

# **Dispute Prevention Manual CMAC**

# Preface

One of the most effective ways of preventing labour disputes from arising is by ensuring that all the parties in the labour relations arena are aware of their rights and how to exercise them. That is the intention of this manual. It has been designed to empower employees, employers, trade unions, employer organizations and representatives of government to make effective use of CMAC's services and generally to approach their relationships in the full knowledge of their rights and obligations.

We hope you will find the manual useful and would appreciate any comments you may have on it. These can be forwarded to CMAC at the following contact addresses:

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Sincerely

**Siphephiso Dlamini**  
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# Contents

Section	Title	Purpose of the section	Subsections	Page
	<b>Glossary</b>	To give readers a list of definitions of common terms used in the Industrial Relations Act and the manual.		6
1.	<b>How to use this manual</b>	To give readers an overview of the manual by describing the origin of the manual, who it is aimed at and how to use it.	<b>1.1 Background to the manual</b> <b>1.2 Who is the manual aimed at?</b> <b>1.3 Overview of the contents of the manual</b> <b>1.4 Different icons</b>	8 8 8 9
2.	<b>The legal framework</b>	To give readers an overview of labour law in Swaziland and how this impacts on dispute prevention and dispute resolution	<b>2.1 Overview of labour laws</b> <b>2.2 The Industrial Relations Act</b>	10 11
3.	<b>The role players in labour relations</b>	To describe employees, employers, trade unions, employer organisations and the state from a labour relations point of view	<b>3.1 Introduction to the role players</b> <b>3.2 The State</b> <b>3.3 Employees</b> <b>3.4 Trade Unions</b> <b>3.5 Employers</b> <b>3.6 Employers' Organisations/ Associations</b>	14 15 16 18 19 19

<b>Section</b>	<b>Title</b>	<b>Purpose of the section</b>	<b>Subsections</b>	<b>Page</b>
4.	<b>Individual employment relationships</b>	To describe the contract of employment and the rights and duties which employers and employees are obliged to comply with in terms of the contract of employment	<b>4.1 The contract of employment</b>	21
			<b>4.2 Probation</b>	24
			<b>4.3 Communication</b>	27
5.	<b>Workplace discipline and dismissal</b>	To explain how employers should deal with discipline in the workplace and the rights of employees in this regard	<b>5.1 Introduction to workplace discipline and dismissal</b>	31
			<b>5.2 Dismissal</b>	33
			<b>5.3 Disciplinary procedures and sanctions</b>	36
			<b>5.4 Disciplinary hearings/enquiries</b>	38
			<b>5.5 Dealing with poor performance</b>	44
			<b>5.6 Dealing with ill health or injury</b>	45
			<b>5.7 Dealing with retrenchments</b>	46
6.	<b>Collective employment relationships</b>	To explain the nature of relationships between employers and trade unions and employers' organizations and trade unions	<b>6.1 Trade union recognition</b>	50
			<b>6.2 Collective bargaining</b>	51
			<b>6.3 Strikes and lock outs</b>	52

<b>Section</b>	<b>Title</b>	<b>Purpose of the section</b>	<b>Subsections</b>	<b>Page</b>
<b>7.</b>	<b>Dispute resolution institutions</b>	To describe the composition, role and functions of the Conciliation, Mediation and Arbitration Commission (CMAC), the Industrial Court, the Industrial Court of Appeal and the Commissioner of Labour	<b>7.1 CMAC</b>	<b>54</b>
			<b>7.2 The Industrial Court</b>	<b>55</b>
			<b>7.3 The Industrial Court of Appeal</b>	<b>56</b>
			<b>7.4 The High Court</b>	<b>56</b>
			<b>7.5 The Commissioner of Labour</b>	<b>56</b>
<b>8.</b>	<b>Dispute resolution processes</b>	To explain conciliation, arbitration and litigation in detail	<b>8.1 Conciliation</b>	<b>58</b>
			<b>8.2 Arbitration</b>	<b>62</b>
			<b>8.3 Litigation</b>	<b>66</b>
			<b>8.4 Points in limine</b>	<b>66</b>
<b>9.</b>	<b>Resources</b>	To give readers additional resources (such as relevant forms).	<b>Codes and Guidelines</b>	<b>73</b>

# Glossary<sup>1</sup>

<b>Advisory arbitration</b>	A way of resolving a dispute which involves an independent third party making recommendations to the parties to the dispute after having heard their different versions. These recommendations, which are presented in the form of an advisory arbitration award, are not binding on the parties to the dispute (i.e. they can accept them or reject them).
<b>Arbitration</b>	A way of resolving a dispute, which involves an independent third party making a binding decision. The decision is presented in the form of an award, and it is based on evidence and argument, which is presented to the arbitrator and is usually final and binding on the parties to the dispute.
<b>CMAC</b>	Conciliation, Mediation and Arbitration Commission. This Commission was established in terms of the Industrial Relations Act of 2000. Its primary purpose is to prevent and resolve labour disputes. It is independent of any person, statutory body, political entity, employer, employee, federation and organization. It is governed by a tripartite (three party) governing body, which is made up of representatives of government, labour and business.
<b>Conciliation</b>	A way of resolving a dispute, which involves an independent party helping the parties to the dispute to find an agreement to resolve the dispute. The conciliator does not have the power to make a ruling to resolve the dispute and if the parties are unable to reach agreement to resolve the dispute, the dispute remains unresolved. In Swaziland, the description of conciliation in the Industrial Relations Act includes “mediation”, fact finding and making an advisory award. It is therefore used as an umbrella term to describe a number of processes in which the third party (the conciliator) helps the parties to find a settlement. The use of the term in this “umbrella” way is common in the Southern African region and can also be found in the legislation of South Africa, Namibia and Lesotho.
<b>Employers’ Organization</b>	An organisation or association, which is made up of different employers that have joined together to further their interests in the labour relations arena.
<b>Fact finding</b>	A way of resolving a dispute in which an independent third party (the conciliator) determines certain facts in order to assist the parties to the dispute to resolve it.

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<sup>1</sup> The definitions in this glossary are intended to be a layman’s guide to key terms used in the manual and are therefore not taken from the law. Where appropriate, legal definitions from relevant statutes are quoted in the text of the manual.

- Mediation** A way of resolving a dispute, which involves an independent party helping the parties to the dispute to find an agreement to resolve the dispute. The mediator does not have the power to make a ruling to resolve the dispute and if the parties are unable to reach agreement to resolve the dispute, the dispute remains unresolved. Mediation and conciliation are essentially the same process although in some jurisdictions a distinction is made between whether the third party makes recommendations (this is called “mediation” in the UK), and the third party not making recommendations (this is called “conciliation” in the UK).
- Rescission** An application by a party to an arbitration or a decision of the Executive Director for the arbitrator to withdraw his/her decision. Such applications can be made in the event that a decision is made in the absence of a party.
- Trade Union** An organisation made up of employees who have joined together to further their interests in the labour relations arena.

# How to use this Manual

# 1

## 1.1 Background to the Manual

**Assisting our Clients** This manual has been developed by the Conciliation, Mediation and Arbitration Commission (CMAC) in order to assist our clients to make better use of our services and to understand their rights and duties in terms of the labour law of Swaziland. In this way it is hoped that labour disputes will be prevented and where they cannot be prevented, they will be resolved as quickly and efficiently as possible.

## 1.2 Who is this Manual aimed at?

**Users of CMAC** The manual is aimed at employees, trade unions, employers and employer organisations and their representatives (i.e. users of CMAC)

## 1.3 Overview of the Contents of the Manual

**Sections of the Manual** The remaining part of the Manual is divided into the following sections:

- ◆ The legal framework
- ◆ The Role players in labour relations
- ◆ Individual employment relationships

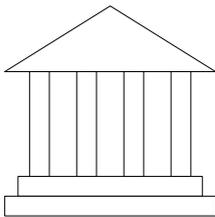
- ◆ Workplace discipline
- ◆ Collective employment relationships
- ◆ Dispute resolution institutions
- ◆ Dispute resolution processes

## 1.4 Different Icons

**When you see:**



We will be examining an idea or concept in more detail, usually through an example or short case study.



We will be pointing to information in the Industrial Relations Act or other relevant legislation.



This icon reflects information that is critical that everyone in your organisation knows and understands.

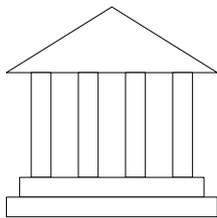
# The Legal Framework

# 2

## 2.1 Overview of labour laws

### **The Origin of labour law**

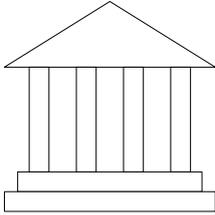
All proposed labour law is considered by the Labour Advisory Board (LAB) before it is introduced in Parliament. The LAB is one of the institutions created to facilitate the transformation of relationships in the labour market. It is made up of representatives of employees (through trade unions), employers (through employers' organisations), and government. The LAB was established by the Industrial Relations Act of 2000 and one of its functions which is set out in that Act, is to consider proposals for new labour law and to advise the Minister responsible for Labour



The following pieces of labour law provide the legal framework for labour relations in Swaziland:

- ◆ The Industrial Relations Act 2000 as amended, and
- ◆ The Occupational Safety and Health of 2001.
- ◆ The Employment Act 1980
- ◆ The Workmen's Compensation Act of 1983
- ◆ The Wages Act No. 16 of 1964
- ◆ The Factories Machinery and Construction Works Act of 1976.

## **Different pieces of labour law**



The Industrial Relations Act 2000, as amended, provides for collective bargaining (i.e. negotiation between employers and trade unions), collective relationships and dispute resolution.

The Occupational Safety and Health of 2001 provides for the safety and health of persons in the workplace and creates rights and duties for employers and employees regarding health and safety. It also provides for the protection of persons other than persons at the workplace against hazards to safety and health arising out of or in connection with the activities of persons in the workplace.

The Employment Act 1980 and the Wages Act No. 16 1964 create minimum standards and conditions of employment for all employees in Swaziland (e.g. maximum hours of work leave entitlements as well as minimum wages).

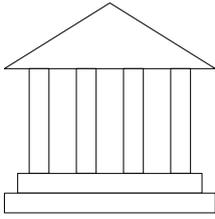
The Workmen's Compensation Act of 1983 creates rights and duties on employers and employees in relation to injuries or illnesses that employees might contract at work. In terms of this Act, employees injured or ill as a result of working conditions may claim compensation.

The Factories Machinery and Construction Works Act of 1976 gives power to inspectors to enter any factory premises and inspect the machinery in order to ensure safety at the workplace. It works hand in hand with the Occupational Health and Safety Act.

## **2.2 The Industrial Relations Act**

### **The Industrial Relations Act**

The Industrial Relations Act is the main piece of legislation in the Industrial Relations area. As indicated by its title, this is the main



Act governing relationships between employers and employees in the labour market. It came into effect in August 2000, and was a product of consensus between the various stakeholders in the industrial relations arena in Swaziland. The preamble indicates that it is “an Act to provide for the collective negotiation of terms and conditions of employment and for the provision of dispute resolution mechanisms”.

The purpose and objectives of this Act are to:

- ◆ Promote harmonious industrial relations;
- ◆ Promote fairness and equity in labour relations;
- ◆ Promote freedom of association and expression in labour relations;
- ◆ Provide mechanisms and procedures for speedy resolution of conflicts in labour relations;
- ◆ Protect the right to collective bargaining
- ◆ Provide a healthy and legally sound environment for the creation of smart partnerships between the government, labour and capital;
- ◆ Promote and create employment and investment;
- ◆ Stimulate economic growth, development and competitiveness;
- ◆ Stimulate a self-regulatory system of the industrial and labour relations and self-governance;
- ◆ Ensure adherence to international labour standards; and
- ◆ Provide a friendly environment for both small and big business development.

### **Rules, Codes and Guidelines**

In addition to legislation (law), labour relations in Swaziland are also covered by rules, codes and guidelines. The Industrial Relations Act enables CMAC to develop and publish rules and guidelines. The rules should deal with procedures to be followed at CMAC and the guidelines may deal with any matter referred to

in the Act. Guidelines on conciliation and arbitration have been published and CMAC is in the process of developing rules for the conduct of proceedings before it. In addition, the LAB may from time to time consider and publish codes and guidelines, such as the Code of Good Practice published as part of the Industrial Relations Act.

Rules are a form of subordinate legislation (i.e. law) and are therefore binding on decision makers (such as arbitrators) and users of procedures (such as employers and trade unions which use CMAC). Codes are descriptions of best practice, which must guide the courts and arbitrators but cannot bind them. Guidelines indicate administrative policy and should guide conciliators, arbitrators and the users of CMAC. Rules, codes and guidelines are developed through consensus between government representatives and the social partners (representatives of employees and employers) and as such should be taken into account as an expression of their collective view.

# Role Players in labour relations

## 3

### 3.1 Introduction to the role players

#### **The State and the social partners**

The labour relations arena is made up of the following role players:

- ♦ The State,
- ♦ Employees and employee organizations (such as trade unions), and
- ♦ Employers and employers organizations)

Each of these role players contributes to labour relations in different ways. The State through parliament is the lawmaker and through the Department of Labour it is the enforcer of labour laws. The State is also an employer as well as a facilitator of labour relations through dispute resolution institutions such as CMAC and the Industrial Court. Employees contribute to providing goods and services into the economy and employers provide capital and equipment to facilitate the production of goods and services into the economy. Trade unions and employers organizations represent the interests of their members. The way in which they do this is primarily through negotiation (collective bargaining) with each other. Employees and their representatives and employers and their representatives are collectively called “the social partners” in recognition that together, in partnership, they build the society.

## 3.2 The State

**Different roles** The State plays the following roles in the labour relations arena:

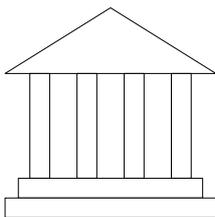
- ♦ Law maker
- ♦ Enforcer of labour laws
- ♦ Employer
- ♦ Facilitator of smooth labour relations

**Law maker** The State, through parliament is the lawmaker although as indicated earlier, all labour laws are passed through the LAB before they are presented to parliament. This makes labour law unique in that it is the product of negotiation between the state and the social partners and compromises, which are normal in a negotiation process, are often evident in the drafting on labour law.

**Enforcer of labour laws** The Department of Labour was set up to monitor, promote a humorous industrial relations climate and ensure that all labour laws are complied with. Its functions include the following:

- ♦ Formulation, implementation, monitoring and evaluating at labour market policies.
- ♦ Ensuring that there are fair conditions of work.
- ♦ Ensuring that there is a decent and safe working environment
- ♦ Regulation of industrial and vocational training.
- ♦ Empowering of citizens for job opportunities.

**Employer** The State is also an employer. The Industrial Relations Act in section 3 indicates that the Act applies to employment by or under the Government in the same way and to the same extent as if the Government were a private person. The following parts of the public service are however excluded from the Act:



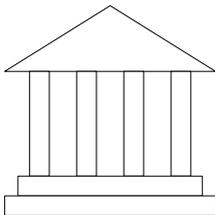
- ♦ Any person serving the Umbutfo Swaziland Defence Force established by the Umbutfo Defence Force Order, 1977,
- ♦ The Royal Swaziland Police Force; and
- ♦ His Majesty's Correctional Services established by Prison Act

No. 40 of 1964.

**Facilitator** Through the dispute resolution institutions (which are described in more detail in section 7), the State facilitates the smooth running of labour relations. These institutions are funded by the State, although in the case of CMAC and the Industrial Court, they are independent of the State. The State therefore indirectly facilitates the smooth running of labour relations by funding dispute prevention and dispute resolution institutions.

### 3.3 Employees

#### Definition of employee



An employee is defined in section 2 of the Industrial Relations Act as a person whether or not the is an employee at common law who works for pay or other remuneration under a contract of service or under any other arrangement involving control or by sustained dependence for the provision of work upon another person. This definition indicates clearly that an employee is someone who works for someone else and is under the control of the other person and dependent on the other person for work. The employee may or may not receive remuneration for working (i.e. this is not the test of whether the person is an employee or not). An employee is always a “natural” person (i.e. a flesh-and-blood human being) as opposed to a “juristic” person (i.e. a legal person such as a company).

#### Employee not the same as independent contractor

An employee is not the same as an independent contractor and the distinction is important because labour law covers employees whereas independent contractors are not (although they are covered by the law of contract). Sometimes employers and employees try and disguise their relationship as an independent contractor relationship in order to avoid the consequences of labour law. Whereas an employee is someone who works for another person and is dependent on them for work and under their

control, an independent contractor may work for another person but the contract is for a defined output or service.



For example, a company may have a contract with a cleaning service to clean the offices once a day. The relationship between the company and the cleaning service is that of a client and an independent contractor as the cleaning service is contracted to provide the specific output of clean offices once a day, the cleaning service provides its own cleaning materials to do the job, its own employees to do the job and its own supervisors to supervise that the job is done.

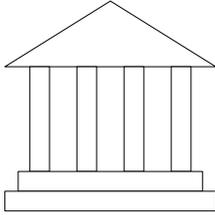
A summary of some of the main differences between employees and independent contractors is listed below:



<b>Employee</b>	<b>Independent contractor</b>
Puts his/her capacity to labour at the employer's disposal	Contracts to provide a certain output
Operates under the control and authority of the employer	Operates independently of the employer provided the output is achieved
Is told by the employer how and when the work must be done	Decides how and when the work is done
Contract of employment ends if the employee dies	Contract does not end if one of the employees of the independent contractor dies
Is usually provided with "tools of the trade" by the employer	Usually provides his/her own "tools of the trade"
Usually receives wages/salary and benefits such as leave, pension etc.	Usually is paid a fixed rate for the work
Usually has tax deducted by the employer	Is responsible for own tax liability

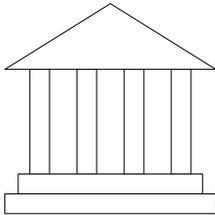
## 3.4 Trade Unions

### **Definition of a trade union**



Section 2 of the Industrial Relations Act defines a trade union as a combination of employees, the principal purpose of which is the regulation of relations between employees and employers.

### **Registration of trade unions**



Section 26 of the Industrial Relations Act requires that a trade union apply for registration within three months of having been formed. The application for registration is made to the Commissioner of Labour and should include a copy of the union's constitution. Once a trade union is registered, it becomes a body corporate in legal terms which means that it has legal standing and may conclude agreements, contracts etc.

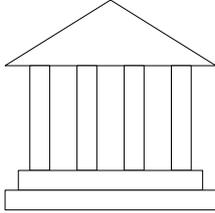
The primary responsibilities of a trade union are to represent the interests of its members. It does this through negotiation (collective bargaining) and representation of members in grievance meetings, disciplinary hearings, conciliation, and arbitration and Industrial Court proceedings. The Act prescribes what should be contained in a trade union constitution as well as the need for annual financial statements to be submitted and other measures designed to protect members.

### **Federations of trade unions**

The Act also provides for the amalgamation of trade unions and the formation of federations of trade unions.

## 3.5 Employers

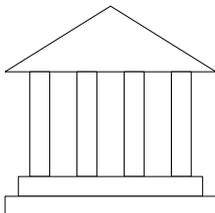
### Definition of employer



Section 2 of the Industrial Relations Act defines an employer as a person who employs another person as an employee or any person action on behalf of an employer. Unlike an employee who is a “natural” person, an employer will usually be a juristic person (except commonly in the case of domestic disputes where the employer will be a natural person). Employers who are juristic persons will often be a close corporation, a “Pty” (indicating that it is a private company) or a “Pty Ltd” (indicating that is it a public company).

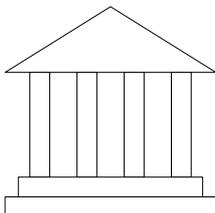
## 3.6 Employers’ Organizations/associations

### Definition of employers’ association



Section 2 of the Industrial Relations Act defines an employers’ association as an association of employers which seeks to provide collective representation for employers in the negotiation and regulation of relations between employers and employees or between employers and employers

### Registration of employers’ associations



Section 26 of the Industrial Relations Act requires that an employers’ association/organisation apply for registration within three months of having been formed. The application for registration is made to the Commissioner of Labour and should include a copy of the organisation’s constitution. Once an association/organisation is registered, it becomes a body corporate in legal terms which means that it has legal standing and may conclude agreements, contracts etc.

The primary responsibilities of an employers’ association/organisation are to represent the interests of its members. It does this through negotiation (collective bargaining)

and representation of members in conciliation, arbitration and Industrial Court proceedings. The Act prescribes what should be contained in an employers' association/organisation constitution as well as the need for annual financial statements to be submitted and other measures designed to protect members.

**Federations of Employers' associations** The Act also provides for the amalgamation of employers' associations/organisations and the formation of federations of employers' organisations.

# Individual Employment Relationships

## 4

### 4.1 The contract of employment

#### The nature of the contract

A contract of employment is a contract in terms of which an employee places his or her labour potential at the disposal of an employer, usually in exchange for some remuneration. Contracts of employment may be oral or in writing and usually contain the following elements:

- ◆ There must be two people i.e. the employee and the employer;
- ◆ There must be an agreement between the two people;
- ◆ The employee places his services at the disposal of the employer;
- ◆ For a fixed term or indefinite period of time; and
- ◆ For remuneration.

#### Different types of contract of employment



Contracts of employment may be for a fixed term or for an indefinite period. A contract of employment can either be a fixed term contract or an indefinite contract. **A fixed-term contract** is a contract in which the parties clearly define or specify the duration of the contract by linking it to a determined or determinable period, the completion of a particular task or the occurrence of a particular event. In order to prove that a fixed term contract is in existence, the parties must initially have agreed that the duration of the contract will be limited. Where the parties have indicated that the contract will terminate on the occurrence of a particular event or the completion of a task, the onus rests on the employer to prove that the event has occurred or that the task was completed.

Fixed term contracts cannot be terminated during their currency, unless the parties have otherwise agreed. If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed. The renewed contract will continue on exactly the same terms and conditions as the previous contract except that its duration may not be the same as that of the original contract.

**Indefinite period contracts** on the other hand refer to contracts in which the parties do not specify the date of termination and thus they continue to exist until terminated by agreement, by contractually stipulated notice, on fundamental breach of contract by either of the parties, on retirement at the agreed age, insolvency of the employer, state action, or the death of either party.

**Different types of employment relationship**

Employment relationships may be classified as being either permanent or temporary. In relation to both categories the main parties to the contract of employment are easily identifiable as being the employer and the employee.

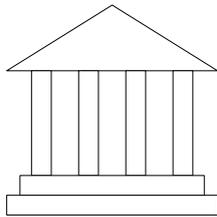
A **permanent employee** is an individual who is employed for an indefinite period of time. The employer and employee usually agree that the employment relationship will be an ongoing one. The contract continues to exist until either party giving statutory notice to the other party, or by means of dismissal terminates it. A permanent employee may either be employed on full-time or part-time basis. Part-time employment may entail, for example, an employee working in the mornings only or working on two days per week.

A **temporary employee** is usually employed for a specific period of time in order to perform a specific task. The employment

contract comes to an end once the specified period or the specified task comes to an end. Included in this category of employees are **casual employees** who are engaged on a once-off basis or on an ad hoc basis, for example a person who is engaged to help offload a truck in a construction site. **Seasonal employees** are also included in this category, for example those employees who are recruited to harvest a crop.

### **The beginning of the employment relationship**

The beginning of an employment relationship creates certain obligations that the parties must meet. In order to meet the primary objective of providing a service in return for remuneration, the parties generally need an opportunity to test one another to determine whether they can continue working with one another for a long period of time in a productive employment relationship.



It is generally accepted that an employer may subject an employee to a period of probation at the beginning of employment. Although the Employment Act does not define probation, there is some reference made to a probationary period in Section 32. Probation does not automatically form part of the employment contract. Probation must be added to the contract of employment. The contract must specifically state how long the probation will be and when will begin and when it will end.

Both employers and employees need to know what their rights and obligations are during the employee's period of probation. This will ensure that the objective of assessing the employee's suitability for continued employment is achieved in a fair manner.

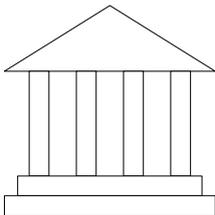
## 4.2 Probation

### **Purpose of probation**

Probation means to undergo a test or trail period. It is generally understood that the purpose of probation is to give an employer a chance to assess the employee's performance and compatibility before deciding whether or not to confirm the employee's job. During this period the employer must decide whether or not the employee is suitable for the job, whether or not she/he can perform the tasks the job requires, and whether or not this performance is satisfactory. During this period of probation, the employer also has to see whether or not the employee gets on with the other employees, and also is able to adapt and fit in at the new company.

During the probationary period the employer should assist and guide the employee so that the employee can perform his/her job properly in order to have the job confirmed.

### **Length of probation**



The Employment Act is clear on how long a probation period should be. Section 32 (2) states that "no probationary period shall except in the case of employees engaged on supervisory, technical or confidential work, extend beyond three months" This means that generally in most types of work the probationary period should not be more than three months. Section 32(3) relates to the employees who are excluded in subsection (2). This section states that "in case of employees engaged in supervisory, technical or technical work, the probation shall be fixed in writing, between the employer and employee at the time of engagement." From the foregoing it is clear that the length of probation must be reasonable and should relate to the type of work. Therefore, if a job is difficult it may take an employer a longer time to decide on the suitability of that employee.

**Assessment during probation**

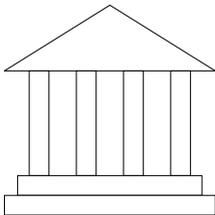
The Employment Act does not stipulate how the employer should assess the employee during the probationary period, however, the trend has been to follow case law and precedent from neighbouring countries which is as follows:

- ◆ The employer must decide on how long the period of probation will be before taking the employee on. The employer must tell the employee how long the probation will be. This should be done in writing and included in the employment contract.
- ◆ The employer should have a discussion with the employee before taking him/her on. The employer should make sure that the employee knows exactly what type of job she/he will be doing and what duties and responsibilities she/he will have. The employee should be upfront and advise the employer if she/he does not have some or all the skills necessary for the job. If the employer is aware that the employee lacks certain skills the employer should draw up a plan to assist the employee to obtain these skills. The plan must have time periods and deadlines.
- ◆ An employer should apply the same probation conditions to all new employees in the same or similar position. It would be unfair to place one employee on probation and one not.
- ◆ The employer must inform the employee how his/her performance is going to be measured. The employee should be told how often this will happen, who will do the assessment and what methods will be used to assess the employee.
- ◆ During the probation the employer must assess the employee and tell the employee whether or not she/ he is performing reasonably, and if not, what his/her weaknesses are and how she/he needs to improve.
- ◆ The employer is expected to guide the employee and give him/her training and counselling so that the employee can perform in a satisfactory manner.
- ◆ The employer cannot wait until the end of the probation to tell

the employee for the first time that she/he is not suitable for the job. This will defeat the purpose of probation, which is to assist and guide the employee during his/her probation, and to tell the employee what his/her weaknesses are during probation, so that the employee can improve.

- ♦ An employer may make the probation longer if the employer is not performing in as satisfactory manner, but is willing to try and improve if she/he is given more time.

**Dismissal  
during or at  
the end of  
probation**



The Employment Act allows for the termination of the contract of employment between the parties without notice. In terms of Section 32(1) of the act “During any period of probationary employment as stipulated in the form to be given to an employee under section 22, or in a collective agreement governing the terms and conditions of employment, either party may terminate the contract of employment between them without notice.” However we have seen the entrenchment in case law of the requirement to follow a fair and corrective/disciplinary procedure.

Listed below are some of the things that an employer should consider before dismissing an employee who is on probation:

- ♦ The employer must explain to the employee that his/her performance is not satisfactory and explain why this is so. The employee must be advised that she/he is not suitable for the job and that she/he could be dismissed.
- ♦ Before making a decision to dismiss the employee, the employer must allow the employee to make representations about his/her performance and the fact that she may be dismissed.
- ♦ A shop steward or a fellow employee can make representations on behalf of an employee.
- ♦ The employer must consider the employees representations before making a decision to dismiss the employee. The

- employer must reply to the employee in writing.
- ◆ Once the employer has made a decision to dismiss the employee the employer should advise the employee of his/her rights to refer the matter to the CMAC or a bargaining council if s/he is unhappy with the decision.
  - ◆ Any person making a decision about fairness of such dismissal ought to accept reasons that may be less compelling (less strict) than would be the case in dismissals effected after the completion of the probationary period.
  - ◆ 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
  - ◆ 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.

### 4.3 Communication

#### **The importance of communication**

Communication as a process refers to the channels and or systematic method established by the enterprise to disseminate information from management to employees i.e. downward communication, employees to management i.e. upward communication, management to management, and employees to employees i.e. sideways communication to ensure effective information dissemination within the organization. Communication is a two way process that involves the element of telling and listening.

Communication and the channels used for it in any organization are its lifeline and are essential for its survival. It is a fact that the communication methods and channels used in organisations usually determine the effectiveness of the communication between the various groups. What is important as expressed in the slogan “It is not what you say, but how you say it” Therefore if the communication between union members, employees and the employer is hostile, unfriendly and based on incorrect assumptions, it will lead to conflict and the relationship between these parties will be strained.

It is generally accepted that we spend 70% of our day communicating, and of this 45% is spent listening and that people normally have 25% efficiency when listening. It is therefore not surprising that something like 50% of all communication normally fails.

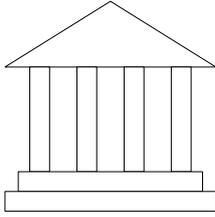
**Advantages of  
good  
communication**

There are a number of advantages of effective communication.

These include;

- ◆ Commitment to the job is improved: the provision of information helps to build trust and motivate workers.
- ◆ The damaging effect of distorted information carried by the “grapevine” which is inevitable in informal communication, is reduced. Regular formal communication serves to reduce such distortion since employees come to expect an official version instead of giving credence to rumours.
- ◆ Misunderstanding between management and employees which may be present as a result of differing perceptions and attitudes, can be reduced.
- ◆ There is feedback, that is, communicating information always elicits a response from the receiver.

## The Code of Good Practice



The Code of Practice (Section 109) of the Industrial Relations Act also emphasises the importance of communication and consultation between the parties. The code states in S20-24 that;

- ◆ Management, employee representatives and organisations share a responsibility for ensuring that there is effective communication and consultation in all establishments. Communication and consultation are essential at any time, but they are particularly important in times of change. For example major changes in working conditions should not take place without prior discussion between management and employees or their representatives.
- ◆ Effective arrangements should be introduced to ensure a flow of information between management and employees. Personal contact between each manager or supervisor and the working group they control should be supplemented, where practicable, by written information e.g. on notice boards or by training courses and meetings. Employees should be regularly informed about the performance of the undertaking and organizational or managerial changes which affect them.
- ◆ Management should ensure that managers and supervisors know that it is an important part of their duties to explain management policies and convey work instructions clearly and that they have the requisite information to do so. Opportunities should be provided for employees to discuss matters affecting their employment and management should ensure that they are kept informed of these discussions.
- ◆ Every employee should be given information about the requirements of his job and to whom he is directly responsible, disciplinary procedures and the circumstances which can lead to suspension and dismissal, any arrangements which exist relative to an employee organisation, opportunities for promotion and necessary training to achieve promotion, social and welfare facilities and fire prevention, safety and health

rules.

- ◆ Employee representatives and employee organisations should ensure that they have the means of communicating effectively with those they represent, whilst at the same time, recognising that management has a responsibility for communicating directly with the employees. All parties should co-operate in keeping employees informed of the results of any negotiations or consultations affecting them.

**Briefing Groups** The Briefing Group System enjoys wide acceptance as an effective method of communicating relevant information and vice versa. A brief refers to a written document that contains relevant information to be discussed by the department head or supervisor verbally with employees in their respective work groups.

# Workplace discipline and dismissal

## 5

### 5.1 Introduction to workplace discipline and dismissal

#### **The origin of workplace discipline**

Workplace discipline is a difficult and contentious issue! The employee's duty to obey lies in the heart of the employment relationship. The employer on the other hand has a right to maintain discipline in the workplace. The function of discipline is to make sure that employees contribute effectively and efficiently to the goals of the common enterprise.

If one of the parties does not carry out his/her duties in terms of the employment contract that party is said to be in breach of the contract. The breach in contract may result in the employee taking legal action against an employer or the employer taking disciplinary action against the employee, which could result in the employee being dismissed.

It is essential for both employers and employees to be fully conversant with all aspects of the disciplinary process and the legal requirements and rights involved.

#### **Workplace rules and standards**

The starting point for all disciplinary action is rules. These rules may be implied or explicit and will vary from workplace to workplace. Some rules are so obvious that they are implied in the contract of employment (e.g. the rule against stealing from the employer), however it is advisable that even in the case of implied rules, they be included in the rule book or disciplinary code.

In an organised workplace an employer should ideally negotiate workplace rules with a recognized trade union. Recognition agreements with trade unions often include disciplinary procedures and codes. Once a collective agreement has been reached the employer is bound by the agreement unless the agreement is changed or terminated in accordance with the law. Contracts of employment should refer to the rules and disciplinary procedures of the organization and bind employees to them in this manner.



Workplace rules should be reasonable. Grogan<sup>2</sup>suggests the following checklist for determining whether a rule is reasonable or not:

- ◆ Did the employer have the authority to make the rule in terms of the employment contract?
- ◆ Does the rule comply with the applicable statutes or regulations?
- ◆ Is the rule reasonably required for the efficient, orderly and safe conduct of the employer's business?
- ◆ Was the existence of the rule known to the employee, or could/should the employee reasonably have been expected to know of its existence?
- ◆ Has the rule been consistently applied in similar cases in the past?

Workplace standards refer to the standards of performance that an employer expects of an employee. An employer should make these standards known to the employee either verbally or in writing in the form of a job description or performance charter or performance agreement. An employer may not discipline an employee for poor performance unless the employee is aware of the standards of work required of him/her and these standards are reasonable.

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<sup>2</sup> Workplace Law Juta 2003 94

## 5.2 Dismissal

### Reasons for dismissal



Dismissal is the termination of a contract of employment by the employer. An employer may only lawfully terminate an employee's contract if the employer has a fair reason for the dismissal which relates to:

- ◆ Misconduct,
- ◆ Incapacity, or
- ◆ Operational requirements

*and* if the employer follows a fair procedure.

**Misconduct** is a breach of a job requirement (by the employee), with blame (i.e. the employee's actions are blameworthy).

**Incapacity** may be as a result of **poor performance** in which case the employee cannot meet the job requirements due to the employee's lack of capacity but there is no blame attached to the employee. Incapacity may alternatively be as a result of an **injury or illness** which the employee has sustained in which case the employee cannot meet the job requirements due to the injury or illness, again through no fault of the employee's.

**Operational requirements** are the needs of the business which may be economic, technological, structural or similar needs and result in there being no longer a job for the employee through no fault of the employee's.

The type of procedure will differ depending on the reason for the dismissal:

Reason for termination/dismissal	Procedure to be followed
Misconduct	Disciplinary procedure

Poor performance	Disciplinary procedure (unless the employer has a specific poor performance procedure)
Ill health or injury	Incapacity procedure
Operational requirements	Retrenchment procedure

**Fairness in cases of dismissal**

Dismissals should be both procedurally and substantively fair. Procedural fairness refers to the pre-dismissal procedures that were followed. Substantive fairness refers to whether the sanction of dismissal was appropriate in the circumstances (i.e. did the “punishment fit the crime”). The elements of procedural and substantive fairness in cases of misconduct and poor performance will be dealt with in more detail in 5.4 below.

**Constructive dismissal**

A constructive dismissal is identified in Section 37 of the Employment Act as a situation “when the conduct of an employer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves his employment, whether with or without notice, then the services of the employee shall be deemed to have been unfairly terminated by his employer.” In other words, constructive dismissal is a resignation by the employee because the employer made continued employment intolerable.

Hence, when undue pressure is exerted by an employer on an employee to resign, or the employer renders the relationship so unbearable that the employee has no alternative but to resign, the termination of the contract is viewed as a termination by the employer because the employee’s act of resigning is precipitated by the employer’s unjustified conduct.

The employee has the onus (duty) to establish the existence of a dismissal. The employee further has the task of proving that the employer’s conduct was intolerable. But as the Labour Court pointed out in *SmithKline Beecham (Pty) Ltd v CMAC and others (2000) 9*

LC 6.13.1, having established that the employer's conduct was intolerable does not mean that an employee can automatically claim unfair dismissal. Employers may have reasons, possibly for circumstances beyond their control, which cause them to act in such a way. Their actions may not necessarily be unfair or unlawful. The onus then shifts to the employer to prove that its conduct was neither unfair nor unlawful.

There are many instances where a resignation may constitute a constructive dismissal. Briefly, however, examples are:

- ◆ A blatant breach of the employment contract, i.e. failure to pay salary;
- ◆ Removal of duties unilaterally;
- ◆ Removal of equipment required to do the job;
- ◆ Physical assault;
- ◆ Sexual harassment.

It is important that all internal procedures to air grievances must be followed, and that the employee has made every attempt to alert the employer to the problems and does not just walk out. However, in specific circumstances this may not be possible and this would be taken in to account in dealing with the matter.

### Testing for constructive dismissal



Our law does not prescribe any tests but the practice in the region has been to use the tests suggested by John Grogan, a senior commissioner with the CCMA. In the case *CWIU obo Marele and Glass Centre obo Rudy* (1999) 8 CMAC 6.13.15, Grogan observes that the following factors should be considered:

- ◆ Did the employee intend to bring an end to the employment relationship? (*Jooster v Transnet Ltd t/a SA Airways*(1995) 16 ILJ 629 (LAC) at 638 A-B)
- ◆ Had the working relationship become so unbearable, objectively speaking, that the employer could not fulfil his/her obligation to work? (*Pretoria Society for the Care of the Retarded v Loots*

(1997) BLLR 721 LAC)

- ◆ Did the employer create the intolerable situation?
- ◆ Was the unbearable situation likely to endure for a period that justified termination of the relationship by the employer?
- ◆ Was the termination of the employment contract the only reasonable option to open to the employee in the circumstances?

### 5.3 Disciplinary procedures and sanctions

#### **Disciplinary procedures**

Discipline should be progressive, unless the misconduct is serious in which case dismissal may be considered even for a first offence. Most disciplinary procedures provide for various forms of warnings ranging from verbal warnings to final written warnings. In addition, some procedures may provide for sanctions such as suspension without pay (not to be confused with suspension with pay prior to a disciplinary hearing which is not a disciplinary sanction) and demotion (which is most appropriate in cases of poor performance and can only be instituted with the employee's agreement). Prior to any disciplinary action being taken, the employer should always investigate the situation and provide the employee with an opportunity to state his/her case.

Disciplinary action short of dismissal may be the subject of a dispute in terms of the Industrial Relations Act. Such disputes should usually begin internally as a grievance or an appeal (depending on the procedure set out in the organisation's disciplinary Code for dealing with appeals against disciplinary sanctions.)

#### **Disciplinary sanctions**

Disciplinary penalties ought to be applied progressively (i.e. lighter sanction for first offences and graver sanctions for repetitions). The following are sanctions that can be meted on an employee who is



found guilty of misconduct.

- ◆ **Oral/verbal Warning:** This is given to an individual employee as the first stage of discipline. Its purpose is to advise employees of their defective conduct or performance, to remind them of the existence of the rule which they may have overlooked and let them know that they have placed a foot on the lowest rung of the ladder of the disciplinary process. No record of this warning need be kept on the employee's personal file however the supervisor should note that a verbal warning was given in order to ensure that if the misconduct is repeated, progressive discipline is followed. Oral/verbal warnings generally last six months.
- ◆ **Written warning:** This is a more formal act than the oral/verbal warning. It serves to enable the employer to prove that the warning was given if subsequent disciplinary action proves necessary against the employee. Issuing a written warning should be preceded by an informal inquiry during which the employee concerned should be allowed to state his case. Written warnings should be placed on an employee's file. In the event that an employee refuses to sign acknowledgement of the written warning, a witness can sign that the employee received the warning. Written warnings generally last six months.
- ◆ **Final written warning:** This is the last warning that an employee can expect to get before dismissal. Its purpose is to give the employee a last chance to correct his/her behaviour. Generally a final written warning should only be given after a formal hearing in which the employee has had an opportunity to state his/her case. Final written warnings generally last between six months and one year.
- ◆ **Suspension:** Suspension without pay is another penalty that an employer can mete out to an employee. This should be reserved for serious cases in which dismissal would have been appropriate but for mitigating circumstances.

- ♦ **Demotion:** An employer who wishes to demote an employee can only do so if it is offered as an alternative to termination of employment for a just cause and after appropriation action. The employee should agree to the demotion as without this agreement, demotion is a unilateral change to the employee's terms and conditions of employment, which is unlawful. Demotion is generally only appropriate in cases of poor performance.
- ♦ **Dismissal:** This is considered to be the most severe disciplinary penalty that can be lawfully imposed by an employer on an employee. Dismissal should be preceded by a formal disciplinary hearing/enquiry in which an employee is given an opportunity to have his/her say.

## 5.4 Disciplinary hearings/enquiries

### Procedural fairness in cases of misconduct



Procedural fairness in cases of misconduct requires the following:

- ♦ An inquiry (investigation) by the employer to determine whether there are grounds for charging the employee.
- ♦ The employer must advise the employee in advance of the charge/s that he/ she is to answer at the hearing so that the employee can adequately prepare. At least 48 hours notice would generally be a fair period to prepare unless the case is highly complex and technical.
- ♦ The employer must advise the employee in advance about his right to representation by a shop steward or fellow employee. Legal representation is not generally allowed in a disciplinary hearing.
- ♦ The charges must be clearly spelt out and fully explained to the employee in a language which he/she can understand
- ♦ The employee should be given sufficient information about the

charges to enable the employee to prepare a defence.

- ◆ A person who is impartial should chair the hearing.
- ◆ The employee must be given ample opportunity to present his/her case in rebuttal of the charge/s preferred against him/her and to challenge the assertions of his/her accusers. This includes cross examining witnesses brought by the employer and examining any documents relied upon by the employer.
- ◆ The employee must be present at the hearing.
- ◆ The employee should be allowed to lead evidence in mitigation and this should be considered by the chairperson
- ◆ The employee should be told of the finding of the enquiry and the sanction imposed (preferably in writing)
- ◆ The employee should be informed of his/her right to refer a dispute alleging unfair dismissal to CMAC
- ◆ In the event that the disciplinary procedure requires an appeal hearing, the employee should be given an appeal.

### **Substantive fairness in cases of misconduct**

Substantive fairness in cases of misconduct requires the following:

- ◆ **Evidence that the employee broke a rule regulating conduct in the workplace;**

What the employer has to prove under this heading is that there is a rule in the company, which prohibits particular conduct and that this rule was broken by the employee. The rule may be contained in an employee's contract of employment or in a disciplinary code.

- ◆ **Evidence that the employee was aware of or could reasonably be expected to be aware of the rule;**

What the employer has to prove under this heading is that the employee was aware that he/she was doing something wrong and that disciplinary action would follow. Thus, an employer would have to produce proof that the employee was aware:

- ◆ of the terms of the contract (if the rule is contained in the contract); or
- ◆ of the employer's disciplinary code (by testifying that the



employee had attended an induction course or by showing that the disciplinary code was drawn to the employee's attention in some other way).

If the employee admits knowledge of the rule then evidence of this knowledge would not be necessary. Similarly, the rule may be so obvious that its very nature suggests that the employee was aware of it (e.g. the rule against coming to work under the influence of alcohol).

- ◆ **Evidence that the rule was valid or reasonable;**

All of an employer's rules must be lawful. If the rules are unlawful (for example, a rule which prohibits employees joining a trade union), an employee can disobey the rule and will be protected if the employer takes disciplinary action as a result. An employer's rules must also be reasonable – they must make business sense and be directly related to the efficient operation of the business. If the employee admits that the rule is valid/reasonable then evidence of this would not be necessary.

- ◆ **Evidence that the employer has been consistent in applying the rule;**

The employer must show that the rule has been consistently applied. This means that all employees involved in the same incident are treated consistently and employees involved in similar incidents historically are treated consistently.

- ◆ **Evidence that dismissal was the appropriate sanction;**

If the employer decides to dismiss the employee as a result of misconduct, the employer would need to show that dismissal was appropriate in the circumstances. Factors which would influence this include: whether the employee had previous warnings for the same offence, the seriousness of the offence, a consideration of the aggravating and mitigating factors etc.

**The burden of proof and the standard of proof**



Disciplinary hearings are not criminal courts. They have been described as “domestic tribunals”<sup>3</sup>. As such, a disciplinary hearing does not have the powers of a court (e.g. to subpoena witnesses and swear witnesses in). In addition, the allegations presented in a disciplinary hearing are not generally criminal charges and the “prosecutor” is not the State, but the employer. For these reasons, the standard of proof in a disciplinary hearing (and an arbitration), is a balance of probabilities. This means that the party who bears the burden of proving a point, has to do so on a “balance of probabilities” rather than “beyond reasonable doubt” as would be the case in a criminal court. The employer bears the burden of proving that an employee has committed the misconduct as charged (i.e. the burden of proof lies with the employer).

**Stages in a disciplinary hearing/ Enquiry**



The typical stages in a disciplinary hearing are as follows:

<p><b>Opening the hearing</b></p>	<ul style="list-style-type: none"> <li>◆ The Chairperson introduces himself/herself and establishes who the parties are and who their representatives are.</li> <li>◆ The Chairperson finds out whether or not an interpreter is needed for the employee or witnesses.</li> <li>◆ The Chairperson advises the employee of his/her rights during the hearing and finds out if the employee has had enough time to prepare, understands the charge and has consulted with his/her representative</li> <li>◆ The Chairperson explains how the hearing will be run.</li> </ul>
<p><b>The employee is asked to plead</b></p>	<ul style="list-style-type: none"> <li>◆ The charge is put to the employee and the employee is asked to plead guilty or not guilty.</li> <li>◆ If the employee pleads guilty the hearing will move directly to argument in mitigation or aggravation without listening to evidence.</li> <li>◆ If the employee pleads not guilty the employer will have to prove the employee’s guilt.</li> </ul>
<p><b>Opening statements</b></p>	<ul style="list-style-type: none"> <li>◆ Both parties give the Chairperson a brief outline of their cases and the witnesses they</li> </ul>

<sup>3</sup> (Mhlambi v Matjhabeng Municipality & Another (2003) 24 ILJ 1659 (O) (1998/2002 at 1664)

	<p>will be calling.</p> <ul style="list-style-type: none"> <li>◆ The initiator (the employer) begins first.</li> </ul>
<b>Employer's case</b>	<ul style="list-style-type: none"> <li>◆ The employer will call its witnesses one at a time.</li> <li>◆ The witnesses will answer questions put to them by the initiator.</li> <li>◆ The employee or his/her representative will cross-examine the employer's witnesses.</li> <li>◆ The initiator will clarify certain issues with his witnesses that were raised during cross-examination (re-examination).</li> <li>◆ The Chairperson may ask questions at any time.</li> <li>◆ After all the employer's witnesses are called the employer's case is closed.</li> </ul>
<b>Employee's case</b>	<ul style="list-style-type: none"> <li>◆ The employee or his/her representative will call his/her witnesses one at a time.</li> <li>◆ The witnesses will answer questions put to them by the employee and his/her representative.</li> <li>◆ The initiator will cross-examine the employee's witnesses.</li> <li>◆ The employee and/or his/her representative will clarify certain issues with his/her witnesses that were raised during cross-examination (re-examination).</li> <li>◆ The Chairperson may ask questions at any time.</li> <li>◆ After all the employee's witnesses are called the employee's case is closed.</li> </ul>
<b>Closing statements</b>	<ul style="list-style-type: none"> <li>◆ Both parties will summarise their cases and try to convince the Chairperson why she/he should find in their favour.</li> <li>◆ The initiator will begin first.</li> </ul>
<b>Adjournment to make a finding</b>	<ul style="list-style-type: none"> <li>◆ The Chairperson will adjourn the hearing to decide on the guilt or innocence of the employee.</li> </ul>
<b>Argument in mitigation and aggravation</b>	<ul style="list-style-type: none"> <li>◆ The Chairperson will reconvene the hearing and tell the employee of his/her findings.</li> <li>◆ If the Chairperson finds the employee guilty she/he will ask the employee to provide mitigating circumstances. This means that the employee must provide the Chairperson with facts and arguments (like his/her personal circumstances and his/her length of service or a good disciplinary record) to convince the Chairperson to be lenient and not to impose a penalty or impose a lighter penalty.</li> </ul>

	<ul style="list-style-type: none"> <li>◆ The initiator must provide aggravating circumstances, (e.g. if the employee has been dismissed for theft the employer can no longer trust the employee and the relationship is damaged), and convince the Chairperson to impose a particular penalty.</li> </ul>
<b>Sanction and closing</b>	<ul style="list-style-type: none"> <li>◆ The Chairperson will deliver the sanction having considered the arguments in mitigation and aggravation.</li> <li>◆ If the sanction is dismissal, the Chairperson should advise the employee of his/her right to appeal (if there is an appeal procedure) and of his/her right to refer the case to CMAC if it is disputed</li> </ul>

**Evidence** The rules of natural justice are fundamental to all disciplinary hearings. This means that:

- ◆ A person is innocent until proven guilty.
- ◆ The person hearing the case should not have a vested interest in the outcome (no person may his/her own case).
- ◆ The accused must be given a proper opportunity to state his/her case and submit pertinent evidence.
- ◆ Evidence is used to either prove or disprove issues in dispute, and as such comprises facts, which either support or do not support the issues in dispute. Evidence must be relevant in order to be admissible. This means that it must be reliable and necessary to prove the facts in dispute. Evidence must therefore be relevant, admissible and reliable.
- ◆ Evidence is made up of relevant facts and inferences that can be drawn from facts, which either prove or disprove a disputed issue.
- ◆ The Chairperson of a disciplinary hearing can only consider facts if they are supported by evidence.
- ◆ Evidence need not only be oral evidence from a witness but may also be documentary, photographic, video evidence etc.

The most important considerations for Chairpersons of disciplinary hearings with regard to evidence are:

- ◆ Is the evidence relevant?

- ◆ Is the evidence admissible?
- ◆ Is the evidence reliable?
- ◆ Is the evidence direct or indirect evidence?
- ◆ How much weight (if any) can be attached to the evidence submitted?

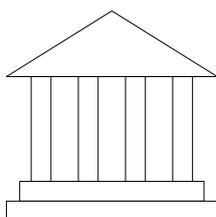
The rules of evidence that are used in disciplinary hearings (and arbitrations) are not as rigorous as those in a criminal court. For example, hearsay evidence may be admitted but the chairperson will need to decide how much weight to attach to this evidence and it will not carry much weight as it is a form of indirect evidence.

## 5.5 Dealing with poor performance

### Procedural fairness in cases of poor performance



Poor performance concerns the inability of an employee to perform and can arise as a result of an employee not having enough or any training, or that she/he has to use poor machinery or tools. Unlike dismissal for misconduct wherein the employee is accountable for his/ her actions, this type of dismissal is known as a “**no fault dismissal**”. This is because it arises from circumstances for which the employee is not to blame. With poor performance the intention of the employer should be to help the employee improve his/her performance. This is done by speaking to the employee to find out what the employee’s weaknesses are and to assist in overcoming these problems. If the employee fails to improve despite counselling and training the employer may then hold a poor performance hearing.



Dismissal for poor work performance is one ground that is recognized by our law for lawfully dismissing an employee. Section 36 (a) of the Employment Act provides that it shall be fair for an employer to terminate the services of an employee “because the conduct or work performance of the employee has, after written

warning been such that the employer cannot be reasonably be expected to continue to employ him”.

A dismissal for poor work performance must also be both procedurally and substantively fair. For procedural fairness the assessment, advice, guidance and ultimately warning are an integral part. This means that prior to dismissing an employee for poor performance the employer should hold an investigation to establish the reasons for the unsatisfactory performance by the employee. An employer should consider other options besides dismissal to remedy the matter. The employees should have the right to be assisted by a fellow employee or a trade union representative in this process.

**Substantive  
fairness in  
cases of  
poor  
performance**

Substance fairness involves the employer proving poor work performance on the part of the employee and proving that dismissal was an appropriate sanction in the circumstances. In determining whether a dismissal for poor work performance is substantively fair, the following needs to be considered:

- ◆ Whether the employee failed to meet a performance standard;
- ◆ Whether the employee was aware or could reasonably have been expected to be aware of the required performance standard;
- ◆ Whether the employee was given a fair opportunity to meet the performance standard;
- ◆ Whether dismissal is an appropriate sanction for not meeting the required standard.



**5.6 Dealing with ill health or injury**



An employee may be unable to work due to ill health or injury. If the ill health or injury is temporary the employer should investigate its extent and nature, the time of absence from work, and look at other alternatives for the employee such as securing a temporary replacement for the injured person.

In cases of permanent disability, the employer should ascertain the possibility of securing alternative employment or adapting the duties or work circumstances of the employee to accommodate his/her disability. The duty of the employer to accommodate incapacity is greater if the employee is injured at the workplace or incapacitated by a work-related illness.

There are four main things that an employer has to consider before considering dismissal under these circumstances. These are;

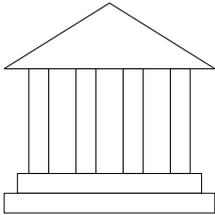
- ◆ Is the employee capable of doing the work?
- ◆ If the employee is not capable, what part of the work can he/she do?
- ◆ How can the work circumstances be adapted to accommodate the disability, or how can the employee's duties be adapted?
- ◆ Is there any other work available for the employee to do?
- ◆ Employers should discuss and determine the extent of an employee's incapacity with him/her and the employee is entitled to representation from a fellow employee or shop steward during these discussions. The employer may seek the opinion of a doctor. This would require the employee's consent.

## 5.7 Dealing with retrenchments

### **What is retrenchment/Redundancy?**

Apart from dismissal of an employee for misconduct or for incapacity, an employer may dismiss employees for reasons based

on the employer's operational requirements or redundancy. It normally takes the form of retrenchment. The Employment Act of 1980 as amended also recognizes this type of dismissal. In terms of Section 36(1) (j) "It shall be fair for an employer to terminate the services of an employee because the employee is redundant."



The Employment Act of 1980 as amended defines a redundant employee as "an employee whose contract of employee has been terminated:

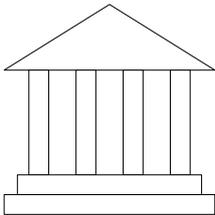
- ◆ Because the employer has ceased or intends to cease to carry on the business or activity in which the employee was employed; or
- ◆ Because the employer has ceased or intends to cease to carry on business in or at the place in which the employee was employed; or
- ◆ Because of any of the following reasons connected with the operation of the business;
  - Modernisation, mechanisation, or any other change in the method of production which reduces the number of employees necessary;
  - The closure of any part or department of business
  - Marketing of financial difficulties
  - Alteration in products or production methods necessitating different skills on the part of employees
  - Lack of orders or shortage of materials
  - Scarcity of means of production
  - Contraction in the volume of business
- ◆ Because of a natural disaster if the termination is wholly or mainly attributable to the destruction of, or damage caused to, the employers place of business by fire, hurricane, earthquake or other act of God, whether or not similar to any of the foregoing causes

Restructuring of a business, for whatever reason, can be a

traumatic experience for employers and employees alike. When employees lose their jobs through no fault of their own, it is not only they that are affected, but 'the survivors' as well. The cost to employers in retrenching staff can also be significant.

While the law accepts that employers have right to retrench employees, the law places certain checks and balances on both the employer's reason to retrench and the way in which it goes about the retrenchment to ensure that employees get as fair a deal as possible

**Procedural  
fairness in  
cases of  
retrenchment**



Section 40(2) of Employment Act 1980 outlines the procedure that has to be followed when an employer intends to retrench. It states that " where an employer contemplates terminating the contracts of employment of five or more of his employees for reasons of redundancy, he shall give not less than one month's notice thereof in writing to the Labour Commissioner and to the organisation (if any) with which he is a party to a collective agreement and such notice shall include the following information:

- ◆ The number of employees likely to become redundant
- ◆ The occupation and remuneration of the employees affected
- ◆ The reasons for the redundancies
- ◆ The date when the redundancies are likely to take effect

This section has been amended by section 6 of the Employment Amendment Act of 1997. As a result the information to be submitted to the Commissioner of labour must also include the following;

- ◆ The latest financial statements and audited accounts of the undertaking
- ◆ What other options have been looked into to avert or minimize the redundancy

**Consultation** If there is a need to retrench it is important that the employer first consult with a workplace forum if one exists and at the same time



the majority registered trade union. If there is no workplace forum, the employer must consult with a registered trade union representing the majority of employees who may be affected by a proposed retrenchment. If there is no such trade union at the workplace, the employer must consult directly with the employees who are likely to be affected or with their representatives specially nominated for this purpose.

For the process to be meaningful it must be a joint exercise where both parties consult in good faith. The employer should not have made up its mind to dismiss employees prior to the consultations. The employer must keep an open mind in respect of any suggestions the union/employee consulting party makes to avoid or reduce the number of retrenchments. The parties must exchange ideas, information as well as explore every option to avoid retrenchments.

The purpose of the consultations is for the parties to reach agreement on the following appropriate measures:

- ◆ To avoid dismissals;
- ◆ To keep the number of employees to be retrenched as low as possible;
- ◆ To time the dismissals to suit the employees, i.e. not just before Christmas;
- ◆ To provide ways to assist those employees who are to be retrenched.
- ◆ In addition, the parties should try reaching agreement on a fair method to be used to select which employees are to be retrenched, for example LIFO (Last In, First Out) and the severance pay the employer is proposing to pay employees.

# Collective Employment Relationships

## 6

### 6.1 Trade union recognition

#### Acquiring recognition



Once a trade union has been registered by the Commissioner of Labour, it may apply in writing to an employer to be recognised as the representative of its members in respect of matters concerning terms and conditions of employment. A copy of this application should be given to the Commissioner of Labour.

On receiving this application, the employer is obliged to respond to the union within 21 days and to copy this response to CMAC. The employer is obliged to recognise the union if fifty per cent of the employees that the union is seeking to represent, are fully paid up members of the union. A stop order form signed by the employee is proof of membership. If the union represents less than fifty per cent of the employees which the union is seeking to represent then the employer may recognise the union at its discretion.

Recognition of a union usually results in a recognition agreement, which contains the rights and duties of the employer and the union in respect of their relationship. It may contain grievance and disciplinary procedures and should also provide for the election, functions and time off for training of shop stewards, the deduction of stop orders, disclosure of information and access to union officials.

If the employer does not respond to the union within 21 days, or the employer refuses to recognise the union, the union may lodge a dispute with CMAC. Such disputes will initially be referred to

conciliation and if this fails to resolve the dispute, they will be resolved through arbitration.

**Withdrawal of recognition**

If a trade union's members drop below fifty per cent or if the union materially breaches its obligations under a recognition agreement or any award made by an arbitrator, the employer may apply to the Industrial Court to withdraw recognition and the Court shall make any appropriate order

**6.2 Collective bargaining**

**What is collective bargaining?**

Collective bargaining is a process of negotiation, which takes place between representatives of an employer or an employers' organisation and trade union(s) representatives over terms and conditions of employment and other matters of mutual interest between them.

**Duty to bargain**



Section 42(5) of the Industrial Relations Act indicates that an employer is obliged to recognize a registered trade union (or staff association) which has fifty per cent of the employees it seeks to represent as members. Section 42(1) indicates that recognition involves being the representative of these employees concerning all terms and conditions of employment including wages and hours of work. This means that once a trade union is recognized it is entitled to negotiate with the employer over terms and conditions of employment and the employer is obliged to negotiate with it.

## 6.3 Strikes and lock outs

### What is a strike?

A strike is the complete or partial stopping or slowing down of work when this is done by more than one employee acting together in order to put pressure on their employer to give in to or change or give up a demand concerned with the employer relationship. Employees are not entitled to be paid while they are on strike.

### What is a lock out?

A lock out is the complete or partial refusal by an employer or a group of employer to allow their employees to work in order to put pressure on their employees to give in to or change or give up a demand concerned with the employer relationship. The employer is not obliged to pay employees if they have been legally locked out.

### Legal and illegal strikes and lock outs



Strikes and lockouts may be legal or illegal. Legal strikes and lock outs are protected by the Industrial Relations Act in that employees and employers who engage in them do not breach the contract of employment and are not therefore liable in this respect. In addition, an employer may not dismiss employees on a legal strike because they are on strike. If employees commit misconduct during the legal strike (e.g. damage to the employer's property), this misconduct may be dealt with in the normal way (i.e. disciplinary action which could include dismissal). An employer is also not prevented from retrenching employees on a legal strike provided the procedures for retrenchment are complied with.

### Requirements for a legal strike

A strike will be legal if:

- ◆ An attempt has been made to resolve the dispute through conciliation at CMAC and a certificate has been issued by the conciliator indicating that the dispute remains unresolved,
- ◆ The dispute does not relate to the application of existing terms and conditions of employment, dismissal, reinstatement or re-engagement (i.e. most legal strikes relate to wages for the



following year),

- ◆ The dispute has not been referred to arbitration,
- ◆ The parties are not engaged in an essential service,
- ◆ The union has given written notice to the employer, the Commissioner of Labour and CMAC that its members intend to strike and CMAC has within seven (7) days of this notice arranged and supervised a secret ballot for union members,
- ◆ A majority of those members balloted have voted in favour of the strike, and
- ◆ Written notice of the strike has been given by the union to the employer, the Commissioner of Labour and CMAC at least 48 hours before the strike begins.

# Dispute Resolution Institutions

## 7

### 7.1 CMAC

#### Powers and functions



The primary institution, which exists for the resolution of labour disputes in Swaziland, is the Conciliation, Mediation and Arbitration Commission (CMAC), which was established in terms of Section 62 of the Industrial Relations Act and launched in October 2001. In terms of Section 64(1)(b) of the Act, CMAC is required to attempt to conciliate any dispute referred to it in terms of the Act. In terms of Section 64(1)(c), CMAC is required to arbitrate a dispute referred to it if the dispute remains unresolved after conciliation and if one of the following circumstances exist:

- ◆ the Act requires arbitration,
- ◆ the Act permits arbitration and both parties to the dispute have requested that the dispute be resolved through arbitration, or
- ◆ the parties to the dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of CMAC.

In addition to these existing provisions for arbitration at CMAC, the amendment to Section 8 of the Act makes provision for the President of the Industrial Court to be empowered to direct that any dispute referred to the Court in terms of any Act, be determined by arbitration under the auspices of CMAC instead.

Theoretically, unless otherwise indicated, all disputes defined in the Act, should be referred to CMAC initially for conciliation, prior

to referral to the Industrial Court or industrial action. However, the Act does not explicitly require disputes to be referred to CMAC first, although the rules of the Industrial Court do require cases to be referred to CMAC first. It may still be possible under common law to refer some labour disputes (e.g.: unfair termination) to the High Court instead of to CMAC.

## 7.2 The Industrial Court

**Powers and functions** The Industrial Court is established in terms of the Industrial Relations Act and in terms of Section 8(1) has exclusive jurisdiction

“to hear, determine and grant any appropriate relief in respect of any application, claim or complaint or infringement of any of the provisions of (the Industrial Relations Act), the Employment Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employers’ association and a trade union, or staff association or between an employees’ association, a trade union, a staff association, a federation and a member thereof.”

As indicated above, unless specifically indicated in the legislation, disputes referred to the Industrial Court should have first been referred to CMAC for conciliation.

### 7.3 The Industrial Court of Appeal

**Powers and functions**

The Industrial Court of Appeal is also established in terms of the Industrial Relations Act. It has the power to hear appeals on question of law from the Industrial Court (Section 19(1)). The amendments to the Act seek to extend this right of appeal on questions of law to arbitrations conducted under the auspices of CMAC when ordered by the President of the Industrial Court. In addition, the amendments indicate that appeals against decisions of the High Court, in respect of reviews of decisions of the Industrial Court or arbitrators, should lie to the Industrial Court of Appeals.

### 7.4 The High Court

**Role in labour dispute resolution**

This is the highest Court in the Industrial Relations arena. It has the same powers and functions of the Court of Appeal but only deals with appeals from the Industrial Court. It consists of three judges namely the judge President and two Justices of Appeal. The decision of the majority of the judges hearing an appeal become the decision of the court and it is final. The decision of the Industrial Court of Appeal is binding on the Industrial Court.

### 7.5 The Commissioner of Labour

**Role in labour dispute resolution**

With regard to dispute resolution, the previous role of the Commissioner of Labour was essentially to “screen” disputes. The amendments to the Industrial Relations Act essentially transfer the current powers of the Commissioner of Labour in respect of disputes,

to CMAC. In other words, disputes are referred directly to CMAC by the parties, rather than first to the Commissioner. CMAC will then have the power to request further particulars, refer the dispute back to internal procedures or reject it on the basis that it is frivolous, vexatious or time wasting. The amendments also extend the time frame for the referral of a dispute from six months maximum to a maximum of eighteen months and the provision for condonation of a late application is eliminated in the Act although it is still referred to in the Arbitration Guidelines.

Section 82 gives the Commissioner of Labour proactive powers to intervene in a dispute, which has not yet been referred. The amendments to this section retain the proactive nature of the section in the hands of the Commissioner of Labour and extend the options, which the Commissioner has to resolve the dispute, including the appointment of a commissioner from CMAC to attempt to resolve or prevent the dispute through conciliation. Under the amendments the Commissioner may intervene before the dispute is reported if the Commissioner is satisfied that the dispute may have serious implications for employers, employees and the economy if it is not resolved quickly.

# Dispute Resolution Processes

## 8

### 8.1 Conciliation

#### What is conciliation?



In broad terms, **conciliation** is a process in which a person independent of the parties attempts to assist them to resolve the dispute. The Act gives the conciliator the power to determine how the conciliation will be conducted. The conciliator may do this by mediating the dispute, conducting a fact finding exercise or making recommendations to the parties, which may be in the form of an advisory award. **Mediation** is a process in which a conciliator meets with the parties to a dispute, either together or separately, and through discussion attempts to help the parties settle their dispute on terms acceptable to them.

**Fact-finding** is a process in which a conciliator attempts to assist parties in determining certain facts in order to assist them in settling the dispute. Fact-finding is useful where parties' views on certain facts differ, and this is preventing the resolution of a dispute. The conciliator's fact-finding attempts are not binding on the parties, unless they agree to be bound. They have persuasive power, giving the parties an independent person's view on the facts.

Making an **advisory award** may be an informal recommendation to the parties or may result from a formal process similar to

arbitration. Whatever its form, the outcome is not binding on the parties. It has persuasive power and is used in order to assist the parties in attempting to settle a dispute. An advisory award should only be given if the parties to the dispute agree or the conciliator believes it will enhance settlement.

### Steps in the conciliation process



Conciliation generally follows the following four steps although these steps flow into each other:

- ◆ **Introduction:** at this stage the conciliator introduces the parties, explains the process, establishes the “ground rules” for the process and deals with any housekeeping arrangements (e.g. time, language etc.) The ground rules include confidentiality which means that the conciliator will not disclose any information to a third party without the permission of the parties and the conciliator will not disclose confidential information told to the conciliator by one party in a side meeting, to the other party, without the party’s permission. The ground rules also indicate that the process is “without prejudice” which means that nothing said or suggested by a party during conciliation will be held against that party at a later stage (e.g. in arbitration) unless there is agreement on the suggestion (in which case it becomes part of a binding agreement). The ground rules also indicate that the process is off the record, which means that there is no recording or official minutes of the meeting, and that the conciliator’s notes are only to assist in the conciliation process and cannot be used for any other process.
- ◆ **Information gathering:** at this stage the conciliator invites the parties to explain the dispute and indicate how they each believe the dispute should be settled.
- ◆ **Exploring options and developing consensus:** at this stage the conciliator begins to explore ways of resolving the dispute. This often involves meeting with the parties separately in side meetings and asking probing questions and

making suggestions regarding possible settlements.

- ◆ **Conclusion:** at this stage the conciliator will draft an agreement for the parties to sign and give each party a copy of the agreement, if the dispute has been solved. If the dispute has not been resolved, the conciliator will explain what the next steps could be if the party which referred the dispute wishes to take it further. The conciliator also issues a certificate indicating that the dispute has been resolved or that it has not been resolved.

### **Representation at conciliation**



Any person who is a party to a dispute at CMAC must personally attend the conciliation meeting(s), even if that person is represented. If the person is a juristic person (e.g. a company, then a representative will attend on behalf of the juristic person). The only people who are entitled to attend a conciliation meeting are:

- ◆ members, office bearers or officials of organisations which are party to the dispute (e.g. a member of the union or the president of the employers' organisation),
- ◆ fellow employees (if an employee is a party to the dispute, or
- ◆ directors or employees of juristic persons if the juristic person is a party to the dispute (e.g. if the company is a party to the dispute, a director of the company may attend the conciliation.)

If all of the parties to the conciliation agree, then someone other than those listed above, may attend the conciliation (e.g. a lawyer or consultant). Parties to the conciliation may object to the conciliator if they believe that someone is attending the conciliation that is not entitled to attend and in such a case, the conciliator will have to make a ruling on the matter. Before doing so the conciliator is entitled to order that person to produce evidence (e.g. a payslip for an employee) to show that he/she is entitled to be there.

### **When conciliation takes place**

Anyone wishing to report a dispute to CMAC, must do so using the prescribed form. A copy of the completed form must be given to the other party to the dispute and proof of this given to CMAC at the time that the prescribed form is given to CMAC. CMAC will not proceed to deal with the dispute unless this proof is provided. Proof can be in the form of:

- ◆ the signature of the other party or a person representing the other party,
- ◆ a registered letter notice from the Post Office,
- ◆ a copy of a telegram/telex to the other party, or
- ◆ a fax transmission paper indicating that the document was successfully faxed.

Once CMAC has this proof, it must appoint a conciliator within four (4) days and the conciliator must attempt to conciliate the dispute within 21 days from appointment. Parties to the dispute must be given at least seven (7) days written notice of a conciliation meeting. The conciliator may extend the time period if the parties agree.

### **Failure to attend conciliation**



The consequences of failing to attend a conciliation meeting differ depending on:

- ◆ what the dispute is about, and
- ◆ which party fails to attend

If the dispute is about an alleged breach of terms and conditions of employment, dismissal, reinstatement or re-engagement:

- ◆ if the party which refers the dispute does not attend, the conciliator may dismiss the dispute (i.e. close the case),
- ◆ if the party which is responding to the dispute does not attend, the conciliator may hear the applicant party's case and make a decision on the matter in the absence of the responding party (this is called a default award)

If the dispute is about anything else then the conciliator may

extend the conciliation period by up to 21 days or issue a certificate indicating that the conciliation was unsuccessful.

**Postponements** Conciliations may be postponed if all parties to the conciliation agree in writing to postpone the conciliation, this written agreement is received by CMAC at least seven (7) days before the conciliation and there are compelling reasons to postpone.

## 8.2 Arbitration

### What is arbitration?



Arbitration is a dispute resolution process in which a person independent of the parties, resolves the dispute by determining it for them. The process involves a hearing at which the parties present evidence and argument and the arbitrator delivers his/her decision in the form of an arbitration award. The award is final and binding on the parties and can be enforced by order of the Industrial Court although parties may review the arbitration award in the High Court.

### Steps in the arbitration process



Arbitration generally follows the following stages:

- ♦ **Introduction:** at this stage the arbitrator introduces the parties, explains the arbitration process and deals with any housekeeping matters (e.g. language and recording of the process),
- ♦ **Opening statements and narrowing the issues:** at this stage the parties are invited by the arbitrator to make their opening statements. These should include a summary of the issues in dispute and each party's version of these issues, an overview of how the party will prove its case (e.g. which witnesses it will call or which documents it will rely on) and how each party wishes the arbitrator to decide. At the end of the opening statements, the arbitrator will ask questions of each party in order to narrow down those issues, which are in

dispute, and identify those issues that are not in dispute. The arbitrator will also establish which documents the parties are intending to use and what the status of these documents is (i.e. are the disputed or agreed). At the end of this process the arbitrator should summarise what evidence needs to be led in relation to those issues that are in dispute. For example: if the applicant agrees that there was no procedural unfairness then there is no need for evidence to be led regarding the procedure prior to dismissal. In some cases there is no dispute on the facts and merely a dispute on whether dismissal was appropriate (e.g. the applicant admits that he committed the offence but believes that he was justified because of certain mitigating factors). In this case the only evidence, which should be led, is evidence relating to whether the sanction of dismissal was appropriate. In some cases there is no need for evidence as everything is common cause, and the parties can then move to the argument stage directly.

- ◆ **Evidence:** at this stage the parties produce their evidence, which is usually in the form of oral testimony from witnesses. Witnesses are called one by one and are obliged to take an oath or affirmation to tell the truth. The witnesses for one party are called and examined by that party. Questions during this part (which is called examination in chief) should be open and may not be leading. After a witness has given his/her evidence in chief, the other party may cross-examine that witness. During this part leading questions may be asked and the party should put its version to the witness. After cross-examination the party that called the witness may ask any final questions in re-examination. This process is followed for all of the witnesses of one party and then all of the witnesses of the other party. The arbitrator may ask questions of the witness at any stage but should ideally ask questions at the end of cross-examination.

- ◆ **Argument:** at this stage the parties attempt to persuade the arbitrator to decide in their favour. Each closing statement should summarise the issues in dispute, analyse the evidence and suggest to the arbitrator what he/she should decide. Case law may also be referred to at this point.
- ◆ **Award:** at this stage the arbitrator considers his/her decision and makes a written award. This award must be written within 30 days of the end of the arbitration and should contain the following headings:
  - details of the parties and the hearing,
  - the issues in dispute,
  - background information,
  - a summary of the evidence and argument presented
  - analysis of the evidence and argument presented (this is the section in which the arbitrator justifies his/her decision), and
  - order

### Representation at arbitration



A party to an arbitration may appear in person or be represented only by:

- ◆ a member, office bearer or official of that party's organisation (e.g. a member of the union or the president of the employers' organisation),
- ◆ a fellow employee (if an employee is a party to the dispute, or;
- ◆ or a director or employee of that person if the person is a juristic person (e.g. if the company is a party to the dispute, a director of the company may attend the arbitration.)

Legal representatives may represent parties only if:

- ◆ the parties to the dispute agree
- ◆ the arbitrator is satisfied that the dispute is of such complexity that it is appropriate to have legal representation and the other party will not be prejudiced, or
- ◆ the Industrial Court refers the matter to arbitration.

**When  
arbitration  
takes place**

Arbitration takes place in the following circumstances:

- ◆ if a dispute has not been successfully resolved at conciliation and the parties agree to refer it to arbitration,
- ◆ if the dispute is in an essential service and it remains unresolved after conciliation, or
- ◆ if the President of the Industrial Court has directed that the dispute be resolved by arbitration.

Once a dispute has been referred to CMAC for arbitration, CMAC must appoint an arbitrator within ten (10) days. The arbitrator must conduct the arbitration within 45 days of being appointed and deliver his/her award within 30 days of the end of the arbitration. CMAC must give the parties to an arbitration at least 14 days notice in writing of the arbitration.

**Failure to attend arbitration** If the party, which referred the dispute to CMAC, does not attend the arbitration, the arbitrator may dismiss the matter (i.e. close the case). If the party against whom relief is sought fails to attend the arbitration, the arbitrator may proceed in the absence of that party (i.e. the arbitrator will issue a default award/judgement).

**Postponements** Arbitrations may be postponed if all parties to the arbitration agree in writing to postpone the arbitration, this written agreement is received by CMAC at least seven (7) days before the arbitration and there are compelling reasons to postpone.

**Rescission and variation** If a default award/judgement has been issued by a conciliator because the dispute concerned existing terms and conditions of employment or rights in respect of dismissal, reinstatement or re-engagement and the responding party did not attend the conciliation, the responding party may apply to the Executive Director of CMAC to have the judgement rescinded (i.e. withdrawn). This application must be made in the prescribed manner within 14 days of the party becoming aware of the judgement.

Any party to a dispute which wants an arbitration award to be withdrawn (rescinded) or varied (changed), may do so by making application in the prescribed manner within 14 days of knowledge of the award if:

- ◆ the award was mistakenly made in the absence of one party,
- ◆ the award is ambiguous or contains an error (but the award may then only be changed to remedy the ambiguity or error),  
or
- ◆ the award was made as a result of a mistake that is common to the parties.

## 8.3 Litigation

**What is litigation** Litigation is the use of the courts to resolve disputes. The Industrial Court and the Industrial Court of Appeal are the primary courts used in Swaziland for the resolution of labour disputes.

**Representation at court** Any party to proceedings before the Industrial Court may represent him/herself or be represented by a legal practitioner or any other person authorised by the party (section 9 of the Industrial Relations Act), unless the Rules of the Court determine otherwise.

**Process before the Court** The Court is not strictly bound by the rules of evidence or procedure, which apply in civil proceedings and may disregard any technical irregularity that does not or is not likely to result in a miscarriage of justice (section 11 of the Industrial Relations Act).

## 8.4 Points in limine

**What are points in limine?<sup>4</sup>** There are a range of issues that may arise at the beginning of a conciliation or arbitration process. These are commonly called “points in limine” which comes from the Latin and, means “on the threshold”. These issues are called “in limine” because they need to be dealt with at the beginning of the process before the substance of the matter can be dealt with. In labour disputes the most common of these involve questions regarding the jurisdiction of the Commission. Examples of these include:

- ◆ an allegation that the application is out of time,
- ◆ an allegation that the applicant is not an employee but an independent contractor,
- ◆ an allegation that internal procedures have not been dealt with,

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<sup>4</sup> The CCMA training course on jurisdiction is acknowledged for some of the ideas in this section

or

- ♦ an allegation that there was no dismissal (e.g. the employee resigned or deserted)
- ♦ disputes about representation
- ♦ disputes about whether to postpone the matter or not

Sometimes there will also be calls for documents to be exchanged or even for the arbitrator to recuse him/herself. These are all preliminary issues, which may arise at the beginning of a conciliation or arbitration process.

**Jurisdiction** Since most of these issues relate to jurisdiction, it is important to understand what is meant by jurisdiction. In a South African court case *Graff Reinet Municipality v Reineveld's Poss Irrigation Board 1950 (2) SA 420 (A) at 42*, jurisdiction was defined as:



“...the power or competence of a court, to hear and determine an issue between parties, and limitation may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc. The best way in which a statute can indicate the jurisdiction of a court, is by stating categories of persons in respect of which it has jurisdiction, the geographical area in which such a court has jurisdiction and, finally but very importantly, the matters such a court may entertain and deal with.”

From this extract, it can be seen that jurisdiction essentially concerns:

- ♦ Who?
- ♦ Where?
- ♦ What? and
- ♦ When?

in relation to a particular set of circumstances. In the case of disputes referred to the Commission, it refers to the “who”, “where”,

“what” and “when” of labour disputes referred to the Commission.

**Who the dispute involves**

In relation to labour disputes, “who” refers to the parties to the dispute. These will be employees, employers, trade unions and employer organizations. Employees will be natural persons in a legal sense and may be represented by trade unions, which are juristic persons (i.e. a legal entity made up of natural persons but separate and distinct from natural persons). The Industrial Relations Act implicitly excludes “independent contractors” from the definition of “employee” in section 2. of the Act.

Employer parties will usually be juristic persons (except commonly in the case of domestic disputes where the employer will be a natural person). Employer parties that are juristic persons will often be a close corporation, a “Pty” (indicating that it is a private company) or a “Pty Ltd” (indicating that it is a public company). In certificates and settlement agreements it is important that the full and correct title of the employer is cited in order to ensure that any possible claim by the employee later will not fail due to incorrect citation of the respondent.

**Where the dispute arose and where it is dealt with**

Generally CMAC will have jurisdiction over disputes that arose within Swaziland, involving parties that work and reside in Swaziland. If an employer party is a foreign company that operates in Swaziland, CMAC is also likely to have jurisdiction. In some cases, even if the work is conducted outside the country, the Commission may still have jurisdiction, although Swazi jurisprudence will need to be consulted on this matter. For example:

if the employee resides in Swaziland but works elsewhere for a Swazi company,

if the contract of employment was entered into in Swaziland for work which is conducted outside Swaziland.

If the employee works in South Africa, South African labour law generally covers the relationship and any dispute arising from it.

**What the dispute involves** In general terms disputes dealt with by CMAC concern disputes that arise from the employer-employee relationship. However, as a “creature of statute” (i.e. an organization created by the Industrial Relations Act), the Act and related statutes (such as the Employment act) determine the types of dispute over which CMAC has jurisdiction. Clearly a dispute between a husband and wife over the maintenance of their child, for example, is not a dispute that CMAC would have jurisdiction to entertain. However, a dispute over unfair dismissal of an employee would be a dispute envisaged by the Act. The definition of “dispute” in section 2 of the Act is significant in this determination, as are the provisions of Part VIII of the Act.

In respect of the nature of the dispute, it is also important to note the roles of the Commissioner of Labour and the Industrial Court, Industrial Court of Appeal and the High Court as there may be certain types of dispute (e.g. application for withdrawal of trade union recognition (section 42(11)) which can only be entertained by the Industrial Court and not the Commission. Similarly, there may be certain disputes which, once they pass through the conciliation stage, move into the jurisdiction of the Court (e.g. unfair dismissal) even if the Court may refer the case back to CMAC for arbitration.

**When the dispute arose** There is a time limit of eighteen months for the referral of disputes to CMAC. If a dispute is referred after this time the Act does not indicate an option to apply for condonation but the Arbitration Guidelines do so there may be provision for condonation to be granted. Clearly a dispute that is out of time and for which no condonation has been granted may not be determined by CMAC.

**Process for dealing with points in limine**

Irrespective of what the allegation is, if a point is raised in limine, a conciliator or arbitrator should follow the same fair procedure in dealing with it. This essentially involves:

- ◆ giving the party who raised the point an opportunity to have their say (this may mean introducing evidence and argument),
- ◆ giving the other party an opportunity to have their say on the matter (which may also mean introducing evidence and argument),
- ◆ giving the party who raised the point a final opportunity to reply to the response of the other party,
- ◆ the conciliator/arbitrator making a ruling, which is final and binding on the parties and the process. This should ideally be in writing and will no doubt be subject to review by the Industrial Court.

The conciliator/arbitrator will need to establish whether the issue(s) concerns a dispute(s) of fact or a dispute(s) of law or both. Disputes of fact are determined by weighing up different versions and deciding whom to believe. Factors which influence the decision include: logic, witness credibility and reliability, probability as well as the instinct and intuition of the decision-maker. Disputes of law relate to relevance, applicability and interpretation of law. Factors which influence the decision include: applicable sources of law available from text books, case law etc. In the event that an allegation involves only a dispute of law, argument alone will be necessary (and not evidence). In the event that an allegation involves both disputes of fact and law, both evidence and argument will be needed to decide the matter.

This process may be done orally (i.e. with witnesses sworn in and argument taken orally) or in writing (i.e. the parties making arguments on the papers). If there are no disputes of fact then evidence is not necessary and the parties need only argue the point

(either orally or in writing). Factors which should influence whether to call for written arguments or to take them orally, include:

- ◆ are both parties ready “there and then” to argue the point? (often the applicant is not aware of the jurisdictional challenge until the day of the conciliation/arbitration in which case it would be fairer to either reschedule or allow them both to argue “on the papers”),
- ◆ are both parties able to give written arguments? (if the applicant is not represented it may be fairer to hear oral argument in which the conciliator/arbitrator can explain what the legal principles are so that the applicant is not prejudiced by having to put the argument in writing),
- ◆ is the matter a complex legal issue? Sometimes the jurisprudence on the matter is unclear or unknown to the conciliator/arbitrator in which case it may be appropriate to ask the parties to submit written arguments on the matter. This allows the conciliator/arbitrator time to research the issue and decide it in a more leisurely way.

If the parties are asked to make written submissions regarding the point, the conciliator/arbitrator should give them time limits in which to make these. All submissions should be copied to the other party and the conciliator/arbitrator and should contain the following:

- ◆ the title of the matter,
- ◆ the case number,
- ◆ the relief sought by the party (e.g. to have the application dismissed),
- ◆ the address where all documents or notices can be served or received,
- ◆ the time limit for the responding party to oppose the application (NB: points in limine are usually raised by the respondent party however in the process of dealing with the point, they become the applicant and the other party the respondent because they are applying for the point to be decided (e.g. the case to be

dismissed)),

- ◆ a schedule of any supporting documents,
- ◆ relevant affidavits (if there are disputes of fact),
- ◆ heads of argument.

# Resources

# 9

<b>Resource Number</b>	<b>Resource Title</b>
1	Conciliation guidelines
2	Arbitration guidelines
3	Code of good practice: Resolution of disputes at the workplace
4	Code of good practice: Employment and Discrimination
5	Code of good practice: Termination of Employment
6	Code of good practice: Intervention by Commissioner of Labour
7	Code of good practice: Protest action
8	Code of good practice: HIV/AIDS