

CML4607F

Law for Engineers

The world of work

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Overview

- Sources of labour law
- The individual employment relationship & employment contract
 - Who is an 'employee'?
 - *Essentialia* of the employment contract
 - The duties of employees and employers
 - Termination of employment
 - Breach of contract and remedies
- Selected issues from the world of work
 - Job applications
 - Fixed term employment contracts
 - Employees on probation
 - Restraint of trade
 - Salary levels and overtime
 - Private life and conscience
 - Disability and incapacity
 - Private work
 - Whistleblowing
 - Conflict resolution (later in the semester)
 - Negligence (later in the semester)

Sources of labour law

8h33-8h334

1. Legislation Fairness Mechanisms

- Constitution (always starting point!)
- Labour Relations Act 66 of 1995 (LRA) NB
- Basic Conditions of Employment Act 75 of 1997 (the BCEA)
- Employment Equity Act 55 of 1998 (the EEA)
- Occupational Health and Safety Act 85 of 1993 (OHSA)
- Compensation for Occupational Diseases Act 130 of 1993 (COIDA)
- Unemployment Insurance Act 63 of 2001 (UIA)
- Minimum Wage Act 9 of 2018 (NMWA)

2. International and foreign law

3. Common law Contract of employment influences the rel between er and ee Contract law is concerned with legality.

4. Case law

5. Collective agreements

6. Employment contracts

Individual ^

Tuesday recording

43 mins... 5 things that
thing.. Fairness mechanisms

Wednesday Lecture: 8am to 8h10

Collective bargaining

Concept of fair dismissal

Establishment of minimum employments conditions

Sources of labour law

Labour law regulates various rights & obligations

- **Individual rights & obligations** Between employer and employee
 - These are primarily governed by the Labour Relations Act 66 of 1995 (LRA) & the Basic Conditions of Employment Act 75 of 1997 (BCEA)
 - Examples include the right not to be unfairly dismissed & the right to be paid overtime
- **Collective rights** Between trade unions representing employees or employers orgs
 - These are primarily governed by the LRA
 - Examples include the right to join a trade union and the right to strike
- **Anti-discrimination rights & obligations**
 - These are primarily governed by the Employment Equity Act 55 of 1998 (EEA)
 - Examples include the right not to be discriminated against in the workplace & the obligations of employers in respect of affirmative action
- **Social security rights**
 - These are governed by numerous statutes, including for instance the Unemployment Insurance Act 63 of 2001 (UIA) and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)
 - Examples include the right to be paid unemployment insurance when you lose your job & compensation for injuries at work

Who is an 'employee'?

- An agreement between two or more persons in terms of which the **employee** agrees to provide their **personal services** to the **employer**, under the **control** of the employer, in return for **remuneration** by the employer.
- Parties:
 - Employee
 - Employer

Employment contracts during Roman time was a lease agreement (you lease your personal services to someone)

Employee (continued)

- Definition in legislation (section 213 LRA):
 - (a) someone, other than an independent contractor, who works for someone else or the state and who receives or is entitled to receive remuneration; and
 - (b) someone else who in any way helps to continue or operate the business of the employer.
- Excluded? Independent contractors & others (Defence Force, Intelligence etc)
- Origin? Common law: employment contract vs independent contractors (Roman law origin)
 - *locatio conductio operis*: was/is a contract for the completion of a particular job (independent contractor).
 - *locatio conductio operarum*: was/is a contract for the rendering of *personal* services (employment contract)

Employee (continued)

- Different tests developed by the courts: *To determin whether someone is an employee or a contractor*
 - Control test
 - Organisation test
 - Dominant impression test
- Factors that create a presumption that the person is an employee: contained in section 200A of the LRA – BUT earning below threshold amount: R241 110,59 per year effective from 1 March 2023.
 - Manner of work subject to the control/direction of another person;
 - Work hours subject to the control/direction of another person;
 - Person forms part of the organisation;
 - Worked for an average of at least 40 hours per month over the last 3 months;
 - Economically dependent
 - Provided with tools of trade or work equipment
 - Only works for or renders services to one person.

Vulneraable employees

If any one of these is present then the person is an employee if you earn below the threshold (via legislative presumption)

Essentiala of an employment contract

- Common law requirements for a valid employment contract
 1. Consensus (agreement)
 2. Legal capacity
 3. Possibility of performance
 4. Legality
 5. Formalities
 - Need not be in writing (verbal, tacit conclusion possible) EXCEPT where required by legislation (eg, auditing clerks)

Essentiala of an employment contract

- **Two further requirements:**

1. Employee must make their services available
2. Employer must pay the employee

- **What else should typically be included?**

- Job description
- Remuneration
- Duration
- Benefits
- Leave
- Restraint of trade
- Closed shop and agency shop agreements
- Disciplinary code
- Dispute resolution

Duties of employees (common law duties)

1. Duty to tender service
2. Must perform competently
3. Further the employer's interests (duty of good faith)
 - Restraint of trade
4. Be respectful and obedient
5. Refrain from misconduct

Duties of employers (common law duties)

1. Receive the employee into employment
2. Remunerate the employee
3. Provide safe working conditions
 - Compensation for Occupational Injuries and Diseases Act

Termination of employment

By way of:

1. Completion of the contract
2. Cancellation
 - Breach of contract - repudiation
3. Agreement
 - Note: constructive dismissal
4. Death
5. Insolvency
6. Impossibility of performance

Breach of contract and remedies

- Normal contract law remedies available (see week 3-5)
- LRA provides for 3 possible remedies for unfair dismissal (week 6):
 - Reinstatement (in the same position) - same as specific performance in terms of common law
 - Re-employment in another suitable position
 - Compensation

Selected issues: Job applications

- **Misrepresentation, puffery and the truth**
 - *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others (2017) 38 ILJ 881 (LAC)*
 - When asked "Have you ever been convicted of a criminal offence?" the e/ee (a security guard) indicated that he had not.
 - 14 years later, he applied for promotion. A criminal record check indicated two previous criminal convictions.
 - The employer dismissed the employee for misrepresentation and/or dishonesty.
 - The Labour Appeal Court found the employee's dismissal was fair, given the serious nature of the misconduct committed.
- Recently in the **media**:
<https://www.dailymaverick.co.za/article/2024-01-17-economist-thabi-leokas-phd-appears-to-be-a-figment-of-her-imagination/>
- Consider common law duty of good faith

Selected issues: Fixed term employment

- Employment contracts can be for:
 - A fixed term
 - The duration of a certain project
 - Indefinite period
- Fixed term contracts employ employees for a **fixed term**, until **completion of a project, occurrence of a future event**
- Form of employment abused in practice, LRA amended
 - Sec 186(1)(b) LRA - reasonable expectation of renewal
 - Sec 198B LRA - not longer than 3 months
 - Sec 198B – not be treated less favourably

a fixed term contract may not be longer than 3 months unless there is a justifiable reason for it. If the person was appointed for longer than 3 months and earns below the threshold,, and there is no justifieable reason for the employee to be appointed on a fixed term contracct, then the employee is deemed to be indefinitely employed. Only available to employees below the threshold.
- “Reasonable expectation”? More than subjective belief, backed up by objective facts

Then the employee can claim unfair dismissal. then you have the same remedies in terms of the LRA as an employee that was unfairly dismissed.

Fixed term employment

- Unless (exceptions):
 1. Employee temporarily replaces someone
 2. Temporary increase in the volume of work
 3. Student – work experience
 4. Specific projects
 5. Work permit for non-citizens
 6. Seasonal work
 7. Public works scheme/ job creation scheme
 8. Outside funding
 9. Retirement age

Selected issues: Probation

- Item 8 Code of Good Practice: Dismissal applies.
 - Although this Code is not strictly binding like the law (eg the LRA) is, employers are bound to follow its procedural & substantive requirements prior to dismissing or disciplining employees UNLESS they adopt an alternative but still FAIR approach/process (eg, disciplinary code).
- An employer may require a newly appointed employees to serve a period of probation before the appointment of the employee is confirmed.
- The purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment.

Selected issues: Probation

- **BUT** probation should **not** be used to deprive employees of the status of permanent employment.
- The **period of probation** should be determined in advance and be of reasonable duration.
 - EG 3 months
- During the probationary period, the employee's performance should be **assessed**.
- **If below standard**, advice/counselling/training on how to improve should be provided.
- **If incompetent**, after further advice etc, the employer may either extend the probationary period or dismiss the employee following a fair procedure.

Selected issues: Restraint of trade

- Purpose: to protect trade secrets, intellectual property, clients
- Two conflicting principles:
 - Sanctity of contract (common law principle)
 - Freedom of trade and profession (section 22 of the Constitution)
- Contracts including restraint of trade:
 - Sale of a business (goodwill)
 - Employment contract (trade secrets, customers, intellectual property)

Selected issues: Restraint of trade

- If contrary to public interest = **unreasonable**
- How is reasonableness determined? 8h26-8h33
 - Does the person who wants to enforce the restraint have a **legitimate interest**?
 - Does the restraint only protect this interest or does it go beyond it?
 - Duration of clause
 - Area is it applicable to a certain region?
 - Scope what exactly is restrained?
 - Protection of legitimate interest vs freedom trade of restricted person (*Basson v Chilwan*)

Selected issues: Restraint of trade

- What are **legitimate interests**?
 - Trade secrets, which must
 - be capable of application in trade or industry;
 - not be public knowledge or property;
 - be known only to a restricted number of people, and
 - be of economic value to the person seeking to protect it.
 - Confidential information
 - Client / customer connections

Selected issues: Salary levels & overtime

- The **BCEA** regulates overtime
 - Its aim is to set basic minimum standards/terms & conditions for all employees **BUT** these do not prevent employees from negotiating or receiving **better** standards of employment (*employers simply may not go below those in the BCEA)
- Section 10 requires an **agreement** to work overtime and **prohibits** more than 10 hours overtime per week.
- Overtime must be paid at the rate of **1.5 times** the employee's wage.
- **BUT NOTE** section 6:
 - Overtime pay **does not apply** to “senior managerial employees” (SMEs) or to employees who earn in excess of the annual salary threshold.
 - Thus, those who are SMEs or who earn more are not entitled by law to overtime **BUT** their contracts may provide for overtime to be paid anyway.

Selected issues: Private life & conscience

- There is **tension between** the construct of the 'loyal, obedient employee' and statutory acceptance of an employee who is permitted and encouraged to challenge, to bargain, to confront, to speak out, to report and whistle-blow, and to strike.
- **Section 77 of LRA** provides workers with the right to participate in socio-economic protests (*there are also constitutional rights which entitle people to express themselves/assemble/associate etc).
- Cases have held that **published criticism of the employer** which is not dishonest or malicious, and which does not mention any managers by name, does not usually justify dismissal.

*See also the Protected Disclosures Act (discussed later...)

Selected issues: Disability & incapacity

- When is **illness/conditions** considered a **disability**?
- The Code of Good Practice on the Employment of People with Disabilities:
 - Item 5.3 provides that only people who satisfy all the criteria in the definition are regarded as having a disability.
- These include that the person has an impairment which:
 - (i) is long-term or recurring;
 - (ii) is physical or mental; and
 - (iii) substantially limits the employee's prospects of entry into, or advancement in employment.
- Eg, *IMATU & another v City of Cape Town* and *Damons v City of Cape Town*

Selected issues: Private remunerative work

- Roman Law *locatio conductio operarum* = employees should be 'at the disposal of the employer'.
- The employee must further the employer's business **interests**.
- Employees must devote all their normal **working hours** to the employer's business and may not without the employer's **permission** simultaneously work for another employer during the hours they are contractually obliged to devote to their employer's needs.
- The relationship between the employer and employee is of a **fiduciary** nature – employees may not place themselves in positions where their own interests conflict with those of their employers.
- An employee cannot **compete** with the employer.
- There can be **no conflict of interest** and if there is a conflict which exists prior to employment, this must be **disclosed** before starting the job.

- **Example cases**

Selected issues: Private remunerative work

- **Outside employment policies (OEPs)**
- Some employers have OEPs but what are these all about?
 - OEPs *limit outside employment* and are therefore similar to restraints of trade clauses in contracts.
 - BUT they apply to e/ees *during their employment* rather than after it.
- The **commercial rationale** for an **Outside Employment Policy** is to manage legitimate concerns about:
 - conflicts of interest
 - the avoidance of secret profits or commission
 - distractions from job performance quality or scheduled work hours
 - misuse of the employer's resources
 - the appearance of impropriety, bringing the employer into disrepute
 - misrepresentation to or confusion of outsiders

Selected issues: Whistleblowing

- The **Protected Disclosures Act 26 of 2000 (PDA)** facilitates whistleblowing by protecting whistle-blowers where they disclose information (which is generally required to be in good faith/disclosed honestly/which is reasonably believed to be true), in terms of specified procedures and to specific bodies.
- S 3 provides that no employee may be subjected to any **occupational detriment** by the employer on account, or partly on account, of having made a protected disclosure.
- What is an **occupational detriment**?
 - A negative consequence imposed on an e/ee by the e/er
 - **Examples** include dismissal/disciplinary action etc...

Selected issues: Whistleblowing

City of Tshwane Metropolitan Municipality v Engineering Council of SA & another

- Disciplinary action was taken against Weyers for 'misconduct'. Found guilty for writing the letter to the DOL.
- When the chair of the disciplinary tribunal refused to postpone the inquiry at the sanction stage, W approached the court for an urgent interdict, which was granted.
- The Court found that W's action constituted a 'protected disclosure' in terms of the PDA.
- The disclosure was reasonable and in the public interest.
- The municipality was interdicted from imposing any disciplinary action against W for sending the letter.
- On appeal, the SCA confirmed the High Court's finding that:
 - Honest opinions held by an expert in the field, such as Weyers, could constitute a fact and thereby fall within the ambit of the PDA.
 - The E/er was not permitted therefore to impose an occupational detriment on him (through disciplinary action).

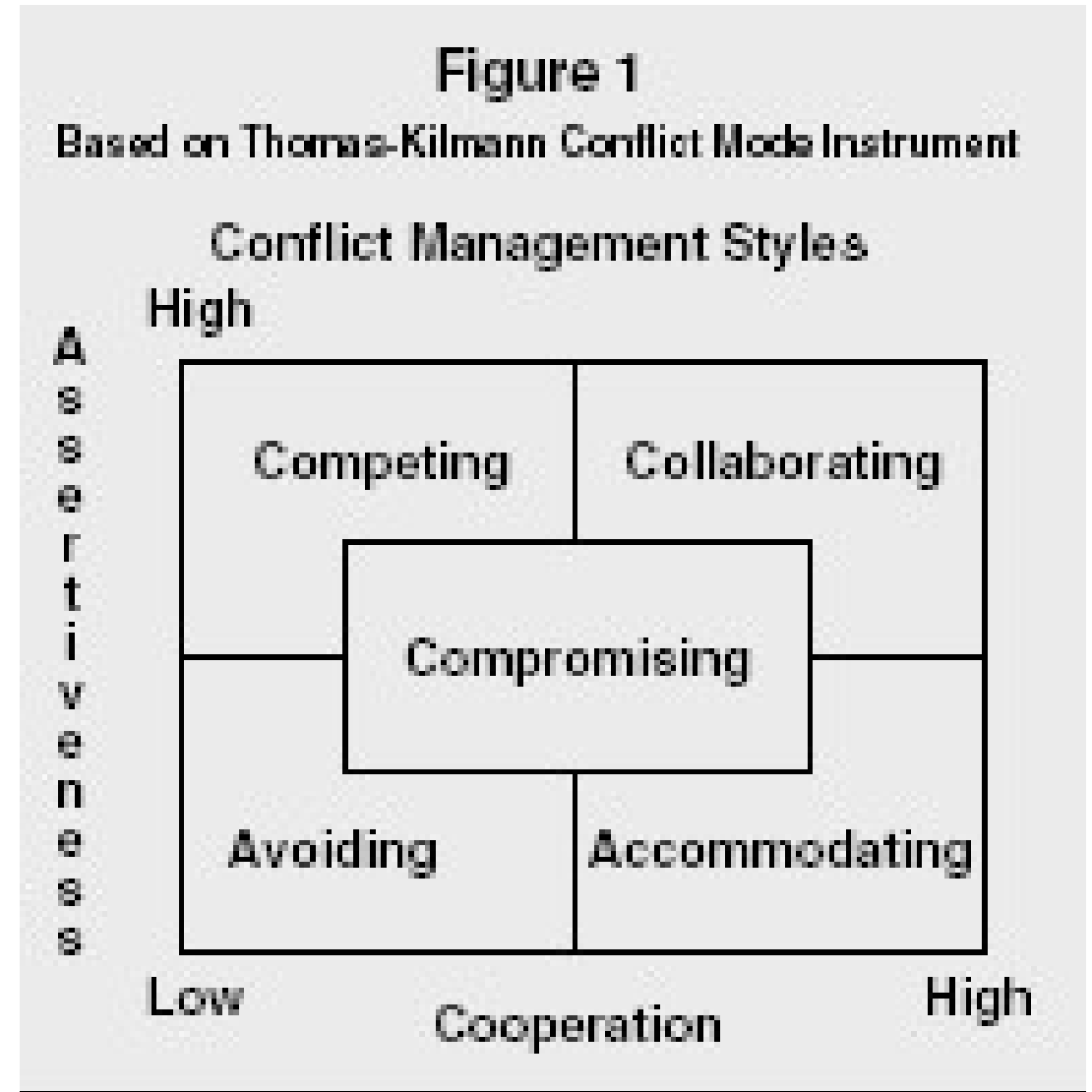
Selected issues: Workplace negligence

- This is governed by the **law of delict**.
- A delict is a non-criminal wrong done to another person (*eg crashing into someone else's car) either negligently or intentionally.
- The **test for negligence** (as a requirement for a delict) is that of the fictional '**reasonable person**'.
- WHO is this **reasonable person**?
 - A reasonable person is an 'objective' person.
 - THUS the test doesn't take into account the specific perspectives, abilities or views of the litigant.
 - Rather it considers what a *reasonable person* would consider to be negligent in the circumstances.
- Eg, *Skhosana v Eskom*

Selected issues: Workplace conflict resolution

There are 5 basic styles to conflict resolution:

- Avoiding
- Accommodating
- Compromising
- Competing
- Collaborating.



Selected issues: Workplace conflict resolution

COMPETING

- When quick, decisive action is vital - eg in an emergency.
- On important issues where unpopular courses of action are required (eg cost-cutting, enforcing unpopular rules, discipline)
- On issues vital to welfare, when you know you are right.
- To protect yourself against people who take advantage of non-competitive behaviour.

ACCOMMODATING

- When you realize you are wrong; to show you are reasonable.
- When the issue is much more important to the other person than yourself.
- To build up social credits for later issues which are important to you.
- When continued competition would damage your cause.
- When preserving harmony and avoiding disruption are especially important.

Selected issues: Workplace conflict resolution

COMPROMISING

- When goals are moderately important, but not worth the effort or potential disruption of more assertive modes.
- When two opponents with equal power are strongly committed to mutually exclusive goals.
- To arrive at expedient solutions under time pressure.
- To achieve temporary settlements to complex issues.
- A back-up mode when joint-problem solving or competition fails.

JOINT-PROBLEM SOLVING / COLLABORATING

- To find an integrative solution when both sets of concerns are too important to be compromised.
- When your objective is to learn (EG testing assumptions, or seeking to understand other views)
- To merge insights with different perspectives of the problem.
- To gain commitment by incorporating other's concerns.
- To work through hard feelings.