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THE EMPLOYMENT AND LABOUR RELATIONS ACT, 2004

(No. 6 OF 2004)

RULES

Made under section 99(1)

THE EMPLOYMENT AND LABOUR RELATIONS (CODE OF GOOD PRACTICE) RULES, 2007

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PART I

Preliminary Provisions

Citation

1. These Rules may be cited as the Employment and Labour Relations (Code of Good Practice) Rules, 2007.

Application

2. These Rules shall apply to all employees, employers, trade unions, employer organizations, mediators, arbitrators, assessors, judges and shall include Government officials.

PART II

(a) Termination Generally

(i) Forms of Termination and Procedures

Termination of Employment

3.–(1) For the purposes of these Rules, the termination of employment shall include-

(a) a lawful termination under the common law;

(b) the employer made continued employment intolerable for the employee;

(c) failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal of the contract;

(d) failure to allow an employee to resume work after a maternity or paternity leave; and

(e) failure to re-employ an employee where the employer has terminated the employment of a number of employees for the same or similar reasons and has offered re-employment only to some of those terminated.

(2) A lawful termination of employment under the common law shall be as follows–

(a) termination of employment by agreement;

(b) automatic termination;

(c) termination of employment by the employee; or

(d) determination of employment by the employee;

(3) The rules regulating the termination of a contract of employment shall depend on the duration of the contract.

(4) The agreed duration shall be applicable where there is–

(a) an agreement to work for a fixed term in respect of a fixed time or upon completion of a task; or

(b) an agreement to work without reference to limitation of time or task in accordance to the agreement.

Termination of employment by Agreement

4.–(1) An employer and employee shall agree to terminate the contract in accordance to agreement.

(2) Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise.

(3) Subject to sub-rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it.

(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstance where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.

(5) Where fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for the expectation such as previous renewals, employer's undertakings to renew.

(6) The provision of this rule shall not apply where–

(a) the size of the employer may justify a departure;

(b) the nature of the employment business may require strict adherence to rules than may normally be the case; or

(c) collective misconduct may justify a departure from the ordinary procedure rules provided that the employees are given a fair opportunity to make representations.

(7) The provision of this rule may be varied by collective agreement.

Automatic termination

5.–(1) A contract of employment may be terminated automatically in certain circumstances such as death or loss of profession of the business (sequestration) of the employer.

(2)Subject to sub-rule (1), a person taking over the business in such circumstances, shall first consider the employment of the employees whose employment have been terminated as a result of the death or sequestration, before any other employees are hired.

(3) Unless the contract of employment provides otherwise, a contract of employment may terminate automatically when the employee reaches the agreed or normal age of retirement.

(4) Where there is no agreed retirement age the normal retirement age shall be implied from the employer's practice in the past and the practice in the industry.

(5) Where the employee continues to work after attaining the retirement age, the contract shall be renewed and the normal rules of termination of employment apply, unless the employee and the employer agreed to something different.

Resignation

6.–(1) Where 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 employee may lawfully terminate the contract before the expiry of the fixed term by getting the employer to agree to an early termination.

(2) Where there is an indefinite contract, the employee may resign-

(a) by giving a notice of termination; or

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

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

(4) Conducts which shall amount to a material breach of a contract of employment and that may justify the summary termination of the contract by the employee are–

(a) the refusal to pay wages;

(b) verbal or physical abuse or sexual harassment;

(c) unfair discrimination; or

(d) any other breach.

(5) Notwithstanding section 41 of the Act, the minimum period of notice to be given by an employee on a lawful termination of contract, an employer and employee may agree to a longer notice.

Constructive termination

7.–(1) Where an employer makes an employment intolerable which may result to the resignation of the employee, that resignation amount to forced resignation or constructive termination.

(2) Subject to sub-rule (1), the following circumstances may be considered as sufficient reasons to justify a forced resignation or constructive termination-

(a) sexual harassment or the failure to protect an employee from sexual harassment; and

(b) if an employee has been unfairly dealt with, provided that the employee has utilized the available mechanisms to deal with grievances unless there are good reasons for not doing so.

(3) Where it is established that the employer made employment intolerable as a result of resignation of employee, it shall be legally regarded as termination of employment by the employer.

Termination by an employer

8.–(1) An employer may terminate the employment of an employee if he–

(a) complies with the provisions of the contract relating to termination;

(b) complies with the provisions of sections 41 to 44 of the Act concerning notice, severance pay, transport to the place of recruitment and payment;

(c) follows a fair procedure before terminating the contact; and

(d) has a fair reason to do so as defined in Section 37(2) of the Act.

(2) Compliance with the provisions of the contract relating to termination shall depends on whether the contract is for a fixed term or indefinite in duration. This means that-

(a) where an employer has employed an employee on a fixed term contact, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract;

(b) where there is no breach to terminate the contract lawfully is by getting the employee to agree to early termination;

(c) where the contract is for an indefinite duration, the employer must have a fair reason to terminate and follow a fair procedure.

(d) the employer may terminate the contract-
  (i) by giving notice of termination; or
  (ii) without notice, if the employee has materially breached the contract.

(3) Where an employer requires the employee to work the notice and the employee fails to do so, the employer may deduct from any money due to the employee the equivalent of the amount that would have been due to the employee had the employee worked.

(4) The amount of severance pay due to an employee shall be as specified under Rule 25.

Fair reasons and fair procedures

9.–(1) An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination.

(2) Notwithstanding the procedures used in these Rules the procedure which may be used in respect of incapacity or incapability shall be different.

(3) The burden of proof lies with the employer but it is sufficient for the employer to prove the reason on a balance of probabilities.

(4) The reasons which may justify termination by the employer are as follows–

(a) conduct;
(b) capacity;
(c) compatibility; or
(d) employer's operational requirements.

(5) The reason shall not only be one of the kinds of reasons considered fair but the reason in a particular case shall be sufficiently serious to justify termination.

Probationary employees

10.–(1) All employees who are under probationary periods of not less than 6 months, their termination procedure shall be provided under the guidelines.

(2) Terms of probation shall be made known to the employee before the employee commences employment.

(3) The purpose of probation is normally to enable the employer to make an informed assessment of whether the employee is competent to do the job and suitable for employment.

(4) The period of probation should be of a reasonable length of not more than twelve months, having regard to factors such as the nature of the job, the standards required, the custom and practice in the sector.

(5) An employer may, after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not yet been able to properly assess whether the employee is competent to do the job or suitable for employment.

(6) During the period of probation, the employer shall-

(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 discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counseling to the employee during probation.

(7) Where 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 shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.

(8) Subject to sub-rule (1) the employment of a probationary employee shall be terminated 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 a reasonable time to improve performance or correct behaviour and has failed to do so

(9) A probationary employee shall be entitled to be represented in the process referred to in sub-rule (7) by a fellow employee or union representative.

(ii) Misconduct

Managing conduct

11.–(1) All employers shall implement disciplinary policies and procedures that establish the standard of conduct required of their employees.

(2) The form and content of policies and procedures shall obviously vary according to the size and nature of the employer's business.

(3) An employer's rules in the application of discipline and standards of conduct shall be made available to the employees in a manner that is easily understood.

(4) Subject to sub-rule (3), discipline shall be corrective efforts and be made to correct employee behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(5) The effect of a warning is to notify the employee that a further offence of a similar nature may result in more serious disciplinary action being taken.

(6) Procedures of invoking disciplinary measures specified shall be taken as in the schedule to these Rules.

Fairness of the reason

12.–(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

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

(b) if the rule or standard was contravened, whether or not–

(i) it is reasonable;

(ii) it is clear and unambiguous;

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

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it.

(2) First offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

(3) The acts which may justify termination are–

(a) gross dishonesty;

(b) wilful damage to property;

(c) wilful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(f) gross insubordination.

(4) In determining whether or not termination is the appropriate sanction, the employer should consider –

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

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

(5) The employer shall apply the sanction of termination 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 commit same misconduct.

Fairness of the procedure

13.–(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.

(4) The hearing shall be held and finalized within a reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary.

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

(7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

(9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing.

(10) Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act.

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense

with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

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

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

Termination of employment in unlawful strikes

14.–(1) Disciplinary action shall not be taken against an employee who participated in a strike that complies to the provisions of Part VII of the Act.

(2) Notwithstanding the provision of sub-rule (1) participating in a strike that does not comply to the provision under Part VII constitutes misconduct and may justify termination of employment after having considered-

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

(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 employee have been given an ultimatum;

(e) the manner in which the employee have conducted themselves during the strike, namely whether the strike was conducted in a peaceful manner or accompanied by violent behaviour of the employee; or

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

(3) Prior to termination of the employee the employer shall, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt.

(4) The employer shall issue an ultimatum in clear and unambiguous terms which states what is required of the employee and what sanction shall be imposed if they do not comply with the ultimatum.

(5) The employee shall be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. What constitutes 'sufficient time' shall depend on the circumstances of each case, but normally would allow the employee to reflect on the ultimatum over night.

(6) Where the employer cannot reasonably be expected to take these steps, the employer may dispense with them for the reason that the employee or his representative refuse to meet with the employer.

(7) The employer may not discriminate between the striking employees by terminating the employment of some of them or, after having terminated their employment, re-instating some of them.

(8) Where the reason for difference in treatment is based on fair grounds such as participation in strike related misconduct, picket violence or malicious damage to property the termination may be fair.

(iii) Incapacity

Incapacity generally

15.-(1) An employee's incapacity may be due to ill health, injury or poor work performance.

(2) Each reason needs to be dealt with on its merits and a fair procedure applied in each case.

Managing work performance standards

16.–(1) It is important in determining the fairness of termination for poor work performance, that the performance standard is not only reasonable but is also known to the employees.

(iv) Poor work performance

Fairness of the reason

17.–(1) Any employer, arbitrator or judge who determines whether a termination for poor work performance is fair shall consider–

(a) whether 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; and

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

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

(3) Proof of poor work performance is a question of fact to be determined on a balance of probabilities.

Fairness of the procedure

18.–(1) The employer shall investigate the reasons for unsatisfactory performance. This shall reveal the extent to which is caused by the employee.

(2) The employer shall give appropriate guidance, instruction or training, if necessary, to an employee before terminating the employee for poor work performance.

(3) The employee shall be given a reasonable time to improve. For the purpose of this sub-rule, a reasonable time shall 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.

(4) Where the employee continues to perform unsatisfactorily, the employer shall warn the employee that employment may be terminated if there is no improvement.

(5) An opportunity to improve may be dispensed with if –

(a) the employee is a manager or senior employee whose knowledge and experience qualify him to judge whether he 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 termination.

(6) Prior to finalising a decision to terminate the employment of an employee for poor work performance, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance.

(7) At the meeting, the employer shall outline reasons for action to be taken and allow the employee and/or the representative to make representations, before finalising a decision.

(8) The employer shall consider any representations made and, if these are not accepted, explain why.

(9) The outcome of the meeting shall be communicated to the employee in writing, with brief reasons.

(v) Ill health or injury

Fairness of the reason

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

(a) the cause of the incapacity;

(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 or pension.

(2) Where an employee is injured at work or is incapacitated by a work-related illness (the cause), an employer shall go to greater lengths to accommodate the employee (the ability to accommodate).

(3) The employer shall be guided by an opinion of a registered medical practitioner, in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature.

(4) Where an employee is temporarily unable to work, the employer shall investigate the extent of the incapacity or the injury.

(5) Where the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer shall investigate possible ways to accommodate the employee or to consider all possible alternatives short of termination.

(6) Possible alternatives short of termination shall include–

(a) temporary replacement;

(b) light duty;

(c) alternative work;

(d) early retirement;

(e) pension; or

(f) any other acceptable alternative.

(7) 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.

(8) Where the cause of the incapacity is due to alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(9) Where the employee is permanently incapacitated, the employer shall ascertain the possibility of securing alternative employment for the employee or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(10) Where the employee is incapacitated to a limited degree, the employer shall consider-

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

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

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

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

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

(12) Where it is established that the employee's work circumstances or duties cannot reasonably be adapted to accommodate the disability, the employer shall consider the availability of any suitable alternative work.

(13) 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.

(14) Where there is a vacancy which the employee could fill with training, such vacancy shall be offered to the employee.

HIV/AIDS Status

20.–(1) No employment shall be terminated merely on the basis of HIV/AIDS status.

(2) HIV/AIDS infected employees shall continue to work under normal conditions in their current employment for as long as they are medically fit to do so.

(3) Where HIV/AIDS infected employee cannot continue with normal employment because of HIV/AIDS related illness, the employer shall endeavour to find alternative employment without prejudice to that employee's benefits.

(4) When an employee becomes too ill to continue in employment, the provisions of this rule or any collective agreement dealing with incapacity on grounds of ill health shall be applied.

Fairness of the procedure

21.–(1) The employer shall investigate an employee's incapacity due to ill-health or injury.

(2) The employee shall be consulted in the process of the investigation and shall be advised of all the alternatives considered.

(3) The employer shall consider the alternatives advanced by the employee and, if not accepted, give reasons.

(4) The employee is entitled to be represented by a trade union representative or fellow employee in the consultations.

(5) Prior to decision to terminate the employment of an employee for ill-health or injury, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance.

(6) The employer shall outline reasons for action to be taken and allow the employee and/or the representative to make representations, before finalising a decision.

(7) The employer shall consider any representations made and, if these are not accepted, explain why.

(8) The outcome of the meeting shall be communicated to the employee in writing, with brief reasons.

(vi) Incompatibility

Incompatibility

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

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

(b) incompatibility of the employee in his work environment in that he relates badly with fellow 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 as set out in rule 18 of these Rules are applicable, read with changes required by the context. In particular, the employer shall –

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

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

(4) Before terminating employment on this ground, the employer shall give the employee a fair opportunity to-

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

(b) remove the cause for disharmony; or

(c) propose an alternative to termination.

(b) OPERATION REQUIREMENTS

Operational requirements

23.–(1) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.

(2) As a general rule the circumstances that might legitimately form the basis of a termination are -

(a) economic needs that relate to the financial management of the enterprise;

(b) technological needs that 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;

(c) structural needs that arise 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.

(3) The courts shall scrutinize a termination based on operational requirements carefully in order to ensure that the employer has considered all possible alternatives to termination before the termination is effected.

(4) The obligations placed on an employer are both procedural and substantive. The purpose of the consultation required by Section 38 of the Act is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on –

(a) the reasons for the intended retrenchment (i.e. the need to retrench);

(b) any measures to avoid or minimise the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;

(c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications.

(d) the timing of the retrenchments;

(e) severance pay and other conditions on which terminations take place; and

(f) steps to avoid the adverse effects of the terminations such as time off to seek work.

(5) The requirement which the employer is required to adhere to under subsection (1) of section 38.

(6) In order for it to be effective, the consultation process shall commence as soon as the employer contemplates a reduction of the workforce through retrenchment so that possible alternatives can be explored. The process shall allow 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.

(7) 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 consultation process may be. Urgency may not, however, be induced by the failure to commence the process as soon as a reduction of the workforce was likely. On the other hand, the parties who are required to reach agreement shall meet, as soon and as frequently, as may be practicable during the process.

(8) Section 38(2) of the Act provides that if no agreement is reached between the parties, the matter shall be referred to mediation by the

Commission for Mediation and Arbitration. An agreement reached between the employer and a trade union recognised as the exclusive bargaining agent, is binding on all employees within the bargaining unit in terms of Section 71(3)(c) of the Act.

(9) The employer may not implement the retrenchment within 30 days of the referral to mediation, unless otherwise agreed between the parties. Once this period has passed, the employer may proceed with the retrenchment unilaterally. The fairness of the employer's actions may be disputed and referred to arbitration, once the mediation fails.

Selection criteria

24.–(1) Where one or more employees are to be selected for termination from a number of employees, the criteria for their selection shall be agreed with the trade union. If criteria are not agreed, the criteria used by the employer shall be fair and objective.

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

(3) Selection criteria that are generally accepted as fair include length of service, the need to retain key jobs, experience or skills, affirmative action and qualifications.

Preference in re-hiring

25.–(1) Retrenched employees shall be given preference if the employer re-hires employees with comparable qualifications, subject to the following:–

(a) the employee having expressed within a reasonable time from the date of termination, a desire to be re-hired; and

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

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

(c) SEVERANCE PAY

Severance pay

26.–(1) When an employment contract terminates, the employer shall pay the employee severance pay at least equal to 7 days basic wage for each completed year of continuous service with that employer, up to a maximum of 10 years.

(2) The employer is not required to pay severance pay if the employment is terminated-

(a) before the completion of the first year of employment;

(b) fairly on grounds of misconduct;

(c) on grounds of incapacity, incompatibility or operational requirements and the employee unreasonably refuses to accept alternative work with the employer or alternative employment with any other employer.

(3) What constitutes an "unreasonable refusal" in sub-rule 2(c) above will depend on the circumstances of each case.

(d) SUSPENSION

Suspension

27.–(1) Where there are serious allegations of misconduct or incapacity, an employer may suspend an employee on full remuneration whilst the allegations are investigated and pending further action.

(2) The employee suspended shall be given a written letter of suspension, setting out the reason for the suspension and any terms of the suspension.

(3) The reasons for suspension are the following-

(a) the employee's presence at work may obstruct the investigation; and/or

(b) the employee's ongoing performance of work duties may present a problem whilst the investigation takes place;

(4) The period of suspension must be reasonable, taking into consideration how long the investigation and the decision on any further action may take.

(5) Notwithstanding the provision of section 35 of the Act, an employee charged with a criminal offence may be suspended on full remuneration pending a final determination by a court and any appeal thereto, on that charge.

PART III
WORKPLACE DISCRIMINATION

Elimination of Discrimination

28.–(1) Subject to section 7(1) of the Act, the objective of this Part of these Rules is to eliminate discrimination at the workplace and promote equality of opportunity and treatment in employment.

(2) This Part shall guide employers in developing register plans as provided under the Act.

Prohibition of Discrimination

29.–(1) Employer shall not directly or indirectly, discriminate any employee in any employment policy or practice.

(2) Discrimination may include but not be limited to the list of factors stated under Section 7(4) of the Act.

(3) Harassment of an employee, whether of a sexual nature or otherwise, constitutes a form of discrimination.

(4) Not every differentiation based on one of the listed grounds under Section 7(4) of the Act constitutes discrimination. It is not discriminatory to –

(a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job;

(c) employ citizens in accordance with the National Employment Promotion Services Act. **Cap.243**

Developing a Plan

30.–(1) Every employer shall be required to develop and publish at the workplace its plan to prevent discrimination and to promote equal opportunity in employment.

(2) Where there is a recognised trade union in the workplace, the employer shall consult the union in developing the plan and, if possible, incorporate the plan in a collective agreement.

(3) Where there is no recognised trade union in the workplace, the employer shall invite representatives of the employees to participate in developing plan.

(4) The plan shall take into account, all employees entitled to equal opportunity and equal treatment, subject to an assessment of their abilities in relation to the employer's organisational needs.

(5) The plan shall address each of the employment policies or practices described under paragraph (c) of Section 7 (9) of the Act, and contain plans to eliminate any discrimination under each item as follow–

(a) with regard to recruitment procedures, advertising and selection criteria, an employer may direct that interview panels as far as possible comprise men and women, job adverts highlight any affirmative action policies in existence, or that selection criteria be audited to ensure they strictly relate to the inherent requirements of a job;

(b) with regard to appointments and the appointment process, an employer may direct that preference in selection be given to suitably qualified candidates from previously disadvantaged groups. These groups include, but are not limited to, women and people with physical and/or mental disabilities;

(c) with regard to job classification and grading, remuneration, employment benefits and terms and conditions of employment, the employer may require an audit to ensure these relate strictly to objective criteria, such as the inherent job requirements;

(d) with regard to the working environment and facilities, the employer may audit that these are non discriminatory that employees with disabilities are not disadvantaged;

(e) with regard to job assignments, training and development, performance evaluation systems, promotions and transfers, the employer may take steps to ensure these opportunities are determined objectively, without discriminating against any groups or classes of employees; and

(f) with regard to demotion, termination of employment and disciplinary measures, the employer may audit that these are based on fair and objective criteria.

(6) Collective agreements shall not contain provisions which discriminate against employees in respect of any of the grounds specified under section 7(4) of the Act.

(7) Employers' association and trade unions may not discriminate in the admission or retention of membership or in conducting their affairs.

(8) The employer shall establish a committee, or task an existing committee, to promote the application of the employment discrimination plan in the workplace, including-

(a) taking all practical measures to foster and communicate understanding and acceptance of the principle of non-discrimination and to promote equality among employees; and

(b) investigating complaints that the plan is not being observed and, if necessary, making recommendations or decisions about the manner in which discriminatory practices may be corrected.

(9) Application of the plan shall not adversely affect special measures designed to meet the particular requirements of employees who, for reasons such as age, sex, race, disability or marital status, require special protection or assistance.

Direct and Indirect Discrimination

31.–(1) This Rule aims to eliminate both direct and indirect discrimination.

(2) Direct discrimination occurs where an employee is treated prejudicially on the listed grounds referred to in Rule 30.

(3) Indirect discrimination occurs where a requirement or condition, which on the face of it, appears to be neutral, has the effect of discriminating against a person or category or persons on the grounds listed in Rule 30.

Employer Responsibilities

32.–(1) It is primarily the employer's responsibility to ensure that there is equal opportunity in the work place.

(2) The employer shall adopt, communicate, implement, monitor and periodically review policies to eliminate discrimination.

Advertising

33.–(1) An employer shall not unfairly limit advertisements for employment to areas or publications which may exclude or disproportionately reduce the number of applicants on the grounds referred to in rule 30.

(2) An employer shall as far as possible avoid being too prescriptive in the advertised requirements for a job, unless the prescriptions are genuinely required for the position.

(3) An employer using recruitment agencies shall take all reasonable steps to ensure that those agencies subscribe to these Rules.

Selection

34.–(1) Selection criteria and tests shall be analysed from time to time to ensure that they genuinely relate to the job requirements and do not directly or indirectly discriminate against candidates.

(2) Where reasonably possible, the short-listing and interviewing of applicants shall not be done by only one person, and shall also be checked by someone at a more senior level.

(3) Persons responsible for short-listing, interview and selection of candidates shall be given guidance or training on the proper application of the principle of equal opportunity in selection and the dangers of indirect discrimination.

Training

35.–(1) Every employer shall ensure that criteria for selecting employees for training, whether for induction, promotion or skill training are not discriminatory.

(2) Every employer shall examine its policies periodically to avoid indirect discrimination.

Performance reviews

36.-(1) Every employer shall ensure that the assessment criteria do not discriminate indirectly.

(2) Every employer shall ensure that those responsible for conducting performance review evaluations do not discriminate.

Employee Responsibilities

37.–(1) Every employee, in carrying out employment functions, shall not discriminate and shall take action to prevent any discrimination they come across in the workplace.

(2) In order to promote a non-discriminatory work environment, employees shall –

(a) comply with the plan's measures to avoid discrimination;

(b) notify the employer or the recognised trade union of any suspected discriminatory conduct; and

(c) refrain from harassing or victimising employees.

Trade Union Responsibilities

38.–(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) Trade unions shall not discriminate by unfairly refusing membership or offering membership or offering less favourable terms of membership on any discriminatory grounds such as those referred to in Section 7(4) of the Act.

(3) Trade unions shall accept that discriminatory conduct by their members may be treated as a disciplinary offence by employers.

(4) Trade unions shall provide training and information for officials and representatives on their responsibilities for equal opportunity, and must co-operate in developing, implementing and monitoring plans to eliminate discrimination and promote equality.

PART IV
STRIKES AND LOCKOUTS

Role of strikes and lockouts in collective bargaining

39.–(1) The role of strikes and lockouts in collective bargaining as the core for employer and employees is to resolve matters of mutual interest themselves without outside interference.

(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. Their purpose is not to unnecessarily damage the organisation.

Objective

40.–(1) The object of a strike or lockout is to settle a dispute and shall come to an end if the dispute that gave rise to it is settled.

(2) The dispute may be settled by an agreed compromise or a return to work. An agreed compromise normally shall take the form of a collective agreement.

Matters in respect of which a strike or lockout is permissible

41.–(1) The subject matter of a lawful strike or lockout is limited to disputes of interest only, although it is not normally permissible to strike or lockout in respect of disputes of interest in an essential service. Those disputes are referred to compulsory arbitration, if mediation fails.

(2) Subject to sub-rule (1), a dispute of interest on the other hand is a dispute over a labour matter in respect of which an employee does not have an enforceable legal right and the employee is trying to establish that right by getting agreement from the employer.

(3) For the purpose of this Part, a complaint is defined as a dispute arising from the application, interpretation or implementation of an

agreement or contract with an employee, a collective agreement, a provision of the Act or any other Act administered by the Minister of which a dispute of right or a complaint concerns those labour matters that shall be decided by arbitration or the Labour Court:

Provided that, where an employer refuses to give the wage increase demanded by the employee, a dispute over that refusal is a dispute of interest and may only be resolved by an agreement that may be induced by the resort to industrial action.

(4) Dispute of interest may be:

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

(b) a dispute over what next year's wages are going to be;

(c) a dispute over shorter working hours or higher overtime rates; or

(d) a dispute over a new retrenchment procedure or recruitment policy;

(5) Dispute of right or a complaint may be the-

(a) failure to pay an agreed wage;

(b) to failure to comply with a provision of an employment contract;

(c) breach of a collective agreement; or

(d) contravention of the Act.

Procedural requirements for a lawful strike or lockout

42.–(1) Nothing prevents a registered trade union on the one hand and an employer or employers association on the other hand from concluding a collective agreement providing for an agreed procedure for a lawful strike or lockout. In such a case the procedure in the collective agreement shall be followed.

(2) Subject to sub-rule (1), Sections 80 and 82 of the Act contemplate the procedure outlined hereunder in sub-rules (3) to (14) of this rule, before an employer may embark on a lawful lockout or employees may embark on a lawful strike:

(3) The dispute shall be referred to the Commission for Mediation and Arbitration. The Commission shall appoint a mediator who shall attempt to resolve the dispute through mediation within 30 days of the referral.

(4) Where the dispute is resolved, the mediator shall reduce the settlement to writing. The parties to the dispute shall sign the settlement agreement.

(5) Where the mediator at any stage issues a certificate that the dispute is unresolved or the dispute remains unresolved for more than 30 days, a party may give the required notice of its intention to commence a strike or lockout in terms of the Act.

(6) The 30 days mediation period is calculated from the date that the dispute is referred. The mediator may extend that period by a further 30 days if the party referring the dispute fails to attend the mediation meeting.

(7) The mediator may shorten the 30 days period if the other party fails to attend. Nothing prevents the parties to the dispute from agreeing between them to lengthen the period.

(8) Where the strike is called by a trade union, the union shall conduct a ballot of its members being called out on strike. A trade union is only permitted to call a strike if a majority of those who voted supported the strike.

(9) The party initiating the action shall give at least 48 hours notice of the commencement of the strike or lockout to the other party. The notice may be given only after the mediation period contemplated in sub-rule(6) has expired.

(10) The mediator retains jurisdiction over the dispute until the dispute is settled and must continue to try and settle the dispute by mediation after the notice or during the strike or lockout.

(11) Once a dispute has been referred and the procedural requirements of Section 86 of the Act have been complied with, either party to the dispute may commence industrial action, whereas, 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, provided they give the required notice referred to in sub-rule (8).

(12) 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.

(13) The notice of commencement of the strike or lockout shall state the date and time of the strike or lockout. The object of the notice to strike is to ensure that the employer has the opportunity to shut down the business without unnecessary harm being done to it.

(14) Where the strike does not commence at the stated time and date or suspended and the employees return to work, a fresh notice shall be given. The object of the notice to lockout is to ensure the employees know in advance from when they shall be prevented from working and not be paid.

(15) Where the intended strike or lockout is to be intermittent, the notice of the commencement of the strike or lockout shall include the dates and times of each stoppage.

(16) Where a strike or lockout is a fresh notice shall be given if the strike or lockout is resumed. That notice shall state the date and time of the resumption of the strike.

Rules regulating the conduct of strikes and lockout

43.–(1) Where an interest dispute is not resolved at mediation, the mediator shall try to get the parties to agree on rules to regulate the conduct of the strike or the lockout.

(2) The rules shall address the following matters –

(a) the conduct of strike ballot;

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

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

(d) appointment of representatives responsible for ensuring compliance with the rules and their contact details;

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

(f) commitment to take steps to ensure compliance with the provisions of the Act, this code and any agreed rules; and

(g) mediation during the strike or lockout in terms of Section 86(8) of the Act.

(3) Even if the mediator doesn't assist the parties in trying to agree these rules, the parties themselves shall attempt to agree on rules to regulate the type of matters set out in sub-rule (2).

Procedure for engaging in a secondary strike

44.-(1) A secondary strike is a solidarity strike in support of other employees who are on strike (called the primary strike) or who may be subject to a lockout by their employer.

(2) In terms of Section 81 of the Act, a secondary strike is lawful if–

(a) it is in support of a lawful primary strike;

(b) it opposes a lockout imposed by another employer against its employees;

(c) the trade union has given 14 days notice of the commencement of the strike;

(d) there is a relationship between the secondary employer and the primary employer; and

(e) the secondary strike is proportional.

(3) The secondary strike shall be lawful if the primary strike is lawful. In order to be lawful, the primary strike shall comply with the provisions of Section 80 of the Act.

(4) The lawfulness of a secondary strike does not depend on the lawfulness of a lockout. A secondary strike may be called in respect of both a lawful and an unlawful lockout.

(5) There shall be a relationship between the secondary employer and the primary employer which may take a range of the following forms:

(a) the secondary employer may be a supplier or a client of the primary employer;

(b) the employers may be in the same group of companies; or

(c) the secondary employer may have shares in the primary employer.

(6) The test in establishing a relationship is always the capacity of the secondary employer to place pressure on the primary employer. It is the necessary pre-requisite for assessing the proportionality of the secondary strike.

(7) The secondary strike shall proportional taking into account two factors:–

(a) the effect of the strike on the secondary employer; and

(b) the possible effect that the secondary strike may have in resolving the dispute giving rise to the primary strike or the lockout.

(8) The trade union calling a secondary strike shall tailor the secondary strike in such a way as to limit the harm to the secondary employer, while applying pressure on the primary employer.

Termination of strikers

45.–(1) Subject to section 83 (2) of the Act, protection against termination does not extend to strike related misconduct such as violence, malicious damage to property.

(2) The ordinary Rules relating to termination of employment for misconduct shall apply to an employee charged with this kind of misconduct.

(3) It may be fair to terminate the employment of a striker engaged in unlawful strike. The fairness of the termination depends on a number of factors provided under these Rules.

Role of the police

46.–(1) The police shall apply any policy and guidelines on strikes and lockouts issued by the Minister responsible for public safety and security.

(2) As a general rule, police shall only intervene if there is a breach of the peace or law, particularly if there is a threat of violence or damage to property.

(3) The police shall have no responsibilities of enforcing the Act or orders of 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 if there is a breach of the peace.

(4) The police may arrest persons who engage in violent conduct or are armed with dangerous weapons and take steps to protect the public, if they are of the view that the strike or lockout is not peaceful and is likely to lead to violence. It shall not the function of the police to take any view of the merits of the dispute giving rise to the strike.

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.

(2) The private security personnel shall have no responsibility of enforcing the Act or any order of the Labour Court.

(3) Enforcement of a court order is a matter for the courts and its officers.

Information and education

48.–(1) The Minister shall ensure that-

(a) copies of these Rules are accessible and available to all, especially the employees and employers to whom it applies; and

(b) these Rules are known by, and available to, organs responsible for enforcement of public order.

(2) Employers and employers' associations shall include the subject of strikes and lockouts in their orientation, education and training programmes of employees.

(3) Trade unions shall include these subjects in their education and training programmes for shop stewards, officials and members.

PART V
COLLECTIVE BARGAINING

Applying the Rules

49.–(1) The purpose of these Rules, is to guide trade unions, employers and their associations on how to exercise their rights and give effect to their obligations to bargain collectively by -

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

(b) providing guidelines on good practice.

(2) Employees, employers, trade unions, employer's organisations, mediators, arbitrators, assessors, Judges and officials in the Ministry on interpreting or applying the law shall take the Rules into account.

(3) The provisions of these Rules do not impose any hard and fast obligations on any party, the legal obligation may be to justify a departure from the provisions of a Rule.

(4) A party may depart from these provisions if circumstances warrant it, but it have to justify the departure.

(5) Subject to sub-rule (4), justification for departure may be–

(a) the size of the employer, if employer with only one employee would not be expected to enter into a recognition agreement;

(b) the nature or location of the employer's premises may justify special rules in respect of organisational rights, there may have to be special rules regulating trade union access where the employees reside on the premises; or

(c) the nature of the employer's business there may have to be special rules regulating trade union access to high security premises such as a diamond mine.

(6) Resolution of labour disputes may be solved through negotiation and collective bargaining.

(7) Collective bargaining may take place at one workplace or at a number of workplaces, and may involve one employer, a number of employers or an employers' association.

(8) A trade union that represents the majority of employees is entitled to be recognised as the exclusive bargaining agent.

(9) A collective agreement may determine the bargaining unit in a manner that is different to the rules suggested in this Rule, but the agreement may not do away the right to be recognised as the exclusive bargaining agent.

(a) RECOGNITION

Recognition and objectives

50.–(1) All employer or employer's association shall recognise a trade union as a collective bargaining agent of its employees.

(2) A recognised trade union engages with the employer or employers' association with the following objectives to -

(a) represent employees in their dealings with their employer;

(b) negotiate and conclude collective agreements; and

(c) prevent and resolve labour disputes.

(3) A bargaining unit or a recognised constituency may be restricted to the trade union's members or it may be for specific categories of employees with similar economic or business interests, in which employees with similar agree on an appropriate bargaining unit.

(4) It is only trade union entitled to represent the employees in the bargaining and where if two unions together represent the majority of

the employees in the bargaining unit and they seek recognition jointly as the exclusive bargaining agent, the exclusivity shall applies to both trade unions.

(5) Members of senior management who by virtue of their position are responsible for determining policy on behalf of the employer and who are authorised to conclude collective agreements on behalf of the employer shall not be member of a trade union.

(6) Nothing in the Act prevents registered trade unions, on the one hand, and employers or employer associations, on the other, from establishing their own collective bargaining arrangements by collective agreement.

(7) An employer may recognise a registered trade union without the union being a majority.

Provided that if the bargaining unit attain majority membership, all employees including those who are not belonging to the trade union shall be members of the trade union.

Applying for recognition

51.–(1) A registered trade union before being recognised as an exclusive bargaining agent in respect of a proposed bargaining unit, it shall fill in the prescribed form and service it to in employer or employer association.

(2) In the application, a registered trade union shall–

(a) describe the proposed bargaining unit, taking into account the factors referred to in sub-rule 5; and

(b) provide documentary proof that it is representative, and may attach an authorisations to deduct trade union dues signed b employees in the bargaining unit, other documentary proof of membership or by a petition signed by employees.

(3) The employer shall meet with the trade union to discuss the application within 30 days and, if possible, conclude a collective agreement recognising the trade union as specific in a model recognition agreement as a guide for the parties to discuss, set out in the schedule to these Rules.

(4) Where the employer does not meet within the 30 days or the employer and trade union fail to conclude a collective agreement, the union may refer the dispute to the Commission.

(5) The employer may refuse to recognise the union on the following grounds-

(a) the union does not represent a majority of the employees in the bargaining unit;

(b) the employer and the union cannot agree on the appropriate bargaining unit;

(c) the Labour Court has authorised the withdrawal of recognition in terms of Section 69 of the Act and the period contemplated in the order has not expired; or

(d) the employees that the union seeks to represent are members of senior management.

(6) The term "Senior Management" means an employee who, by virtue of that employee's position makes policy on behalf of the employer and is authorised to conclude collective agreement on behalf of the employer.

(7) Where the dispute remains unresolved after 30 days of the referral, the union may refer the dispute to the Labour Court for its decision in terms of Section 67 of the Act.

(8) Where the dispute concerns the representativeness of the union, the Court may direct the Commission to conduct a ballot, the Court has the power to make a recognition order compelling an employer to recognise a representative and registered trade union within a determined bargaining unit.

(9) The process for recognition in respect of a number of employers or an employers' association is the same as that outlined above.

Determination of a bargaining unit

52.–(1) When recognising a trade union as an exclusive bargaining agent, the issue of which employees the union is to represent in collective bargaining inevitably arises.

(2) There may be separate bargaining units for professional and non-professional employees.

(3) For the purpose of avoiding conflicts of interest senior managers who are responsible for determining policy and authorised to conclude collective agreements with a union are normally excluded from a bargaining unit.

(4) The facts identified to assist unions, employers, mediators, arbitrators and the courts in determining an appropriate bargaining unit are the following–

(a) the wishes of the party;

(b) the bargaining history of the party;

(c) the size and significant of membership of union organisation in certain categories of employees;

(d) the employees shares similar terms of employment or similar conditions of work, that points to a single bargaining unit;

(e) the employer has separate workplaces and the terms and conditions are left to the discretion of the managers of those workplaces, which points to separate bargaining units. If however the decisions are made at head office, that points to a single unit;

(f) the employer's operations effectively divided into separate business (pointing to separate bargaining units) or is it one streamlined operation (pointing to a single unit); and

(g) 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.

53.–(1) Where a registered trade union is recognised as an exclusive bargaining agent and it no longer represents the majority of the employees in the unit , the employer shall give the union an opportunity to acquire a majority within 3 months.

(2) Where it does not acquire a majority, the employer shall withdrawal recognition as an exclusive bargaining agent.

(3) Notwithstanding the provision of sub-rule (2) the employer may continue to recognise the trade union in respect of its members but not as an exclusive bargaining agent in respect of all employees within the bargaining unit.

(4) Subject to Section 69(4) of the Act, the Commission may be called upon to conduct a ballot, of the effected person.

(5) Where a party to a recognition agreement or recognition order materially breaches the agreement or Labour Court order, the other party may apply to the Commission for Mediation and Arbitration for mediation. If mediation fails, any party may refer the dispute to the Labour Court for an appropriate order.

(6) A material breach includes–

(a) the refusal to negotiate in good faith;

(b) the refusal or failure to comply with an arbitration award or an order of the Labour Court;

(c) the refusal or failure to comply with a collective agreement.

Duty to bargain in good faith

54.–(1) Bargaining in good faith requires the parties to explore issues with an open mind and with the intention to reach an agreement.

(2) Subject to sub-rule (2), conduct is consistent with bargaining in good faith in–

(a) respecting the representatives of the parties;

(b) preparing for negotiations in advance, which entails developing proposals and securing mandates for those proposals;

(c) retaining consistent representation during the negotiation process, unless there are good reasons for not doing so;

(d) attending meetings timely;

(e) motivating any proposals made;

(f) considering proposals made by the other party and, if not accepted, give reasons why they are not accepted;.

(3) Where parties cannot be compelled to reach agreement, conduct which leads to an inference that the party concerned has no genuine desire to reach agreement may, constitute bargaining in bad faith. Bargaining in bad faith may be inferred from the conduct-

(a) making grossly unreasonable demands;

(b) refusing without good reason, to make concessions;

(c) refusing to disclose relevant information that is reasonably required for collective bargaining;

(d) being insulting, derogatory or abusive in negotiations;

(e) delaying negotiations unnecessarily;

(f) imposing unreasonable conditions for negotiations to proceed;

(g) by-passing the representatives of the parties in the collective bargaining process;

(h) engaging in unilateral action such as the unilateral alternation of terms and conditions or industrial action before negotiations have been exhausted.

(4) Negotiations are exhausted if both parties agree or one party declares deadlock after-

(a) that party has genuinely sought to reach agreement but failed to do so after a reasonable period;

(b) the other party conducts itself in a manner from which it may be inferred that it no longer wishes to bargain; and

(c) the other party bargains in bad faith.

(5) A party that bargains in bad faith may not rely on its own conduct to terminate the bargaining process and declare deadlock.

(6) Where the innocent party does not declare a deadlock, the defaulting party may not implement its proposals or engage in industrial action.

(7) Any party in the bargaining process may refer a dispute concerning a failure to bargain in good faith to the Commission for mediation.

(8) Where the dispute is not settled through mediation, the dispute may be referred to the Labour Court for its decision.

(9) Where a party bargains in bad faith, the other party need not continue negotiations and its duty to bargain in good faith is met.

Bargaining matters

55.–(1) Subject to the provisions of Section 68 of the Act, bargaining matters include–

(a) wages, salaries and other forms of remuneration;

(b) terms and conditions of employment;

(c) allowances and employment benefits;

(d) employment policies and practices concerning the recruitment, appointment, training, transfer, promotion, suspension, discipline and termination of employees;

(e) the collective bargaining relationship including–

(i) organisational rights;

(ii) negotiation and dispute procedures;

(iii) grievance, disciplinary and termination of employment procedures; and

(f) any other agreed matters.

(2) Terms and conditions of employment shall include-

(a) the terms stated or implied in a contract or employment such as the hours of work, leave, duration, notice periods; and

(b) the conditions normally associated with employment such as rules regulating behaviour in the workplace, canteen facilities, health and safety.

(3) The greater involvement of the trade union in employer's decisions that affect employees carries with it the additional responsibilities of co-operation and confidentiality.

(4) Where however the decision may have an employment related consequence such as retrenchment, the employer shall negotiate or consult with the union over the employment related consequences.

Disclosure of Information

56.–(1) An employer is to disclose to a recognised trade union all the relevant information that is reasonably required to allow the union to represent its members in consultations and collective bargaining with the employer or employers' association.

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

(a) is legally privileged;

(b) the employer cannot disclose without contravening a prohibition imposed on the employer by any law or court;

(c) is confidential and, if disclosed, may cause substantial harm to the employee or the employer; and

(d) is an employee's private personal information, unless the employee consents to the disclosure of that information.

(3) The purpose of disclosure is to make the negotiation or consultation process as rational as possible, to ensure good faith during bargaining and to develop trust between the bargaining parties.

(4) As a general rule, the employer is obliged only to disclose information that is relevant. Information is generally relevant if it is likely to influence a party's views on a matter being discussed.

(5) The following information may be relevant in negotiations-

(a) remuneration and benefits issues:–

(i) reward policies and systems;
(ii) job evaluation systems and grading criteria;
(iii) earnings according to grade, department, workplace, sex, race, casual workers, giving if appropriate the distributions and make-up of remuneration showing any additions to the basic rate;
(iv) the total wage bills; and
(v) details of fringe benefits and total labour costs;

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

(c) performance issues-
(i) productivity and efficiency records;
(ii) savings from increased productivity and output;
(iii) return on capital invested; and
(iv) sales and state of order book;

(d) labour force issues:-
(i) number of employees analysed according to grade, department, location, age, sex, race or any other appropriate criterion;
(ii) labour turnover;
(iii) absenteeism;
(iv) overtime, short-time;
(v) lay-offs;
(vi) planned changes in work methods, materials or equipment; and
(vii) available manpower plans;

(6) Confidential information is information that the employer regards as confidential in order to protect its interests or the interests of those associated with its business such as its employees, customers, suppliers and investor.

(7) Information shall be confidential if when disclosed may cause substantial harm to an employee or employer such as–

(a) the employer losing customers to competitors;

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

(c) banks refusing to grant loans; or

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

(8) The employer may not disclose private personal information found in an employee's employment file unless the employee consents or an arbitrator or court requires it to do so.

(9) Trade unions shall identify and request information in advance of negotiations, if practical.

(10) In order to avoid misunderstandings and cause unnecessary delays, trade unions shall-

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

(b) include motivating for the information taking into account the matters raised in this Rule;

(c) give the employer sufficient time to prepare and submit the information requested, taking into account whether there is likely to be a dispute over disclosure.

(11) Any dispute over the disclosure of information shall be referred to the Commission as provided under Section 70 of the Act, which shall refer that dispute for mediation.

(12) Where the dispute is not settled, any party may refer the dispute to the Labour Court for a decision.

Duty of fair representation

57.-(1) The duty to bargain in good faith places a responsibility on a recognised trade union to fairly represent employees within the recognised bargaining unit.

(2) The duty of fair representation imposes the following duties on a recognised trade union in respect of employees within the bargaining unit who are non union members:-

(a) the union cannot refuse to represent non-union members;

(b) the union may not discriminate against non-union members; and

(c) the union may not enter in collective agreements that favour its members at the expense of non-union members.

(3) Any dispute over fair representation shall be processed as a dispute about the duty to bargain in good faith, and shall be referred to the Commission.

(4) Where the dispute is not settled, any party to the dispute may refer the dispute to the Labour Court for a decision.

(b) COLLECTIVE AGREEMENTS

Agency shop agreements

58.–(1) As a consequence of a duty of fair representation imposed on a recognised trade union, the union and the employer may agree to implement an agency shop agreement within a recognised unit, in terms of which employees within that unit who are non union members may be obliged to pay an agency fee to the trade union of not more than the amount of the union subscription.

(2) In order for an agency shop agreement to be binding it has to comply with the following requirements that-

(a) the agency fees collected from non-union members shall be paid into a separate account administered by the union;

(b) the monies in that account may only be used to advance and protect the socio-economic interests of the employees in that workplace;

(c) the socio-economic interests of workers including labour matters affecting employment or labour relations, worker

education, scholarships, contributions to political parties or any person standing for public office is prohibited.

(3) An agency shop agreement shall be suspended if the trade union is not a representative and its recognition is withdrawn in terms of Section 69 of the Act, the agency shop is automatically terminated.

SCHEDULE

CONTRACT OF EMPLOYMENT FORM

This agreement is made

BETWEEN

.....

(hereinafter referred to as
the "Employer")

Physical, Postal and e-mail Address
of the Employer: .....

.....

AND

.....

(hereinafter referred to
as the "Employee")

Age: ..... Sex: .....

Physical, Postal and e-mail Address
of the Employee: .....

1. COMMENCEMENT

This contract shall commence on .....and continue until lawfully.

2. PLACE OF RECRUITMENT

.....

3. PLACE OF WORK

.....

4. JOB DESCRIPTION

4.1 Job title: .....

4.2 Duties: .....

.....

.....

.....

5. PROBATION

This contract is subject to a probationary period of _____ weeks/months, starting from the commencement date of employment. The purpose of this probationary period is to assess whether the employee has the capacity or compatibility required for the job. Where the contract is terminated during the first month of employment, seven days' written notice is required.

6. REMUNERATION

6.1 The employee's basic wage shall be_____ per day/week/month.

6.2 The employee shall be entitled to the following allowances/payments in kind/bonuses: .....
.....

6.3 The remuneration shall be ..... per day/week/month;

6.4 The wage period is weekly/monthly and the wages shall be paid on

.....

6.5 The employee agrees to the following deductions:
.....

7. HOURS OF WORK

7.1 The ordinary daily working period shall be from ..... a.m. to ..... p.m.

7.2 The ordinary working week commences on ..... and ends on
.....

7.3 Overtime may be worked when agreed.

7.4 The employee shall be paid overtime at the following rate:-

.....

8. WORK DURING REST PERIODS

Where the employee works during a weekly rest period, the employee shall be paid double the basic wages for the period worked.

9. PUBLIC HOLIDAYS

9.1 The employee shall be entitled to a basic pay for each paid public holiday.

9.2 Work on a paid public holiday shall be agreed.

9.3 Where the employee works on a public holiday, the employee shall be paid double the basic wage for each hour worked on that day.

10. ANNUAL LEAVE

10.1 The employee is entitled to 28 consecutive days paid leave during each leave cycle. These days shall be inclusive of any public holidays falling within the leave period. A leave cycle for the purpose of annual leave means a period of 12 months consecutive employment from the commencement date of employment or the completion of the last leave cycle.

10.2 The employee's leave shall be taken from ..... to ..... or at other time determined by the employer after consultation with the employee.

10.3 The number of days may be reduced by the number of days of occasional leave granted at the request of the employee.

10.4 Leave pay shall be paid in advance of leave.

10.5 The employer shall not require nor permit an employee to work for the employer during any period of annual leave.

11. SICK LEAVE

11.1 Subject to Section 32 of the Act, the employee is entitled to 126 days paid sick leave in any leave cycle, if supported by a medical certificate on each occasion when sick leave is taken. Payment by the employer shall however not be required if the employee is entitled to paid sick leave under any law, fund or collective agreement.

11.2 Payment for sick leave shall be calculated as follows:-

(a) the first 63 days shall be paid at the basic wage; and

(b) the second 63 days shall be paid at half the basic wage.

11.3 For the purposes of sick leave, a leave cycle means a period of 36 months consecutive employment from the commencement of date of employment commenced or the completion of the last 36 month leave cycle.

11.4 The employee shall notify the employer as soon as possible in the event of absence from work through illness.

12. PATERNITY AND MATERNITY LEAVE

The employee shall have the rights to maternity or paternity leave.

13. TERMINATION OF EMPLOYMENT

13.1 This contract may be terminated by either party giving the other .....weeks/months notice.

13.2 Notice shall be given in writing than the minimum period specified stating the reasons for termination and the date on which the notice is given.

13.3 Upon termination of the contract of employment, the employer must furnish the employee with a prescribed certificate of service.

14. SEVERANCE PAY

14.1 The employee shall be entitled to severance pay of not less than seven days basic wage for each completed year of continuous service up to a maximum of ten years, where employment is terminated by the employer and the employee has completed a minimum of 12 months continuous service.

14.2 The employee shall not be entitled to severance pay if the termination of employment was on grounds of–

14.2.1 misconduct; or.

14.2.2 incapacity, incompatibility or operational requirements, and the employee unreasonably refuses to accept alternative work or employment.

15. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

16. APPLICATION OF THE ACT

16.1 This Agreement shall be interpreted and applied in accordance with the provisions of the Act.

16.2 Where any conflict arise between this Agreement and the Act, the provisions of the Act shall apply as if it is a term of this Agreement.

16.3 The employee shall be entitled to any other benefits stipulated by the Act even if not stated in this Agreement or as agreed between the parties.

SIGNED:

_____ _____

EMPLOYEE DATE

_____ _____

EMPLOYER DATE

*This contract shall be produced in two authentic copies, to be signed by both parties, one by the employer and the other by the employee.

Form No....

RECOGNITION AGREEMENT

CONCLUDED

BETWEEN

_____ ("The Employer")

AND

_____ ("The Union")

GENERAL PRINCIPLES

1.–(1) The employer and the union enter into this agreement to facilitate co-operative labour relations and to give effect to the parties' rights and obligations.

(2) The employer and the union agree that fair labour relations are essential for the effective functioning of the organisation and for the benefit of the parties to this agreement and all employees.

(3) The parties agree that, whilst their interests may differ, they will use their best efforts through discussion, consultation and negotiation to resolve any differences or disputes which may occur. They agree to deal with each other in good faith in accordance with this agreement, in seeking mutually acceptable solutions to differences or disputes which occur.

(4) The parties endorse the principle of freedom of association and recognise the right of employees to belong to the union of their choice. No action shall be taken by either party to interfere with these rights.

(5) The employer recognises the right of the union to run its own affairs in accordance with its constitution, and to work for improved conditions of employment for its members. In doing so, the union shall comply with the terms of this agreement and any other agreement between the parties obligations imposed by law.

(6) The union recognises the employer's rights to manage its business. In doing so, the employer will comply with the provisions of this agreement and any other agreement between the parties obligations imposed by law

(7) The parties undertake not to discriminate on any ground or any other arbitrary ground such as union membership.

(8) The parties recognise that it is their common objective to ensure the efficient running and growth of the organisation from which all parties shall benefit.

(9) The employer's management and the union leadership, including union representatives, undertake to encourage their constituencies to act in the following ways-

(a) to treat one another with respect and courtesy;
(b) to act in ways which develop trust;
(c) to be participative and proactive in responding to challenges;
(d) to work as partners to develop outcomes which benefit all.

(10) The union acknowledges its responsibilities to ensure that union members and officials understand and comply with all agreements between the union and the employer. The employer acknowledges its responsibilities to ensure that management also understands and complies with all these agreements.

(11) For the purposes of this agreement –

(a) "days" means all days excluding Saturdays, Sundays and statutory public holidays.
(b) Unless specifically provided otherwise, words shall be interpreted in terms of the Act.

RECOGNITION AND REPRESENTATION

2.–(1) For the purposes of this agreement, the "bargaining unit" means employees, other than fixed term contract and casual employees, employed in the following grades/ categories – (insert/amend wording if appropriate).

(2) The employer recognizes the union as the exclusive bargaining agent of employees within the bargaining unit, provided that the union represents in excess of 50 percentum of employees within the bargaining unit.

(3) The parties agree that the number of valid instructions to deduct union dues from employees' salaries which are being processed by the employer on the union's behalf at any time, shall be the sole measure of the union's representation for the purposes of this agreement[1].

TRADE UNION DUES

3.–(1) A union member may authorise the employer in writing to deduct union subscriptions from his/her salary in terms of the prescribed form.

(2) The employer shall pay the union on or before the seventh day of the next month, the aggregate amounts deducted each month.

(3) The subscriptions collected by the employer shall be forwarded to the union, together with a monthly schedule reflecting-

(a) a list of names, in the prescribed form of all members from whose salary the employer has made deductions;

(2) All union representatives shall act in a manner that attempts to promote the objectives of this agreement.

(3) A union representative shall obtain the consent of a manager, in advance where duties as a union representative will take the representative away from normal work duties. This consent shall not be unreasonably withheld.

(4) Subject to the provisions of this agreement, a union representative shall at all times comply with terms and conditions of employment, and shall be subject to the same standards of discipline and performance that are applicable to other employees.

ELECTION

6.–(1) Union representatives shall be elected to represent union members at the Employer's premises in terms of the constituencies set out in annexure A. The union constitution shall govern the nomination, election and term of office of the Union representatives, provided that Union representatives elected shall be employed within the bargaining unit.

(2) Elections shall be held during working hours by a secret ballot on the Employer's premises. The arrangements for conducting the elections shall be agreed between the union and management prior to elections.

(3) Management may observe ballot proceedings but undertakes not to interfere in the election of union representatives. Elections may be conducted by a union official or any other union office bearer as defined in its constitution.

(4) The number of women trade union representatives shall be broadly in accordance with the level of women representation within the bargaining unit.

(5) Whenever a union representative vacates his position during a term of office, a by-election shall be held. The union representative elected to take that person's place will hold office for the unexpired term of office.

RIGHTS

7.-(1) Union representatives shall have the right to represent union members during working hours in terms of this agreement, without loss of pay or fear of victimisation. Union representatives shall be entitled to reasonable paid time off[2] to perform the functions specified in Section 62(4) of the Act,.

(2) Union representatives shall be entitled to hold a meeting with union members on the employer's premises during working hours once a month and that meeting shall not last longer than one hour. Union representatives shall be entitled to meet for one hour during working hours during the week preceding the meeting, to prepare.

(3) The employer shall provide union representatives with the use of an office to perform their duties in terms of this agreement.

(4) A union representative shall not be subjected to a disciplinary hearing, unless five days prior written notice has been given to the union.

LEAVE

8.–(1) Each union representative shall be entitled to take paid leave for union business including training, conventions and conferences, for a maximum of .....days[3] per annum, provided the union's written confirmation of the reason for the leave is provided and management's consent has been granted in terms of subclauses (2). Additional leave may be granted whether paid or unpaid or by agreement between the parties.

(2) Union representatives shall obtain written consent from management if they wish to take time off in terms of subclause (1), at least five days prior to the date on which leave is required, and this permission shall not be unreasonably withheld.

JOINT LABOUR RELATIONS TRAINING

9.–(1) The employer and the union agree in principle to joint labour relations training for managers and union representatives, and shall meet to discuss such training. They shall attempt to agree on the content of joint labour relations courses and the facilitators to be used.

DISCLOSURE OF INFORMATION

10.–(1) The employer shall disclose to the union all relevant information that will allow the union to engage effectively in consultation and/or negotiation[4] and to perform its functions in terms of this agreement.

(2) Any request for information by the union shall be made in writing.

(3) The employer is not required to disclose information that -

(a) is legally privileged;

(b) the employer cannot disclose without contravening a prohibition imposed on it by any law or order of Court;

(c) is confidential and, if disclosed, may cause substantial harm to an employee or to the employer; and

(d) is private personal information relating to an employee, unless that employee consents in writing to the disclosure of that information.

NEGOTIATION AND CONSULTATION

11.–(1) A meeting between the Union representatives and management shall be held once every month, provided that this may be varied by an agreement between the parties.

(a) the purpose of these meetings is to enable the parties to communicate, consult and negotiate on issues affecting the employment of the Union's members.

(b) the parties shall provide written notification to each other at least five days before the date of a meeting (unless otherwise agreed between them), of the issues they wish to raise, thereby enabling both parties to adequately prepare for the meeting. At the beginning of each meeting, the parties shall discuss and attempt to reach an agreement on the agenda for that meeting.

(c) meetings shall take place on the employer's premises and shall commence during normal working hours. Management shall record the minutes of the meetings and circulate them within five days after the meeting, and these minutes shall be approved at the next meeting.

(d) union officials shall be entitled to attend these meetings, provided that at least two days prior written notice has been given to management.

(2) Negotiations shall take place once a year between the union (represented by its officials and representatives) and the employer, unless agreed otherwise between the parties, for the purposes of negotiations on wages and other substantive conditions of employment:-

(a) the parties agree to commence wage negotiations at least two months before the normal annual wage review date.

(b) the parties shall, at least ten days before the date of the first negotiating meeting (unless agreed otherwise between them), provide written notification to each other of issues they wish to raise, thereby enabling them to adequately prepare for the negotiations.

(c) annual wage negotiations shall take place at the Employer's premises and shall commence during normal working hours. Management shall record the minutes of each meeting and circulate them within five days after the meeting, and these minutes shall be approved at the next meeting.

(3) In monthly meetings (sub-clause (1) above) and the annual wage negotiations (sub-clause (2) above), the parties shall meet as often as they agree to be necessary to resolve issues. The parties agree to work together to ensure the efficient conduct of these meetings. Any agreements concluded shall be reduced to writing and signed by the representatives of the parties and shall be binding for the period stipulated in the agreement.

(4) Union representatives shall provide feedback to union members on negotiations and any agreements concluded, in terms of sub-clause (2) of this Agreement. Additional feedback meetings on company premises may be agreed between the parties. A copy of any agreements reached between the parties shall be displayed on the notice board referred to in clause 4(3) of this Agreement, unless otherwise agreed between the parties. The employer shall have the right to communicate with its employees at any stage.

(5) The parties shall use their best endeavours to reach a consesus during negotiations as quickly and as effectively as possible. If a consensus has not been reached or concluded within a minimum of two meetings, either party may declare a dispute in terms of clause 12 below; provided that the parties may agree to continue to meet without declaring a dispute, notwithstanding two or more meetings having being held.

DISPUTE PROCEDURE

12.-(1)The Employer and the Union shall negotiate in good faith and use their best endeavours to reach mutually acceptable solutions to all disputes which arise between them, and they shall consult each other when they anticipate that disputes may arise. They agree to use the procedure below in an attempt to settle disputes which arise through negotiations in terms of this clause.

(2) Either party may declare a dispute in writing to the other party, setting out the nature of the dispute and a proposed settlement.

(3) The party receiving a declaration of dispute in terms of subclause (2), shall within five days respond in writing, setting out its understanding of the nature of the dispute and its proposed settlement.

(4) Within ten days of the declaration of the dispute or on a mutually agreed date, a meeting shall be held between the parties in an attempt to resolve the dispute. Further meetings may be held by mutual agreements between them and the parties shall use their best endeavours to resolve the dispute.

(5) The parties recognise their commitment in terms of clause 13 to minimise the possibility of industrial action and undertake to consider referring unresolved disputes to mediation, arbitration (whether of a binding or advisory nature), or any other constructive method for resolving a dispute.

(6) Notwithstanding anything else contained in this Agreement, either party may use the dispute procedures of the Act: -

(a) if negotiations are deadlocked and both parties agree to use those procedures; or

(b) since the dispute was declared, the parties have met on at least two occasions or fifteen days have elapsed, and agreement still has not been reached; or

(c) if the other party is in breach of its obligations in terms of this Agreement or in law.

(7) The parties shall use their best endeavours to resolve disputes between themselves without having to resort to the Act. Even if the dispute machinery in the Act has been invoked, the parties may continue to meet in an attempt to resolve the dispute.

STRIKES AND LOCKOUTS

13.–(1) The employer and the union agree that they shall not cause, take part in or support any industrial action, without first exhausting the negotiation and dispute procedures in this agreement and thereafter having complied with the requirements of the Act. For the purposes of this agreement, "industrial action" means a strike or lockout as defined in the Act.

(2) The union undertakes to take all reasonable steps to ensure that its officials and members do not breach the provisions of this agreement, and the employer similarly undertakes to take all reasonable steps to ensure that its management does not breach the provisions of this agreement. Both parties agree to take all reasonable steps to remedy any breach that may occur.

(3) Either party shall be entitled to exercise its rights to deal with misconduct or criminal conduct or serious breaches of this agreement during industrial action.

(4) Where the union engages in a strike in accordance with Part VII of the Act, it shall

(a) allow non-striking employees to continue working without unlawful interference;

(b) allow the employer to continue with its ordinary business, including access to and exit from the employer's premises by staff, customers, suppliers and any other third parties;

(c) not, either on or of the employer's premises, intimidate, threaten or harass any non-striking employees or any other persons;

(5) The union and/or its members shall, during industrial action, leave the employer's premises immediately if requested to do so by the employer. The union and/or its members shall not unlawfully occupy the employer's premises.

(6) The parties agree that it is vital that contact be maintained between the employer and the union during any industrial action. For this purpose, the employer and the union shall, within 24 hours of any notification of industrial action having been given advise each other of the name and telephone contact details of their duly authorised representative(s) who will be contactable at all times during any industrial action.

(7) Where union members participate in a strike in contravention of this agreement or the The Employment and Labour Relations Act, 2004 then the following shall apply–

(a) the employer shall as soon as possible advise the union, and shall afford the union an opportunity to remedy the breach;

(b) the employer may issue an ultimatum in clear and unambiguous terms, stating what is required of the employees concerned 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.

(8) Where repeated or intermittent industrial action occurs, or if circumstances are such that the employer cannot reasonably be expected to do so, the employer shall not be required to comply with the requirements set out in clause 9(7).

(9) Where either party causes, participates in or supports industrial action which is unlawful or in breach of this agreement, the other party shall have the right to use any lawful means to protect its interests.

BREACH AND TERMINATION

14.–(1) This agreement shall come into operation effective on the date of signing.

(2) This agreement may be terminated as follow;

(a) after the expiry of three calendar months of either party giving the other written notice of termination of the agreement; or

(b) if the employer gives written notice to the Union that its representation may have fallen below 50 percentum of the bargaining unit, and the union fails to substantiate its membership as being in excess of 50 percentum within three calendar months, the employer shall be entitled to summarily terminate this agreement by way of a written notice to the union.

(3) If a party (the defaulting party) fails to fulfill any of its obligations in terms of this agreement and subsequently fails to remedy the breach within five days of receiving written notice of the breach from the other party (the aggrieved party), the aggrieved party shall be entitled to refer a dispute to mediation by the Commission. If mediation is unsuccessful, either party may refer the dispute to the Labour Court.

ADDRESSES AND NOTICES

15.–(1) For the purposes of this Agreement, the giving of notices and the serving of legal processes, including requests for meetings the parties choose the physical localities at which documents may be served:[5]

EMPLOYER:..... UNION:.....

(2) The parties may at any time change their stated address by notice in writing, provided that it includes a physical address at which documents may be served.

(3) Any document served in connection with this Agreement shall be delivered by hand, sent by prepaid registered post, or sent by fax. If sent by registered post, it shall be deemed to have been received on the 7th day after posting.

GENERAL

16.–(1) No relaxation or indulgence which the employer or the union may grant to the other party shall constitute a waiver by the former of any of its rights under this agreement.

(2) This agreement constitutes the entire agreement between the parties and no amendments shall be binding unless the amendment is reduced to writing and signed by both parties.

Dated at ..... This ..... day of .....

WITNESSES:

1. _____

2. _____

..... For and on behalf of the Union

WITNESSES:

1. _____

2. _____

..... For and on behalf of the Employer

_____

Details must be inserted

(2) The Manager should inform the employee of the reasons for the action, and to give the employee an opportunity to make representations. During this process, the employee may have a representative appointed to be present. This process should not be constituted as a formal hearing.

(3) After having considered any representations made, the Manager should decide whether or not to give the employee a written warning. Any warning should be issued to an employee personally and in accordance with the prescribed form, and a copy of the completed form should be given to the employee.

(4) Where an employee is aggrieved by a written warning, the employee may complete the appropriate part relating to appeal of the employee's copy of the warning form within five working days after receipt, and hand it to the Manager who issued the warning.

(5) The appeal should be referred to the next level of management above the level of the manager who issued the warning.

(6) The Manager considering the appeal should consider the written representations contained on the form and may speak to the persons concerned to obtain additional information, but no formal hearing should take place.

(7) The Manager considering the appeal should personally advise the employee of the outcome of the appeal within five working days from the date of receipt. The Manager should record the outcome on the appropriate part of the original warning form and the employee's copy and return it to the employee.

DISCIPLINARY HEARING

4.–(1) Senior manager[6] should be appointed as chairperson to convene a disciplinary hearing in the event of –

(a) further misconduct following a written warning or warnings; or

(b) repeated written warnings for different offences; or

(c) allegations of serious misconduct such as those referred to the Rules relating to termination of employment, and which could on their own justify a final written warning or dismissal.

(2) The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson.

(3) The employee should be advised in writing of the allegations and the time and date of the proposed hearing, giving the employee a reasonable opportunity to prepare for the hearing.

G.N. No. 42 (contd.)

Form No.....

GUIDELINES FOR DISCIPLINARY, INCAPACITY AND INCOMPATIBILITY POLICY AND PROCEDURES

INTRODUCTION

1.–(1) The purpose of these guidelines is to provide for a fair procedure to be applied-

(a) if the conduct of an employee is unacceptable;
(b) if an employee is incapable of rendering satisfactory service due to ill health injury or poor work performance; or
(c) in cases of incompatibility.

(2) Employees are expected to carry out their duties effectively and conduct themselves in a reasonable manner so that any act shall at all time be in accordance with the policies and rules existing within an organisation.

(3) An employer shall apply disciplinary measures where possible in a corrective manner, and ensure that employees comply with the rules and policies governing their employment

(4) This procedure serves as a guide and should be implemented in a specific offence is not provided for in these rules in a flexible manner. Management may deviate from it in appropriate circumstances if a specific offence is not provided for in the Rules.

(5) These guidelines does not provide for procedures to be followed in the event of unlawful strikes. That action must be dealt with in accordance with applicable legislation and the Rules.

COUNSELLING AND VERBAL WARNINGS

2.–(1) The primary aim of disciplinary measures is to correct employees' behaviour, in order to ensure that they conduct themselves in an acceptable manner. The primary means of achieving this objective should be the counselling of employees by supervisors or managers, who should explain to employees what is expected of them. If this does not achieve the desired objectives, stronger action may be required.

(2) If an employee commits minor misconduct or performs poorly, the action taken should be a verbal reprimand coupled with an instruction from the employee's manager to correct the behaviour These reprimands constitute informal corrective action and will not be reflected on the employee's personal file.

WRITTEN WARNINGS

3.-(1) A written warning may be issued by a supervisor or manager, if the work performance or conduct of an employee has not improved following counselling or verbal warnings or if the misconduct or work performance requires stronger action than a verbal warning.

(4) The employee should be informed of the right to choose another employee to present him at the hearing to provide assistance. The employee providing assistance may be a trade union representative .

(5) The employee and the representative or representatives are entitled to be present at all times during the hearing and should be informed of the facts of the case against the employee. An interpreter should be provided by the employer, if required.

(6) A management representative should present the case in support of the allegations against the employee and the employee should be given an opportunity to respond to the allegations at the hearing parties shall have the right to call witnesses and question any witnesses called by the other party.

(7) After hearing the evidence, the chairperson should make a decision based on a balance of probabilities as to whether the employee is guilty of the allegations or not. If the chairperson is undecided, the employee should be given the benefit of the doubt.

(8) The question of guilt and the penalty to be imposed should be considered separately and the employee or the representative is entitled to make representations in regard to an appropriate penalty. Mitigating and aggravating factors to be considered should include the-

(a) seriousness of the offence and the likelihood of repetition;

(b) employee's circumstances (including personal circumstances, length of service and previous disciplinary record);

(c) nature of the employee's job (including health and safety considerations); and

(d) circumstances of the infringement itself.

(9) The chairperson should inform the employee of the outcome of the hearing as soon as possible, but not later than five working days after the hearing, giving brief reasons for a decision. The chairperson should sign the disciplinary form and give a copy to the employee.

(10) Where the employee is given a final written warning, it should be made clear that any further misconduct of a similar nature whilst the final written warning is operative, may result in termination of employment. In appropriate circumstances, the chairperson may issue a comprehensive final written warning, which specifies that any further misconduct of whatever nature whilst the final warning is operative, may result in termination of employment

(11) Termination of employment should only take place in cases of serious or repeated misconduct, when the employer is justified in concluding that the misconduct has made the employment relationship intolerable to be continued. When considering whether a termination for misconduct is fair, the chairperson should consider the following–

(a) whether the employee contravened a rule or standard regulating conduct relating to employment.

(b) whether such a rule or standard contravened was-
  (i) reasonable;
  (ii) clear and unambiguous;
  (iii) known, or ought to have been known, by the employee;
  (iv) consistently applied; and
  (v) sufficiently serious to justify dismissal.

(12) An employee may appeal against the outcome of a hearing by completing the appropriate part of the copy of the disciplinary form and give it to the chairperson within five working days of being disciplined, together with any written representations the employee may wish to make. The chairperson must within five working days refer the matter to the more senior level of management, with a written report summarising reasons for the disciplinary action imposed. The appealing employee must be given a copy of this report.

(13) The Manager considering the appeal must take into consideration the documents provided. An appeal should not constitute a re-hearing of the entire case but it should focus specifically on the grounds for appeal and be decided on the basis of the written submissions provided. The Manager considering the appeal may however arrange a further hearing to consider evidence and argument relating to the appeal, in this event the employee may be assisted by a representative.

(14) The Manager considering the appeal must record the outcome of the appeal in the appropriate part of the original disciplinary form and return the copy to the employee.

(15) An employee wishing to challenge the outcome of the appeal, may utilise dispute mechanisms contained in the Employment and Labour Relations Act. The time period within which to exercise these rights shall commence from the date the employee is advised of the outcome of the appeal.

SUSPENSION

5.-(1) In circumstances of serious misconduct or incapacity a senior manager may suspend an employee from work pending an inquiry. An employee may be suspended if the employee's presence would obstruct the investigation into the alleged offence or if the employee's presence could create difficulties at the workplace. An employee who is suspended by management under these circumstances must be paid basic wage for the period of suspension.

(2) Management may, in appropriate circumstances and with the consent of the employee, suspend an employee without pay for a maximum period of thirty days, as a form of disciplinary action. This suspension should be accompanied by a final written warning, which runs from the time the employee recommences employment. Suspension without pay should be used for offences which justify a more serious

penalty than a final written warning, but where the employment relationship has not irreparably broken down.

(3) An employee should be given a written notice of any suspension, which should briefly describe the reasons for the suspension and any conditions applicable.

INCAPACITY: POOR WORK PERFORMANCE

6.-(1) In cases of alleged poor work performance by an employee, a Manager should consult the employee to identify and analyse the problem. The employee should be given an opportunity to account for the poor work performance.

(2) Where the Manager believes that it is a matter constituting misconduct, it should be dealt with in terms of the procedures outlined the Rules.

(3) Where the manager believes it is a matter constituting incapacity on the part of the employee concerned, a process of consultation and counselling between management and the employee should take place in an attempt to rectify the problem. The process may include appropriate evaluation, training, instruction, guidance or counselling and should provide for a reasonable period of time for improvement.

(4) Where the employee continues to perform unsatisfactorily, the employer should warn the employee that employment may be terminated 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 meets the standards set by the employer; or

(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 termination.

(5) Prior to decision making to terminate the employment of an employee for poor work performance, management should call a meeting with the employee, who should be allowed to have a fellow employee or trade union representative present to provide assistance. At the meeting, management should provide reasons for the action to be taken and allow the employee and/or the representative to make representations, before making a decision. Management should consider any representations made and if these are not accepted, explain why. The outcome of the meeting should be communicated to the employee in writing, with brief reasons

(6) When considering whether a termination for incapacity in respect of poor work performance is fair, management should consider the following-

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

(b) if the employee failed to meet the required standard, whether or not-

(b) details of the amounts deducted, the employees' place of work and period to which the deduction relates; and

(c) a list of any employees who have ceased to be contributors since the previous schedule provided, specifying the reasons for the cessation of contributions.

(4) Where the union increases its subscriptions or if it wishes to collect additional levies from its members, the employer shall agree to implement provided that the union gives thirty days notice in writing to the employer and to its members, which shall expire prior to the month in which the increase or the levy is to become effective.

(5) The employer shall not be responsible for the collection of any arrears of subscriptions unless the arrears are the employer's fault.

(6) A union member may cancel the authorisation referred to in subclause (1), by addressing a written instruction to the employer and the union, subject to thirty days notice. The employer shall forward to the union the next monthly schedule referred to in subclause (3) and a copy of any cancellation instructions received.

ACCESS

4.–(1) Union officials shall, subject to any conditions regarding time and place that are reasonable and necessary to safeguard life or property or to prevent undue disruption of work, have access to the employer's premises to -

(a) recruit members;
(b) communicate with members;
(c) meet members in dealings with the employer;
(d) hold meetings of employees on the premises;
(e) arrange voting in any ballot under the union constitution.

(2) The Union shall obtain the consent of management in advance, to hold general meetings with employees at the employer's premises. Union officials must notify management in advance of their intention to visit the premises.

(3) The employer agrees in principle to make reasonable facilities available to the union for the conduct of its business. The detail of these arrangements shall be discussed between the parties, and any agreements shall be recorded in writing. A notice board shall be provided at the employee's entrance to the employer's premises, for the union's use.

RECOGNITION OF THE TRADE UNION REPRESENTATIVES

5.–(1) The employer acknowledges the right of union representatives elected in terms of the union's constitution and in accordance with subclause (2) of this agreement, to represent the interests of union members by performing the functions provided under in Section 62(4) of the Act.

(i) the employee was aware or ought to have been aware, of the standard;
(ii) the performance standards are reasonable;
(iii) the employee was given a reasonable opportunity to meet the standard and the reason for the failure to meet the standard; and
(iv) the dismissal was the appropriate sanction.

INCAPACITY : ILL-HEALTH AND INJURY

7.–(1) In cases of alleged incapacity of an employee due to ill health or injury, a Manager should consult the employee to identify and analyse the problem. The manager should be guided by the opinion of a registered medical practitioner in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature.

(2) The parties should use their best endeavours during this process to agree on solutions to the problem. Consideration should be given to the extent of the incapacity and whether it is temporary or permanent, and possible alternatives to termination should be considered.

(3) Prior to decision making termination of the employment of an employee for ill health or injury, management should call a meeting with the employee, who should be allowed to have a fellow employee or trade union representative present to provide assistance. At this meeting, management should provide reasons for the action to be taken and allow the employee and/or the representative to make representations, before decision making. Management should consider any representations made and if not accepted, explain why. The outcome of the meeting should be communicated to the employee in writing, with brief reasons.

(4) When considering whether a termination arising from ill health or injury is fair, management should consider the following-

(a) whether the employee is able to perform the work; and

(b) if the employee is incapable-
(i) the extent to which the employee is unable to perform the work;
(ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability or if not possible, the extent to which the employee's duties might be adapted; and
(iii) the availability of any suitable alternative work or employment.

INCOMPATIBILITY .

8.–(1) Incompatibility may constitute a fair reason for termination of employment. There are two types of incompatibility–

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

(b) incompatibility of the employee in his or her work environment, in that he or she relates badly with fellow 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 Clause 6 are applicable, read with changes required by the context. In particular, the employer should -

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

(b) warn and counsel the employee before termination. This should include advising the employee of the conduct who has been adversely affected by that conduct, and the remedial action proposed.

(4) Before terminating employment on this ground, the employer should give the employee a reasonable opportunity to-

(a) consider and reply to the allegation of incompatibility;
(b) remove the cause for disharmony; or
(c) propose an alternative to termination.

GENERAL

9.-(1) Disciplinary action should be recorded on the prescribed forms. An employee's signature on any form shall not be an admission of guilt and is merely an acknowledgement that the employee has received the form.

(2) Written warnings and final written warnings should be kept on an employee's personal file and should remain operative for six months.

(3) Where an employee or a representative unreasonably frustrates or delays the implementation of the processes provided in the Rules, management is entitled to proceed in their absence.

(4) The levels of responsibility for managing discipline as indicated in the Rule may have to be varied in cases where senior managers are being disciplined. Appropriate senior managers should be used for these purposes, and consideration may also be given in certain circumstances of bringing in outside persons to fulfil functions such as chairing inquiries involving senior managers

(5) It is recognized that an empoyee's misconduct may in certain circumstances result in criminal proceedings being instituted against the employee (e.g. cases of theft or assault). A clear distinction should be made between criminal proceedings and internal disciplinary proceedings. Disciplinary action should be instituted and decided fairly, irrespective of the process and outcome of any criminal proceedings instituted.

DISPLINARY PROCEDURE

This Disciplinary procedure applies to all employees and is a guide for appropriate disciplinary action. As such, it does not detract from management's right to depart from it depending on the circumstances of each case it aims to achieve flexibility and consistency, and to ensure fairness in the application of disciplinary actions.

The list of offences is not exhaustive and an employer may discipline any employee for good cause even though the specific offence may not be stated in this procedure.

The penalties relate to the commission of the offence in isolation. The existence of any previous warnings and other material factors should be taken into account in deciding on the appropriate disciplinary action.

OFFENCES FOR WHICH WARNINGS MAY BE GIVEN

ABSENCE

1. Late for work, leaving work place without permission or general time keeping offences.

2. Absence from work without permission or without acceptable reason for up to five working days.

INSTRUCTIONS

3. Failure to carry out reasonable instructions of the employer.

WORK PERFORMANCE

4. Poor work performance without acceptable reason.

5. Doing unauthorised private work or matters at the workplace.

PROPERTY

6. Causing damage or loss to the employer's property or other property (e.g. property belonging to other employee, customer, client or members of the public), either through negligence or failure to carry out instructions.

7 Misuse or neglect of the employer's property.

BEHAVIOUR

8. Unacceptable behaviour towards customers, clients, fellow employees or members of the public.

GENERAL

9. General offences and breaches of organisational rules.

OFFENCES WHICH MAY CONSTITUTE SERIOUS MISCONDUCT AND LEADING TO TERMINATION OF AN EMPLOYEE[8].

ABSENCE

1. Absence from work without permission or without acceptable reason for more than five working days.

INSURBORDINATION

2. Commission of serious or repeated act of insubordination at the employer or during working hours against the employer.

POOR WORK PERFORMANCE

3. Habitual, substantial or wilful negligence in the performance of work.

4. Unacceptable work performance, behaviour or consistent work performance below average despite at least two written warnings.

5. Dishonesty or any other major breach of trust.

6. Gross incompetence or inefficiency in the performance of work.

7. Lack of skill, which the employee expressly or impliedly claimed to possess.

PROPERTY

8. Causing serious damage (real or potential) to or loss of the employer's property or other property (e.g. belonging to other employees, customers or clients), either through gross negligence or wilful damage.

9. Theft or unauthorised possession of the employer's property or other property (e.g. belonging to other employees, customers, clients).

10. Fraud or misappropriation of organisational funds.

BEHAVIOUR

11. Abusive behaviour, assaults, threatened assaults or other unacceptable conduct towards other employees, customers, clients, or members of the public.

12. Being under the influence of alcohol or drugs whilst at work or consuming alcohol or drugs whilst on duty.

GENERAL

13. Other serious breaches of organisational rules or policy which have the effect of causing an irreparable break down in the employment relationship.

14. Criminal convictions relating to an offence which impacts directly or indirectly, on the employment relationship.

PART I

HEARING FORM

(To be completed by the manager conducting the hearing)

1. Name of employee : .....

2. Name of chairperson: .....

3. Summary of allegations against employee : .....
.....
.....
.....

4. Date and time which the employee was informed of the hearing:
.....

5. Date and time of hearing: .....

6. Persons present at hearing (excluding witnesses) and their designations:
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.....
.....

7. (a) Employee does/does not wish to have a representative present (delete whichever does not apply). Name of representative:

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7 (b) Employee does/does not wish to have an interpreter (delete whichever does not apply). Name of the interpreter:

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8. **Brief summary of employee's response to allegations:**

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9. **Summary of evidence, main points of evidence (names and designations of witnesses giving the evidence) (additional paper to be used if sufficient space is not available on this form :**

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10. **Manager's findings, based on the evidence presented:**

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11. **Relevant factors to be taken into account in deciding on the appropriate penalty:**

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12. **The outcome of hearing:**.....

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13. **Manager's signature :** ..... **date:** .....

14. **Employee's signature:** ..... **date :** .....

PART II

EMPLOYEE

(To be completed within five working days of action having been taken, by an employee wishing to appeal)

I ..... **wish to appeal against the outcome of the hearing for the following reasons:**

.....

.....

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.....

.....

In terms of this appeal, I ask that the following action be taken wherefore, I ask for the following actions to be taken:

.....

Employee's signature : ..... date : .....

Received by the manager on this ..... day of ..... 20...

Signature: .....

PART III

EMPLOYER

(To be completed by the Senior Manager hearing the appeal)

Date received : .....

Findings of the appeal:

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Outcome of the appeal: .....

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.....

Senior Manager's signature : ..... date.....

Employee's signature : ..... date.....

GRIEVANCE PROCEDURE

INTRODUCTION

1.–(1) These guidelines for grievance procedure is a guidance and shall be applicable employers and employees and their organizations.

(2) The objectives of these procedures are-

(a) to provide for a process for resolving employee's grievances;

(b) to settle grievances as near as possible to their point of origin;

(c) to ensure that the employer treats grievances seriously and resolves them as quickly as possible; and

(d) to ensure that employees are treated fairly and consistently by the employer.

(3) Management and employees, at all levels within an organization, shall give careful consideration to grievances raised and should use their conflict resolution skills to resolve grievances.

(4) All employees and managers shall treat one another with sensitivity and respect.

(5) Where a grievance is lodged an employee's employment should not be prejudiced in any way whatsoever.

(6) The employee has a right to be accompanied and assisted by a fellow employee or by a trade union representative in dealing with a grievance at all stages.

INFORMAL GRIEVANCE PROCEDURE

2.–(1) An employee should be entitled to use this procedure when it is within a reasonable period from when the grievance occurred.

(2) In the interests of maintaining good working relations, an aggrieved employee is encouraged to first discuss any grievance verbally with his immediate manager Provided that, this shall not be required if it would be unreasonable to expect the employee to do so. Where the grievance concerns that immediate manager, the employee may proceed directly to stage one of this procedure.

(3) Where the manager fails to resolve the grievance to the employee's satisfaction within five working days or any other agreed period between them, the aggrieved employee may complete a formal grievance form and refer the matter to stage one, to be dealt with by a much senior manager.

FORMAL GRIEVANCE PROCEDURE
STAGE ONE

3.-(1) The employee must outline the grievance in writing and suggest for a possible remedy in the prescribed formal grievance form. The Manager who dealt with the grievance in the informal grievance stage must fill, the steps taken to resolve the grievance, comment; and any suggested remedies.

(2) Where the employee's immediate manager deals with grievances at Stage two of this procedure, the employee should discuss the grievance verbally with that person in terms of subclause (2) of clause before completing a formal grievance form. Stage two of this procedure shall be dealt with by a senior manager.

STAGE TWO

4.-(1) Once the Manager dealing with the grievance in stage two has received a formal grievance form, should invite the aggrieved employee to attend a grievance meeting to discuss the matter and should use best endeavours to resolve the grievance within ten working days or any other period agreed between them.

(2) The Manager dealing with the grievance in this stage may agree with the employee and the employee's representative, on the appropriate procedure to followed in each case. This may involve calling a meeting of aggrieved parties, and facilitation of mediation, arbitration, a commission of inquiry or any other procedure that may be deemed appropriate in the circumstances.

(3) Where it happens that the employee is still aggrieved, notwithstanding the efforts to resolve the disputes in terms of subclause 2 the employee may use means available in law for the protection for the employee's rights.

FORMAL GRIEVANCE FORM

(To be completed by the employee lodging the grievance in terms of stage 2 of the grievance procedure)

Name of the employee: ..... sex: .....

Cause of the grievance: .....
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.....

Solution sought:
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.....
.....

The signature of the employee: ..... date: .....

The signature of the employee's representative.....
date .....

PART II

(To be completed by the Manager who dealt with the grievance in the informal grievance stage and stage one of the formal grievance procedure) (unless not applicable in terms of clause 2(2) of the informal grievance stage)

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Date received: .....

Name of the manager: .....

Steps taken to resolve grievance: .....
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Comments about the grievance: .....
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.....

Remedy proposed by the Manager dealing with the grievance
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Outcome:
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Manager's signature: ..... date: .....

PART III

MANAGER

(To be completed by the manager dealing with the grievance in terms of stage two of the informal grievance procedure)

Date received: .....

Senior Manager's comments: .....
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.....
.....

Outcome: .....
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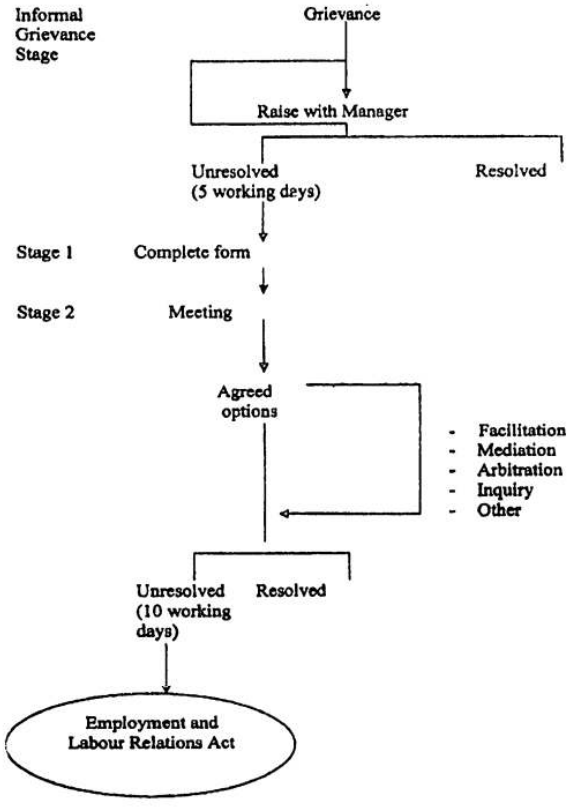
.....

N. No. 42 (contd.)

.....

The signature of the Senior Manager	Date
The signature of the employee	Date
The signature of the employee's representative	Date

GRIEVANCE PROCEDURE OUTLINE



RETRENCHMENT PROCEDURE

INTRODUÇTION

1.–(1) This procedure shall apply where an employer contemplates to terminate the employment of employees on the basis of operational requirements.

(2) For the purpose of this procedure, retrenchment means a termination of employment based on operational requirements such as economic, technological, structural or similar needs of an employer.

(3) An employer shall strive to implement this procedure having regard to the sensitivity of the needs and interests of employees.

CONSULTATION

2.–(1) Where an employer contemplates to retrench the employees for operational requirements, the management shall notify in writing the employees likely to be affected and to consult with the trade union which includes-

(a) any union recognized as the exclusive bargaining agent if retrenchment is contemplated within the bargaining unit;

(b) any other union having members who will be affected, if they do not fall within a bargaining unit for which a union is recognized as the exclusive bargaining agent; and

(c) any affected employees who are not represented under (a) or (b) above.

(2) Subject to sub-clause (1), management's written notice shall state the employer's views on the following-

(a) the reason for the intended retrenchment;

(b) any measures to avoid or minimize the intended retrenchment;

(c) the selection for the employees to be retrenched;

(d) the timing of the retrenchment;

(e) severance pay in respect of the retrenchment; and

(f) Any additional retrenchment package.

(3) The management should consult the parties referred to in sub-clause 1 of as soon as possible after the employer contemplates retrenchment, to explore possible alternatives and the issues to be consulted about shall include issues as specified in sub-clause 2.

(4) The management shall allow the consulting parties referred to in Clause 2.1, an opportunity to prepare and to make representations on matters being consulted on[9].

(5) The management shall consider and respond to any representations made and, if management disagree with them, state reasons for disagreeing and the management shall have to respond in writing, to any representations made in writing.

DISCLOSURE OF INFORMATION

3.-(1) The management shall disclose to the consulting parties referred to above, all the relevant information on the intended retrenchment, to enable meaningful consultation to take place on the range of issues referred to in Clause 2.

(2) Notwithstanding sub-clause (1), the management shall not be required to disclose confidential or privileged information and the information shall be confidential or privileged if-

(a) it is legally privileged;

(b) the employer may not disclose that information without contravening a law or an order of court;

(c) it is confidential and if disclosed, may cause substantial harm to an employee or the employer;

(d) it is a private and personal information relating to an employee and the employee has not consented to its disclosure.

SELECTION CRITERIA[10]

4.-(1) Employee to be retrenched shall be selected according to the criteria that agreed or which are fair and objective.

(2) These criteria shall take into account factors such as the following-

(a) the employees' length of service, with employees being selected according to the LIFO principle (last-in-first-out);

(b) the need for the efficient operation of the organization;

(c) the need to retain key jobs and skills; or

(d) the ability, experience, skill or occupational qualifications of employees or affirmative action criteria.

SEVERANCE BENEFITS

5.–(1) Subject to Section 42 of the Act, an employer shall pay severance pay to a retrenched employee at least equivalent to seven days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years.

(2) Notwithstanding the provision of sub-clause (1) severance pa shall not be paid to an employee who has not completed twelve months of continuous service.

(3) The employer's obligation to pay severance pay shall fall away where the employee unreasonably refuses to accept alternative work with that employer or alternative employment with any other employer.

THE WORK OPPORTUNITIES FOR PREFERENTIAL RE-EMPLOYMENT

6.–(1) Retrenched employees expressing an interest in future re-employment shall be given preference in re-employment if, the employer within two years of retrenchment seeks to re-recruit employees in comparable occupations.

(2) In these circumstances, the management must take reasonable steps to inform the retrenched employees, any union existing workplace and any registered union with members employed by the firm, of these employment opportunities.

DEPARTURE FROM THE PROCEDURE

7.–(1) Subject to Section 99(3) of the Act, these procedures shall not be applied in an inflexible manner and management may deviate from them in appropriate circumstances.

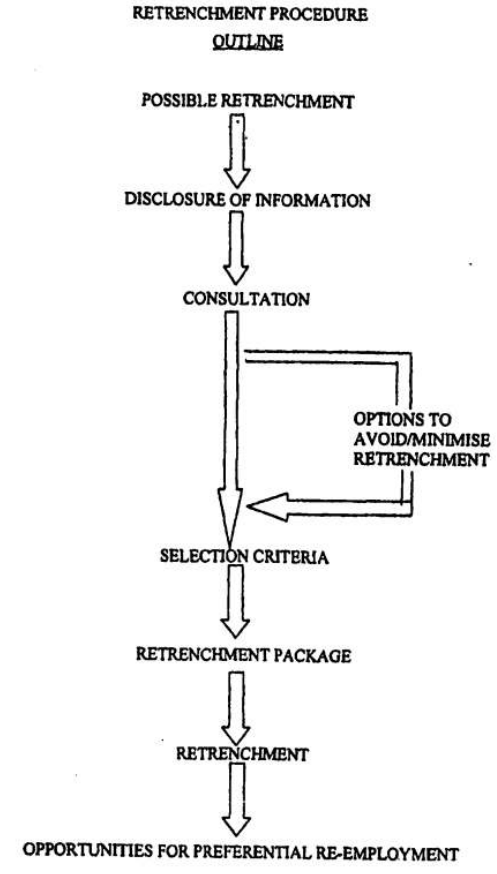
(2) Where the management departs from these procedures, shall justify the grounds for departure.

(3) The management shall at all time act in a fair manner and to consider the interests of the employees to be retrenched.

G.N. No. 42 (contd.)

RETRENCHMENT PROCEDURE

OUTLINE



Dar es Salaam,
24th January, 2007

JOHN Z. CHILIGATI
Minister for Labour, Employment and Youth Development