



**LABOUR RELATIONS
ACT
66 OF 1995 UPDATED 2005
(EXTRACTS)**

**CHAPTER 8: UNFAIR
DISMISSAL AND UNFAIR
LABOUR PRACTICE**

**SCHEDULE 8: CODE OF
GOOD PRACTICE: DISMISSAL**

**Samwu Shopsteward Training
Programme: supplementary material**

CONTENTS

CLAUSE	PAGE NUMBER
CHAPTER VIII	
185. Right not to be unfairly dismissed	1
186. Meaning of dismissal and unfair labour practice	1
187. Automatically unfair dismissals	2
188. Other unfair dismissals	3
188A. Agreement for pre-dismissal arbitration	3
189. Dismissals based on operational requirements	5
189A. Dismissals based on operational requirements by employers with more than 50 employees	7
190. Date of dismissal	11
191. Disputes about unfair dismissals and unfair labour practices	12
192. Onus in dismissal disputes	14
193. Remedies for unfair dismissal and unfair labour practice	15
194. Limits on Compensation	15
195. Compensation is in addition to any other amount	16
196. Severance pay	16
197. Transfer of contract of employment	16
197A. Transfer of contract of employment in circumstances of insolvency	19
197B. Disclosure of information concerning insolvency	20
SCHEDULE 8: CODE OF GOOD PRACTICE: DISMISSAL	
1. Introduction	21
2. Fair reason for dismissal	21
3. Disciplinary measures short of dismissal	22
4. Fair procedure	23
5. Disciplinary record	23
6. Dismissal and industrial action	23
7. Guidelines in cases of dismissal for misconduct	24
8. Probation	24
9. Guidelines in cases of dismissal for poor work performance	26
10. Incapacity: ill health or injury	26
11. Guideline in cases of dismissal arising from ill health or injury	27

CHAPTER VIII : UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE

185. Right not to be unfairly dismissed or subjected to unfair labour practice

Every *employee* has the right not to be-

- (a) unfairly dismissed; and
- (b) subjected to unfair labour practice.

186. Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that--

- (a) an employer has terminated a contract of employment with or without notice;
- (b) an *employee* reasonably expected the employer 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;
- (c) an employer refused to allow an *employee* to resume work after she--
 - (i) 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; or
- (e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*.
- (f) an *employee* terminated a contract of 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 at work that are substantially less favourable to the *employee* than those provided by the old employer.

(2) "Unfair labour practice" means 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 a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;

- (b) the unfair suspension of an *employee* or any other unfair 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, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.

187. Automatically unfair dismissals

(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to section 5¹ or, if the reason for the *dismissal* is --

- (a) that the *employee* participated in or supported, or indicated an intention to participate in or support, a *strike* or *protest action* that complies with the provisions of Chapter IV;²
- (b) that the *employee* refused, or indicated an intention to refuse, to do any work normally done by an *employee* who at the time was taking part in a *strike* that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- (c) to compel the *employee* to accept a demand in respect of any matter of mutual interest between the employer and *employee*;
- (d) that the *employee* took action, or indicated an intention to take action, against the employer by ----
 - (i) exercising any right conferred by *this Act*; or
 - (ii) participating in any proceedings in terms of *this Act*;

¹ Section 5 confers protections relating to the right to freedom of association and on members of workplace forums.

² Chapter IV deals with industrial action and conduct in support of industrial action. Section 67(4) and (5) provide--

" (4) An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.

(5) Subsection (4) does not preclude an employer from fairly dismissing an employee in compliance with the provisions of Chapter VIII for a reason related to the employee's conduct during the strike, or for a reason based on the employer's operational requirements."

Section 77(3) provides-

"a Person who takes part in a protest action or in any conduct in contemplation or in furtherance of protest action that complies with subsection (1) enjoys the protections conferred by section 67".

- (e) the *employee's* pregnancy, intended pregnancy, or any reason related to her pregnancy;
 - (f) that the employer unfairly discriminated against an *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.
 - (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
 - (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act.
- (2) Despite subsection (1)(f)---
- (a) a *dismissal* may be fair if the reason for *dismissal* is based on an inherent requirement of the particular job;
 - (b) a *dismissal* based on age is fair if the *employee* has reached the normal or agreed retirement age for persons employed in that capacity.

188. Other unfair dismissals

- (1) A *dismissal* that is not automatically unfair, is unfair if the employer fails to prove--
- (a) that the reason for *dismissal* is a fair reason--
 - (i) related to the *employee's* conduct or capacity; or
 - (ii) based on the employer's *operational requirements*; and
 - (b) that the *dismissal* was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for *dismissal* is a fair reason or whether or not the *dismissal* was effected in accordance with a fair procedure must take into account any relevant *code of good practice* issued in term of *this Act*.³

188A. Agreement for pre-dismissal arbitration

- (1) An employer may, with the consent of the *employee*, request a *council*, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that *employee*.

³ See Schedule 8: the Code of Good Practice: Dismissal.

- (2) The request must be in the *prescribed* form.
- (3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of –
- (a) payment by the employer of the *prescribed* fee; and
 - (b) the *employee's* written consent to the inquiry.
- (4) (a) An *employee* may only consent to a pre-dismissal arbitration after the *employee* has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.
- (b) Despite subparagraph (a), an *employee* earning more than the amount determined by the Minister in terms of section 6 (3) of the *Basic Conditions of Employment Act*, may consent to the holding of a pre-dismissal arbitration in a contract of employment.
- (5) In any arbitration in terms of this section a party to the *dispute* may appear in person or be represented only by –
- (a) a co-employee;
 - (b) a *director* or *employee*, if the party is a juristic person;
 - (c) any member, office bearer or official of that party's registered *trade union* or registered *employers' organisation*; or
 - (d) a legal practitioner, on agreement between the parties.
- (6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.
- (7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142 (1)(a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the *director* for the purpose of this section, must be read as a reference to-
- (a) the secretary of the *council*, if the arbitration is held under the auspices of the *council*;
 - (b) the *director* of the accredited agency, if the arbitration is held under the auspices of an accredited agency.
- (8) The provisions of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.
- (9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness

in the Act, direct what action, if any, should be taken against the *employee*.

(10) (a) A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.

(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission.

189. Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult--

(a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation--

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*;

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on ----

(a) appropriate measures----

(i) to avoid the *dismissals*;

(ii) to minimise the number of *dismissals*;

(iii) to change the timing of the *dismissals*; and

- (iv) to mitigate the adverse effects of the *dismissals*;
 - (b) the method for selecting the *employees* to be dismissed; and
 - (c) the severance pay for dismissed *employees*.
- (3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to--
- (a) the reasons for the proposed *dismissals*;
 - (b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;
 - (c) the number of *employees* likely to be affected and the job categories in which they are employed;
 - (d) the proposed method for selecting which *employees* to dismiss;
 - (e) the time when, or the period during which, the *dismissals* are likely to take effect;
 - (f) the severance pay proposed;
 - (g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed;
 - (h) the possibility of the future re-employment of the *employees* who are dismissed;
 - (i) the number of *employees* employed by the employer; and
 - (j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.
- (4)(a) The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).
- (b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.
- (5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.
- (6)(a) The employer must consider and respond to the representations made

by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the *employees* to be dismissed according to selection criteria--

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.

189A Dismissals based on operational requirements by employers with more than 50 employees

(1) This section applies to employers employing more than 50 *employees* if-

(a) the employer contemplates dismissing by reason of the employer's *operational requirements*, at least-

(i) 10 *employees*, if the employer employs up to 200 *employees*;

(ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;

(iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;

(iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or

(v) 50 *employees*, if the employer employs more than 500 *employees*;
or

(b) the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189 (3), is equal to or exceeds the relevant number specified in paragraph (a).

(2) In respect of any dismissal covered by this section-

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65 (1)(c), an *employee* may participate in a *strike* and an employer may *lock out* in accordance with the provisions of this section;

- (c) the consulting parties may agree to vary the time periods for facilitation or consultation.
- (3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultation if-
- (a) the employer has in its notice in terms of section 189(3) requested facilitation; or
- (b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.
- (4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).
- (5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the *Minister* under subsection (6) for the conduct of such facilitations.
- (6) The *Minister*, after consulting *NEDLAC* and the Commission, may make regulations relating to-
- (a) the time period, and the variation of time periods, for facilitation;
- (b) the power and duties of facilitators;
- (c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and
- (d) any other matter necessary for the conduct of facilitations.
- (7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3)-
- (a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*, and
- (b) a registered *trade union* or the *employees* who have received notice of termination may either –
- (i) give notice of a *strike* in terms of section 64(1)(b) or (d); or
- (ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).
- (8) If a facilitator is not appointed-

- (a) a party may not refer a *dispute* to a *council* or the Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and
- (b) once the periods mentioned in section 64(1)(a) have elapsed-
- (i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*, and
 - (ii) a registered trade union or the *employees* who have received notice of such termination may-
 - (aa) give notice of a *strike* in terms of section 64(1)(b) or (d); or
 - (bb) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).
- (9) Notice of the commencement of a *strike* may be given if the employer dismisses or gives notice of *dismissal* before the expiry of the periods referred to in subsections (7)(a) or (8)(b)(i).
- (10) (a) A consulting party may not-
- (i) give notice of a *strike* in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;
 - (ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a *strike* in terms of this section in respect of that dismissal.
- (b) If a trade union gives notice of a *strike* in terms of this section-
- (i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23(1)(d), may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court.
 - (ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.
- (11) The following provisions of Chapter IV apply to any *strike* or *lock-out* in terms of this section:

- (a) Section 64(1) and 3(a) to (d), except that-
- (i) section 64(1)(a) does not apply if a facilitator is appointed in terms of this section;
 - (ii) an employer may only *lock out* in respect of a *dispute* in which a *strike* notice has been issued;
- (b) subsection 2(a), section 65(1) and (3);
- (c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the *strike*;
- (d) section 67, 68, 69 and 76.
- (12) (a) During the 14-day period referred to in subsection (11)(c), the *director* must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any *dispute*, between the employer and the party who gave the notice, through conciliation.
- (b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph (a) does not affect the right of *employees* to strike on the expiry of the 14-day period.
- (13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order-
- (a) compelling the employer to comply with a fair procedure;
 - (b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;
 - (c) directing the employer to reinstate an *employee* until it has complied with a fair procedure;
 - (d) make an award of compensation, if an order in terms of paragraph (a) to (c) is not appropriate.
- (14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)(a).
- (15) An award of compensation made to an *employee* in terms of subsection (14) must comply with section 194.
- (16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.

- (17) (a) An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* service or, if notice is not given, the date on which the *employees* are dismissed.
- (b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph (a).
- (18) The Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191 (5)(b)(ii).
- (19) In any *dispute* referred to the Labour Court in terms of section 191 (5)(b)(ii) that concerns the *dismissal* of the number of *employees* specified in subsection (1), the Labour Court must find that the *employee* was dismissed for a fair reason if-
- (a) the *dismissal* was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;
- (b) the *dismissal* was operationally justifiable on rational grounds;
- (c) there was a proper consideration of alternatives; and
- (d) selection criteria were fair and objective.
- (20) For the purposes of this section, an 'employer' in the *public service* is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Services Act, 1994 (promulgated by Proclamation No. 103 of 1994).

190. Date of dismissal

- (1)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.
- (2)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 notified 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 re-instate or re-employ the *employee*, the date of *dismissal* is the date on which the employer first refused to re-instate or re-employ that *employee*.

191. Disputes about unfair dismissals and unfair labour practices⁴

(1)(a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to--

- (i) a *council*, if the parties to the *dispute* fall within the registered scope of that *council*; or
- (ii) the Commission, if no *council* has jurisdiction.

(b) A referral in terms of paragraph (a) must be made within-

- (i) 30 days of the date of a *dismissal* or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the *dismissal*;
- (ii) 90 days of the date of the act or omission which allegedly constitutes the 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 occurrence.

(2) If the *employee* shows good cause at any time, the *council* or the Commission may permit the *employee* to refer the *dispute* after the relevant time limit in subsection (1) has expired.

(2A) Subject to subsection (1) and (2), an *employee* whose contract of employment is terminated by notice, may refer the *dispute* to the *council* or the Commission once the *employee* has received that notice.

(3) The *employee* must satisfy the *council* or the Commission that a copy of the referral has been *served* on the employer.

(4) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.

(5) If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved--

(a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if-

⁴ See flow diagrams 10,11,12 and 13 in schedule 4

- (i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph (b)(iii) applies;
 - (ii) the *employee* has alleged that the reason for *dismissal* is that 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, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;
 - (iii) the *employee* does not know the reason for *dismissal*; or
 - (iv) the *dispute* concerns an unfair labour practice; or
- (b) the *employee* may refer the *dispute* to the Labour Court for adjudication if the *employee* has alleged that the reason for *dismissal* is--
- (i) automatically unfair;
 - (ii) based on the employer's *operational requirements*;
 - (iii) the *employee's* participation in a *strike* that does not comply with the provisions of Chapter IV; or
 - (iv) because the *employee* refused to join, was refused membership of or was expelled from a *trade union* party to a closed shop agreement.
- (5A) Despite any other provisions in the Act, the *council* or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved if the *dispute* concerns-
- (a) the *dismissal* of an *employee* for any reason relating to probation;
 - (b) any unfair labour practice relating to probation;
 - (c) any other *dispute* contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.
- (6) Despite subsection (5)(a) or (5A), the *director* must refer the *dispute* to the Labour Court, if the *director* decides, on application by any party to the dispute, that to be appropriate after considering--
- (a) the reason for *dismissal*;
 - (b) whether there are questions of law raised by the *dispute*;

- (c) the complexity of the *dispute*;
 - (d) whether there are conflicting arbitration awards that need to be resolved;
 - (e) the public interest.
- (7) When considering whether the *dispute* should be referred to the Labour Court, the *director* must give the parties to the *dispute* and the commissioner who attempted to conciliate the *dispute*, an opportunity to make representations.
- (8) The *director* must notify the parties of the decision and refer the *dispute*--
- (a) to the Commission for arbitration; or
 - (b) to the Labour Court for adjudication.
- (9) The *director's* decision is final and binding.
- (10) No person may apply to any court of law to review the *director's* decision until the *dispute* has been arbitrated or adjudicated, as the case may be.
- (11) (a) The referral, in terms of subsection (5) (b), of a *dispute* to the Labour Court for adjudication, must be made within 90 days after the *council* or (as the case may be) the commissioner has certified that the *dispute* remains unresolved.
- (b) However, the Labour Court may condone non-observance of that time-frame on good cause shown.
- (12) If an *employee* is dismissed by reason of the employer's *operational requirements* following a consultation procedure in terms of section 189 that applied to that *employee* only, the *employee* may elect to refer the *dispute* either to arbitration or to the Labour Court.
- (13)(a) 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.
- (b) A referral in terms of paragraph (a) is deemed to be made in terms of subsection (5)(b).

192. Onus in dismissal disputes -

- (1) In any proceedings concerning any *dismissal* the *employee* must establish the existence of the *dismissal*.

(2) If the existence of the *dismissal* is established, the employer must prove that the *dismissal* is fair.

193. Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may--

(a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

(b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

(c) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to re-instate or re-employ the *employee* unless--

(a) the *employee* does not wish to be re-instated or re-employed;

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to re-instate or re-employ the *employee*; or

(d) the *dismissal* is unfair only because the employer did not follow a fair procedure.

(3) If a *dismissal* is automatically unfair or, if a *dismissal* based on the employer's *operational requirements* is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.⁵

(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.

194. Limits on compensation

(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity

⁵ The Court, for example, in the case of a dismissal that constitutes an act of discrimination may wish to issue an interdict obliging the employer to stop the discriminatory practice in addition to one of the other remedies it may grant.

or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*.

(2) Sub-section (2) deleted by s. 52 (b) of Act No. 12 of 2002

(3) The compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*.

(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months' remuneration.

195. Compensation is in addition to any other amount

An order or award of compensation made in terms of this Chapter 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.

196. S. 196 repealed by s. 95 (5) of Act No. 75 of 1997

197. Transfer of contract of employment

(1) In this section and in section 197A-

(a) 'business' includes the whole or a part of any business, trade, undertaking or service; and

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an *employee* at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the *employee*;

(c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair

labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

- (d) the transfer does not interrupt an *employee's* continuity of employment, and an *employee's* contract of employment continues with the new employer as if with the old employer.
- (3) (a) The new employer complies with subsection (2) if that employer employs transferred *employees* on terms and conditions that are on the whole not less favourable to the *employees* than those on which they were employed by the old employer.
- (b) Paragraph (a) does not apply to *employees* if any of their conditions of employment are determined by a collective agreement.
- (4) ⁶Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14 (1) (c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied.
- (5) (a) For the purposes of this subsection, the *collective agreements* and arbitration awards referred to in paragraph (b) are agreements and awards that bound the old employer in respect of the *employees* to be transferred, immediately before the date of transfer.
- (b) Unless otherwise agreed in terms of subsection (6), the new employer is bound by-
- (i) any arbitration award made in terms of this Act, the common law or any other law;
 - (ii) any *collective agreement* binding in terms of section 23; and
 - (iii) any *collective agreement* binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.
- (6) (a) An agreement contemplated in subsection (2) must be in writing and concluded between-
- (i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
 - (ii) the appropriate person or body referred to in section 189 (1), on the other.

⁶ Section 14 (1) (c) of the Pension Funds Act requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice.

(b) In any negotiations to conclude an agreement contemplated by paragraph (a), the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16 (4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph (b).

(7) The old employer must-

(a) agree with the new employer to a valuation as at the date of transfer of-

- (i) the leave pay accrued to the transferred *employees* of the old employer;
- (ii) the severance pay that would have been payable to the transferred *employees* of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
- (iii) any other payments that have accrued to the transferred *employees* but have not been paid to *employees* of the old employer;

(b) conclude a written agreement that specifies-

- (i) which employer is liable for paying any amount referred to in paragraph (a), and in the case of the apportionment of liability between them, the terms of that apportionment; and
- (ii) what provision has been made for any payment contemplated in paragraph (a) if any *employee* becomes entitled to receive a payment;

(c) disclose the terms of the agreement contemplated in paragraph (b) to each *employee* who after the transfer becomes employed by the new employer; and

(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph (a).

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any *employee* who becomes entitled to receive a payment contemplated in subsection (7) (a)

as a result of the *employee's dismissal* for a reason relating to the employer's *operational requirements* or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

- (9) The old and the new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.
- (10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

197A. Transfer of contract of employment in circumstances of insolvency

- (1) This section applies to a transfer of a business-
 - (a) if the old employer is insolvent; or
 - (b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.
- (2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197 (6)-
 - (a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;
 - (b) all the rights and obligations between the old employer and each *employee* at the time of the transfer remain rights and obligations between the old employer and the each employee;
 - (c) anything done before the transfer by the old employer in respect of each *employee* is considered to have been done by the old employer;
 - (d) the transfer does not interrupt the *employee's* continuity of employment and the employee's contract of employment continues with the new employer as if with the old employer.
- (3) Section 197 (3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197 (6).
- (4) Section 197 (5) applies to a *collective agreement* or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.
- (5) Section 197 (7), (8) and (9) does not apply to a transfer in accordance

with this section.

197B. Disclosure of information concerning insolvency

- (1) An employer that is facing financial difficulties that may reasonably result in the winding-up or sequestration of the employer, must advise a consulting party contemplated in section 189 (1).
- (2) (a) An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act, 1936, or any other law, must at the time of making application, provide a consulting party contemplated in section 189 (1) with a copy of the application.

(b) An employer that receives an application for its winding-up or sequestration must supply a copy of the application to any consulting party contemplated in section 189 (1), within two days of receipt, or if the proceedings are urgent, within 12 hours.

SCHEDULE 8:

CODE OF GOOD PRACTICE: DISMISSAL

1. Introduction

- (1) This *code of good practice* deals with some of the key aspects of *dismissals* for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of *employees* employed in an establishment may warrant a different approach.
- (2) *This Act* emphasises the primacy of *collective agreements*. This Code is not intended as a substitute for disciplinary codes and procedures where these are the subject of *collective agreements*, or the outcome of joint decision-making by an employer and a *workplace forum*.
- (3) The key principle in this Code is that employers and *employees* should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While *employees* should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their *employees*.

2. Fair reasons for dismissal

- (1) A *dismissal* is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a *dismissal* is for a fair reason is determined by the facts of the case, and the appropriateness of *dismissal* as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.
- (2) *This Act* recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the *employee*, the capacity of the *employee*, and the *operational requirements* of the employer's business.
- (3) *This Act* provides that a *dismissal* is automatically unfair if the reason for the *dismissal* is one that amounts to an infringement of the fundamental rights of *employees* and *trade unions*, or if the reason is one of those listed in section 187. The reasons include participation in a lawful *strike*, intended or actual pregnancy and acts of discrimination.
- (4) In cases where the *dismissal* is not automatically unfair, the employer must show that the reason for *dismissal* is a reason related to the *employee's* conduct or capacity, or is based on the *operational requirements* of the business. If the employer fails to do that, or fails to prove that the *dismissal* was effected in accordance with a fair procedure, the *dismissal* is unfair.

3. Disciplinary measures short of dismissal

Disciplinary procedures prior to dismissal

- (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their *employees*. 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 *employees* in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.
- (2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for *employees* to know and understand what standards are required of them. Efforts should be made to correct *employees'* behaviour through a system of graduated disciplinary measures such as counselling and warnings.
- (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 violations of work discipline. Repeated misconduct will warrant warnings, which themselves may 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*. Dismissal should be reserved for cases of serious misconduct or repeated offences.

Dismissals for misconduct

- (4) Generally, it is not appropriate to dismiss an *employee* for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow *employee*, client or customer and gross insubordination. Whatever the merits of the case for *dismissal* might be, a *dismissal* will not be fair if it does not meet the requirements of section 188.
- (5) When deciding whether or not to impose the penalty of *dismissal*, the employer should in addition to the gravity of the misconduct consider factors such as the *employee's* circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.
- (6) The employer should apply the penalty 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 participate in the misconduct under consideration.

4. Fair procedure

- (1) Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The employer should notify the *employee* of the allegations using a form and language that the *employee* can reasonably understand. The *employee* should be allowed the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably furnish the *employee* with written notification of that decision.
- (2) Discipline against a *trade union representative* or an *employee* who is an *office-bearer* or *official* of a *trade union* should not be instituted without first informing and consulting the *trade union*.
- (3) If the *employee* is dismissed, the *employee* should be given the reason for *dismissal* and reminded of any rights to refer the matter to a *council* with jurisdiction or to the Commission or to any *dispute* resolution procedures established in terms of a *collective agreement*.
- (4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

5. Disciplinary records

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.

6. Dismissals and industrial action

- (1) Participation in a *strike* that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve *dismissal*. The substantive fairness of *dismissal* in these circumstances must be determined in the light of the facts of the case, including—
 - (a) the seriousness of the contravention of *this Act*;
 - (b) attempts made to comply with *this Act*; and
 - (c) whether or not the *strike* was in response to unjustified conduct by the employer.
- (2) Prior to *dismissal* the employer should, at the earliest opportunity, contact a *trade union official* to discuss the course of action it intends to adopt. The

employer should issue an 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. If the employer cannot reasonably be expected to extend these steps to the *employees* in question, the employer may dispense with them.

7. Guidelines in cases of dismissal for misconduct

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

- (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard *was* contravened, whether or not--
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.

8. Probation

- (1) (a) An employer may require a newly-hired *employee* to serve a period of probation before the appointment of the *employee* is confirmed.
- (b) The purpose of probation is to give the employer an opportunity to evaluate the *employee's* performance before confirming the appointment.
- (c) Probation should not be used for purposes not contemplated by this Code to deprive *employees* of the status of permanent employment. For example, a practice of dismissing *employees* who complete their probation periods and replacing them with newly-hired *employees*, is not consistent with the purpose of probation and constitutes an unfair labour practice.
- (d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the *employee's* suitability for continued employment.

- (e) During the probationary period, the *employee's* performance should be assessed. An employer should give an *employee* reasonable evaluation, instruction, training, guidance or counselling in order to allow the *employee* to render a satisfactory service.
 - (f) If the employer determines that the *employee's* performance is below standard, the employer should advise the *employee* of any aspects in which the employer considers the *employee* to be failing to meet the required performance standards. If the employer believes that the *employee* is incompetent, the employer should advise the *employee* of the respects in which the *employee* is not competent. The employer may either extend the probationary period or dismiss the *employee* after complying with subitems (g) or (h), as the case may be.
 - (g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.
 - (h) An employer may only decide to dismiss an *employee* or extend the probationary period after the employer has invited the *employee* to make representations and has considered any representations made. A *trade union* representative or fellow *employee* may make the representations on behalf of the *employee*.
 - (i) If the employer decides to dismiss the *employee* or to extend the probationary period, the employer should advise the *employee* of his or her rights to refer the matter to a *council* having jurisdiction, or to the Commission.
 - (j) Any person making a decision about the fairness of a *dismissal* of an *employee* for poor work performance during or on expiry of the probationary period ought to accept reasons for *dismissal* that may be less compelling than would be the case in *dismissals* effected after the completion of the probationary period.
- (2) After probation, an *employee* should not be dismissed for unsatisfactory performance unless the employer has--
- (a) given the *employee* appropriate evaluation, instruction, training, guidance or counselling; and
 - (b) after a reasonable period of time for improvement, the *employee* continues to perform unsatisfactorily.
- (3) The procedure leading to *dismissal* should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of *dismissal*, to remedy the matter.
- (4) In the process, the *employee* should have the right to be heard and to be

assisted by a *trade union representative* or a fellow *employee*.

9. Guidelines in cases of dismissal for poor work performance

Any person determining whether a *dismissal* for poor work performance is unfair should consider-

- (a) whether or not the *employee* failed to meet a performance standard; and
- (b) if the *employee* did not meet a required performance standard whether or not—
 - (i) the *employee* was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the *employee* was given a fair opportunity to meet the required performance standard; and
 - (iii) *dismissal* was an appropriate sanction for not meeting the required performance standard.

10. Incapacity: Ill health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an *employee* is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the *employee* is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the 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*. 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.
- (2) In the process of the investigation referred to in subsection (1) the *employee* should be allowed the opportunity to state a case in response and to be assisted by a *trade union representative* or fellow *employee*.
- (3) The degree of incapacity is relevant to the fairness of any *dismissal*. The cause of the incapacity may also be relevant. 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.
- (4) Particular consideration should be given to *employees* who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the *employee* is more onerous in these circumstances.

11. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a *dismissal* arising from ill health or injury is unfair should consider--

- (a) whether or not the *employee is* capable of performing the work; and
- (b) if the *employee is* not capable--
 - (i) the extent to which the *employee is* able to perform the work;
 - (ii) the extent to which the *employee's* work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the *employee's* duties might be adapted; and
 - (iii) the availability of any suitable alternative work.

