED BY THE MANAGER HEARING THE APPEAL)

DATE RECEIVED:...........................................

Findings concerning the appeal: ...........................................

Outcome of Appeal:...........................................

Manager's Signature: ........................................Date:

Employee's Signature: ........................................Date:

PROTEST ACTION GUIDELINES: SECTION 40 OF THE INDUSTRIAL RELATIONS ACT

1. INTRODUCTION.

1.1. These guidelines are published by the Minister under Section 109 of the Industrial Relations Act.

1.2. These guidelines lay down general principles to guide the Commission and the Labour Advisory Board in applying Section 40 of the Industrial Relations Act dealing with protest action to promote or defend socio-economic interests. These guidelines are also to assist employers, employees and their organizations in understanding how the Commission
and the Labour Advisory Board will carry out their functions in terms of the Act.

1.3. These guidelines are not hard and fast rules and every occasion in which protest action is attempted in terms of Section 40 of the Industrial Relations Act must be considered on its merits.

2. SUMMARY OF THE PROCESS RESULTING IN PROTEST ACTION

2.1. Employees who are not engaged in an essential service have a right to take part in peaceful protest action to promote socio-economic interests in terms of Section 40 of the Industrial Relations Act.

2.2. The protest action must be authorised by a registered trade union or staff association or federation, which must serve written notice on the Labour Advisory Board stating the following:-

2.2.1. the reason for the protest;

2.2.2. the nature of the intended action;

2.2.3. the steps taken to resolve the issues giving rise to the protest action; and

2.2.4. the notice given to the authorities responsible for public order so that the necessary measures can be taken to ensure the safety of protestors and the public.

2.3. The notice described in clause 2.2. must be given at least 14 days before the commencement of the protest action.

2.4. The Labour Advisory Board must within 7 days from the time it receives the notice put in place mechanisms to resolve the issues giving rise to the protest action. This period may be extended at the request of the parties or may be extended by the Labour Advisory Board if the party intending to take protest actions fails without reasonable cause to attend meetings called by the Labour Advisory Board.

2.5. If the matter is not resolved within the required period, the Labour Advisory Board must inform the Commission and the employers' organisation (s) likely to be effected by the protest action.

2.6. The party intending to take protest action must conduct a secret ballot and inform the Commission and Labour Advisory Board of the result of the ballot within 24 hours. This ballot must be conducted amongst-

2.6.1. the affiliates of a federation intending to take protest action; or

2.6.2. the member of a union or staff association intending to take protest action.

2.7. The party intending to take protest action may request the Commission to conduct the secret ballot, which must then be conducted by the Commission within 5 days of the request being made. The Commission must advise the parties and the Labour Advisory Board of the results of the ballot within 24 hours. If the ballot is conducted by the Commission, the results shall be deemed to be conclusive.

2.8. The protest action shall be deemed to comply with the Industrial Relations Act if-

2.8.1. in the case of a federation intending to take protest action, a quorum of at least 40% having been achieved in the ballot and over 50% having voted in favour of the protest action.
2.8.2. in the case of an organisation (i.e. a Union or staff association) intending to take protest action, a quorum of at least 35% in the ballot having been achieved and over 50% having voted in favour of the protest action.

2.9 The protest action shall also be deemed to be in conformity with the Act, if the Commission, having been requested to conduct a ballot, has failed to do so or has failed to notify the results of the ballot within the required time period.

3. WHAT CONSTITUTES PROTEST ACTION AND A SOCIO-ECOOMIC INTEREST?

3.1. "Peaceful protest action" is defined in Section 2 of the Industrial Relations Act to mean the following: 

"The partial or complete concerted refusal to work, or the retardation of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for the purpose referred to in the definition of a strike."

3.2. This means that the purpose of the protest action cannot be a demand concerned with the employer/employee relationship, as this would fall within the definition of a strike. For example, protest action in support of a demand for an employer to reinstate employees dismissed as a result of a strike would not be in compliance with Section 40 of the Industrial Relations Act.

3.3. The protest action must be peaceful and may involve the partial or complete concerted refusal to work, or the retardation of work. It may accordingly include a work stoppage, a go slow, an overtime ban or a complete withholding of labour.

3.4. The protest action must have the purpose of promoting or defending the socio-economic interest of workers.

Section 40 (2) makes it clear that these issues exclude purely political matters. For example, protest action for the purpose of demanding a change in government will not comply with Section 40 of the Act.

3.5. Because protest action is limited to the purpose of promoting or defending the socioeconomic interest of workers, it means that protest action is limited to "interest disputes" and excludes disputes over the interpretation or enforcement of workers' rights. For further information regarding the distinction between interest and rights disputes, refer to clause 2.3. of the Code of Good Practice: Industrial Action.

3.6. It may be difficult in some cases to determine whether the interests which the protest action seeks to promote or defend are socio-economic. As a general rule, if the interest involved will have a direct impact on the social or economic life of workers, the protest action will conform with the Act.

For example, a demand to change the tax system for companies may fall outside the contemplated action, whereas a demand to change the tax rates for workers may comply with the requirements of the Act.

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3.7. Protest action should be in proportion to the issues giving rise to the protest. For example, it may be disproportional for a union federation to call for a 12 week national strike in support of a demand for an additional public holiday in recognition of workers' rights, whereas it may be proportional for a union federation to call for a one day national strike in support of a demand for the revision of workers' tax rates. The right to protest should be balanced against damage resulting from the protest, and the protest action should aim to achieve its objectives with a minimum damage caused.

4. WHAT MECHANISMS MUST THE LABOUR ADVISORY BOARD PUT IN PLACE TO
RESOLVE ISSUES GIVING RISE TO THE PROTEST ACTION?

4.1. Section 40 (2) of the Industrial Relations Act requires the Labour Advisory Board to put mechanisms in place to resolve the issues giving rise to the protest action within 7 days from the time it received the notice of the intention to take protest action.

4.2. These mechanisms will depend on the circumstances of each case. In many cases it will not be possible to resolve the issues giving rise to the protest action within that time but it may be possible to initiate a process which may address the concerns of the employees intending to take protest action.

4.3. The Labour Advisory Board may consider the following options, or a combination of these options:

4.3.1. resolving the issues in dispute if possible;

4.3.2. arranging for expert input on specific issues;

4.3.3. establishing a forum of key stakeholders at which issues can be addressed;

4.3.4. establishing a working group of representatives from key stakeholders;

4.3.5. appointing an expert facilitator who shall attempt to reach consensus amongst key stakeholders;

4.3.6. involving a relevant Government Department;

4.3.7. attempting to get the parties to agree to a form of binding adjudication e. g. arbitration.

4.3.8. utilizing any other appropriate mechanisms to address the issues.

5. HOW LONG CAN THE LABOUR ADVISORY BOARD EXTEND THE PERIOD FOR PUTTING IN PLACE MECHANISMS TO PROTEST RESOLVE THE ISSUES GIVING RISE TO THE ACTION?

5.1. Section 40(2) of the Industrial Relations Act provides that Labour Advisory Board may extend the 7 day period within which it must put in place mechanisms to resolve the issues giving rise to the protest action if-

5.1.1. requested to do so by the parties; or

5.1.2. the party intending to take protest action fails without reasonable cause to attend meetings called by the Labour Advisory Board to resolve the matter.
5.2. If the Labour Advisory Board is extending the period in terms of clause 5.1.1, it must take into consideration the views of the parties in determining how long the period should be extended for.

5.3. If the Labour Advisory Board is extending the period as a result of clause 5.1.2, it should do so for the period of up to an additional 7 days in order to give effect to the objectives set out in Section 40(2) of the Act. The Labour Advisory Board may extend this period for up to a further 7 days for as long as the party intending to take protest action fails without reasonable cause to attend meetings called by the Labour Advisory Board.

6. EFFECT OF PROTEST ACTION IN CONFORMITY WITH THE ACT

6.1. In terms of Section 40(11) of the Industrial Relations Act, a person or an organization or federation taking part in protest action that complies with the Act enjoys the protection conferred in the case of a lawful strike.

6.2. This means that-

6.2.1 a person does not commit a delict or a breach of contract by reason of taking part in that protest action;

6.2.2 an employer may not dismiss an employee for participating in that protest action;

6.2.3 civil proceedings may not be instituted against a person for participating in that protest action.

6.3. Notwithstanding clause 6.2-

6.3.1 an employer is not obliged to remunerate an employee for services that the employee does not render during protest action;

6.3.2 this does not preclude an employer from fairly dismissing an employee for a reason relating to the employee’s unlawful conduct during protest action or for a reason based on the employer’s operational requirements;

6.3.3 an employee forfeits the protection against dismissal if the employee takes part in protest action in breach of an order of the Industrial Court or otherwise acts in contempt of an order of the Court;

6.3.4 a federation, organization or any of its officers, representatives or members shall not be exempt from any civil liability for any criminal, malicious or negligent acts.

7. REFERRRAL OF PROTEST ACTION TO THE INDUSTRIAL COURT

7.1. In terms of Section 40(9) of the Industrial Relations Act, any interested party aggrieved by a decision to take protest action may refer the matter to the Industrial Court. The Court shall have exclusive jurisdiction-

7.1.1 to restrain any organization, federation or any person from taking part in protest action that does not comply with the Act; and

7.1.2 in respect of protest action that does comply with the Act, to grant a declaratory order after having considered-
(b) the steps taken by the organisation or federation to minimise the harm caused by the protest action; and

c) the conduct of the participants in the protest action.

7.2. This means that the Court has the power, irrespective of whether the protest action complies with the Act or not, to put a stop to the protest action in appropriate circumstances. In exercising this discretion, the Court may have regard to Clause 3.7. of these Guidelines.

7.3. In determining whether or not protest action complies with the Act, the Court may have to interpret issues such as whether or not the protest action is:

7.3.1. is peaceful;

7.3.2. promote socio-economic interests;

7.3.3. is in conformity with the Act generally

7.4. These Guidelines aim to assist the Court in interpreting issues such as those referred to in clause 7.3.