LESOTHO
GOVERNMENT NOTICE NO. 4 OF 2003

LABOUR CODE (CODES OF GOOD PRACTICE) NOTICE 2003

Pursuant to section 240 of the Labour Code Order 1992[1], and after consultation with the Industrial Relations Council I,

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Minister responsible for Employment and Labour, make the following Notice.

NOTES ON THE CODES OF GOOD PRACTICE

What is a code of good practice?

Section 240 of the Labour Code provides that the Minister may publish codes of good practice after consultation with the Industrial Relations Council. A code of good practice is what is called 'soft law'. This means that the provisions of the code do not impose any obligation on any person. They constitute policy or best practice – in other words what is expected of a person. The code of a fair procedure describes the kind of practices that are expected of an employer before dismissing an employee. It gives content to the meaning of a 'fair procedure'. An employer may depart from the provisions of the code but if it does so it will have to justify why it did so.

The arbitration and conciliation codes are generally directed to an arbitrator or conciliator. They are directed to a decision-maker and constitute official executive policy. But no decision maker under administrative law may fetter his or her discretion. Accordingly, a conciliator or arbitrator must take all relevant facts and law into account, including the codes, before making a decision and may depart from the official policy if the circumstances justify a departure. In other words, like codes, the policy must be flexibly applied. The publication of policies is permissible under administrative law. The publication of these policies after tripartite consultation is a step to improving transparency and consistency in decision making.

TERMINATION OF EMPLOYMENT

Introduction

1. (1) This code deals with some of the key aspects of termination of employment. It is intended to assist users of the Labour Code. It is designed to assist by -

(a) summarizing some of the provisions of the law, both statutory and the common law;

(b) providing guidelines on good practice in applying the law or exercising any rights in terms of the law.

(2) This code is intended to assist-

(a) employees and their trade unions;

(b) employers and employers' organizations;

(c) conciliators and arbitrators who have to apply the law; and

(d) the presiding officers and assessors of the Labour Court and the Labour Appeal Court.

(3) The guidelines relating to termination of employment should be followed. They may be departed from only if there is good reason to do so. Anyone who departs from them must prove the reasons for doing so. The following kinds of reasons (*Note that this list is not exhaustive*) may justify a departure from the provisions of the code:

(a) the size of the employer may justify a departure. For example, an employer with only one employee may not be able to apply all the provisions in guideline 2 but that employer must, nevertheless, put a charge to the employee and give the employee a fair opportunity to respond.

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

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

(4) The provisions of the codes may be varied by collective agreement provided that no collective agreement may remove a statutory right, for example such as the right to a fair procedure before dismissal.

(5) The key principle in the codes is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While

employees should be protected from arbitrary or other unfair action, employers are entitled to satisfactory conduct and work performance from their employees.

Kinds of Termination

2. (1) Termination of employment includes several kinds of termination –

(a) termination by agreement;

(b) automatic termination, for example the employer dies or is sequestrated;

(c) termination by the employee, normally called resignation;

(d) termination by the employer, normally called dismissal.

(2) The rules that regulate the termination of a contract of employment often depend on the duration of the contract. There are two kinds of agreed duration:

(a) an agreement to work for a fixed term. A fixed term contract may normally terminates automatically on the expiry of the period.

(b) an agreement to work without reference to limit of time (normally up to retirement). This kind of contract continues until it is terminated on notice. All contracts that are not for a fixed term are regarded as agreements to work until terminated on notice.

Termination by Agreement

3. (1) A fixed term contract is a contract in which the parties have agreed to the termination date in advance. The contract terminates automatically when the agreed period expires unless the contract provides otherwise. In some contracts, the parties may agree that the contract will continue after the date but in the form of a contract terminable on notice.

(2) A fixed term contract will be deemed to be renewed by default if an employee continues to work after the period of the fixed term expires and the employer accepts the employee to work. The duration of a contract renewed by default will depend on the circumstances. It may be a contract for another fixed term or one terminable on notice. It will depend on the surrounding circumstances.

(3) Note however that the failure to renew a fixed-term contract in circumstances where the employee reasonably expected continuity of employment, may constitute a dismissal.

(4) Seasonal workers are normally employed on a fixed term contract (i.e. for the season). The contract normally terminates at the end of the season. If a seasonal worker works for the same employer for several seasons -

(a) the employee's service is deemed to be continuous for the purpose of severance pay;

(b) the employee accrues a right to severance pay for periods actually worked; and

(c) the failure to renew the fixed term contract at the commencement of the next season in circumstances where the employee reasonably expected continuity of employment, may constitute dismissal.

(5) If an employer and an employee agree to terminate the contract, the contract terminates in accordance with the agreement. For example, a redundant employee may agree to voluntary retrenchment on an agreed package from a specified date.

Automatic termination

4. (1) A contract of employment terminates automatically on the death or sequestration of the employer.

(2) Unless the contract of employment provides otherwise, a contract of employment terminates automatically when the employee reaches the agreed or normal age of retirement. In other words, it is an implied term of a contract terminable on notice that the contract terminates much as a fixed term does on retirement.

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

(4) If the employee continues to work after reaching retirement age, the contract is renewed and the normal rules of termination of employment apply, unless the employee and the employer agree to something different.

Resignation

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

(2) A material breach means a serious breach that goes to the core of the contract. The following are examples of conduct that amounts to a material breach of a contract of employment:

(a) the refusal to pay wages may justify the summary termination of the contract by the employee.

(b) verbal or physical abuse or sexual harassment may also justify summary termination of the contract;

(c) unfair discrimination may also justify summary termination.

(3) If an employee has agreed to a contract terminable on notice, the employee may resign -

(a) by giving notice of termination; or

(b) without notice, if the employer has materially breached the contract.

(c) A material breach means a serious breach that goes to the core of the contract. For examples of a serious breach, see the examples given above in respect of the cancellation of a fixed term contract.

(4) Section 63 of the Labour Code prescribes the period of notice that an employee must give. An employer and employee may agree to longer notice.

(5) If the employee does not work the period of notice, the employee must pay the employer the equivalent of the remuneration that the employer would have paid to the employee if the employee had worked the notice.

Forced resignation or constructive dismissal

6. (1) If an employer makes continued employment intolerable leading to the resignation of the employee, that resignation may amount to a dismissal. Resignation in these circumstances is often referred to as constructive dismissal.

(2) A resignation in these circumstances will constitute a cancellation of the contract as a result of a material breach of the contract by the employer. Notice need not be given in these circumstances.

(3) A dismissal in these circumstances will normally be unfair. The rules of fair dismissal will apply.

Dismissal

7. (1) An employer may dismiss an employee if the employer –

(a) complies with the provisions of the contract;

(b) complies with the provisions of the Labour Code concerning notice and severance pay;

(c) follows a fair procedure; and

(d) has a fair reason for the dismissal.

(2) If an employer has employed an employee on a fixed term contract, the employer may only dismiss the employee before the expiry of the contract period if the employee materially breaches the contract. If there is no breach by the employee, the only way that the employer may terminate the contract lawfully is by getting the employee to agree to early termination.

(3) A material breach means a serious breach that goes to the core of the contract.

(4) The following are examples of conduct that amounts to a material breach of contract of employment: a refusal to work; theft; fraud; gross insubordination, assault on co-employees etc.

(5) The fact that an employer may dismiss an employee before the expiry of the fixed term does not mean that the employer does not have to follow a fair procedure or have a fair reason, although a material breach is more often than not a fair reason to dismiss. It does not mean however that a fair reason is necessarily a material breach. Operational requirements may amount to a fair reason but it does not permit the employer to terminate a fixed term contract early without the agreement of the employee.

(6) If an employer has entered into a contract of indefinite duration with an employee, the employer may dismiss the employee -

(a) by giving notice of termination; or

(b) without notice if the employee has materially breached the contract.

(7) Whether the employer dismisses on notice or without notice, the employer must still follow a fair procedure and have a fair reason, although a material breach normally amounts to a fair reason.

(8) Section 63 (1) of the Labour Code prescribes the period of notice that either party must give. An employer and employee may agree to longer notice.

(9) Section 65 of the Labour Code states when and how notice must be given.

(10) If the employee does not work the period of notice, the employee must pay the employer the remuneration that the employer would have paid if the employee had worked the notice.

(11) Sections 76 to 79 of the Labour Code regulate matters associated with termination such as severance pay, payment of all outstanding monies and certificates of employment.

(12) In certain circumstances the following may constitute a dismissal:

(a) a forced resignation or constructive dismissal;

(b) the failure to renew a fixed term contract if there was reasonable expectation that the contract would be renewed.

(c) In order for a resignation to constitute constructive dismissal, the employer's conduct must make continued employment intolerable.

(d) If a fixed term contract is not renewed, the employee must demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew etc. Although the contract may provide that the employee accepts that there is no reasonable expectation of renewal, such a provision is not conclusive of the matter. It must be viewed as a factor together with the other relevant facts and circumstances of the case.

(13) A reason is valid if it can be proved. In other words a dismissal will be unfair if the employer is not able to prove the reason for the dismissal. For example, if an employee is dismissed for theft but the employer cannot prove that the employee committed the theft, the dismissal may be unfair.

(14) The burden of proof lies with the employer. It is sufficient for the employer to prove the reason on the balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. Determining which of the contending versions is the more probable depends on the facts led and the inferences drawn from those facts.

(15) A fair reason for dismissing an employee depends on the kind of reason and seriousness of the reason.

(16) Although this list of the kinds of reasons that are normally considered fair is not exhaustive, it is unlikely that a reason other than one of the following will be considered fair:

(a) employee misconduct related to employment;

(b) employee incapacity, whether performance or health related;

(c) the unsuitability of a probationary employee at the expiry of the probationary period;

(d) the operational requirements of the business.

(17) The reason must not only be one of the kinds of reasons considered fair but the reason in a particular case must be sufficiently weighty to justify dismissal.

(18) There are certain reasons that are considered by the Labour Code to be unfair. They are listed in section 66 and Part XV of the Labour Code.

(19) Before an employer dismisses an employee, the employer must process the dismissal fairly. In principle this means that the employer must -

(a) give the reasons for the proposed dismissal to the employee before making the decision to dismiss;

(b) give the employee an opportunity to respond to those reasons before making a decision to dismiss; and

(c) permit the employee to be represented in the proceedings by a workplace union representative or a co-employee.

(20) These three elements of a fair procedure may be given effect to in different ways. Many collective agreements contain detailed dismissal procedures. Provided that they do not depart from the three elements,

compliance with those agreements will constitute compliance with the statutory right to a fair procedure.

(21) The different reasons for dismissal will also call for different kinds of procedures. A fair procedure for dismissing an employee for misconduct may be different from what is fair in respect of dismissing an employee on grounds of incapacity or operational requirements.

Probationary employees

8. (1) It is advisable to make the contents of this part of the code known to the employee.

(2) Subject to what is stated in a collective agreement, an employee may be required to serve a period of probation to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.

(3) The period of probation should be of a reasonable length, usually three and sometimes up to four months, having regard to factors such as the nature of the job, the standards required, etc. The period may be extended by agreement.

(4) A period of probation may not last longer than four months unless the Labour Commissioner approves in writing. (see section 75 of the Labour Code).

(5) An employer who wishes to extend the period of probation of an employee must apply in writing to the Labour Commissioner, stating the reasons for the extension.

(6) The application must be submitted to the Labour Commissioner at least 2 to 4 weeks prior to the lapse of the statutory probationary period.

(7) The Labour Commissioner may grant leave to extend a probationary period in the following circumstances:

(a) If the Commissioner is satisfied that the nature of the job requires a longer period of assessment to determine the suitability of the employee on probation;

(b) If it is the custom and practice in the industry that a longer period of probation is required for the job;

(c) If the Commissioner is satisfied that the employer requires a longer period of probation in order to assess the employee.

(8) The contract must state -

(a) that the employee is on probation; and

(b) the period of the probation.

(9) During the period of probation, the employer should -

(a) monitor and evaluate the employee's performance and suitability from time to time;

(b) meet with the employee at regular intervals in order to advise the employee of the evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counseling to the employee during probation.

(10) If at any stage during the probation period, the employer is concerned that the employee is not performing to standard or may not be suitable for the position, the employer must notify the employee of that concern and give the employee an opportunity to respond.

(11) It is not unfair to dismiss a probationary employee if -

(a) the employee has been informed of the employer's concerns;

(b) the employee has been given an opportunity to respond to those concerns;

(c) the employee has been given reasonable time to improve performance or correct behaviour.

(12) If a probationary employee is dismissed for any other reason, the normal rules of fair dismissal apply.

(13) A probationary employee is entitled to be represented by a fellow employee or workplace union representative.

(14) The employer must inform a probationary employee who is dismissed that if the employee disputes the fairness of the dismissal, he or she has the right to refer a dispute in terms of the Labour Code within the prescribed time period.

Disciplinary rules

9. (1) All employers should adopt disciplinary rules that establish the standard

of conduct required of their employees.

(2) The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

(3) In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to the employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.

(4) Discipline should be corrective. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employee behaviour through a system of graduated disciplinary measures such as counselling and warnings.

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

Fairness of the reason

10. (1) Any person who is determining whether a dismissal for misconduct is unfair should consider:

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if a rule or standard was contravened, whether or not -

(i) the rule is a valid or reasonable rule or standard;

(ii) the rule is clear and unambiguous;

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

(iv) the rule or standard has been consistently applied by the employer; and

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

(2) Although it is generally not appropriate to dismiss an employee for a first offence, dismissal may be justified if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Without being exhaustive, the following acts have been considered by the courts to be sufficiently serious to justify dismissal:

(a) gross dishonesty;

(b) willful damage to property;

(c) willfully endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee or any person associated with the employer; or

(f) gross insubordination.

(3) In determining whether or not dismissal is the appropriate sanction, the employer should consider -

(a) the gravity of the misconduct in the light of past infringements, the strictness of the rule, the nature of the job, health and safety and the likelihood of repetition;

(b) the circumstances of the employee such as the employee's employment record (including length of service, previous disciplinary record) and personal circumstances.

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

Fair procedure

11. (1) An investigation should normally be conducted by the employer to ascertain whether there are grounds for dismissal before a hearing is held.

(2) The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee should be entitled to a reasonable time to prepare a response and to seek the assistance of a trade union representative or fellow employee.

(4) The hearing should be held and finalized within a reasonable time.

(5) The employee should be given a proper opportunity at the hearing to respond to the allegations and to lead evidence if necessary.

(6) If an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee.

(7) After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of the decision.

(8) Discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union.

(9) If the employee is dismissed, the employee should be given the reason for dismissal and reminded of any rights to refer a dispute concerning the fairness of the dismissal to the Directorate.

(10) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.

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

(12) In case of collective misconduct, it is not unfair to hold a collective hearing.

Performance standards generally

12. (1) An employer should stipulate standards of work. Some standards are self-
evident or can be inferred from custom and practice. Others need to be stated in the contracts of employment or in manuals and brought to the specific attention of the employees.

(2) It is important in determining the fairness of a dismissal for poor work performance that the performance standard is not only reasonable but known by the employees.

Fairness of the reason

13. (1) Any person who determines whether a dismissal for poor work performance is fair should consider –

(a) hether or not the employee failed to meet a performance standard;

(b) whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(c) whether the performance standards are reasonable;

(d) the reasons why the employee failed to meet the standard;

(e) whether the employee was afforded a fair opportunity to meet the performance standards.

(2) Although the employer has the managerial prerogative to set performance standards, the standards may not be unreasonable.

(3) Proof of poor work performance is a question of fact to be determined on a balance of probabilities. This can be difficult if the employee's tasks are not capable of precise measurement or evaluation. The burden of proof lies with the employer and that is why it is important for the employer to engage in a process of assessment and appraisal with the employee before dismissal.

Fair procedure

14. (1) The employer must give appropriate guidance, instruction or training, if necessary, to an employee before dismissing the employee for poor work performance. What is appropriate will depend on the circumstances of each case. For example, a highly skilled employee may not require retraining.

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

(3) If the employee continues to perform unsatisfactorily, the employer must warn the employee that he or she may be dismissed if there is no improvement. An opportunity to improve may be dispensed with if -

(a) the employee is a manager or senior employee whose knowledge and experience qualify him or her to judge whether he or she is meeting the standards set by the employer.

(b) the degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify dismissal.

(4) There should be an investigation to establish the reasons for the unsatisfactory performance. That investigation may reveal that all or part of the reason for the employee's poor performance is not the fault of the employee. That would have a bearing on the fairness of any action taken against the employee.

Incapacity, Incompatibility

15. (1) Incompatibility constitutes a fair reason for termination. There are two types of incompatibility:

(a) unsuitability of the employee to his or her work due to his or her character or disposition;

(b) incompatibility of the employee in his or her work environment in that he or she relates badly with co-employees, clients or other persons who are important to the business.

(2) Incompatibility is treated in a similar way to incapacity for poor work performance.

(3) The steps required in respect of that ground are applicable. In particular, the employer must -

(a) record the incidents of incompatibility that gave rise to concrete problems or disruption;

(b) warn and counsel the employee before dismissal. This must include advising the employee of the conduct; who has been adversely affected by that conduct; and what remedial action is proposed.

(4) Before dismissing the employee on this ground, the employer must give

the employee a fair opportunity to:

(i) consider and reply to the allegation of incompatibility;

(ii) remove the cause for disharmony;

(iii) propose an alternative to dismissal.

ILL Health or injury

16. (1) An employer who is considering dismissing an employee on grounds of ill health or injury must take into account the following factors to determine the fairness of the reason in the circumstances –

(a) the cause of the ill health or injury;

(b) the degree of the incapacity;

(c) the temporary or permanent nature of the incapacity;

(d) the ability to accommodate the incapacity;

(e) the existence of any compensation for the ill health or injury or pension.

(2) These factors affect each other. For example if an employee is injured at work or is incapacitated by a work-related illness (the cause), an employer must go to greater lengths to accommodate the employee (the ability to accommodate).

(3) If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury.

(4) If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate possible ways to accommodate the employee. In other words to consider all possible alternatives short of dismissal.

(5) The following are examples of alternatives – temporary replacement; light duty; alternative work; early retirement or pension; etc.

(6) The factors that may be relevant in this investigation include -

(a) the nature of the job;

(b) the period of absence;

(c) the seriousness of the illness or injury; and

(d) the possibility of securing a temporary replacement or adapting the job.

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

(8) If the employee is permanently incapacitated, the employer must ascertain the possibility of securing alternative employment, and adapting the duties or work circumstances of the employee to accommodate the employee's disability. An employer should generally consider adapting an employee's duties only after it has found that it is not possible to adapt his or her work circumstance.

(9) If the employee is incapacitated in a limited degree, the employer must consider -

(a) removing those duties the employee cannot perform and if possible adding less onerous tasks;

(b) adapting the work environment to accommodate the disability.

(10) The general test is whether in a particular case the employer can reasonably be expected to accommodate the employee's disability, having regard to the -

(a) cost, practicality and convenience of such steps ; and

(b) cause of the employee's incapacity (more onerous duty on employer where incapacity arose out of a work-related injury or illness).

(11) If it is established that the employee's work circumstances or duties cannot reasonably be adapted to accommodate the disability, the employer must consider the availability of any suitable alternative work. Suitable alternative work will depend on the circumstances, and may include such factors as -

(a) whether the incapacity was due to a work-related illness or injury;

(b) the employee's experience and qualification;

(c) the employee's ability to adapt to a changed working environment.

(12) Although an employer is not obliged to create a job for the employee, a vacancy which the employee could fill with training should be offered to the employee.

(13) No employee should be dismissed merely on the basis of HIV status. HIV infected employees should continue to work under normal conditions in their current employment for as long as they are medically fit to do so. If HIV infected employee cannot continue with normal employment because of HIV related illness, the employer must endeavour to find alternative employment without prejudice to that employee's benefits. When an employee becomes too ill to continue in employment, the provisions of this code or any collective agreement dealing with incapacity on grounds of ill-health must be applied.

Fairness of the procedure

17. (1) The employee must be consulted in the process of the investigation and must be advised of all the alternatives considered. The employer must consider the alternatives advanced by the employee and, if not accepted, motivate why.

(2) The employee is entitled to be represented by a workplace union representative or co-employee in the consultations.

(3) The employee should be given a copy of this part of the code at the commencement of the consultations.

Unprotected Strikes

18. (1) Participation in a strike that does not comply with the provisions of Part XIX of the Labour Code is misconduct that may justify dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –

(a) the seriousness of the contravention of the Labour Code and the attempts made to comply with the Labour Code;

(b) whether or not the strike was in response to unjustified conduct by the employer;

(c) whether the parties have made genuine attempts to negotiate the resolution of the dispute;

(d) whether the employees have been given an ultimatum. Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, such as where the employees/their representatives have refused to meet with the employer, the employer may dispense with them;

(e) the manner in which the employees have conducted themselves during the strike –

(i) whether the strike was conducted in a peaceful manner or accompanied by violent behaviour of the employees;

(ii) whether the viability of the business is seriously placed at risk.

(2) The employer may not discriminate between the striking employees by dismissing some of them or, after having dismissed them, re-instating some of them. If however the reason for difference in treatment is based on grounds of participation in strike related misconduct such as picket violence or malicious damage to property, the difference may be fair.

Retrenchment

19. (1) A retrenchment means a dismissal arising from a redundancy caused by the re-organisation of the business or the discontinuance or reduction of the business for economic or technological reasons.

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

(a) the re-organisation of the business arises from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working a transfer of the business or part of the business.

(b) economic reasons are those that relate to the financial management of the enterprise;

(d) technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace.

(3) Because retrenchment is essentially a 'no fault' dismissal and because of the adverse effect on the employees affected by it, the courts will scrutinize a dismissal based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to dismissal before the dismissal is effected.

(4) The obligations placed on an employer are both procedural and substantive. The purpose of negotiation is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on -

alternatives to dismissals such as transfer to other jobs, lay off;

criteria for selecting the employees for dismissal such as last-in-first-out (LIFO) subject to special skills and affirmative action.

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

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

steps to avoid the adverse effects of the dismissals such as time off to seek work, social plans etc.

(5) In order for this to be effective, the negotiation process should commence as soon as a reduction of the workforce through retrenchment or redundancies is contemplated by the employer so that possible alternatives can be explored. The obligation to negotiate in good faith requires that negotiations begin as soon as a reduction of the workforce is contemplated and should be long enough for the union to -

(a) meet and report to employees;

(b) meet with the employer; and

(c) request, receive and consider all the relevant information to enable the trade union to inform itself of the relevant facts for the purpose of reaching agreement with the employer on possible alternative

solutions and if necessary, find alternative employment in the business or elsewhere.

(6) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the negotiation process might be. Urgency may not, however, be induced by the failure to commence the negotiation process as soon as a reduction of the workforce was likely. On the other hand, the parties who are required to reach agreement must meet, as soon and as frequently, as may be practicable during the negotiation process.

Selection criteria

20. (1) If one or more employees are to be selected for dismissal from a number of employees, the criteria for their selection should be agreed with the trade union. If criteria are not agreed, the criteria used by the employer must be fair and objective.

(2) Criteria that infringe a right protected by the Labour Code when they are applied can never be fair. These include selection on the basis of union membership or activity, pregnancy or other discriminatory ground.

(3) Selection criteria that are generally accepted as fair include length of service, skills, affirmative action and qualifications.

Preference in re-hiring

21. (1) Retrenched employees should be given preference if the employer again hires employees with comparable qualifications, subject to –

(a) the employee, after having been asked by the employer, and having expressed within a reasonable time from the date of dismissal a desire to be re-hired; and

(b) a time limit on preferential re-hiring should also ideally form the subject of agreement between the employer and the union.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of employment.

COLLECTIVE BARGAINING

Introduction

22. (1) The purpose of this code is to guide employers and trade unions on how they should exercise their rights and give effect to their obligations to bargain collectively. It is designed to assist them by –

(a) (a) summarizing the important provisions of the law; and

(b) (b) providing guidelines on good practice.

(2) Collective bargaining is one of the fundamental policies promoted by the Labour Code. It is through the collective prevention and resolution of labour disputes that the fundamental aims of the Labour Code are realized. Those aims are the protection of employees from exploitation, industrial democracy and industrial peace.

(3) To the extent that this code advances an interpretation of the law, that interpretation is the policy of the Directorate and will be applied by conciliators and arbitrators unless that interpretation is reversed by a decision of the Labour Court or Labour Appeal Court.

(4) The guidelines should be followed. They may be departed from only if there is good reason to do so. Anyone who departs from them may have to justify the departure. The following kinds of reasons may justify a departure from the guidelines (note that this list is not exhaustive) -

(a) the size of the employer may justify a departure. For example, an employer with only one employee can hardly be expected to enter into a collective agreement;

(b) the nature or location of the employer's premises may justify special rules regarding picketing – for example a shopping mall or a workplace in which the employees reside.

(5) The provisions of this code may be varied by collective agreement provided that no collective agreement may remove a statutory right.

Duty to bargain in good faith generally

23. (1) Section 198 A (2) reads – "An employer shall bargain in good faith with a representative trade union".

(2) A representative trade union is a registered trade union that represents over 50% of the employees employed by the employer – see section 198 (1).

(3) If an employer or employers' organization has recognized a trade union -

(a) that employer or organization must bargain in good faith with the union; and

(b) the union must bargain in good faith with the employer or organization.

(4) The duty to bargain in good faith includes a number of duties -

(a) (a) the duty to bargain itself;

(b) (b) the duty to disclose relevant information;

i. (c) the trade union's duty to fairly represent all employees in certain
ii. circumstances.

(c) (5) The failure to bargain in good faith is an unfair labour practice.

Recognition generally

24. (1) Recognition means that an employer or employer's organization recognizes a trade union as the collective bargaining agent on behalf of an agreed constituency of employees.

(2) There is no duty to recognize a trade union. The obligation is only to bargain with a representative one. It makes sense however that once a trade union is representative for the employer to recognize, it may enter into a recognition agreement for the following reasons -

(a) it formalizes the relationship;

(b) the procedure for bargaining no longer becomes a statutory procedure but one that can be tailored to the needs of the employer;

(c) the employer can negotiate over the bargaining unit in respect of which the trade union is recognized;

(d) the employer can negotiate on the matters in respect of which it will bargain;

(e) the employer can negotiate such matters as the size of the union delegation, when and where meetings take place, the procedure for initiating negotiations and how disputes will be resolved.

(3) It makes sense for the trade union in that -

(a) the union will not have to apply in the prescribed notice each and every time it wishes to bargain on a subject;

(b) there are many ancillary rights associated with recognition that improve the stability of the union organization in the workplace;

(c) a recognition agreement formalizes the relationship between an employer or employers' organization and a trade union by confirming in the agreement at least these three issues -

(i) who the trade union represents among the employees – this is generally called the bargaining unit;

what matters are to be the subject of negotiations – this is generally called the agreed bargaining subjects;

how negotiations are to be conducted. Most agreements provide for a negotiation and dispute procedure.

An appropriate bargaining unit

25. (1) Since recognition is voluntary, what is appropriate will be decided by the employer and trade union in negotiations.

(2) In some agreements, the trade union is recognized in respect of its members only. In others the trade union is recognized in respect of a particular constituency.

(3) generally speaking, management is not included in a bargaining unit. This does not mean that management may not belong to trade unions, only that the union is not recognized as representing them for the purposes of collective bargaining. The reason for this is that managers represent the owners in the workplace. This does not mean that managers cannot form

trade unions of their own – it just means that the managers should not represent the employer in negotiations if they have an interest in the outcome of the negotiations.

(4) The following factors have been identified in order to assist trade unions, employers, and conciliators in determining an appropriate bargaining unit for the purpose of collective bargaining. The factors are not exhaustive. The factors are -

(a) the wishes of the parties;

(b) the bargaining history of the parties;

(c) the extent of union organization at the workplace and in the industry generally;

(d) employee similarity of interest. If the employees in the bargaining unit share the same interests, for example, similar terms of employment or similar conditions of work, that points to a single bargaining unit;

(e) the geographic location of the employer. For example, if an employer has several separate places of work close together, that points to a single unit. But if the places of work are far away from each other or in different towns, that points to separate bargaining units;

(f) the nature or the employer's business and its organizational and decision-making structure. For example, if there are separate workplaces and the terms and conditions are left to the discretion of the managers of those workplaces, that points to separate bargaining units. If, however, the decisions are made at Head office, that fact points to a single unit.

(5) A single factor is seldom definitive. A factor points to a certain conclusion rather than determining it. For example, a retail employer may have shops in different towns. The fact that they are in different towns points to separate units but the fact that the employees share similar terms and conditions of employment and the fact that the decisions concerning pay and conditions is made at Head office may point in the other direction.

Bargaining matters

26. (1) The Labour Code contemplates that the issues that a trade union is entitled to bargain about are the issues that form the content of a collective agreement. The Labour Code defines a collective agreement as a written

agreement entered into between a registered trade union and an employers' organization in respect of any matter of mutual interest and includes agreements on recognition, agency shops and grievance, discipline and dispute procedures.

(2) The concept of "matters of mutual interest" includes matters that relate to the relationship between employer and employee. Examples of matters of mutual interest are -

(a) collective bargaining matters (recognition, organizational rights etc);

(b) terms and conditions of employment;

(c) the employment related consequences of technological change, restructuring or re-organisation of the business including, for example, the transfer of part of a business, sub-contracting or outsourcing;

1. (d) employment policies and practices (such as policies on recruitment, promotion, training etc.);

(d) (e) the termination of employment (dismissal etc.);

(e) (f) grievance and dispute procedures;

a. (g) benefits;

(f) (h) any matter that has historically been an issue that the employer has

(g) bargained with unions in the past.

(3) It should be noted that the concept of mutual interest is dynamic. Trade unions engage on a much wider range of issues than in the past. Modern collective agreements contain a much wider range of issues than their predecessors. The fact that the certain issues have historically not been the subject of collective bargaining does not mean that they should on that ground be excluded from collective bargaining in the future but the greater involvement in employer decisions that affect employees carries with it the additional responsibilities of co-operation and confidentiality.

(4) Certain issues are not matters of mutual interest. For example the terms and conditions of employment of employees outside the bargaining unit or not represented by the trade union are not matters of mutual interest. Certain operational and managerial decision making powers of the

employer (called "managerial prerogative") may also fall outside the realm of collective bargaining.

(5) Managerial prerogative is the right to make decisions concerning the business without negotiating or consulting the trade unions. If however the decision may have an employment related consequence such as retrenchment, the employment related aspects of that decision are matters of mutual interest. The following are examples of the kinds of decisions that may fall within the ambit of managerial prerogative -

operational or managerial decisions such as –

(i) the decision to introduce or close down a product line or service;

the decision to introduce new technology. If the new technology will make employees redundant and lead to retrenchment, the consequences of that decision fall to be negotiated with the trade union. There are employers that consult trade unions on the decision itself.

employment related decisions such as –

(i) the decision to employ or promote an employee. Although employment policies on recruitment and promotion may be the subject of collective bargaining, the decision to appoint a particular person is the decision of the employer alone. If the appointment is alleged to be discriminatory, the trade union may refer a dispute in terms of the Labour Code.

(ii) the decision to dismiss or discipline an employee. Although the disciplinary code is normally a matter that is negotiated, a decision to dismiss is normally the employer's decision. A trade union may refer a dispute to the Directorate under the Labour Code;

(iii) the decision to grant discretionary bonuses;

(6) Like its counterpart, matters of mutual interest, the concept of managerial prerogative is dynamic and changes over time. Some employers are prepared to surrender some of their prerogative powers in return for greater co-operation and responsibility. Some go so far as to appoint trade union leaders as directors to their boards of directors.

Duty to bargain in good faith where trade union is recognized

27. (1) Once a trade union is recognized both the employer and the trade union

owe each other a duty to bargain in good faith. The failure to do so may be an unfair labour practice.

(2) Bargaining in good faith requires the parties to have a genuine desire to reach agreement. The following conduct is consistent with such a desire -

(a) respect for each other;

(b) preparing for negotiations, which includes developing proposals or standpoints and securing mandates for those proposals;

(c) retaining a consistent delegation unless there are good reasons to change the delegation;

(d) attending meetings and on time;

(e) motivating any proposals made;

(f) considering proposals made by the other side and, if not accepted, motivating why they are not accepted;

(3) Bargaining in bad faith -

(a) It is an unfair labour practice to bargain in bad faith. Bad faith is normally inferred from the conduct of the bargaining parties in the negotiation process. It is not any robust conduct that constitutes bargaining in bad faith – it must be conduct from which, without explanation, leads to an inference that the party has no genuine desire to reach agreement.

(b) Bargaining in bad faith may be inferred from the following conduct:

(i) breaching the provisions of paragraph (2) dealing with good faith bargaining;

(ii) making grossly unreasonable demands;

(iii) refusing to make concessions;

refusing to disclose relevant information reasonably required for collective bargaining;

being insulting, derogatory or abusive in negotiations;

delaying negotiations without good cause;

imposing unreasonable conditions for negotiations to proceed;

by-passing the trade union. For example by implementing decisions before negotiations have been exhausted or making offers directly to the employees before deadlock has been reached. An employer may make an offer that was rejected by the union in the negotiations directly to its employees but only after deadlock. The offer may not be more favourable than the employer's final offer in the negotiations;

engaging in industrial action before negotiations have been exhausted and deadlock has been reached;

(4) If a party bargains is bad faith, the other party need not continue negotiations and its duty to negotiate is met. For example, if an employer bargains in bad faith, the trade union may, subject to the provisions of section 229 of the Labour Code or any collective agreement, initiate industrial action. If a trade union negotiates in bad faith, the employer may implement or make an offer directly to its employees.

Deadlock

28. (1) Deadlock in negotiations is reached when negotiations are exhausted. Negotiations are exhausted if both parties agree or one of the parties declares deadlock after –

(a) (a) it has genuinely sought to reach agreement (i.e. conducted itself in
a manner consistent with bargaining in good faith) but failed to do so after a reasonable period;

(b) (b) the other party conducts itself in a manner from which it may be
(c) inferred it no longer wishes to continue negotiating. For example, if a
(d) party walks out of negotiations.

(e) (c) the other party bargains in bad faith. For example, if a trade union
(f) representative abuses and insults the employer representative in
(g) retrenchment negotiations, the employer may terminate the
(h) negotiations and, subject to the other provisions concerning
(i) termination of employment and dismissal, implement the
(j) retrenchment.

(2) A party that bargains in bad faith may not rely on its own conduct to terminate the negotiations and declare deadlock. In other words if the innocent party does not declare a deadlock, the defaulting party may not implement its proposals nor engage in industrial action without committing an unfair labour practice.

Duty to bargain in good faith where trade union is not recognized

29. (1) It is useful to discuss this duty in two situations –

(a) when a representative trade union seeks to enter into a collective bargaining relationship for the first time; and

(b) where a representative trade union has been refused recognition but seeks to negotiate a particular matter of mutual interest with the employer.

(2) Entering into a collective bargaining relationship for the first time -

(a) if a registered trade union has not bargained with an employer before, it must notify the employer of its intention to represent the employees in collective bargaining.

(b) the trade union must attach the following documents to the notice -

(i) any written proof of the fact that it represents more than 50% of the employees;

(ii) a copy of its registration certificate; and

(iii) a copy of its constitution.

(3) The notice requires the trade union to state what it intends to bargain about. The trade union may bargain about any matter of mutual interest. A matter of mutual interest includes wages, hours of work and recognition. (For a full description of what is meant by "mutual interest" see paragraph 26 of this Code.) But because this is the first time that the trade union is representing employees of the employer in collective bargaining, it is advisable to seek recognition – a formal agreement recognizing the union as a collective bargaining agent. Such an agreement will mean that the union will not have to notify the employer each time it wishes to bargain on some matter. (See the discussion on "recognition" in paragraph 24 of this Code and the model recognition agreement.)

(4) The employer must consider the notice and reply in writing within 30 days. The employer must advise the union that-

(a) it agrees to bargain collectively with the trade union, in which case the employer should propose a time, date and venue for the first meeting; or

(b) it refuses to do so, in which case the employer must give the reasons for doing so.

(5) There are only three acceptable reasons for refusing to bargain collectively with a trade union at this stage –

(a) the union does not represent more than 50% of the employees.

(b) the union is not registered; or

(c) the union's constitution does not permit the union to represent the employees. In other words the employees fall outside the scope of the union's constitution.

(6) If the employer's reason for refusing to bargain collectively is the union's representativeness, that dispute may be referred to the Directorate for summary determination by an arbitrator. (s.198B of the Labour Code).

(7) If the employer refuses to bargain collectively or fails to reply within 30 days, the trade union may refer the dispute to the Directorate for conciliation. If the conciliation fails, the dispute may be referred to the Labour Court for determination. (s. 226 (1) (b) read with s.227 (5) of the Labour Code).

Bargaining on a particular matter of mutual Interest

30. (1) If any employer refuses to recognize a representative trade union, that trade union may nevertheless require the employer to bargain on any specific matter of mutual interest.

(2) The representative trade union must notify the employer of its intention to bargain collectively on behalf of the employees.

(3) The trade union must attach the following documents to the notice -

(a) any written proof of the fact that it represents more than 50% of the employer's employees;

(b) a copy of its registration certificate; and

(c) a copy of its constitution.

(4) The trade union need not attach the documentation if the trade union has supplied it in a previous notice to the employer unless there has been a change to the documents or a change in representativeness.

(5) The notice requires the trade union to state what it intends to bargain about. The trade union may bargain about any matter of mutual interest. A matter of mutual interest includes wages, hours of work and recognition.

(6) The employer must consider the notice and reply in writing within 30 days. The employer must advise the union that -

it agrees to bargain collectively with the trade union, in which case the employer should propose a time, date and venue for the first meeting; or

it refuses to do so, in which case the employer must give the reason for doing so.

(7) There are only three acceptable reasons for refusing to bargain collectively
with a trade union –

(h) (a) the union does not represent more than 50% of the employer's employees;

(b) the union is not registered; or

(c) the union's constitution does not permit the union to represent the employer's employees. In other words the employees fall outside the scope of the union's constitution.

(8) If the employer's reason for refusing to bargain collectively is the union's representativeness, that dispute may be referred to the Directorate for summary determination by an arbitrator. (s.198B).

(9) If the employer refuses to bargain collectively or fails to reply within 30 days, the trade union may refer the dispute to the Directorate for conciliation. If the conciliation fails, the dispute may be referred to the Labour Court for determination.

Disclosure of information

31. (1) The duty of the employer to bargain in good faith entails the duty to disclose all relevant information that is reasonably required to allow the trade union to consult or bargain collectively in respect of any labour matter.

(2) An employer is not required to disclose information that -

is legally privileged;

the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of court;

is confidential and, if disclosed, may cause material harm to an employee or the employer;

is private personal information relating to an employee, unless the employee consents to the disclosure of that information;

if the employer refuses to disclose information on grounds of confidentiality, the employer must notify the trade union in writing of that fact;

unless there is a collective agreement that provides otherwise, in any dispute over the disclosure of information, any party to the dispute may refer the dispute in writing to the Labour Court.

(3) The Court must -

(a) determine whether the information is relevant;

(b) if relevant, determine whether it is confidential or private personal information;

(c) if private personal information, determine whether the employee has consented to its disclosure;

(d) if confidential or private personal information, determine whether it is likely to cause harm to the employee or the employer;

(e) if disclosure is likely to cause harm, balance that harm against the harm that the failure to disclose is likely to cause the trade union's ability to engage effectively in consultations or collective bargaining;

(f) if the balance of the harm favours disclosure, determine the form that the disclosure must take in order to limit the harm likely to be caused to the employee or the employer;

(g) before making any order to disclose, take into account any previous breach of confidentiality.

(4) If there is a breach of confidentiality, the Court may -

(a) refuse to make an order to disclose information even if relevant and likely to affect the trade union's ability to effectively engage in negotiations or consultations;

(b) order that the right to disclosure of information in that workplace be withdrawn for a specified period.

(5) Purpose of disclosure

(a) the object of disclosure is to make the process of negotiation as rational as possible, to ensure good faith bargaining and to develop trust between the bargaining parties.

(b) In order to be rational, the parties have to have information in order to formulate reasonable demands or responses, substantiate those demands or responses and to arrive at a realistic settlement.

(c) In order for bargaining to be in good faith, the claims made in negotiations must be honest claims. If an employer claims that it cannot afford the increase demanded by the union, there would be no way of demonstrating its good faith unless it permitted the union or its auditor to determine the accuracy of its claim.

(6) Relevant information

(a) The employer is obliged only to disclose information that is relevant if it -

(i) is reasonably required for the trade union to effectively engage in negotiations or consultations;

relates to that employer and concerns a labour matter; and

relates to a specific round of negotiations or consultations.

(7) Information is relevant only if it is likely to influence the formulation and presentation of pursuance of a trade union demand or the conclusion of a collective agreement. For example, if in any wage negotiations the employer states that it can afford the increase proposed by the union but it will not agree to the demand, the disclosure of the employer's book is not

relevant. If however the employer claims that it cannot afford the proposed increase, the employer's financial position and therefore its books becomes relevant.

(8) Collective bargaining with an employer may range from negotiations on a specific matter that affects one or a few employees to extensive negotiations on an annual basis on terms and conditions of employment affecting all employees in the bargaining unit. The depth, detail, form and subject matter of the information to be disclosed will vary. It is therefore not possible to list all the items that should be disclosed in all circumstances. The following items are examples of the kind of information that may be relevant in certain kinds of negotiations or consultations -

(a) **remuneration and benefits –** reward policies and systems; job evaluation systems and grading criteria; earnings and hours analysed according to grade, department, workplace, sex, race, out-workers, casual workers etc, giving if appropriate the distributions and make-up of remuneration showing any additions to the basic rate; the total wage bill; details of fringe benefits and total labour costs.

(b) **conditions of service –** policies on recruitment, redeployment, redundancy, training, affirmative action, and promotion; appraisal systems; health, welfare and safety matters;

(c) **performance –** productivity and efficiency data; savings from increased productivity and output; return on capital invested; sales and state of order book.

(d) **labour force issue –** numbers employed analysed according to grade, department, location, age, sex, race or any other appropriate criterion; labour turnover; absenteeism; overtime, lay-offs; manning standards; planned changes in work methods, materials, equipment or organization; available manpower plans; investment plans.

(e) **ability to pay** – cost structure; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.

(9) These examples are not intended to represent a check list of information that should be provided in all negotiations or consultations. Nor are they meant to be an exhaustive list of types of information – other items may be relevant in particular negotiations.

Confidentiality

32. (1) Confidential information is information that the employer regards as con
associated with its business such as its employees, customers, suppliers, investors etc.
But the information must not just be confidential, it must also be information that if disclosed, may cause material harm to an employee or the employer.

(2) Some examples of information which if disclosed in particular circumstances may cause material harm are – cost information on individual products or services; detailed analysis of proposed investment, marketing or pricing policies; price quotas or the make up of tender prices; customer lists, trade secrets, and certain kinds of financial information. Information that must be made available publicly, for example under the Companies Act, do not fall under this category.

(3) Material harm may occur if the disclosure of confidential information may lead to, for example -

(a) the employer losing customers to competitors;

(b) suppliers refusing to supply necessary material or services;

(c) banks refusing to grant loans; or

(d) the employer not being able to raise funds to finance the business.

(4) The burden to establish that the information is confidential and that if disclosed is likely to cause harm lies with the employer. The employer must consider alternative means of disclosing the information in order to protect itself while at the same time meeting its duty to disclose relevant information in order to promote transparent and rational collective bargaining. For example the parties may agree on an independent auditor to assess the validity of the employer's claims and to report on his investigation without disclosing any of the information on which the auditor bases the assessment.

Private personal information

33. (1) Private personal information will include certain information that may be found in an employee's employment file. This information may include information concerning the employee's financial circumstances, criminal record or health (e.g. HIV/AIDS or alcoholism). This kind of information

is private and personal. The employer may not disclose it unless the employee consents or an arbitrator requires it to do so.

Trade union responsibilities

34. (1) Trade unions should identify and request information in advance of negotiations if practicable. In order to avoid misunderstanding and cause unnecessary delays, trade unions should –

(a) frame their requests for information in writing and as precisely as possible;

(b) include motivation for the information taking into account the matters raised in this code and the provisions of section 46 of the Labour Code;

(c) give the employer sufficient time to prepare and submit the information requested taking into account whether or not there is likely to be a dispute over disclosure.

(2) The trade unions should keep the employer informed of the persons who will represent the trade unions in the negotiations or consultations.

(3) Confidentiality is fundamental. It is of vital importance for trade unions to respect the confidentiality of the information disclosed by the employer in negotiations and to take all reasonable steps to secure its confidentiality. This does not mean that the trade union cannot pass the gist of this information on to its membership in the process of the negotiations but it must do so in a form that does not compromise that confidentiality.

Duty of fair representation

35. (1) If a trade union is recognized in respect of a defined bargaining unit that includes employees who are not members of the union, the trade union must bargain in good faith in respect of all employees in the bargaining unit irrespective of whether they are members or not. It cannot do the following –

(a) refuse to represent non-union members in grievance and disciplinary hearings;

(b) refuse to take up a non-union member's case solely because they are not a member;

(c) enter into agreements that favour its members at the expense of non-members. For example it may not agree to selection criteria in retrenchment that select non-union members before members.

(2) If an employer does not want the recognized or representative trade union to represent the employee, the duty of fair representation is discharged.

STRIKES AND LOCKOUTS

Introduction

36. (1) This code applies to employees, employers, trade unions and employer organizations. It must be taken into account in any proceedings by conciliators, arbitrators and judges.

(2) The code is intended to provide practical guidance on strikes and lockouts. The guidelines should be followed. They may be departed from only if there is good reason for doing so.

(3) To the extent that this code advances an interpretation of the law, that interpretation is the policy of the Directorate of Dispute Prevention and Resolution and will be applied by its conciliators and arbitrators unless that interpretation is reversed by a decision of the Labour Court or the Labour Appeal Court.

Role of strikes and lockouts in collective bargaining

37. (1) The Labour Code promotes free collective bargaining as the core mechanism for
employer and employees to resolve matters of mutual interest themselves without outside interference. The only exception is that in respect of essential services of which compulsory arbitration resolves disputes after negotiations have failed.

(2) Although a measure of last resort, strikes and lockouts are forms of lawfully sanctioned economic pressure in order to resolve disputes of interest between employers and their employees. A strike and a lockout are temporary applications of pressure in the collective bargaining process. Its purpose is not to unnecessarily damage the employer's business.

(3) The object of a strike or lockout is to settle a dispute. Accordingly a strike or a lockout comes to an end if the dispute that gave rise to it is settled. It may be settled by an agreed compromise or a return to work. If an employer withdraws a lockout, the employees return on the employees' terms. If employees abandon the strike or the strike is called off by the

trade union, the employees return on the employer's terms. Either way, the dispute is settled.

Matters in respect of which a strike or lockout is permissible

38. (1) The subject matter of a lawful strike or lockout is limited to disputes of interest only. Note that it is not permissible to strike or lockout in respect of disputes of interest in an essential service. Those disputes must be referred to compulsory arbitration.

(2) A dispute of interest is defined in the Labour Code. It is a dispute concerning a matter of mutual interest to employees but does not include a dispute of right. In other words a labour matter contemplates two types of dispute: a dispute of interest and a dispute of right.

(3) A dispute of right may be described as a dispute arising from the breach or contravention of a law, contract of employment or collective agreement. A dispute of interest on the other hand is a dispute over a labour matter which the employee does not have the right to. The distinction can be demonstrated by an example. If an employer refuses to give an increase at the agreed rate, a dispute over that refusal is a dispute of interest and may only be resolved by industrial action. There is one exception to industrial action over interest disputes – those disputes of interest that are referred to arbitration in essential services or by agreement.

(4) The following are examples of a dispute of interest.

a dispute over a new collective agreement or the renewal of an agreement;

a dispute over what next years wages are going to be;

a dispute over shorter working hours or higher overtime rates;

a dispute over a new retrenchment procedure or recruitment policy;

(e) a dispute over compulsory deductions of trade union dues from non-members;

(f) a dispute over recognition from an employers organization;

(5) The above list is not exhaustive. It is illustrative only.

Procedural requirements for a lawful strike or lockout

39. (1) The Labour Code contemplates the following procedure before an employer may
embark on a lawful lockout or employees may embark on a lawful strike.

(a) The dispute must be referred to the Directorate.

(b) The Director will appoint a conciliator who will attempt to resolve the dispute through conciliation within 30 days of the referral.

(c) The conciliator will try and conciliate the dispute.

(d) If the dispute is resolved, the conciliator must issue a report and reduce the settlement to writing. The settlement should be signed by the parties to the dispute.

(e) If the dispute remains unresolved for more than 30 days, the conciliator must issue a report that the dispute is unresolved. Note that this period of 30 days may be lengthened or shortened.

(f) The 30 day conciliation period is calculated from the date that the dispute is referred. That period may be lengthened by 30 days if the party referring the dispute fails to attend a conciliation meeting. The period may be shortened to the date of the conciliation meeting if the other party fails to attend. Nothing prevents the parties to the dispute agreeing as between themselves to lengthen the period.

(g) At least 7 days notice of the commencement of the strike or lockout must be given.

(2) The conciliator retains jurisdiction over the dispute until the dispute is settled and must continue to try and settle the dispute by conciliation.

(3) Once a dispute has been referred and the procedural requirements of sections 225 and 230 have been complied with, either party to the dispute may commence industrial action. In other words a trade union may strike in respect of a dispute referred by the employer and an employer may lockout in respect of a dispute referred by the employees.

(4) It is possible to have a strike and a lockout at the same time. If the employees engage in a partial stoppage, the employer may institute a lockout in response.

(5) The notice of commencement of the strike and lockout must state the date and time of the strike or lockout. The object of the notice is to ensure that the employer has the opportunity to shut down the business without

unnecessary harm being done to it. Accordingly, the strike must commence at the stated time and date. If the strike does not commence at the stated time and date, a fresh notice must be given.

(6) If the intended strike or lockout is to be intermittent, the notice of the commencement of the strike or lockout may include the dates and times of each stoppage.

(7) If a strike or lockout is suspended and the employees return to work, a fresh notice must be given if the strike or lockout is resumed. That notice must state the date and time of the resumption of the strike.

(8) The notice of the commencement of the strike or lockout may be given before the conciliation period has expired provided that the strike or lockout commences after the expiry of the conciliation period.

Rules regulating the conduct of strikes and lockout

40. (1) Before issuing a report of an unresolved dispute, the conciliator should try and reach agreement on rules to regulate the conduct of strikes, lockout and pickets.

(2) The rules should address the following matter -

(a) the conduct of strike ballot;

(b) the actual notice of the commencement of the strike or lockout;

(c) notice of the form or change in form of strike or lockout;

(d) picketing;

(f) places, times and conditions for strikers or locked out employees to assemble on the premises during the strike or lockout;

(g) appointment of representatives responsible for ensuring compliance with rules;

(h) security of the employer's premises during the strike or lockout;

(i) commitment to take steps to ensure compliance with the provisions of the Labour Code and the rules;

(j) conciliation process during the strike or lockout.

Dismissal of strikers

41. (1) It is not fair to dismiss a striker engaged in a lawful strike. This protection against dismissal does not extend to strike related misconduct such as picket line violence, malicious damage to property etc. The ordinary rules relating to dismissal for misconduct will apply to an employee charged with this kind of misconduct.

(2) It may be fair to dismiss a striker engaged in an unlawful strike. The fairness of the dismissal depends on a number of factors. Those are specifically dealt with in the Code of Good Practice: Termination of Employment.

PICKETING

Introduction

42. (1) This code is intended to provide practical guidance on picketing in support of any lawful strike or in opposition to any lockout. It is intended to be a guide to those who may be contemplating, organizing or taking part in a picket and for those who may be affected by it.

(2) Section 15 of the Constitution recognizes the right of assembly. This constitutional right may only be exercised peacefully and without arms. Section 233 of the Labour Code seeks to give effect to this right in respect of a picket in support of a lawful strike.

(3) This code does not impose any legal obligations and the failure to observe it does not by itself render anyone liable in any proceedings. But any person interpreting or applying the Labour Code in respect of any picket must take this code of good practice into account. This is the effect of section 240 (4) of the Labour Code.

(4) This code applies to employers, employees, trade unions and employer organizations. It must be taken into account by conciliators, arbitrators, the Labour Court, the Labour Appeal Court and the Lesotho Police.

(5) This code does not apply to all pickets and demonstrations in which employees and trade unions may engage. It applies only to pickets held in terms of section 233 of the Labour Code. In terms of the section -

(a) only an employee, member, or official of a registered union may participate in the picket. Accordingly any picket by other persons must comply with the ordinary law governing freedom of association.

(b) the purpose of the picket must be to peacefully demonstrate in support of any lawful strike;

(c) the picket may be held only in a public place outside the premises of the employer or, with the permission of the employer, inside its premises.

(6) If the picket complies with the above elements then the ordinary laws regulating the right of assembly do not apply. These laws include the common law, municipal by-laws and any statutes that regulate assembly.

(7) A picket with a purpose other than to demonstrate in support of a lawful strike or in response to a lockout is not protected by the Labour Code. The lawfulness of the picket or demonstration will depend on compliance with the ordinary laws governing the public assembly.

Purpose of the picket

43. (1) The purpose of the picket is to peacefully encourage non-striking employees and members of the public to support strikers involved in a lawful strike. The nature of the support can vary. It may be to encourage employees not to work during the strike. It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.

(2) In normal cases, employees picket at their own place of work in support of their strike against their own employer. The purpose of this kind of picket is to put pressure on the strikers' own employer. Cases do arise, however, where employees picket at their own place of work in support of a strike between another employer and its employees. This is what is contemplated in the definition of strike which includes as one of the objects of a stoppage of work, the object of compelling "any other employer" to accept, modify or abandon a demand that may form the subject matter of a dispute.

(3) If a picket is in support of an unlawful strike, the picket is not protected by section 233 of the Labour Code.

Picketing rules

44. (1) A recognized trade union and employer should seek to conclude a collective agreement to regulate picketing during strikes or lockout. The following matters should be addressed –

(a) authorization of the picket by the trade union;

(b) the notice of the commencement of the picket including the place, time and the extent of the picket;

(c) the nature of the conduct in the picket (e.g. commitment not to engage in violence)

(d) the number of picketers and their location;

(e) the channels of communication between marshals and employers and any other relevant parties;

(f) access to the employer's premises for purpose other than picketing e.g. access to toilets, the use of telephones, etc.

(2) If in a dispute of interest, it becomes clear to the conciliator that the dispute is not likely to be settled without resort to a lawful strike or lockout, the conciliator should try and secure agreement on picketing rules before issuing a certificate of an unresolved dispute.

(3) A copy of any agreed picketing rules should be handed to the relevant authorities in the police before the picket commences.

(4) The following factors apply in the determination of the rules regulating picketing at or near the employer's premises or with the permission of the employer, on its premises -

(a) the nature of the workplace e.g. a shop, a factory, a mine etc;

(b) the particular situation of the workplace e.g. distance from place to which public has access, living accommodation situated on employer premises, etc;

(c) the number of employees taking part in the picket inside the emp

(d) the areas designated for the picket;

(e) time and duration of the picket;

(f) the proposed movement of persons participating in the picket;

(g) the proposals by the trade union to exercise control over the picket; the conduct of the picketers.

Conduct in the picket

45. (1) The registered trade union must appoint a convenor to oversee the picket and notify the employer of the name and telephone number of the convenor. The convenor must be a member or an official of the trade union. That person should have, at all times –

a copy of section 233 of the Labour Code;

a copy of these guidelines;

any police guideline of policy issued by the Minister responsible for Police;

any collective agreement of rules regulating pickets; and

a copy of the resolution to picket by the registered trade union.

(2) These documents are important for the purposes of persuading the persons participating in the picket to comply with the law. These documents may also be important to establish the lawfulness and the protected nature of the picket to the employer, the public and, in particular, the police.

(3) The employer must, on receipt of the notification, provide the convenor with the name, address and telephone number of the person appointed by the employer to represent it in any dealings arising from the picket.

(4) The registered trade union should appoint picket marshals to monitor the picket, they should have the telephone numbers of the convenor, the trade union office and any persons appointed to oversee the picket in the absence of the convenor. The marshals should be readily identifiable as marshals. The trade union should instruct the marshals on the law, any agreed picketing rules or where no agreed rules exist any picketing rules that have been stipulated by the conciliators, this code and the steps to be taken to ensure that the picket is conducted peacefully.

(5) Although the picket may be held in any place to which the public has access, the picket may not interfere with the constitutional rights of other persons.

The picketers must conduct themselves in a peaceful, unarmed and lawful manner. Subject to any agreement/rules in existence, they may-

carry placards;
chant slogans; and
sing and dance.

(7) Picketers may not -

(a) physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employers premises;

(b) commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be violent.

Role of the police

46. (1) The Lesotho Police will apply any policy and guidelines issued by the Minister responsible for Police in respect of strikes.

(2) As a general rule, uniformed police should not be seen in an area where a picket is held. Police should only intervene if there is a breach of the peace or law, particularly if there is violence.

(3) It is not the function of the police to take any view of the merits of the dispute giving rise to a strike. They have a general duty to uphold the law and may take reasonable measures to keep the peace whether on the picket line or elsewhere.

(4) The police have no responsibility for enforcing the picketing rules. An employer cannot require the police to help in identifying pickets against whom it wishes to seek an order from the Labour Court. Enforcement of a court order is a matter for the courts and its officers, although the police may assist officers of the court in serving the order but only if there is a breach of the peace.

(5) The police have the responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.

Role of private security personnel

47. (1) Private security personnel may be employed to protect the property of the employer and to ensure the safety of people on the employer's premises.

The private security personnel have no responsibility for enforcing the

Labour Code or any order of the Labour Court and Labour Appeal Court.. Enforcement of an order on the application of an employer is a matter for the courts and its officers.

General rights, obligations and immunities

48. (1) A person who takes part in a picket protected in terms of the Labour Code does not commit a delict or a breach of contract for doing so. This means that the employer may not sue a person or a union for damages caused by a lawful picket.

(2) The employer may not take disciplinary action against an employee for participating in a lawful picket. If the employee's conduct during a picket constitutes misconduct, the employer may take disciplinary action in accordance with the provisions of the Labour Code. For example if a picketer assaults an employee who is trying to enter the premises, that act is an act of misconduct notwithstanding the protected nature of the picket.

Information and education

49. (1) The Labour Department should ensure that copies of this code are accessible and available.

(2) Employers and employers organizations should include the issue of industrial action (including picketing) in their orientation, education and training programmes of employees.

(3) Trade unions should include the issue of industrial action (and picketing) in their education and training programmes of shop stewards and employees.

EMPLOYMENT DISCRIMINATION

Purpose and status of Code

50. (1) This code applies to employees, employers, trade unions, employers' organization, employment agencies, conciliators, arbitrators and judges.

(2) The object of the code is to give practical guidance to assist in understanding and implementing policies to eliminate unfair discrimination and promote equality of opportunity and treatment in employment.

(3) The code is a guideline. It is not an authoritative statement of the law. It must be considered together with and subject to sections 5 and 196 of the Labour Code.

(4) This code must be flexibly applied. The guidelines (not the statutory provisions) may be departed from in appropriate circumstances.

Discrimination

51. (1) Not every difference in treatment is discrimination. In order for there to be an act of discrimination, there must be –

(a) a difference in treatment;

(b) based on one or more of the prohibited grounds; and

(c) a lack of justification.

(2) (a) A difference in treatment can be deliberate. For example a municipality may deliberately appoint a man to work as an attendant in the men's public toilets.

A difference in treatment does not have to be deliberate. This occurs when a criterion is used that appears to be neutral on the face of it but operates in a way that impacts unfairly on the kinds of person contemplated in the list of prohibited grounds. An example may be that only persons who are six foot tall may apply to be fire-fighters. Because women are generally shorter than men, that criterion would mean that more men than women would be employed. The criterion would accordingly have the effect of differentiating between men and women. But this does not automatically amount to discrimination on the grounds of sex . It only becomes discrimination if the criterion cannot be justified.

(3). Prohibited grounds for discrimination

(a) trade union membership;

(b) participation in the lawful activities of the trade union;

(c) exercising a right conferred by the Labour Code.

(d) the grounds set out in section 5 of the Labour Code.

(4). Justification for discrimination

(a) not every difference in treatment based on one or more of the prohibited grounds constitutes discrimination..

(b) there maybe good employment related reasons for treating people differently. There are two generally acceptable reasons for doing so. They are –

(i) the inherent requirements of the job. For example, the height requirement for fire-fighters – there is no evidence that six foot person is a better fire-fighter than one that is 5'6" tall.

(ii) positive action. It is generally regarded as fair to undo the effects of past discrimination by deliberately appointing members of the previously disadvantaged group over those who were the beneficiaries of the discrimination.

Positive action: Employer responsibilities

52. (1) It is primarily the employer's responsibility to provide equal opportunity for all applicants for employment and employees.

(2) Every employer should therefore initiate and ultimately ensure that fair employment policies and practices are adopted, implemented and monitored.

Every employer should also ensure that the policies are clearly communicated to all employees. This can be done by use of notice boards, circulars, employment contracts etc.

Fair employment policies and practices

(a) Advertising

(i) employers should not unjustifiably limit advertisements for employment to those areas or publications which would exc

(ii) employers should as far as possible avoid being too prescriptive in the requirements unless it is genuinely required for the position (e.g. specific length of residence in the country, recognition of qualifications or experience obtained in the country alone);

(iii) employers who use recruitment agencies or similar sources can avoid indirect discrimination by using services which do not provide applicants only from a particular group to the unjustifiable exclusion of others.

(b) Selection -

(i) selection criteria and tests should be analysed from time to time to ensure that they genuinely relate to the job requirements and do not indirectly discriminate against candidates;

(ii) If reasonably possible, short-listing and interviewing applicants should not be done by only one person, and should ultimately be checked by someone at a more senior level;

(iii) employees responsible for short-listing, interviewing and selecting candidates should be given guidance or be appropriately trained on the needs for the job and the consistent application thereof, and of the potential differences which may arise in situations with applicants from various groups.

(c) Training -

(i) employers should ensure that selection criteria for training opportunities, whether for inductions, promotion or skill training, is not discriminatory and should be examined periodically to avoid indirect discrimination.

(d) Performance reviews:

(i) employers should ensure that those responsible for conducting such evaluations do not discriminate;

(ii) employers should ensure that the assessment criteria are examined to avoid indirect discrimination.

Positive action: employee responsibilities

53. (1) Every employee is responsible for ensuring equal opportunity and preventing discrimination. Each employee can assist in making the workplace a discrimination free environment by –

(a) co-operating and complying with fair employment policies and prac

(b) implementing the policies and practices in order to prevent discrimination and to promote equality;

(c) drawing to the employer's or their trade union's attention any alleged discrimination;

(d) refraining from harassment or victimization of other employees;

(e) participating and co-operating in training schemes introduced by employers or trade unions;

(f) participating and co-operating where appropriate in discussions with employers and unions to find solutions to conflicts.

Positive action: trade union responsibilities

54. (1) Trade union officials and representatives play important roles on behalf of their members in preventing discrimination and in promoting equal opportunity and good employment relations.

(2) Admission and treatment of members -

(a) trade unions should not discriminate by either refusing membership or offering less favourable terms of membership on any of the prohibited grounds;

(b) trade unions should encourage diversity in their membership, their office-bearers, officials and employees.

(3) Discipline -

(a) Discriminatory conduct by members, office bearers, officials or emp

(4) Training and information -

(a) because training and information play an important role in the elimination and prevention of discrimination and promotion of equal opportunity, trade unions should -

(i) provide training and information for officials and representatives on their responsibilities in respect of preventing discrimination and promoting equality;

(ii) ensure that members and representatives of all groups are informed of their role in the union, and of industrial relations, union procedures and structures;

(iii) co-operate in the development, introduction, implementation and monitoring of policies to promote equality within the trade union and in the workplace.

SEXUAL HARASSMENT IN THE WORKPLACE

Introduction

55. (1) The Code applies to employees, employers, trade unions, employers organizations, conciliators, arbitrators and judges.

(2) The objective of this code is to eliminate sexual harassment in the workplace.

(3) This Code encourages and promotes the development and implementation of policies and procedures that should lead to the creation of a workplace -

(i) that is free of sexual harassment;

(ii) in which the employer respects the employee's right to dignity, privacy and equity; and

(iii) in which employees respect one another's right to dignity, privacy, and equity.

Application of the Code

56. (1) Although this code is intended to guide employers and employees, it applies to perpetrators and victims of sexual harassment who may extend to –

(i) job applicants;

(ii) clients (including patients, students etc);

(iii) suppliers;

(iv) contractors;

(v) other people dealing with the business.

(2) The employer is required to take steps to prevent non-employees from

harassing employees and taking steps against the employer of the perpetrator. The failure to take steps may render the employer vulnerable to claim of discrimination, an unfair labour practice or unfair constructive dismissal.

(3) This Code is not intended to replace any collective agreement that prohibits sexual harassment in the workplace. It must, however, be taken into account in the negotiation of any collective agreement and in its interpretation by an arbitrator or court.

Provision of the law

57. (1) Section 200 of the Labour Code limits the definition of sexual harassment to quid pro quo sexual harassment. Quid pro quo harassment occurs when an owner, a person of authority or a co-employee attempts to influence any employment related decision affecting an employee in exchange for a sexual favour. Those decisions include a decision to employ, promote, train, discipline, improve terms and conditions of employment or benefits, transfer or dismiss an employee or job applicant.

(2) Quid pro quo harassment constitutes an unfair labour practice in terms of section 200 of the Labour Code.

Definition of sexual harassment

58. (1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if -

(a) the behaviour is persistent although a single incident of harassment can constitute sexual harassment; or

(b) the recipient has made it clear that the behaviour is offensive;

(c) the perpetrator should have known that the behaviour is unacceptable.

Forms of sexual harassment

59. (1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows –

(a) physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex;

(b) verbal forms of sexual harassment include the following statements made in the presence of a person or directed towards that person:

(i) unwelcome innuendos, suggestions and hints;

(ii) sexual advances, sex related jokes or comments with sexual overtones; insult or unwelcome graphic comments about a person's body or sexual body or sexual orientation inappropriate enquiries about a person's sex life or sexual orientation.

(c) Non-verbal forms of sexual harassment include the following unwelcome forms –

(i) whistling;

(ii) sexual gestures;

(iii) indecent exposure; and

(iv) the display of sexually explicit pictures and objects.

(d) Sexual favouritism exists when a person who is in a position of auth rewards whether in the form of promotions, merit, rating or salary increases.

Guiding principles

60. (1) An employer should create and maintain a working environment in which the dignity of each employee is respected. A climate in the workplace should also be created and maintained in which victims of sexual harassment will not fear reprisals or feel that their grievances are ignored or trivialized.

(2) Implementing the following guidelines may assist in achieving these ends -

(a) all employees are required to refrain from committing acts of sexual harassment.

(b) all employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others;

(c) the employer should take steps to ensure that persons such as cust with the business, are not subjected to sexual harassment by any of its employees;

(d) the employer must take appropriate action in accordance with this code if sexual harassment occurs in the workplace.

Policy statement

61. (1) In the absence of a collective agreement, every employer should, as a first step in expressing concern and commitment to dealing with the problem of sexual harassment, issue a policy statement which should endorse the provisions of this Code.

(2) The policy statement must also be effectively communicated to all employees and people listed in paragraph 56 (1) who come on the premises of the employer.

(3) Every employer should develop a clear procedure to deal with sexual harassment. The procedure may be built into existing grievance and disciplinary procedures. The procedure should ensure the resolution of a dispute in a sensitive, efficient and effective way.

Advice and Assistance

62. (1) Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleques for support. As far as is practicable employers should designate a person outside the line management whom victims may approach for confidential advice. Such a person -

(a) could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or an outside professional;

(b) should have the appropriate skills and experience or be properly trained and given adequate resources;

(c) could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

Options to resolve a problem

63. (1) Employees should be advised that there are two options to resolve a problem relating to sexual harassment. The employee should be given the option of resolving the problem in an informal way or in terms of a formal procedure. The employee should be under no duress to accept one or the other option.

(2) In certain severe cases it may not be appropriate to try and resolve the problem informally. Severe cases may include – sexual assault, rape, a strip search and quid pro quo.

Informal procedure

64. (1) It may be sufficient for the employee concerned to have the opportunity to explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it is offensive or makes the employee feel uncomfortable, and that it interferes with work.

(2) If the informal approach has not provided a satisfactory outcome or the conduct continues, it may be appropriate to embark upon a formal procedure.

Formal procedure

65. (1) Where a formal procedure has been chosen, a formal procedure for resolving the grievance should be available and should –

specify to whom the employee should lodge the grievance;

make reference to time-frames, which allow the grievance to be dealt with expeditiously;

provide that if the case is not resolved satisfactorily, the issue can be dealt with in terms of the dispute procedures referred to in this Code.

Investigation and disciplinary action

66. (1) Care should be taken during any investigation of a grievance of sexual harassment that –

(i) the complainant is not disadvantaged;

(ii) the alleged harasser is not prejudiced should the grievance be found to be unwarranted.

(2) The Code on Termination of Employment reinforces the provisions of section 5 of the Labour Code and provides that an employee may be dismissed for serious misconduct or repeated offences. A serious incident of sexual harassment may itself justify dismissal. Continued harassment after warning may also justify dismissal.

(3) In cases of persistent harassment or a single incident of serious misconduct, an employer should follow any agreed procedure or the procedures set out in the Code on Termination of Employment.

(4) The range of disciplinary sanction to which employees will be liable should be clearly stated in any policy or procedure. It should also be made clear that it will be a disciplinary offence to victimize or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

Criminal charges and civil claims

67. (a) a victim of sexual assault has the right to press separate criminal charges or to institute civil legal proceedings against an alleged perpetrator, and the legal rights of the victim are in no way limited by this Code.

(b) the fact that an employee has laid a charge or instituted civil legal proceedings does not affect the employee's duty to take appropriate action including disciplinary action against an employee who has been accused of sexual harassment in the workplace as soon as possible.

(c) an employee who is subject to criminal proceedings for sexual harassment, may exercise the right to remain silent in any disciplinary proceedings. If the employee remains silent, the employer is entitled to take disciplinary action, including dismissal , based on any other evidence led in the disciplinary proceedings.

Referral to conciliation

68. (1) If a complaint of alleged sexual harassment is not resolved to the satisfaction of the complainant, the complainant may refer the matter to the Directorate for conciliation in accordance with the provisions of sections 226 and 227 of the Labour Code. Should the dispute remain unresolved, the matter must be referred to the Labour Court in terms of section 227 (5) of the Labour Code.

(2) Any employee dismissed on grounds of sexual harassment has the right to challenge the fairness of that dismissal in terms of section 66 of the Labour Code read with the provisions of the Code on Termination of Employment.

Confidentiality

69. (1) Employers and employees must ensure that grievance about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.

(2) In cases of sexual harassment, the employer, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary enquiry. Only appropriate members of management as well as the aggrieved person, representatives of the parties, the alleged perpetrator, witnesses and interpreter if required, may be present in the disciplinary enquiry.

(3) Employers are required to disclose to either party or to their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.

Information and education

70. (1) The Labour Department should ensure that copies of this code are accessible and available.

(2) Employers and employer organizations should include the issue of sexual harassment in their orientation, education and training programmes of employees.

(3) Trade unions should include the issue of sexual harassment in their education and training programmes of shop stewards and employees.

(4) Officials of the Labour Department should receive specialized training to deal with sexual harassment cases.