

Labour Relations Act 66 of 1995 (LRA)

Topic: Employment/Labour/Human Resources

IN A CALABASH

Introduction

The Labour Relations Act (LRA) regulates the right to fair labour practice, to join and participate in the activities of a trade union, to join and participate in the employers' organisations and to organise, form and join a federation. Most importantly, the Act affirms the right of trade unions, employers' organisations and employers to collective bargaining.

Objectives of the Act

The Act seeks to

- regulate the organisational rights of trade unions;
- promote and facilitate collective bargaining at the workplace and at sectoral level;
- regulate the right to strike and the recourse to lock-out in conformity with the Constitution;
- promote employee participation in decision-making through the establishment of workplace forums;
- provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation, arbitration and independent alternative dispute resolution services accredited for that purpose; and
- provide for a simplified procedure for the registration and regulation of trade unions and employers' organisations.

Application of the Act and its implication to Tourism

The Act applies to all employees and employers, except members of the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence. With regard to implications, the relationship between the employer and employees within the tourism industry ought to be in line with the provision of this Act and other relevant regulations and sectoral determinations.

Summary of the provisions of the Act

Right to associate

The LRA regulates the right of employers and employees to associate with each other through employer and employee representatives and to conclude substantive and/or organisational agreements.

Trade unions

To give effect to the right to associate, the LRA gives any employee the right to participate in forming a trade union, to join a trade union and to be represented by a trade union, subject to its constitution.

Membership of a trade union entitles members to the right, subject to the constitution of that trade union, to participate in its lawful activities, to participate in the election of any of its office bearers, officials or trade union representatives and to stand for election and be eligible for appointment as a trade union representative.

In turn, every employer has the right to participate in forming an employers' organisation or a federation of employers' organisations, to join an employers' organisation, subject to its constitution, and to participate in its lawful activities.

An employer may not discriminate against a potential or existing employee for exercising any right granted to him or her under the LRA, including the right to be a member of a trade union or workplace forum.

Furthermore, an employer may not force any employee, in exchange for an advantage of any kind, to give up his or her right to join a trade union.

In order to give effect to the functions of a trade union, an employer has to—

- deduct from the employee's wages any subscriptions or levies payable to a trade union, in line with a written request from the employee;
- provide the representative trade union, with each monthly remittance, a list of the names of every member from whose wages the employer has made the deductions and the period to which the deductions relate;
- provide the trade union with a copy of any notice of revocation received from an employee in respect of its membership of the trade union and the authority to make deductions;
- allow an official of a representative trade union to enter its premises in order to recruit members or communicate with them; and
- disclose to a trade union representative all relevant information that will allow the representatives to perform their functions in terms of the LRA, as and when requested.

Bargaining councils

One or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for any number of sectors. Sectors are divided according to type of industry, e.g. the tourism industry or the hospitality industry.

A bargaining council has the right to–

- conclude collective agreements;
- enforce those collective agreements;
- prevent and resolve labour disputes;
- promote and establish training and education schemes;
- establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the bargaining council or its members;
- develop proposals for submission to the National Economic Development and Labour Council (NEDLAC) or any other appropriate forum on policy and legislation that may affect the sector and area;
- determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace;
- confer on workplace forums additional matters for consultation;
- provide industrial support services within the sector; and
- extend the services and functions of the bargaining council to workers in the informal sector and to home workers.

Any collective agreement concluded in a bargaining council binds

- the parties (who are parties to the collective agreement) to the bargaining council;
- each party to the collective agreement and the members of every other party in the collective agreement in so far as its provisions apply to the relationship between that party and the members of the other party; and
- the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is a party to the collective agreement, if the collective agreement regulates terms and conditions of employment or the conduct of the employers in relation to their employees or the conduct of the employees to their employers.

A bargaining council may make a request to the Minister, in writing, to extend a collective agreement to any non-parties that are within its registered scope and who are identified in the request. This is usually then published in the Government Gazette.

Strikes and picket action

The LRA gives every employee the right to strike and to picket, subject to the employee or his or her union meeting certain requirements.

The LRA sets out when and under what circumstances strike and picket action can take place, and it protects the right of an employee from dismissal when the strike or picket is legal and correctly managed.

Lock-out

By the same token, every employer has recourse to lock out its employees, subject to certain procedures being followed.

Workplace forums

A workplace forum may be established as long as it seeks to promote the interests of all employees in the workplace. It is not relevant as to whether the employees are trade

union members or not. Workplace forums enhance efficiency in the workplace. The workplace forum acts as a consultation body which allows the employer to approach it with a view to reaching consensus about certain labour matters and to participate in joint decision-making efforts.

Temporary employment services and independent service providers

The LRA specifically provides that when a temporary employment service provider provides a temporary employee to an employer to render a service on a temporary basis, that temporary employee will be deemed to be an employee of that temporary employment service provider and the temporary employment service provider will be deemed to be that person's employer.

Notwithstanding the above, when a person operates as an independent contractor, such person will not be viewed as an employee of the employer or of the temporary employment service provider.

Despite the relationships detailed above, the temporary employment service provider and the person who is using the temporary employee are jointly and severally liable if the temporary employment service provider, in respect of any of its employees, contravenes—

- a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
- a binding arbitration award that regulates terms and conditions of employment;
- the Basic Conditions of Employment Act; or
- a determination made in terms of the Wage Act.

Application of collective agreements to a temporary employee

Two or more bargaining councils may agree to bind the following persons, if they fall within the combined registered scope of those bargaining councils, to a collective agreement concluded by any one of them—

- employees provided and employed by a temporary employment service provider;
- a person employed by a temporary employment service provider; and
- a temporary employment service client.

Any such agreement is binding only if the collective agreement has been extended to non-parties within the registered scope of the bargaining council.

Unfair labour practices

The LRA prevents an employer from taking any unlawful action against an employee and provides that an employee may not be unfairly dismissed, subjected to an unfair labour practice or victimised.

An unfair labour practice has been defined under the LRA to mean any unfair act or omission that arises between an employer and an employee involving—

- unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation), training of an employee or provision of benefits to an employee;
- the unfair suspension of an employee or any other unfair disciplinary action, short of dismissal, in respect of an employee;

- a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
- an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000, on account of the employee having made a protected disclosure defined in that Act.

The LRA states that a dismissal of an employee will be automatically unfair if the employer, in dismissing the employee, acts contrary to the LRA, as it offers protection to an employee relating to the right to freedom of association and on members of workplace forums, or, if the reason for the dismissal is due to any of the following factors–

- the employee participated in, supported or indicated an intention to participate in or support a legal strike, protest action, industrial action or protected strike;
- the employee engaged in legal and legitimate conduct in contemplation or in furtherance of a strike, protest action, industrial action or protected strike;
- 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 legal strike or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
- the dismissal was done in order to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
- the employee took action or indicated an intention to take action against the employer which was legitimately allowed under any law or the LRA;
- because the employee was pregnant or any reason related to her pregnancy;
- where the employer unfairly discriminated against an employee, either 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;
- in consequence of a transfer or a reason related to a transfer, such as where the contract of employment is transferred in the case of a change of ownership or when the business becomes insolvent; or
- in consequence of the employee having made a protected disclosure allowed under the Protected Disclosures Act, 2000.

Note that any dismissal of an employee may be fair if the reasons for dismissal are based on an inherent requirement of the particular job or if the dismissal is based on age, which is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

Dismissals for operational requirements

The LRA has taken cognisance of the fact that certain employers may not be able to continue employing an employee due to operational requirements. The LRA states that when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult with any person with whom the employer is required to consult in terms of a collective agreement.

Following that, if there is no collective agreement that requires consultation, the employer must consult a workplace forum when the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum. The employer must also consult any registered trade union whose members are likely to be affected by the proposed dismissals.

If there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, the employer must consult with any registered trade union whose members are likely to be affected by the proposed dismissals. If there is no such trade union, the employer must consult with any employees who are likely to be affected by the proposed dismissals or their representatives nominated for that purpose.

The employer and the other consulting parties must, in the consultation, engage in a meaningful joint consensus-seeking process and attempt to reach consensus on–

- appropriate measures to avoid the dismissals;
- the number of dismissals and an attempt to minimise this number;
- the timing of the dismissals;
- measures to mitigate the adverse effects of the dismissals;
- the method for selecting the employees to be dismissed; and
- severance pay for dismissed employees.

The employer must issue a written notice to the party representing the employees disclosing all relevant information, including, but not limited to

- the reasons for the proposed dismissals;
- the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each of those alternatives;
- the number of employees likely to be affected and the job categories in which they are employed;
- the proposed method for selecting which employees to dismiss;
- the time when, or the period during which, the dismissals are likely to take effect;
- the severance pay proposed;
- any assistance that the employer proposes to offer to the employees likely to be dismissed;
- the possibility of the future re-employment of the employees who are dismissed;
- the number of employees employed by the employer; and
- the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

Once the written notice has been issued, the employer must invite the other party to consult with the employees and to provide it, in response, with relevant representations.

In addition to the above, where any employer employs more than 50 employees within the workplace and the employer contemplates dismissal on the grounds of operational requirements, the employer must give notice of any such termination of employment in accordance with the provisions of the LRA, one of which entails the appointment of a facilitator who will assist with the retrenchment negotiations. This will apply where the employer considers dismissing at least

- 10 employees, if the employer employs up to 200 employees;
- 20 employees, if the employer employs more than 200, but not more than 300, employees;
- 30 employees, if the employer employs more than 300, but not more than 400, employees;
- 40 employees, if the employer employs more than 400, but not more than 500, employees; or
- 50 employees, if the employer employs more than 500 employees; or
- 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 of dismissal based on operational requirements, is equal to or exceeds the above numbers.

Transfer of employment where business is sold or employer becomes insolvent

Another important section of the LRA applies when an employer sells the business with a provision to protect employees against any loss of employment and/or retrenchment which may arise in consequence of any such sale of the business.

Employers are to note that–

- the term 'business' includes the whole or a part of any business, trade, undertaking or service; and
- the term 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

If a transfer of a business takes place

- 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;
- all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they are rights and obligations between the new employer and the employee;
- 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
- 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.

The new employer will comply if it employs employees who have been transferred on terms and conditions that are on the whole not less favourable to the employees than those terms and conditions on which they were employed by the old employer. This will not apply to employees if any of their conditions of employment are determined by a collective agreement.

The above 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 the Pension Funds Act 24 of 1956 are satisfied.

Unless otherwise agreed, the new employer is bound by

- any arbitration award made in terms of the Pension Funds Act 24 of 1956, the common law or any other law;
- any binding collective agreement; and
- any extension of a binding collective agreement, unless a commissioner acting in terms of the provisions of the LRA decides otherwise.

Any such transfer agreement must be in writing and concluded between either the old employer, the new employer or the old and new employers acting jointly on the one

hand and the appropriate person or body on the other. This could be the trade union, a bargaining council or the employee(s).

In any transfer, the old employer must agree with the new employer to a valuation as at the date of transfer of–

- the leave pay accrued to the transferred employees of the old employer;
- 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
- any other payments that have accrued to the transferred employees but have not been paid to employees of the old employer

all of which refer to the amounts agreed between the employee and the old employer.

To conclude this process, a written agreement must be drawn up that specifies

- which employer is liable for paying the agreed amount and in the case of the apportionment of liability between them, the terms of that apportionment; and
- what provision has been made for the payment of the agreed amounts if any employee becomes entitled to receive a payment.

The parties must disclose the terms of the agreement to each employee who, after the transfer, becomes employed by the new employer. The parties must 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 as a result of the transfer.

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 as a result of his or her 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 the Act.

The old and new employers are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

The liability of any person to be prosecuted for, convicted of and sentenced for any offence is not affected.

Records to be kept by employer

Every employer must keep the records that an employer is required to keep in compliance with any applicable collective agreement, arbitration award or determination made in terms of the Wage Act 5 of 1957. An employer must retain those records in their original form or a reproduced form for a period of seven years from the date of the event or end of the period to which they relate, and they must submit those records in their original form or a reproduced form in response to a demand made at any reasonable time to any agent of a bargaining council, commissioner or any person whose functions in terms of the Act include the resolution of disputes. An employer must keep a record of the prescribed details of any strike, lock-out or protest action involving its employees.

Disputes

Any dispute arising from a contravention of the LRA may be referred to either the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court, depending on jurisdiction. The company should familiarise itself with the CCMA rules and how a conciliation or arbitration will proceed in the event of any matter under dispute.

If there is a dispute about the fairness of a dismissal, the dismissed employee may refer the dispute to either a bargaining council, or, where no such council has been established, the matter may be referred to the CCMA.

The council or the commission must attempt to resolve the dispute through conciliation, and, when this fails, the council or the commission must arbitrate the dispute at the request of the employee if

- the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity;
- 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, unless the employee alleges that the contract of employment was terminated for a reason contemplated in the LRA;
- the employee does not know the reason for dismissal; or
- the dispute concerns an unfair labour practice.

On the other hand, the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is

- automatically unfair;
- based on the employer's operational requirements;
- based on the employee's participation in a strike which did not comply with the provisions of the Act; or
- based on the employee's refusal to join, refused membership of or expulsion from a trade union party to a closed shop agreement.

Despite any other provision in the LRA, the council or commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns

- the dismissal of an employee for any reason relating to probation; or
- any unfair labour practice relating to probation.

Despite the above, the director must refer the dispute to the Labour Court. If the director decides that, on application by any party to the dispute, such referral would be appropriate after considering

- the reason for dismissal;
- whether there are questions of law raised by the dispute;
- the complexity of the dispute;
- whether there are conflicting arbitration awards that need to be resolved; and
- the public interest.

If an employee is dismissed by reason of the employer's operational requirements following a consultation procedure that applied to that employee only, the employee may elect to refer the dispute either to arbitration or to the Labour Court.

An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that he or she has been subjected to an occupational detriment by the employer in contravention of the Protected Disclosures Act 26 of 2000 for having made a protected disclosure defined in that Act.

Orders where dismissal is unfair

If the Labour Court or an arbitrator finds that a dismissal is unfair, the Court or the arbitrator may

- order the employer to reinstate the employee from any date not earlier than the date of dismissal;
- 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
- order the employer to pay compensation to the employee.

The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless

- the employee does not wish to be reinstated or re-employed;
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- it is not reasonable for the employer to reinstate or re-employ the employee; or
- the dismissal is unfair only because the employer did not follow a fair procedure.

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 may make any other order that it considers appropriate in the circumstances. For example, the Court, 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.

An arbitrator appointed in terms of the LRA 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.

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

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

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

Severance pay

An employer must pay to an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, unless the employer has been exempted.

An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay.

The payment of severance pay does not affect an employee's right to any other amount payable according to law.

An employer or a category of employers may apply to the Minister for exemption from the severance pay provisions, which will be viewed as an application in terms of the Basic Conditions of Employment Act, and the Minister may grant an exemption as if it were an exemption granted in terms of that Act.

If there is a dispute only about the entitlement to severance pay, the employee may refer the dispute in writing to

- a council, if the parties to the dispute fall within the registered scope of that council; or
- the commission, if no council has jurisdiction.

The council or the commission must attempt to resolve the dispute through conciliation. If the dispute remains unresolved, the employee may refer it to arbitration.

If the Labour Court is adjudicating a dispute about a dismissal based on the employer's operational requirements, the court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled, and the court may make an order directing the employer to pay that amount.



WHAT HAPPENS IF YOU DO NOT COMPLY?

Penalties

Fines for failing to comply with a collective agreement which do not involve an underpayment vary between R100 to R500 per employee in respect of whom the failure to comply occurs.

Fines for failing to comply with a collective agreement and which involve an underpayment vary between 25% and 200% of the amount due, including any interest owing on the amount at the date of the order.

Furthermore, in the case of an unfair dismissal or unfair labour practice, an employer could be handed an order of reinstatement or an order compelling it to pay the dismissed employee wages of up to 12 months.



RECOMMENDED ACTIONS OR CONTROLS WHICH SHOULD BE IMPLEMENTED BY THE TARGET AUDIENCE TO ENSURE COMPLIANCE WITH THE ACT

In order to demonstrate compliance with the LRA, the employer as a bare minimum should have the following physical documents or procedures in place or do as follows:

- All employees should be allowed to associate with any trade union or bargaining council;
- Consider allowing a bargaining council to extend the collective agreement to non-parties;
- Conclude, where applicable, and extend or renew a collective agreement;
- Picketing rules in place and followed;
- Lawful strikes and lock-outs;
- Lawful picketing;
- Lawful protest action;
- Allow a representative trade union to establish a workplace forum;
- Allow a representative trade union to establish a trade union-based workplace forum;
- Recognise any registered trade union;
- Apply for the amalgamation, where applicable, of an employers' organisations;
- Register an employers' organisation;
- Keep an up-to-date list of all employees who belong to a trade union and ensure deductions of fees made and paid over to the trade union;
- Keep a list of members who belong to any employers' organisation;
- Refer a dispute to the CCMA for conciliation;
- Request operational requirements facilitation;
- Keep records of workers' earnings, deductions and time worked;
- Record strikes, lock-outs or protest action;
- Submission by a statutory council to the Minister of Labour to promulgate a collective agreement as a determination;
- Apply for registration of bargaining councils;
- Ensure that no unfair labour practices take place;
- Retrenchment for operational reasons must be substantively and operationally fair;
- Dismissal for poor performance or non-compliance with laws to be substantively and operationally fair;
- HR codes of practice for all labour issues to be in place including disciplinary procedures;
- Disciplinary procedures and guidelines;

- Grievance procedures;
- PAIA Manual;
- Substantive or collective agreement with a union; and
- Records maintained for required periods.

FURTHER INFORMATION

Regulators

Department of Labour

CCMA

Bargaining Councils

Websites

www.labour.gov.za

www.ccma.org.za