



# Labour Law

An overview of the relevant provisions of the Labour Act, Act 11 of 2007



## **PREFACE**

Labour Law is possibly the one portion of general statute law that has been developed and refined the most in recent years. In Southern Africa statutory labour law only really became a practical reality in the latter portion of the twentieth century and as a result amendments and changes in labour law have become fairly frequent occurrences.

The frequent amendments and changes have been necessitated by the constant changing economic developments and the growing political and economic influence of workers unions and industrial communities. Over time it became obvious that the common law of contract did not meet the demands of the labour market.

After Namibian independence, the Labour Act 6 of 1992 was introduced and promulgated by the legislature but this statute apparently did not meet the requirements or have the full support of certain sectors of the economy. Extensive tri-partite discussion were had and it was agreed that there was a need for a more effective and less adversarial means of resolving labour disputes.



During December 2007 the new Labour Act No 11 of 2007 was signed and promulgated which has resulted in a fairly significant review in employment relationships and labour practices.

The overriding target of the Labour Act is to regulate the relationship between employer and employee and to protect the worker against unfair discrimination, and also to attempt to ensure equitable labour relationships.

### **A REVIEW OF SOME OF THE IMPORTANT PROVISIONS OF THE NEW LABOUR ACT 2007**

Although the common law duties of the employer and employee do not explicitly form part of the Labour Act, they remain relevant in considering issues of fair and valid reasons in disciplinary cases.

#### **Employment Relationships**

Whereas the modern day employment relationships are controlled and defined from a number of sources viz. common law, collective bargaining, custom, statute and

contractual agreements, the labour market is in reality very dependent on both parties, i.e. employer and employee, honouring their respective obligations to the other party.

## **Employee's Duties**

### **1. Service**

An employee's most basic and principal duty is to make his or her services available to the employer once he/she accepts employment.

The employee must make his or her services available even if he or she is given no work to do.

### **2. Obedience/ Discipline**

Although the original common law relationship between master and servant has become more temperate and controlled by the introduction of statutory labour legislation, the disciplined subordination of the employee to the lawful orders of the employer is still the hallmark of the relationship.

No business can be economically viable unless there is a management making decisions and instructing the workforce who must perform with the required discipline and subordination.

### **3. Good Faith/Fidelity**

An employee must refrain from doing anything which will have the effect of prejudicing or obstructing his/her employer's business i.e he/she must not conduct a business of his/her own which will have the effect of negatively affecting his/her employer's business interests, or earn a secret commission or profit from his/her employment or divulge confidential information or trade secrets obtained in the course of his/her employment.

### **4. Competence/Ability**

An employee must display the necessary competence, ability, diligence and skills to perform the work for which he/she has been appointed and is being paid. It has been stated that lack of skills in fact amounts to negligence.

## **Employer's Duties**

### **1. Remuneration**

At common law the tacit or express obligation to remunerate an employee is essential for a contract of employment to be valid.

An employer must remunerate an employee who makes his/her services available even though the employer, for whatever reason, does not utilise such services.

The Labour Act, however, now prescribes the manner in which basic wages must be calculated and paid, what deductions are permissible and when an employee may be absent from work with pay e.g. annual leave, compassionate leave, sick leave and maternity leave, subject to the provisions of section 26 and the Social Security Act.

### **2. Safe Working Conditions**

The employer must take all reasonable precautions to ensure safe working conditions for his employees. Depending on the degree of risk, the employer may be required to provide special training, specialised equipment and/or protective clothing for his workers.

The employee, however, also has a duty to take reasonable care to ensure his own and co-workers' safety and to co-operate with his employer to enable work which may bear an element of risk, to be performed safely.

In the event of an employee having a reasonable ground to believe that the work place has become dangerous or unhealthy he is entitled to leave that place until necessary measures have been taken to rectify the situation.

## **APPLICATION OF THE ACT SECTION 2**

The Labour Act regulates and controls the relationship between all employers and employees except independent contractors and members of the-

- (a) Namibian Defence Force;
- (b) Namibian Central Intelligence Service; and
- (c) Prison Service
- (d) Police Force including the City Police

The prohibitions and restrictions of child labour (Section 3) and discrimination and sexual harassment (Section 5) are, however, applicable to the members of the State departments named above (a) to (c).

The Act defines an “employee” as an individual, other than an independent contractor, who-

- (a) works for another person and receives a wage or salary for that work; or
- (b) in any manner assists in carrying on or conducting the business of an employer, and

an “employer” as any person, including the State, who-

- (a) employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
- (b) permits an individual to assist that person in any manner in the carrying on or conducting that person’s business.

An independent contractor is essentially someone who is his own master, engaged to do certain work.

## **BASIC CONDITIONS OF EMPLOYMENT SECTION 8**

Except in instances where the Minister has, by notice in the Government Gazette, declared otherwise and subject to the provisions of Section 5, where there is a conflict between the provisions of the Labour Law and the provisions of any other law, the law that provides the more favourable terms and conditions for the employee will prevail.

The Act stipulates the minimum conditions of employment, and employers and employees may only deviate from such minimum conditions in instances where the conditions agreed upon are more favourable to the employee than the statutory basic conditions.

## **Remuneration – Section 10**

This section of the Act sets out the basis and method to be applied to determine the applicable hourly, daily, weekly or monthly rate of pay of an employer where it is necessary to do so.

The Act defines remuneration to mean “the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee”. An employee who is remunerated on a basis other than time worked is considered for the purpose of this section to be remunerated on a weekly basis.

It should also be noted that the portion of the basic wage that an employer may pay to an employee in-kind may not exceed the equivalent of 1/3 of the employee’s basic wage. A table is included setting out the calculation of remuneration and basic wages:

**Table: Calculation of remuneration and basic wages**

	<b>To calculate hourly rates</b>	<b>To calculate daily rates</b>	<b>To calculate weekly rates</b>	<b>To calculate monthly rates</b>
Employees whose remuneration is set <u>by the hour</u>		Multiply the hourly rate by the number of ordinary hours of work each day.	Multiply the hourly rate by the number of ordinary hours of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set <u>by the day</u>	Divide the daily rate by the number of ordinary hours of work each day.		Multiply the hourly rate by the number of ordinary hours of work each week.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set <u>by the week</u> .	Divide the weekly rate (or calculated weekly rate) by the number of ordinary hours of work each week.	Divide the weekly rate (or calculated weekly rate) by the number of ordinary days of work each week.		Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.
Employees whose remuneration is set <u>by the fortnight</u> .	Divide the fortnightly rate by two times the number of ordinary hours of work each week.	Divide the fortnightly rate by two times the number of ordinary days of work each week.	Divide the fortnightly rate by two.	Calculate the weekly rate, then multiply the calculated weekly rate by 4,333.

Employees whose remuneration is set <u>by the month</u> .	Divide the monthly rate by 4,333 = x, times the number of hours ordinary worked each week.	Divide the monthly rate by 4,333= x, times the number of days ordinary worked each week.	Divide the monthly rate by 4,333.	
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For the purpose of the Table calculations, “ordinary hours” must not exceed the maximum hours permitted by Section 16 (1) of the Act (Vide “working hours”) and “ordinary days” means five days, if the employee works a five day week, or six days, if the employee works a six day week or the number of agreed days if the employee works for less than five days a week.

An employee must receive his/her pay in cash, or at the employee’s option by cheque, in a sealed envelope not later than one hour after completion of the ordinary hours of work on the normal pay day unless the employee has furnished a written request that it be paid direct into his/her bank account.

The employer must also be furnished with a written statement of particulars in the prescribed form and payment may not be made at a shop, bottle store etc unless such place is the employees’ place of employment.

**Permissible Deductions – Section 12**

No amounts may be deducted from an employee’s remuneration except-

- (a) where permitted or required by a court order or any law; or
- (b) if agreed to in writing-
  - (i) rent for accommodation provided by the employer;
  - (ii) goods sold to the employee by the employer;
  - (iii) a loan advanced by the employer;
  - (iv) contributions to employee’s benefit fund;
  - (v) subscriptions or levies to a registered trade union;
  - (vi) arbitration awards; or
  - (vii) required or permitted under any collective agreement.

Deductions in total in terms of Section (b) above are limited to one-third of the employee’s remuneration.

## **Reduction of Working Hours**

An employer may by written notice to the employee, subject to any provision in the contract of employment or applicable collective agreement, reduce an employee's working hours for a period of no longer than three (3) months for operational reasons or other legal reasons. In such instances the employee's remuneration may also be reduced, but such reduction is limited to no more than 50% of the employee's basic wage.

The reduction period may be extended for an additional period of three (3) months by written agreement between the parties.



## **Working Hours – Section 16**

Subject to certain exceptions set out below, an employee may not be required or permitted to work more than 45 hours in any week.

An employee who works for five days or fewer in a week may not be required or permitted to work more than nine (9) hours a day, and one who works more than five days a week more than eight (8) hours a day.

Exceptions to above are in respect of security officers and employees working in emergency healthcare services who may not be required or permitted to work more than 60 hours a week i.e 12 hours on any day if such employee works for five days or fewer in a week, or 10 hours a day if the employee works for more than five days a week.

Employees other than security officers are entitled to a 60-minute break after every 5 hours of work, which break is not calculated as working hours.

An employee is entitled to a weekly rest period of 36 consecutive hours. Security officers may be required to work during meal breaks and such time will be included in the working hours.

## **Overtime and night work – Section 17**

An employee may agree to work overtime, but such overtime may not exceed ten (10) hours a week or more than three (3) hours a day, unless the Permanent Secretary, on application, permits an exception. The above condition does not apply to an employee who is performing urgent work.

All employees performing overtime must be paid a rate of at least one and one-half times the basic wage if working weekdays and at least double the basic wage if such



employee ordinarily works on a Sunday or public holiday and the overtime is worked on such days.

An employee performing work between the hours of 20h00 and 07h00 is entitled to an additional payment of six percent (6%) of his hourly basic wage, excluding overtime.

### **Sunday Work and/or Public Holidays – Section 21 and 22**

Work on a Sunday is only permitted for certain purposes eg. urgent work, domestic service, health and welfare services or if approved by the Permanent Secretary on application.

An employee may not be required or permitted to perform work on a public holiday except where such employee-

- (a) performs urgent work;
- (b) works at a shop, hotel, boarding house or hostel;
- (c) performs domestic service;
- (d) health & social welfare care;
- (e) is employed on a farm;
- (f) works in continuous shifts; or
- (g) the Permanent Secretary has approved such work on application

If a public holiday falls on an ordinary working day and an employee is required to work on that day, such employee must receive his normal daily remuneration plus the normal basic wage rate for the hours worked.

An employee who is absent without leave on a working day before or after a public holiday is not entitled to payment for either the public holiday or the day he/she is absent before or after such holiday.

An employee, who is required to work on a public holiday that falls on a day other than an ordinary working day, must be paid double his/her hourly basic wage for every hour worked.

### **Annual leave – Section 23**

For every completed period of 12 months the employee is entitled to leave calculated as follows:



Days in work week	Annual leave
6	24 working days
5	20 working days
4	16 working days
3	12 working days
2	8 working days
1	4 working days

An employer may determine when the employee may take his/her annual leave provided such leave is taken not later than four (4) months after the end of the annual leave cycle or, if the employer has agreed in writing to such extension, six (6) months after the end of the annual leave cycle.

Except on termination of employment, an employer and an employee may not agree that the employee is to be paid any amount *in lieu* of the leave to which the employee is entitled.

### **Sick leave – Section 24**

During a period of 36 consecutive months of employment, an employee is entitled to the following sick leave:

- for a 6 day working week – 36 paid working days;
- for a 5 day working week – 30 paid working days;
- for a 4 day working week – 24 paid working days;
- for a 3 day working week – 18 paid working days;
- for a 2 day working week – 12 paid working days;
- for a 1 day working week – 6 paid working days.



During the employees first year of employment he/she is entitled to one (1) day's sick leave for every 26 working days completed.

Sick leave does not form part of annual, compassionate or maternity leave and any untaken leave lapses at the end of every 36-month period.

If any employee is absent from work for more than two (2) consecutive days allegedly due to illness and fails to produce a medical certificate or any other prescribed proof of illness, the employer is not required to pay the employee for such leave.

### **Compassionate leave – Section 25**

An employee is entitled to a total of five (5) days compassionate leave with full pay for each period of 12 months of continuous employment.

Compassionate leave may be taken when there is a death or serious illness of an employee's close family member i.e a child, spouse, parent, grandparent, brother or sister, or father-in-law or mother-in-law.

Compassionate leave does not form part of annual, sick or maternity leave and any untaken compassionate leave lapses at the end of the 12-month period.



### **Maternity leave – Section 26**

After completing six months' continuous service, a pregnant employee is entitled to four (4) weeks leave before the expected date of confinement and to at least eight (8) weeks after her date of confinement.

The employee must furnish the employer with a signed medical certificate confirming the expected date of confinement before taking maternity leave and a medical certificate confirming the actual date of confinement on her return from leave.

During her maternity leave an employee is entitled to receive all remuneration payable in terms of her contract of employment except the basic wage. In terms of the Social Security Act (No 34 of 1994), the employee may claim payment from the Social Security Commission for the prescribed portion of her basic wage. It should be noted that the Employer is not prohibited from paying an employee her basic wage during the period of maternity leave, but neither is the employer obligated to do so.

Should complications arise from pregnancy or delivery which requires extended maternity leave, and the employee has no sick leave remaining, the maternity leave may be extended for one (1) month.

An employee may not be retrenched during her maternity leave.

### **Termination of Employment – Section 29 - 32**

If an employee is entitled to resign or an employer is entitled to terminate the employee's contract of employment, the following notice periods must be adhered to-

- (a) one (1) day's notice, if the employee has been employed for 4 weeks or less;
- (b) one (1) week's notice if the employer has been employed for more than 4 weeks but less than one year;
- (c) one (1) month's notice if the employee has been employed for more than one year.

The employer and employee may agree to longer notice periods provided that such periods are of equal duration for both parties.

Except in the instance of an illiterate employee, who may give notice orally, notices of resignation or termination must be in writing, and in the case of an employer terminating employment, such termination must be in writing and must state the reasons for termination.

A notice of termination of employment may not be given during any period of leave or run concurrently with such leave. The statutory notice periods may be dispensed with-

- (i) where the employer or employee waive the right to notice by agreement;
- (ii) where the employer pays the employee the remuneration to which he/she is entitled;
- (iii) the employee resigns and pays an amount equal to his/her remuneration for the notice period to the employer;
- (iv) the employee is dismissed for serious misconduct e.g. theft, insubordination, disobedience etc.

In the event of the death or sequestration of an individual employer, the contract of employment terminates automatically after one (1) month of the employers death.

In the instance of a juristic person such as a limited liability company or a partnership which is wound up or dissolved, contracts of employment will also terminate automatically after one (1) month of the dissolution.

An employee whose contract is terminated automatically as indicated above, is considered a preferent creditor in respect of any amounts due to him/her in terms of the Act.

Where an employer terminates the services of an employee who is required to live at the place of employment or to reside on any premises owned or leased, the employer may not require the employee to vacate the said premises or land unless –

- (a) in the case of an employee residing on agricultural land, three month written notice is given; or
- (b) in the case of all other employees, one (1) month written notice is given.

If the employee has referred the dispute to the Labour Commissioner within 30 days following his/her termination and alleging unfair dismissal, the employer may not require the employee to vacate the premises or land until the dispute is resolved in terms of this Act.

### **Unfair Dismissals – Section 33 - 34**

The job security of an employee has taken a significant importance over the past number of years due to the growth of the industrial economy. and the practice of “hiring and firing” employees at will has been eliminated by labour law legislation.

In terms of the Labour Act, an employee cannot be dismissed, whether notice is given or not, without a lawful, valid and fair reason and without following a fair procedure.

An employee may not be dismissed for disclosing information, which he/she is legally entitled to disclose, or for refusing to do anything, which is unlawful, or for participating in the lawful activities of a trade union.

An employee may also not be dismissed because of his/her sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status.

In the event of a dismissal of an employee the onus rests on the employer to prove that such dismissal was both valid and reasonable.

Section 34 of the Labour Act prescribes the route which must be followed in the event of a employer intending to reduce his/her workforce due to the reorganisation or transfer of the business, or the discontinuation or reduction of such business due to economic or technological factors.

Employees who are subject to retrenchment are entitled to four (4) week’s notice as well as the opportunity to negotiate in order to mitigate the impact of such retrenchment.



"You can take our standard retirement package, or you can trade it for what Carol has behind door No. 2."

### **Severance Pay- Section 35**

An employee who has completed at least 12 months of continuous service and who is dismissed, dies, resigns or retires on reaching the age of 65-years, is entitled to severance pay in an amount equal to one week's remuneration for each year of continuous service.

Severance pay need not be paid to an employee who is dismissed for misconduct or for poor work performance or for unreasonably refusing re-instatement.

### **Payments on Termination – Section 37**

On termination of the employee's employment the employer must pay the employee-

1. (a) all amounts due to him/her for work done including overtime worked during the notice period if applicable;
- (b) for periods of leave not granted and to which he/she is entitled;
- (c) any severance pay due to him/her;
- (d) a transport allowance if the employee was taken into service within 12 months before the date of dismissal at another place; and
2. provide the employee with a certificate of employment.

The certificate of employment must state-

- (i) the full particulars of the employer and employee;
- (ii) the description of the industry in which the employer was engaged and his/her job description;
- (iii) the period of service;
- (iv) the employee's remuneration, and
- (v) if the employee so requests, the reason for termination of employment.

## **FUNDAMENTAL RIGHTS & PROTECTION**

### **Child Labour – Section 3**

The Act restricts not only the age at which children may be employed, but also regulates their working conditions. The aim of the statute is not only to protect children from abuse, but to ensure that their legal obligation to attend school until the age of 16 years is adhered to.

A child under the age of 14 years may not be employed or permitted to work in any circumstances.

Children of 14 to 16 years of age may not be employed or required to work-

- (i) in circumstances prohibited in article 15 (2) of the Constitution i.e, work that may be hazardous or be harmful to his/her health or his/her physical, mental, spiritual, moral or social development or interfere with his/her education;
- (ii) between the hours of 20h00 and 07h00;
- (iii) except in circumstances where the Minister permits, on premises where the work is done underground or in a mine, where construction or demolition takes place, goods are manufactured, electricity is generated, transformed or distributed, or machinery is installed or dismantled.

A child of 16 years but under the age of 18 years may not be employed in circumstances set out in sections (ii) and (iii) above unless permitted by the Minister.

Any person who permits or requires a child to perform work prohibited by the Act may be fined a maximum of N\$20,000.00 or sentenced to imprisonment for a period of up to four (4) years or both to such fine and imprisonment.

### **Forced Labour – Section 4**

In terms of the Act, forced labour amounts to a criminal offence. Forced labour is defined as-

- (i) any work or service performed or rendered involuntarily by a person under threat of any penalty or punishment;
- (ii) any work performed by an employee's child under the age of 18 years in terms of an agreement between employer and employee;

- (iii) any work performed by a person because he/she is subject to the control or supervision of a traditional chief or headman.

Article 9(3) of the Namibian Constitution excludes certain labour from the expression “forced labour” e.g. any labour required to be performed in terms of a sentence or order of a Court, by members of the defence force, police or prison service, or labour required to be performed in a period of public emergency or calamity.

### **Discrimination in Employment – Section 5**

The Labour Act confirms the Namibian Constitutional prohibition of discrimination in employment on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The Act furthermore prohibits discrimination in employment on the grounds of HIV/AIDS and marital status, family responsibilities, political opinion and previous, current or future pregnancies.

### **Sexual Harassment**

Any form of sexual harassment towards an employee is forbidden and should such harassment result in the resignation of an employee such resignation will constitute a constructive dismissal, which in turn may constitute an unfair dismissal entitling the employee to certain remedies.

## **Rights and Duties of Employers and Employees Health, Safety and Welfare**

An employer is under a legal obligation to provide a working environment which is safe and without risk to the health of the employee(s).

The workplace must accordingly be reasonably maintained in this regard to ensure the safety and welfare, not only of employees, but also of persons who may be expected to enter the premises.

Where necessary, employee’s must be provided with adequate protective clothing and equipment and receive the necessary training to ensure that the work they do is safe and without undue risk.



An employee who has reasonable cause to believe that his working environment is dangerous or unhealthy may, on notice to his employer, leave the premises until the situation has been rectified.

Where 10 or more employees are employed in a workplace, they may elect from their ranks a health and safety representative whose duty is to ensure the safety, health and welfare of the employees.

In terms of the Act, an employee is also under an obligation to take reasonable care to ensure his/her own safety and health as well as those of his fellow employees.

### **Unfair Labour Practices – Section 48 - 51**

The law for unfair labour practices was introduced by statute in order to prevent employers, employees, trade unions or employer organisations from acting negatively towards other parties in order to exert pressure or undue influence on such parties in a negotiating process, or effectively to gain time for their own advantage.

Trade unions may not refuse to negotiate collectively, or engage in conduct that subverts orderly collective bargaining or engage in intimidating conduct, or to negotiate in bad faith and must fairly represent an employee in a bargaining unit.

An employee may not engage in conduct that subverts orderly collective bargaining or has the effect of intimidating any person.

Employer or employer's organisations may not-

- (a) refuse to negotiate collectively or negotiate in bad faith;
- (b) fail to disclose relevant information reasonably required to allow a workplace union representative to perform his/her functions or to consult or negotiate collectively;
- (c) unilaterally alter any term or condition of employment;
- (d) attempt to control any trade union;
- (e) engage in conduct that subverts orderly collective bargaining or intimidates any person.

Section 51 provides that any party to a dispute may refer such dispute to the Labour Commissioner.

## **COLLECTIVE AGREEMENT'S – SECTION 70**

It has long been recognised that there is an inherent and extreme conflict of interest between employer and employee in the labour market. This conflict often leads to unnecessary repercussions in the market which in turn can lead to unfortunate downturns in the local economy.



In order to attempt to prevent disruptive conflicts occurring between management and organised labour, collective agreements have been introduced with the object of formalising the relationship between the said parties regarding such matters as conditions of service, remuneration and other matters of mutual interest.

In terms of the Act, a collective agreement, being a written agreement concerning the terms and conditions of employment or any other matter of mutual interest, is binding on all the persons who were members of the bargaining unit of the employers' organisation or trade union at the time of its conclusion and for the duration of such agreement, irrespective of whether that person withdraws from the organisation or trade union.

## **Strikes / Lockouts – Section 74**

Historically at common law, strikes and lockouts basically amounted to a breach of the contract of employment.

In time, however, the legislators realized that strikes were virtually the sole bargaining power of the workforce and that it was essential that legislation be introduced to regulate and permit and control both strikes and lockouts in certain circumstances and to ensure that the economy suffers the least possible damages.

In terms of the Labour Act, a party to a labour dispute has, subject to certain limitations, the right to strike or lockout if the matter has been referred to conciliation but has not been resolved within 30 days or such further period as may be applicable.

A party to a dispute is prohibited by the Act from taking part in a strike or lockout if the dispute is still in the process of conciliation, or the dispute must be referred to arbitration, or the parties have agreed to refer the matter for arbitration, or the dispute is between parties engaged in an essential service.

In participating in a strike or lockout in compliance with the Act, a person is not committing a breach of contract or delict, but an employer is not obliged to remunerate an employee taking part in such strike.

### **Labour Disputes – Section 80**

The Act has introduced methods and means whereby disputes in the labour market may be settled or resolved without the parties becoming involved in litigation in Courts of Law, or resorting to violent and illegal tactics in order to achieve their aim.

### **Conciliation – Section 81**

Conciliation is a process of mediation and an extension of the process of collective bargaining whereby an impartial and neutral third party is appointed to assist the parties to reach a voluntary settlement of the matters in dispute.

A conciliator is empowered to control the process of negotiation and he/she has no decision making power. The parties themselves must reach the necessary decision to determine the outcome of the conciliation.

#### **Conciliation will be used to resolve-**

- (a) disputes of interest i.e. disputes regarding legal entitlements or rights (things that you want but are not entitled to);
- (b) disputes involving affirmative action; or
- (c) disputes referred for conciliation by the Minister of Labour and Social Welfare or the Labour Court.

Any party to a dispute may, after due notice to all other parties, refer the dispute in the prescribed form to the Labour Commissioner or any labour office and the Labour Commissioner, if satisfied that all reasonable steps have been taken by the parties to resolve or settle the dispute, must appoint a conciliator.

In conciliation proceedings a party may be represented by a member or official of the party's trade union or employer's organisation, a co-employee, or, if the party is a juristic person such as a limited liability company, by a director or member of such juristic person.

Legal Practitioners and other individuals such as labour consultants, will only be permitted to represent a party to a conciliation dispute, if-

- (i) the parties involved agree, or

- (ii) the conciliator allows it due to the complexity of the matter or that it is appropriate in the circumstances and the other party will not be prejudiced by it.

### **Arbitration – Section 84**

Arbitration is a more formal method of dispute resolution than conciliation.

An arbitrator is not only in control of the arbitration process but also determines the outcome of the dispute. In this respect the arbitrator is in much the same position as a judicial officer such as a magistrate or judge in a court case.

Arbitration will be applied in disputes arising from the following issues-

- (i) breaches of contracts of employment and collective agreements;
- (ii) unfair labour practices, unfair dismissals and unfair disciplinary action; and
- (iii) disputes required to be referred to arbitration in terms of the Act.

In arbitration proceedings a party may be represented by the same persons that are permitted to represent parties in conciliation hearings. Legal Practitioners and other persons may also only be permitted to appear on behalf of parties as in the case of conciliation proceedings.

A party to a dispute may appeal to the Labour Court against an arbitrator's decision-

- (a) on a question of law alone or;
- (b) on a question of fact and/or law if such a question arises from the scope of chapter 3 of the Namibian Constitution i.e matters arising from Equality and Freedom, Discrimination, Fundamental Rights, Affirmative Action etc.

### **Private Arbitration – Section 91**

In order to facilitate the expeditious resolution of labour disputes, private arbitration procedures are provided for in the Act. Concern has, however, been expressed that although the main aim of private arbitration should be the speedy, expeditious and inexpensive resolution of disputes, the provisions of the Arbitration Act (No 42 of 1965) are applicable.

The Arbitration Act requires the parties to enter into a written agreement providing for the referral to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement.

The parties may agree to the appointment of an arbitrator, but should no agreement be reached in this regard the Labour Court may, on application, designate an arbitrator.

The appointment of an arbitrator may only be terminated by agreement or by order of the Labour Court.

Unless otherwise agreed, the costs of arbitration are borne by the parties equally and must normally be paid or guaranteed in advance.

It is generally advisable for the written agreement to set out the procedural duties and terms of the arbitrator, but the arbitrator is in any case empowered to subpoena any person to attend the hearing whose evidence the arbitrator considers necessary, to administer an oath or accept an affirmation from such witness and to question him or her.

Subject to the provisions of the arbitration agreement, the arbitrator has fairly extensive powers to make an appropriate arbitration award including issuing an interdict, directing the performance of an act to rectify a wrong, issuing a declaratory order, an order reinstating an employee, compensation and an order for costs.

Unless the arbitration agreement provides otherwise the arbitrator must give a written, signed finding within 30 days after the conclusion of proceedings.

### **Appeals and Reviews**

An arbitration award is final unless it is only of an advisory nature and may be made an order of the Labour Court if filed with the Court by a party to the dispute or the Labour Commissioner. A party to a dispute may appeal to the Labour Court against an arbitrator's award-

- (a) on any question of law alone; or
- (b) a matter involving a fundamental constitutional right or privilege.

A party to a dispute may apply to the Labour Court to review or set aside an arbitration award on the grounds that the arbitrator-

- (a) committed misconduct in his duties;



- (b) committed a gross irregularity in the arbitration proceeding;
- (c) exceeded his powers, or
- (d) that the award was improperly obtained.

Appeals and reviews must be lodged with the Labour Court within 30 days after the award was served on a party, unless the alleged defect involves corruption, in which case the application must be filed within 6 weeks after the date that the applicant becomes aware of the corruption.

## **Labour Institutions**

Various bodies and posts have been created by the Labour Act to ensure the expeditious and facilitious application and implementation of the law.

(a) **Labour Advisory Council – Section 92**

This is a Council established to investigate and advise the Minister in respect of all aspects of national labour policy and consists of committee members representing the State, registered trade unions and registered employer's organisations.

(b) **Committee for Dispute Prevention and Resolution – Section 100**

This committee is a sub-committee of the Labour Advisory Council and its main function is to make recommendations to the Advisory Council regarding general aspects of conciliation and arbitration, dispute preventions and resolutions and to report on the activities of the Labour Commissioner when instructed to do so.

(c) **Essential Service Committee – Section 104**

An "essential service" is defined as a service, the interruption of which would endanger the life, personal safety or health of any part of the population and the committee's function is to recommend to the Labour Advisory Council the designation of such essential service and to investigate disputes as to whether an employer or employee is performing an essential service.

### **Labour Court – Section 115**

The Labour Court, being a division of the High Court, is presided over by a judge of the High Court of Namibia and has exclusive jurisdiction to hear a wide array of labour cases, including appeals of arbitration awards, compliance orders and reviews.

### **Labour Inspectors – Section 123**

The Act confers extensive powers on labour inspectors to police the labour market to ensure adherence to the law. They have the power to issue a compliance order, directing a party to remedy any violation of the Act.

Inspectors must produce their certificates of appointment on request, but are entitled to enter premises at reasonable times in order to conduct a search, inspect books or documents, take samples of the atmosphere, enforce arbitration awards and generally do whatever may be necessary to enforce the terms of the Act.

Inspectors may not be hindered or obstructed in the performance of their duties.

## **CONCLUSION**

With the increasing development of industrial economies it eventually became necessary to introduce legislation which regulated the labour market and provided for the formation of trade unions and organisations to represent the labour masses. Mutual participation and co-operation between management and staff is not only the ideal situation for every business concerned, but a peacefully functioning labour market will hopefully promote a country's economic progress as a whole.

It should be noted that there are three industries for which minimum wages have been established in terms of the Minister's exercise of the power to extend collective agreements between a trade union and an employer's association to cover all employers and employees in the specific industry, being agriculture, security and construction.

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