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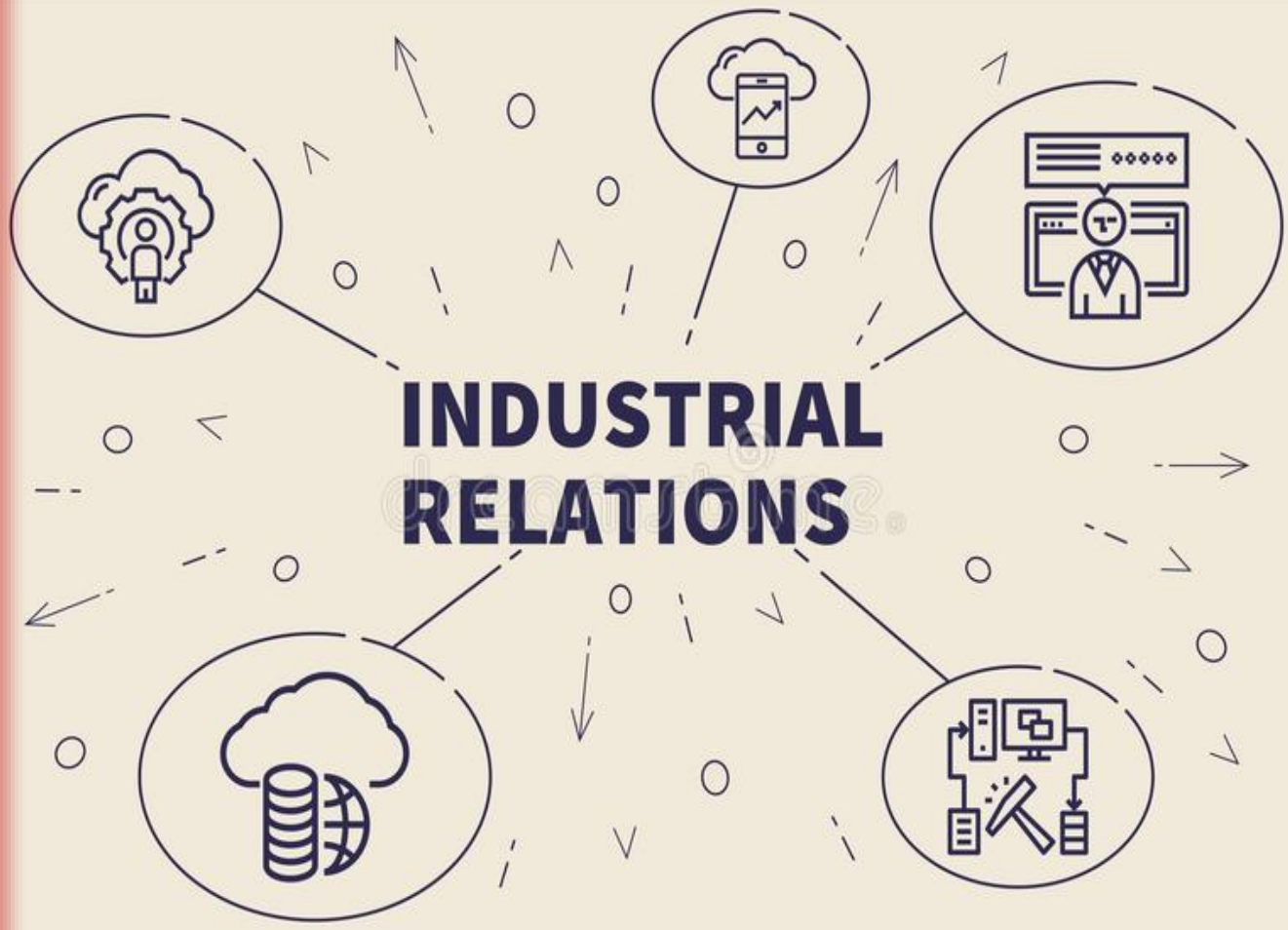
INDUSTRIAL RELATIONS



INDUSTRIAL RELATIONS

BPG 007

23 August 2021

INDUSTRIAL RELATIONS ISSUES

1. INTRODUCTION:

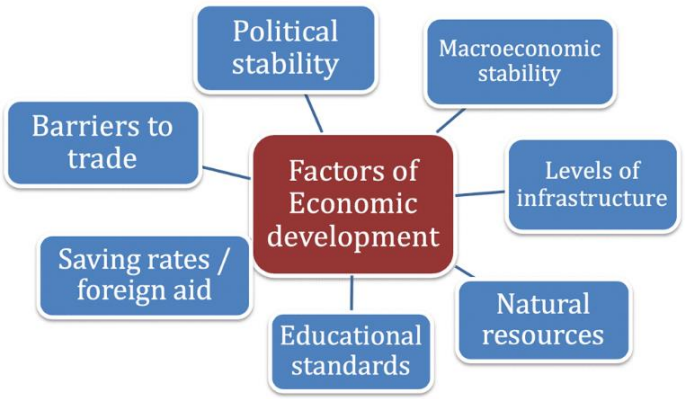
With COVID-19 affecting all workplaces, there have been many issues that have changes and to what have not been done. Health and Safety was focused on, but only the COVID side of it. The rest of Health and Safety seems to be ignored. So has labour relations and industrial relations.

In this document we cover some issues that are important, and managers should all read this and even a bit of training to be done on some of these issues.

Let's look at the law:

The Labour Relations Act is the relevant law which we should look at.

The purpose of the Act is to ensure economic development, in the interest of society, democracy and peace?



Does this law apply to me?

The law applies to all workers, employers, trade unions and organisations for employers.

However, it does not apply to a member of the National Defence Force, the National Intelligence Agency or the SA Secret Service.

What rights are protected?

Rights that this law protects include:

Trade unions

The right to form and join trade unions if you are a worker. The right to join employers' organisations, if you are the owner or boss. The law also focuses on helping build fair relationships between workers and bosses.

Collective bargaining

The right to organise and bargain collectively. This can be within a company or a sector. Sectoral collective bargaining means that workers, who are doing similar work, have the right to be together when negotiating and discussing with employers about what pay and job benefits, they want.

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Legal strikes

The right to strike and the process and rules you must follow to make sure that the strike is legal. In particular, a new change to the law helps to stop strikes from going on for too long or becoming too violent.

Lock outs

The rights of employers to lock out workers. However the rules for when they can do this are very strict in order to protect the rights of the workers.

Dealing with disputes

The law also sets out a guideline of how to deal with disputes (disagreements) between an employee and employer in a fair way. This law sets up various institutions to help settle these disputes.

What organisations protect workers?

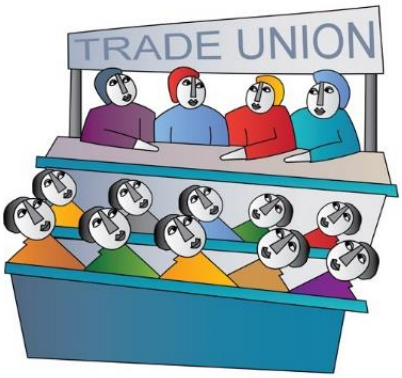
The Labour Relations Act is the law that protects employers and employees through the following institutions:

- The Commission for Conciliation, Mediation and Arbitration (CCMA)
- The section at the Bargaining Councils that helps solve disputes
- The Labour Court
- The Labour Appeal Court

How does this law protect these rights?

Here are ten key ways in which the Labour Relations Act protects your rights as a worker:

1. Workers are allowed to join and take part in all legal trade union activities without the fear of being fired or victimized for this.



2. Workers have the right to refuse (say no) to doing the work of striking colleagues (fellow workers) if the request is unreasonable.

3. Workers have the right to a disciplinary hearing, even if their boss has accused them of taking part in an unprotected (illegal strike). A disciplinary hearing is when both the worker and boss can explain to a neutral party (a chairperson – who cannot take sides) about the dispute between them.

The chairperson will then consider all the facts and reach a final decision about who is right and who is wrong.

4. Workers have the right to motivate (give reasons) as to why they want to bring an external representative (someone to support them) to a disciplinary hearing. This could include a person like a lawyer or a trade union or bargaining council representative.

5. The law makes sure that workers cannot be fired under unfair conditions. Depending on the specific details, this can include when someone else takes over the business. The law also rules that people cannot be fired for pregnancy or other forms of discrimination such as their race, gender, religion or language.

6. You can be employed on a fixed-term contract of three to six months, or longer if the specific project you are working on requires. However, you have the right to request a permanent position rather than a contract extension if you have a reasonable (realistic) expectation that your position would continue in the long-term.

7. Even if an employer believes that the worker absconded (left the employment without resigning), the employer cannot replace the worker before following a very strict process.

8. If a worker accuses their boss of unfair dismissal at the CCMA or a Bargaining Council, they need to prove that they have dean Tired.

   Once the worker has proven this, then the boss is assumed (considered) guilty of unfair dismissal until he or she proves themselves to be innocent.

9. The CCMA also has the power to make an employer overturn (reverse) their decision to fire or discipline a worker. The employer can be forced to do this. The law also makes sure that when an employer wants to fire or discipline a worker, they have to follow a very fair and strict process, before they can do so.

What are the other laws which assists workers?

The Labour Relations Act (LRA) is supported by a number of other laws such as:

- The Basic Conditions of Employment Act details your day-to-day conditions at work, such as your rights around hours, leave and pay.
- The Occupational Health and Safety Act ensures that you are not placed in danger in your job.
- The Compensation for Occupational Injuries and Diseases Act makes sure that you are given help and payments if you are injured at work and it is the fault of the employer.
- The Mine Health and Safety Act.

NOW, MANY PEOPLE ARE WORKING FROM HOME. LET'S TOUCH ON TAX DEDUCTIONS FOR HOME EXPENSES

In light of the Covid-19 pandemic there has been a significant increase in employees having to work from home. Following from the national lockdown, many businesses have started looking at the possibility of having employees work from home for an extended period of time to save costs.

This has however resulted in an increase of expenses for employees working from home.

Employees are able to claim tax deductions for home office expenditure, provided that they meet the requirements of Section 11(a), read together with Section 23(b) and (m) of the Income Tax Act 58 of 1962 (the "Act").

According to Section 23(b) of the Act, home office expenditure included expenses such as phone costs, office equipment and stationery, cleaning fees, rent of premises, interest on bonds, cost of repairs to a premises and other expenses in connection with the wear and tear of the premises.

In terms of the Act, an employee can claim a tax deduction for expenses incurred in working from home, if the employee works from home for at least six months of a tax year.

In order to meet the requirements in the Act, the employee's home office must be specifically equipped for work, which includes a dedicated work area.

This means that employees who share a work area with family members or employees working from their dining room will not qualify for the tax deduction.

As a result of the national lockdown, many employees are in a situation where they are forced to work from home, without a designated office space or reimbursement for additional expenses incurred.

SOME DISCIPLINARY ISSUES TO KEEP IN MIND

10 key questions to ask yourself to ensure that disciplinary action is fair.

Disciplinary action refers to steps that are taken, if it is believed that you have broken the rules for how to behave at work. Here are ten key questions to ask yourself to ensure that disciplinary action is fair:

1) Did your employer/company make you aware beforehand of the rules you were expected to obey?
2) Did you break the rule that you are accused of doing - and is there proof of this?
3) Would other people consider the rule to be fair or reasonable for the kind of work you do?
4) Does your workplace have a specific way that they handle misconduct, such as giving warnings - and have these processes been followed in your case?
5) Have you been informed of the charges made against you in a language you understand?
6) Have you been given a set date for a hearing or does it keep being delayed?
7) Are you being given a fair chance to prepare for the hearing?
8) Are you being given a chance at the hearing to defend yourself?
9) Are the people who will be making the rulings (judgment) at the hearing, fair and impartial (not biased against anyone)?
10) Will you be given a chance to appeal (ask for the judgment to be examined again) if you are not happy with it?

However, the law does make sure that disciplinary action is FAIR throughout.

The law makes sure that there is:

Substantive fairness - this means that there are **fair reasons** for the disciplinary action.

Procedural Fairness - this means that the **processes** followed for the disciplinary action is **fair.**

CAN I RESIGN WITH IMMEDIATE EFFECT IN THE FACE OF A DISCIPLINARY SANCTION TO BE IMLEMENTED?

One of the oldest tricks in the book is for employees who are notified that they are to attend a disciplinary hearing is to resign with immediate effect. Employees hope that by doing so, they can avoid the consequences of being dismissed for misconduct and thus extricate themselves from a blemished disciplinary record that may scupper their prospects of future employment elsewhere.

By the same token, it may be that an employer wishes to proceed with disciplinary action even in circumstances where an employee resigns with immediate effect. The law has been in a state of flux on this issue. What about a variation of the just-mentioned theme? What if an employee resigned after a disciplinary hearing was held and finding of guilt delivered, but before a sanction of dismissal was imposed? This is the precise issue which the Labour Court had to consider in the recent case of Mthimkhulu v Standard Bank of South Africa delivered on 18 September 2020 ("Mthimkhulu").

In this case, the employee was of the view that because he resigned first, the employer could not dismiss him as it had no jurisdiction over him. Once the employee resigned, the employer nevertheless sought to hold the employee to his 30 days' notice period and ultimately announced his dismissal. This set of circumstances precipitated the launching of an urgent application by the employee to set aside his alleged unlawful dismissal.

Q: will a tactical resignation to avoid a sanction being imposed have any legal effect and be of any assistance to the employee?

No. According to the Labour Court in Mthimhkhulu, an employer may still dismiss the employee. The Labour Court there recounted the principles of contract law, which stipulate that an "employee who is contractually obliged to serve a notice period, repudiates a contract when he or she does not serve the notice period". In those circumstances, the employer as an aggrieved party has an election: it may decide whether it will accept the repudiation and sue for damages or it may decide to reject the repudiation and seek specific performance, i.e. to hold the employee to his or her notice period.

In this case, the employer, as we know, elected to keep the contact alive and hold the employee to his notice period. The employee's dismissal was, in the circumstances of this case, found to have been valid and it was determined that "the resignation [with immediate effect] before the announcement of a sanction of dismissal has no legal effect" because of the election made by the employer.

Q: what about the legal principles laid down in 2019 Labour Court decision of Naidoo and another v Standard Bank of SA Ltd and another ("Naidoo")?

In Naidoo, two employees resigned without serving their notice period (in other words, with immediate effect) once they received notices to attend a disciplinary hearing. The employer sought nevertheless to hold the employees to their notice period and proceed with their disciplinary hearings, regardless of whether they attended.

The employees sought an urgent interdict to restrain the employer from proceeding with their disciplinary hearings. The Labour Court in Naidoo held that although there was a breach of contract by the employees, for the employer to continue with their disciplinary proceedings it ought to have approached the court for an order of specific performance, but it had not done so.
The Labour

Court in Mthimhkhulu referred to the Naidoo decision and departed from it. The Labour Court in this more recent judgment held that where an employee resigns in breach of his or her employment contract, the employer need not approach a court for an order of specific performance to keep the employment contract alive.

It is the election by an employer to reject the repudiation of the employment contract that keeps it alive, not an order of specific performance.

Q: what have we learnt from the Mthimhkhulu decision?

Among the things that this case has taught us, is that the Labour Court has placed emphasis on the election which employers may make where an employee resigns with immediate effect in breach of his or her notice period. In response to the breach of contract by the employee, an employer may either accept the repudiation or it may reject it and hold the employee to his or her notice period, thus precluding the employee from avoiding a sanction being imposed upon him or her.

GOOD LABOUR RELATIONS IN THE WORKPLACE ALSO ENSURE POSITIVE AND SAFE WORKERS

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