LABOUR LAW AND EMPLOYMENT MANUAL 2013

SECTION F

Trade Unions Guide

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Module 1: Introduction

Trade unionism in South Africa dates back to as far as the 1970s or before. The early strikes in Durban in the early 1970s resulted in a review of South African labour law in the early 1980s.

The courts proceeded to establish the principles of substantive and procedural fairness, and with the usual speed and alacrity of our justice system, finally resulted in the Labour Relations Act of 1995.

Historically, trade unions were treated as "the enemy", and were reviewed by employers to be nothing than trouble makers. It is indeed true that many governments attempted to discourage, or even to outlaw trade unions in certain countries.

In Western Europe, trade unions developed - sometimes even in the guise of a political party. In the early days, labour laws were enacted by the South African Parliament, but these were mainly "window dressing."

Probably the most well-known of the early strikes in South Africa was the 1922 miners strike. The majority of those strikers were white mineworkers, and a large amount of force was used by the authorities to put down the strike.

That strike led to the enactment of the Industrial Conciliation Act 11 of 1924. That act provided for the registration of white trade unions and white employers organisations. It also recognised strikes and lockouts.

Early labour legislation was mainly for whites only. Despite this, a number of black Unions did spring up - but they were not recognised. Various acts were brought into being, mostly granting privileges to white labour to the exclusion of the black labour force in this country.

We all are aware of recent history, until today we have the Labour Relations Act of 1995 as well as other legislation regulating the country's labour force. Trade unions today are governed by their own constitution, and certain rights bestowed upon them by the Labour Relations Act.

Sections 4 to 10 of the Labour Relations Act regulates freedom of association. The Act states that every employee has the right to participate in forming a trade union or Federation of trade unions, and to join a trade union subject to its constitution.

Union members can participate in the lawful activities of the trade union. Similarly, employers have the right to participate in forming an employers’ organisation, or to join the employers’ organisation or a federation of employers’ organisations.

Employers may not interfere in the statutory right of freedom of Association of employees, and employees may not interfere in the statutory right of freedom of Association of employers.

Any dispute arising regarding an infringement of these rights can be referred to the relative bargaining Council or the CCMA, and if the matter remains unresolved either party to the dispute may refer it to the Labour Court.

1.1 What exactly is a trade union?

Definition

Section 213 of the Labour Relations Act gives the following definition:
“A trade union is "an association of employees whose principal purpose is to regulate relations between the employees and employers, including any employer’s organisations.”

The primary function of a trade union is to engage in collective bargaining processes with the employers of their members, mainly bargaining on improved terms and conditions of employment, and any other matter affecting their members in the workplace.

Trade unions also represent members in grievance and disciplinary matters, and they also ensure that the employer complies with labour legislation, collective agreements, health and safety regulations or any other statutory requirements affecting the workplace.

Trade unions also provide representation for their members at arbitration proceedings and the Labour Court.

In some cases, Unions also represent their members on bargaining councils.

Put differently, trade unions are there to protect the interests of their members in the workplace including all members’ rights in terms of any legislation, and where possible to attempt to improve on any terms and conditions of employment.

Module 2: The Recognition of Trade unions

Note: Before a trade union can exercise any rights, it must be properly registered. The procedure for the registration of a trade union or employer's organisation is stipulated in chapter 6 of the Labour Relations Act - from section 95 onwards.

A trade union that is not registered in terms of chapter 6 of the Labour Relations Act is not entitled to exercise any of the rights bestowed upon a trade union by the Labour Relations Act.

A registered trade union is in fact a body corporate, meaning that it has a legal identity separate from its members.

The members are not liable for any of the obligations or liabilities of the trade union, and a trade union representative, member, office bearer or official of a registered trade union is not personally liable for any losses or damages as a result of any acts performed in good faith by a member, office bearer, official or trade union representative.

2.1 Representative trade union

The first right bestowed upon a Union is in section 12 of the Labour Relations Act.

This section states that a registered trade union, or two or more registered trade unions acting jointly, and that are "sufficiently representative" of the employee is employed by an employer in a workplace, is entitled to enter the employer's premises in order to recruit members or communicate with members, or otherwise serve their interests.

2.2 Representative trade unions

A further right bestowed in this section is the right to hold meetings with the employees outside of the working hours at the employer's premises.

In addition the members of the Representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated by that trade union's constitution.

And lastly, it states that the rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent me a new disruption of work.
Let us more closely examine these rights.

Note: these are <u>the only</u> rights that a trade union, which is not a majority trade union, has - but it is only a "representative trade union" that has these rights in the workplace. Such a trade union does not have any legal claim to any other rights.

2.3 What is a "sufficiently representative" trade union?

The Labour Relations Act does not define what is meant by the term "sufficiently representative." The word "sufficiently" means "enough or adequate."

Therefore, a trade union wishing to exercise these rights must show that it has "enough or an adequate number of members" in the workplace that enables the trade union to believe, and enables the employer to agree, that they qualify to legally claim these rights.

Note: The trade union must show that it has "enough or an adequate number" of the total employees in the workplace as members of the Union, to enable it to say that they are "sufficiently representative" of the total number of employees in the workplace.

This implies that whether or not the trade union is "sufficiently representative" or not is a matter that must be discussed or negotiated between the employer and the trade union.

Obviously, common sense should prevail. A trade union that has 15 members in a workplace consisting of 200 employees can hardly be said to be "sufficiently representative."

It is difficult to give you any guidelines, but we would say that if a trade union holds a membership of between 25% to 30% of the employees in the workplace, then "sufficient representation" must be seriously considered.

2.4 Definition

Therefore, a trade union that is "sufficiently representative" in the workplace, may:

a. enter the employer's premises in order to recruit members or communicate with members, or otherwise serve their interests.
b. hold meetings with employees (not only members but with employees) outside of their working hours at the employer's premises
c. hold voting at the employer's premises in any election or ballot contemplated by that trade unions constitution.
d. All of the above rights are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent the new disruption of work.

This implies that should the trade unions wish to enter premises to recruit members, or otherwise serve their interests, or he wishes to hold a meeting with the employees outside of their normal working hours, or he wishes to hold a voting session on some or other matter affecting the members, then prior arrangements must be made with the employer.

Note: Section 19 of the Labour Relations Act states that a registered trade union that is a party to a council or bargaining Council automatically has the right of access to the workplaces of all the employers falling under the scope of the Council, automatically has the right to hold meetings with employees outside of the working hours at the employer's premises and automatically has the right to hold voting or ballots at the employer's workplace in terms of section 12, and also has the rights regarding deduction of trade union subscriptions in section 13.
The trade union has these rights irrespective of the degree of representativeness in any particular workplace.

2.5 Deduction of trade union subscriptions or membership fees or levies

At the written request of a member of a trade union, the employer is obliged to deduct subscriptions or levies payable to that member's trade union from the employee's wages as required.

Section 13 of the Labour Relations Act lays down the procedure which must be followed for making the deductions and remitting the money deducted to the trade union.

Module 3: Majority trade unions

A majority trade union enjoys certain additional rights in terms of the Labour Relations Act.

3.1 What is a majority trade union?

Definition

A majority trade union is a trade union that has as members, a minimum of 50% plus 1 of the total employees employed by the employer in a workplace.

One of the important rights that a majority trade union has, and which a representative or sufficiently representative trade union does not have, is the election of trade union representatives (shop stewards) In the workplace.

The election of shop stewards is regulated in section 14 of the Labour Relations Act.

3.2 Workplace

This section also limits the number of shop stewards that may be elected in terms of the number of members of the trade union in the workplace.

Definition

A "workplace" is defined in section 213 of the Labour Relations Act as meaning “the place or places where the employees of an employer work."

If an employer carries on contracts IN two or more operations that are independent of one another by reason of size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

Note: If an employer has his head office in Johannesburg, and has branches in Port Elizabeth and in Cape Town, Johannesburg is a workplace, Port Elizabeth is a workplace, and Cape Town is a workplace.

It is therefore possible that a trade union could be a majority trade union in Johannesburg, but not in the employer's branches in Port Elizabeth and Cape Town.

Note: The nomination, election, terms of office and removal from office of a trade union representative or shop steward is governed by the Constitution of the trade union. (Labour Relations Act section 14(3)).

This means that should a shop steward misconduct himself in the performance of his duties as a shop steward, the employer does not have the authority to remove that shop steward from office. The employer can only report the shop steward to his trade union, and demand that the trade union remove him from office.

3.3 Definition of a shop steward

Definition: A shop steward is an employee of the company, who is elected by secret ballot held in terms of the Constitution of the trade union, to act as the elected trade union representative of all the members of that trade union in the workplace.

The term of office of a shop steward is usually 12 months.

A shop steward does not receive additional remuneration from the employer for conducting his duties as a shop steward, and usually does not receive remuneration from the trade union.

A shop steward may stand for re-election.

Module 4: The duties of the shop steward

The duties of a shop steward are clearly detailed in section 14 (4) of the Labour Relations Act.

Employers should note that these are the only duties that a shop steward may legally undertake.

Note: In other words, it must be remembered that the shop steward is employed first and foremost as an employee of the company.

He must therefore perform his normal employment duties and functions first, and his duties as a shop steward are a secondary consideration.

4.1 Right to perform certain functions:

Section 14 (4) of the Labour Relations Act state as follows:

“A trade union representative has the right to perform the following functions:

a. at the request of an employee (not only a member, but any employee) in the workplace, to assist and represents the employee in grievance and disciplinary proceedings;
b. to monitor the employer's compliance with the workplace related provisions of the Labour Relations Act, any law regulating terms and conditions of employment, and any collective agreement binding on the employer; (This implies that the Shop Steward should be fully trained and thoroughly familiar with, as a minimum, the Basic Conditions of Employment Act and the Labour Relations Act. He should also be trained in the content of the company Disciplinary Code and Procedure, and the company Policy and Procedure Manual, and be familiar with the content of any collective agreements or the recognition agreement.)
c. to report any alleged contravention of the workplace related provisions of the Labour Relations Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer, to:

    i. the employer
    ii. the representative trade union; and
    iii. any responsible authority or agency; and

d. to perform any other function agreed to between the representative trade union and the employer.

Therefore, the functions and responsibilities of the employee in his capacity as a shop steward is limited to the above - any additional functions must be agreed to between the employer and that the trade union.

The shop steward cannot simply do as he likes - he is still subject to the direction and control of the employer.

4.2 Reasonable paid time off work

A shop steward is entitled to take reasonable paid time off work during working hours to:

a. perform the functions of a trade union representative; and
b. to be trained in any subject relevant to the performance of the functions of a trade union representative.

Note: The Labour Relations Act does not define what constitutes “reasonable time off with pay during working hours.”

The Labour Relations Act also does not stipulate that "reasonable time off with pay" must be negotiated with the shop steward or with the trade union. This therefore implies that it is the employer who makes the decision regarding what constitutes "reasonable time off with pay."

The act goes further (section 15) in addressing Leave for trade union activities - as opposed to “time off for trade union activities.” “Time off” refers specifically to allowing a shop steward time off from his regular duties to attend to Union activities on the workplace.

Section 15 “ Leave for trade union activities” refers to allowing an employee who is an office bearer of a representative trade union reasonable leave of absence from the workplace, and in addition to his normal annual leave, and during working hours, for the purpose of performing the functions of his office.

A shop steward is not an office bearer of a representative trade union.

An office bearer is employed by the trade union - a shop steward is not employed by the trade union - he is elected by his fellow members to the position of shop steward.

4.3 Meet with the newly elected shop steward

Employers should hold a meeting with newly elected shop stewards, and at this meeting should also be attended by the persons to whom the shop steward reports in the course of his normal daily duties - his immediate supervisor his, line manager and Department head - addressing as a minimum the following items on the agenda:

a. Define what a shop steward is. Clearly define to the shop steward what his duties are - and make sure that he understands. Make sure that the shop steward’s immediate supervisor, line manager and Department Head are also clear on points [a] an [b] above. It is a fact that many newly elected shop stewards (as well as immediate supervisors, line managers and department heads) do not know exactly what the term means, and do not know what their duties are as a shop steward.
b. Clearly explain to the shop steward that when he wishes to take time off from his normal duties to attend to a Union matter, he may only do so with the prior permission of his immediate supervisor.

c. Clearly explain to the supervisor, line manager and department head that the shop steward is not the enemy - he is a management asset that can be a great asset to the company.
d. Explain to the supervisor, line manager and department head that they are not to be unreasonable in considering requests from the shop steward for reasonable paid time off from his regular duties.
e. Discuss and define what “reasonable paid time off’’ will be.

As a guide, in a reasonable size company, the shop steward should not require more than a few hours a week away from his job to attend to Union activities in the workplace.

This time off does not include allowing the shop steward to visit the Union's offices - it does not include absence from work - but only time off on the workplace from his regular activities on the workplace.

Note: Management would be wise to hold regular - we suggest monthly - meetings with the shop steward so that any “rumblings” in the workplace can be addressed before those “rumblings“, turn into tornadoes.

Module 5: How does a trade union gain access to a workplace?

5.1 Procedure that the trade union must follow

In order for a trade union to gain access to the workplace, there is a specific procedure that the trade union must follow.

This procedure is regulated by section 21 of the Labour Relations Act, which states as follows:

1. any registered trade union may notify an employer in writing that it seeks to exercise one or more of the rights conferred by the Labour Relations Act, Chapter 3, Part A.

2. The written notice referred to above must be accompanied by a certified copy of the trade unions certificate of registration and must specify:

    a. the workplace in respect of which the trade union seeks to exercise the rights;
    b. the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and
    c. the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.

3. Within 30 days of receiving the above written notice, the employer must meet the registered trade union and endeavour to conclude a collective agreement (recognition agreement) as to the manner in which the trade union will exercise the rights in respect of that workplace.

5.2 Dispute Resolution

It is important to note that section 21 (3) does not say that the collective agreement or recognition agreement must be concluded within 30 days.
It states only that within 30 days of receiving the notice from the Union, the employer must meet with the Union and endeavour to conclude a collective or recognition agreement.

It does not say that the collective or recognition agreement must be concluded.
It says only that you must endeavour to conclude such an agreement.

Thus, there does not seem to be any statutory time limit on for what period of time these negotiations can continue. The act makes provision for a procedure should a dispute arise.

This procedure is stipulated in section 21 (4) through to 21 (11).

It is very similar to the dispute resolution procedure for unfair dismissals, involving conciliation and arbitration.

The procedure bestows certain authorities on the CCMA, regarding what action must be taken:

a. if the dispute is about whether or not the registered trade union is a representative trade union;
b. if the dispute is about the number of members or the membership or what support the registered trade union has in the workplace.

5.3 Legal effect of a collective agreement

A collective agreement or recognition agreement is a legal document and is binding on all the parties to the agreement.

Module 6: Agency Shop and Closed Shop Agreements

6.1 Agency Shop Agreements

Section 25 of the act allows a representative trade union and the employer, or a representative trade union and an employer's organisation, to conclude a collective agreement known as an Agency Shop Agreement.

This agreement requires the employer to deduct an agreed agency fee from the wages of employees - who must be identified in the agreement - who are not members of the trade union but who are eligible for membership.

The reasoning behind this type of agreement is that the trade unions say that when they negotiate for improved terms and conditions of employment for their members, or they negotiate for higher wages for the members, all employees in that workplace benefit from the results of those negotiations - even those employees who are not members of the trade union.

The viewpoint of the trade union is therefore that those employees who are not members of the trade union but who are benefiting from the negotiation efforts of the trade union, should pay some sort of fee to the trade union.

Those employees are not forced to join a trade union, and they are still free to join any other trade union of their choice.

Only a trade union who is a majority trade union may enter into such an agreement.

The agreement is binding only if:

a. the employees who are not members of the trade union are not compelled to become members of the trade union.
b. the agreed agency fee must be equivalent to or not less than the normal subscription paid by any normal member of the Union.

6.2 Closed Shop Agreements

A Closed Shop Agreement is something rather different.

This type of agreement is a collective agreement, requiring that all employees covered by the agreement must be members of the majority trade union in the workplace.

Before a Closed Shop Agreement can be entered into, a ballot must be held of the employees to be covered by the agreement, and the result of the ballot must be that two thirds of the employees who voted, have voted in favour of the agreement.

It should be carefully noted that the majority required it is not two thirds of the employees in the workplace who must be in favour, but rather two thirds of the employees who voted.

The employee does not have to be a member of the majority trade union in the workplace before he commences employment with that employer, but once employment commences he must become a member of that trade union in terms of the closed shop agreement.

It has been argued that such an agreement removes the employees Freedom of Choice or Freedom of Association - because he is forced to join a particular trade union.

6.3 Usage of Subscriptions

The subscriptions paid by members through an Agency Shop Agreement or a Closed Shop Agreement may not be paid to a political party as an affiliation fee, may not be contributed in cash or kind to a political party or a person standing for election to any political office, but must used for expenditure that advances or protects the socio-economic interests of the employees.

Module 7: Approached by a union – the beginning

You are being approached by a trade union, who have already signed up a number of members in your workplace, and they have a bunch of membership forms in hand and they contact you by fax stating that they seek organisational rights in your workplace.

You have to agree to meet with them within 30 days in order to negotiate organisational rights.

7.1 The first thing that you do

The first thing that you do when the Union delegation arrives at your premises is that you ask them for a copy of their registration certificate.

This is to ensure that the Union is properly registered, and you are entitled to be handed a copy of their registration certificate and a copy of the Constitution.
At the first opportunity, you must check with the Department of Labour to make sure that the Union is still registered.

The Department of labour website is **www.labour.gov.za**

7.2 The rights of trade unions

Some of the rights that they are entitled to are stipulated in labour law, and these are the rights that you must allow.

You allow only those rights that are stipulated in law - any other rights that they seek must be negotiated, and there are certain rules to follow:

1. The recognition agreement will consist only of the rights allowed by law.
2. You never include your Disciplinary Code or your Disciplinary Procedure in any agreement.
3. You do not include your policies and procedures and your rules and regulations in any agreement.

In other words, you do not give the Union permission to have authority over your rules and regulations or company policies.

If these things are included in a recognition agreement, it implies that the Union must first approve of all your disciplinary procedures, including company policies and rules and regulations, before you can implement them.

If you have such a provision in your recognition agreement, what it basically means is that you are handing over management of your company to the Union!!

And that is to be avoided at all costs.

Some of the things that the Union will try to persuade you to include in the recognition agreement will be:

- your disciplinary code and disciplinary procedure
- a provision that the Union must first approve of your company policies and rules and regulations before you implement them
- a provision that an office bearer from the Union's offices be allowed to represent employees in grievance and disciplinary hearings;
- a provision that for all disciplinary hearings, the Union will send a representative to attend as "an observer"
- a provision that the decision on the sanction in a disciplinary hearing must first be approved of by the Union before it is implemented;

There may be other matters, but the above is the main issues that they will seek.

Certain questions may come to mind when you have been approached by a Union – the nightmare of becoming “Unionised” has now become a reality - and your mind is filled with questions.

7.3 How do you know that your employees unionised?

Initially you are probably not aware that your workers have joined a trade union. The reason you are not aware of it is because at this stage, they have only filled in and signed a membership form. They have not informed the employer that they have done this, and the Union has not informed the employer that he has been recruiting members in your workplace without your knowledge.

Only when they have built up a significant data base of members will they approach you - and that is the first you learn of it.

7.4 Can I prevent any employee from becoming a member?

The short answer is no - employees have freedom of choice. You cannot prevent an employee from becoming a member and you cannot persuade him to resign his membership.

It is also illegal to give your employees a choice - such as “you must decide between Union membership and your employment with this company.”

Any suggestion like that would be unlawful.

7.5 What about a senior manager or director, can he join a trade union?

This is a question that arises frequently – and just as frequently it causes problems in the workplace. The bottom line is that the senior employee or director has just as much right as anybody else to join a trade union.
But it does introduce problems in terms of management and loyalties. Another question that arises is that when a worker is promoted to a supervisor, does it mean that he is now a managerial employee?

In IMATU and others v Rustenburg Transitional Council [1999] 12 BLLR 1299 (LC), the Council prohibited senior employees on certain grades from serving in the executive positions in trade unions and participating in trade union activities.

The court held that a trade union is a body whose primary object is to maximise the benefits of its members in the employment situation, by negotiation with the employer or, if necessary, industrial action such as a strike.

The court held further that when a senior employee or director becomes a member of a trade union, they commit themselves to that trade union and they "go over to the opposition."

The court held further that if the legislature wished to draw a distinction in terms of trade union membership between managerial and ordinary employees, it would have done so.

The court ruled that employees who joined Unions must still perform the work for which they were employed to do, and if they do not, they could be disciplined for misconduct. Therefore, senior employees who decided to join Unions must therefore "tread carefully."

Our view is that a senior managerial employee or director cannot be a member of a trade union, where he is in the situation that he owes allegiance to the Union and its aims and objectives, he owes allegiance to the employees because they are members of the trade union, and at the same time over allegiance and loyalty to the employer.

There is an obvious conflict of interest. The employer should handle this by counselling the senior employee, pointing out to him the problems, and suggesting that there is an obvious conflict of interest or incompatibility, and it may be necessary to terminate his employment contract.
However, employers must always take expert legal advice before terminating the contract of such an employee.

7.6 Keeping the union out of the company

The short answer is that you cannot keep the Union out of the company. It is better to cooperate, and of course as with any negotiations, remain neutral.

7.7 The rights of the employees

It is our view that employees are entitled to know what the Union can do for them in return for their subscription fees.

It is recommended that when the negotiations commence, at the first meeting with the Union they should be requested to put in writing what benefits they offer to members in return for payment of a subscription fee, so that the employer can inform their employees which enables the employees to make an informed decision regarding whether to join the Union or not.

7.8 The rights that the Union is entitled to by law

What rights is the Union entitled to by law?

7.9 The “representative” trade union - section 11 LRA

For the purposes of this section, a “representative trade union” means a registered trade union that is sufficiently representative of the employees employed by an employer in a workplace.”

That is what is stated at the beginning of section 11 in the LRA

7.10 So what is “sufficiently representative”

The act does not say - it does not give us a definition or even a guideline. Which means that the Union and the employer must discuss the matter and agree on whether or not the Union is “ sufficiently representative” of the employees employed by an employer.

As a guide, we normally say that if the Union has signed up more than 25% or 30% of the employees as members, the Union could possibly be regarded as "sufficiently representative”

7.11 So, it is agreed that the trade union is "sufficiently representative"

The Union is therefore entitled to:

a. enter your premises in order to recruit members, or communicate with members, or otherwise serve their interests. The act states that this right is subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property, or to prevent the armed you disruption of work. This implies that prior arrangements must be made with the employer - they cannot simply march in at any time they feel like it.

7.12 The sufficiently representative trade union is entitled to:

a. hold meetings with employees (not only in their members, but the employees) after hours at the employer's premises.
b. the members of a sufficiently representative trade union are entitled to vote at the employer's premises in any election or ballot contemplated by that trade unions constitution.

Note: an employee may revoke his membership of the trade union at any time, by submitting his resignation in writing to the trade union and the employer on the prescribed form. In that event, the employer must make deductions until the notice period has expired and then will stop making deductions.

c. the representative trade union is entitled to instruct the employer, with the prior written permission of the member, to deduct from the member's wages any subscriptions or levies payable to that trade union.

Obviously, the employer will require that the Union must hand to the employer a copy of each signed membership form, as well as a copy of each employee's signed written authority instructing the employer to make the deduction from his wages.

The employer should check these forms - the membership forms and the signed written deduction authorisations against his own records. The employer may find that a membership form for an employee who no longer works for the employer has been included, or there may be an irregularity in the signature that will prevent you from making deductions.

Obviously, the control of these deductions introduces additional admin work for the employer. The employer should negotiate with the Union on charging the Union an administration fee for making these deductions.

The employer is not legally empowered to charge an administration fee - the LRA does not mention this at all. Thus it is a matter to be negotiated with the Union.

The administration fee will usually be based as a percentage of the total amounts to be deducted.

d. the employer is required to remit the amount deducted to the representative trade union not later than the 15th of the month following the date on which the deduction was made.

e. with each monthly remittance, the employer must provide the representative trade union with:

- a list of the names of every member from whose wages the employer has made the deductions that are included in the remittance;
- details of the amount deducted and remitted and the period to which the deductions relate; and
- attach a copy of any member's resignation.

Those are the only rights that a "sufficiently representative" trade union has in the workplace.

7.13 The recognition agreement

The recognition agreement that you sign with the trade union must include all the above rights - and nothing more.

Anything else that the Union may require or request you to include in the recognition agreement must be a matter of negotiation and agreement or refusal.

You must refuse to include anything that is a management prerogative - you do not hand over management of your company to the trade union.

That is the answer you give them - and that is the end of the matter.
There is no law stating that your policies and procedures or disciplinary code etc must be approved of by the trade union before you can implement it in the workplace.

Those are management decisions.

Management run the company - the trade union does not run the company.

7.14 The sufficiently representative trade union and shop stewards

The sufficiently representative trade union does not have any legal authority to elect shop stewards in your workplace.

They can elect an “employee representative “, or if you wish you can even allow the members to refer to him as the “shop steward.”

But it must be made clear to the Union and to the members in your workplace that this “shop steward” is not entitled to any of the privileges stipulated in the LRA in section 14(4) AND (5), section 15 and section 16, or anything else that a legally elected shop steward may be entitled to in terms of the LRA.

7.15 The “majority” trade union

A majority trade union is a trade union that has as its members 50% plus 1 of the total employees in workplace.

A majority trade union has all the rights listed above, and in addition they have the right to elect shop stewards in terms of section 14 of the LRA.\

The rights of a legally elected shop steward

A legally elected shop steward has the following rights:

a. at the request of an employee (not only a member, but any employee) in the workplace, to assist and represent the employee in grievance and disciplinary hearings;
b. to monitor the employer's compliance with any workplace related provisions of the LRA or any law regulating terms and conditions of employment, and any collective agreement binding on the employer;
c. report any alleged contravention of any workplace related provisions of the LRA or any other law regulating terms and conditions of employment, including any collective agreement. He can report such matters to the employer, to his trade union, and to any responsible authority or agency such as the Department of labour;
d. perform any other function agreed to between the representative trade union and the employer.

7.17 The shop steward and paid time off work

The LRA states in section 14(5) is entitled to take "reasonable" time off with pay during working hours, to perform the functions of a trade union representative and to be trained in a subject relevant to the performance of the functions of a trade union representative.

This is a bit of a problem - it seems that the trade union representative is entitled to this - but it is unclear whether it is a legal right. It is for the employer to decide what constitutes "reasonable" time off, and the employer can impose "reasonable conditions" for this paid time off.

Note that this"paid time off work" refers to allowing paid time off work for the shop steward to perform his Union duties on the workplace.

Section 15 of the Act, where it refers to "taking leave" for trade union business, refers to an employee who is also an "office bearer" of a representative trade union. This means that he actually holds office in the Union, and a trade union representative or shop steward is not an office bearer of the Union and thus section 15 does not apply to a shop steward.

The union cannot stipulate conditions because they are not paying the employee for this time off - the employer is paying him and therefore the employer has the right to stipulate to these conditions.

The act states in section 15 (2) that the representative trade union and the employer may agree to the number of days leave, the number of days of paid leave and the conditions attached to any leave.

Since the section of the act says " the number of days leave" and it says separately "the number of days paid leave", indicates that " the number of days leave could be a combination of unpaid leave and paid leave.

Module 8: Disclosure of information

Section 16 of the LRA deals with the disclosure of information to the trade union.

It requires that employers should share information with trade union representatives that is relevant to the performance of the functions of that trade union representative.

This might be giving information to the shop steward or to an office bearer of the Union.

The employer and the trade union should actually negotiate on this and try to agree on conditions that apply to the disclosure of information.

Section 16 of the LRA reads as follows:

“16(2) an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in 14(4).” (These are the functions referred to above in the previous module)

16(3) whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

Section 16(3) in fact actually just seems to be repeating what is stated in section 16(2).

16(4) states that the employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.

Section 16(5) states that the employer is not required to disclose information that is legally privileged, or that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court, or information that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or information that is private personal information relating to an employee unless that the employee consents to the disclosure of that information.

Any dispute about the disclosure of information may be referred to the CCMA.

Employers must not be afraid of the disclosure of information - the disclosure of certain information can certainly facilitate the collective bargaining process, such as bargaining for wage increases, and employers must approach the negotiation table or bargaining table properly prepared for whatever it is that is to be negotiated.

Module 9: Collective agreements

What is a collective agreement?

Section 213 of the LRA defines a collective agreement as follows:

" a collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and on the other hand:

a. one or more employers
b. one or more registered employers organisations; or
c. one or more employers and one or more registered employer's organisations.

9.1 The legal effect of a collective agreement

(Refer section 23 LRA)

It binds each party to the collective agreement, and the members of every other party to the collective agreement, in so far as the provisions applicable between them.

The members of the registered trade union and the employers who are members of a registered employers organisation that are party to the collective agreement are also bound by it if the collective agreement regulates terms and conditions of employment, or the conduct of the employers in relation to the employees, or the conduct of the employees in relation to their employers.

Employees who are not members of the registered trade union or trade unions that are party to the agreement are also bound by it if the employees are identified in the agreement and the agreement expressly binds the employees, and that the trade union or those trade unions have as their members, the majority of employees employed by the employer in the workplace.

So in other words, the employees of a employer, where there is a majority trade union in the workplace, will be bound by the collective agreement even if they are not members of that trade union.

Thus a collective agreement could possibly regulate:

a. minimum wages in an industry or with a single employer;
b. regulate other terms and conditions of employment, such as:

iv. annual leave agreements;
v. annual wage negotiations;
vi. various other conditions of employment, such as variations to terms and conditions contained in the Basic conditions of Employment Act;
vii. and so on.

9.2 Typical objectives of Trade unions

It is important to be aware of the typical objectives of trade unions, because in many cases trade unions will want to negotiate on these objectives with the aim of having their objectives entrenched in a collective agreement or even a recognition agreement.

Some of the typical trade union objectives are:

i. to organise and unite workers into one strong body;
ii. to promote and to further the interests of members and promote the welfare of members;
iii. to guide, train and coordinates the activities of shop stewards; and
iv. to provide feedback on decisions made by other levels of the Union;
v. to always strive for better working conditions and more benefits for their members;
vi. to try to gain as much control as possible over the management functions of an employer;
vii. to try to persuade employers that the Union should be involved in all aspects of the decision-making process, such as regarding grievance or disciplinary hearings, decisions on employment such as involvement in interviewing applicants and the selection process, and similar matters.
viii. to strive for economic and social justice for all members;
ix. to resist retrenchment and to fight for full employment by eliminating employment on short-term contracts and so on;
x. to set up effective collective bargaining structures;
xi. to oppose any policy or similar which may cause division or disunity among members;

There may also be a few other objectives not mentioned here.

Module 10: Some common problems

There are a couple of common problems that arise when an employer becomes unionised. This cannot be denied. Sometimes the employee elected as a shop steward gets the idea that because he is a shop steward, he is also the Managing Director of the company.

Sometimes the employee elected as a shop steward believes that he has full authority to decide whether or not he is able to fit in some productive work in between he is shop steward duties, or he simply takes time off work to attend to trade union matters without any authority from the employer.

10.1 Should union officials or shop stewards be allowed to represent members in disciplinary hearings?

Firstly, a shop steward is entitled to represent a member in a disciplinary hearing if he is requested to do so by that member. Therefore, if the member chooses to have a shop steward representing, you must allow that.

However, this is a right that is conferred on a shop steward by the LRA and it is not extended to Union officials - meaning office bearers of the trade union.
Thus, you should not allow representation by office bearers of the trade union.

10.2 What if the shop steward feels that his status as a shop steward entitles him to take extended tea breaks, extended lunch breaks and/or smoke breaks, or even to arrive late for work?

The shop steward is first and foremost an employee of the company, and he is bound by his employment contract, terms and conditions of employment, and all company policies and procedures.

His duties or status as a shop steward is secondary to his status as an employee of the company.

He must be disciplined the same as any other employee - just make sure that before you take disciplinary hearing you must notify the Union that you are taking disciplinary action against the shop steward, tell them what the charges are, and invite them to consult with you before the date of the hearing if they wish to do so.

10.3 Sometimes the shop steward adopts an aggressive or threatening manner when addressing supervisors or employees.

This is just as unacceptable as it would be from any other employee. Your disciplinary code applies to the shop steward in the same way as it applies to any other employee.

The consistent - take disciplinary action against the shop steward.

10.4 Time off for shop steward duties

In all cases, without exception, when the shop steward needs to leave his workplace to attend to shop steward duties, he must request permission from his immediate superior to leave his workstation.

If he does so without permission, it will be regarded as an unauthorised absenteeism and disciplinary action will be taken.

Shop stewards should be given this instruction in writing as soon as he is elected to that office.

10.5 We have a shop steward who is also a Union office bearer - it is hardly ever at work, but he's always at the Union's office attending to duties there. Do we have to allow this?

In such cases, it is necessary that the employer anti-union must agree on the number of days paid leave to which the shop steward is entitled to take for Union matters, the number of days unpaid leave that the employer is prepared to allow, and the conditions applicable to such leave.

The shop steward cannot expect to simply do as he pleases - he is still an employee of the employer.

The Union and the employer should meet and discuss exactly what the Union needs this shop steward to do as an office bearer of the Union, when he must do it, and how many days per month he needs off work to do it.

The employer might even suggest that the Union should contribute to the employee's wages for the days taken off work, or something like that.

10.6 Trade union training courses or conferences

Sometimes requests received from the trade union for shop stewards to be given 3 or 4 days off on full pay to attend a trade union conference or a training course. Very often, this request is received only a day or two before the conference or the commencement of the training course.

Such short notice is unacceptable - it is the employer no time to make alternative arrangements. In such circumstances the employer should respond to the Union in writing, stating that the notice period is unacceptably short, and permission cannot be granted for the shop stewards to take leave or paid time off.

The shop stewards should also accordingly be informed that permission has been refused.

If the period of notice is reasonable, then the employer could possibly agree to it. He may state that they can take annual leave or unpaid leave for that purpose.

Module 11: Demands for organizational rights

Let's divide this into sections or steps or phases – it is a much easier way of approaching the matter – one step at a time.

11.1 Step 1 – The first meeting with the Union

Make sure that you do as much research as possible - even to the extent of visiting the Union's website if they have one, and glean as much information as you can from that website.

Alternatively, you may be able to obtain information from other employers who have the same Union in the workplace. For the first meeting with the Union, you must be properly prepared.

The agenda for the first meeting will be something like the following:

a. introductions of all persons attending the meeting.
b. sharing general information about the Union and about the employer;
c. the Union will hand over a copy of their registration certificate and Constitution.
d. information about the Union's activities, what other workplaces they represent and so on. (It is a good thing if the Union can give you the names of some other employers where they de representative trade union. This enables you to contact those are the employers and ask them about how this Union operates in their workplace.)
e. the Union must hand to you sign a membership forms to show that they do have a number of members in your workplace.
f. if requested by the Union, you can share with them something about your company's activities.
g. settle the issue of the representativeness in the workplace - do they have sufficient members to constitute " sufficiently representative" or a " majority", or in your opinion, do they not have sufficient members and you are not prepared to recognise the Union. Be reasonable on this issue - if you have 100 employees and they have 3 members, then obviously this is not sufficient to constitute a representative trade union, and organisational rights will be denied.
   But if they have 100 employees and they have 32 members, that could well be construed to be sufficient to constitute a representative trade union.
h. settle the issue of what rights are sought by the Union in your workplace.

This will probably consist of:

i. firstly, recognition of the Union.
ii. recognition of shop stewards - which you must deny if they are majority trade union. State that they can elect an "employee representative", who can be termed to be a shop steward, but you are not prepared to allow him to have any of the rights of a shop steward as detailed in not the the LRA.

The duties of such a person must be negotiated between the employer and the trade union:

i. the Union will seek a right of access to your premises;
j. stop order facilities and deduction of trade union subscriptions or levies;
k. payment of member's subscriptions or levies on a monthly basis to the Union.
l. If the Union is only the representative trade union and not the majority trade union that is about the limit of the organisational rights that they may seek.

11.2 Proof of membership

Just remember that proof of membership - in the form of properly completed and signed membership forms is vital.

There is rather no point in proceeding with any of the items on the agenda if proof of membership is not submitted.

Module 12: Preparation for the first meeting with the union

12.1 Step-by-step preparation for the 1st meeting with the Union

If it is established that the Union is the "sufficiently representative" or the "majority" Union, this may be a long meeting. Be prepared to provide lunch. This can be a light finger lunch – a few plates of snacks, and also Kentucky Chicken is very popular. Serve lunch with soft drinks – no liquor.

1. You receive a letter from the Union requesting a meeting as they wish to seek organizational rights. This request must be in writing – if it is a verbal request, tell them to put the request in writing and it will then receive your attention. You have 30 days in which to arrange the meeting – don't rush it – give yourself plenty of time. Make the meeting date about 3 weeks ahead – give yourself plenty of time to prepare.

2. Tell them to forward you a copy of their Registration Certificate by fax. This will enable you to verify their credentials before the meeting – it saves time at the meeting.

   It is a good idea that you also ask the Union to fax you a copy of each membership form. This will enable you to check the membership forms before the meeting (to save time at the meeting) and to verify signatures, check the forms to make sure that no ex-employees have been included, and to establish how many members there are in relation to your total workforce.

3. Remember that "sufficiently representative" and "majority" is established by the number of Union members in relation to your total workforce – including office workers, managers, directors and so on.

4. Fax the Union a letter giving them the date of the meeting. If it does not suit them (they will seek an early meeting – they always want to do things as quickly as possible – but do not allow yourself to be rushed) try to give an alternative date that suits you.

5. Prepare your agenda – a typical agenda will contain:

   a. Switch on your digital voice recorder – the whole meeting must be recorded. The Union has no right to object to this, and especially not in terms of labour law.
   b. Remember that if the Union contends that some or other organizational right that they seek "is the law" or "the law states" etc, ask them what Act of Parliament it is in and what section of the Act it is to enable you to verify it.

Note: be aware – the Unions very often misinterpret the act – make sure that you have an expert interpretation before proceeding, Bear in mind that their Organizational rights are stipulated in the Labour Relations Act and nowhere else.

You only agree to what is in the LRA and nothing else – any other demands must be the subject of negotiation at another meeting.

c. Introductions all round.
d. Offer tea, coffee and biscuits – or make sure that water is on the table as well as peppermints or other sweets. Make the atmosphere informal, relaxed and cordial.
e. Union hands over copy of Registration Certificate and their Constitution.
f. State that you will read the Constitution later and raise any issues at the next meeting.
g. Union hands over membership forms to verify membership
h. Establish the level of representativeness if not already done.
i. Agree or otherwise whether you are prepared to consider or accept that the Union is "sufficiently representative" or is the "majority" Union, as the case may be.

If it is agreed that the trade union is sufficiently representative, then they are entitled to the following organisational rights and nothing else:

a. trade union access to the workplace
b. deductions of subscriptions from members' wages and submitting these to the Union.
c. leave for trade union activities.

These are the only organisational rights that the representative trade union or sufficiently representative trade union trade union is entitled to in terms of the Labour Relations Act.
If the Union is agreed to be the majority trade union, the following organisational rights apply:

a. trade union access to the workplace
b. deduction of subscriptions from members wages and submitting these to the Union;
c. leave for trade union activities (office bearers);
d. the election of shop stewards;
e. disclosure of information
f. agreement on dates for negotiations - such as wage negotiations.
g. agreement on dispute resolution procedures involving trade union activities or the collective agreement or any argument about organisational rights.

12.2 The Recognition Agreement

Whatever organisational rights are agreed to be put into a Recognition Agreement (sufficient representation or the representative trade union) or into a Collective Agreement (majority Union).

In fact, a Recognition Agreement is also a Collective Agreement.

The Collective Agreement or a Recognition Agreement must be concluded and signed within 30 days of the date on which Agreement regarding organisational rights was reached.

Any other demands that the Union may have, regarding any other terms or conditions of employment, or any other items that they say should be included in the Agreement, such as a requirement that Union approval must be obtained on your disciplinary procedure and disciplinary code, that Union approval must be obtained for all your policies and procedures and rules and regulations etc, must be negotiated in a separate meeting - or that the Union has the right to sit in on all your disciplinary hearings, or participate in the decision process regarding a sanction, or that the Union has the right to sit in on all your interview meetings when you are interviewing applicants for employment, and that the Union has the right to participate in the decision making in that regard, these must all be negotiated in a separate meeting.

These items are not a matter of right - in other words, the trade union does not have the right to be given all of these permissions, but these are matters of interest between the trade union and the employer, and therefore must be negotiated.
It is not advisable to give the Union these rights or permissions because if you do, it means you're handing over management of your company to the trade union.

12.3 What is it that you want from the Union?

The information you want from the Union at that first meeting will be:

1. Details of the Unions organizational structure – you want to know who is:

    a. The president – and his contact details
    b. The general Secretary and his contact details.
    c. The branch executive and his contact details
    d. The local organizer and his contact details.

2. A certified copy of their constitution and addresses of its branch offices.

3. What affiliation do they have to Cosatu etc?

4. The Unions area of interest (industry, class of employees etc.)

Note: Generally you will find that Unions accept membership from anybody.

5. Information on the activities of the Union.

6. What benefits of membership does the Union offer your employees?

Note: A trade union that is not a registered trade union has no rights whatsoever in terms of Labour law and the employer can simply refuse to have any dealings whatsoever with such a Union.

12.4 What are the Unions expectations?

What does the Union expect? Usually it will be some or all of the following:

1. Inclusion of your disciplinary code and procedure in the agreement (not a right and not a good idea).

2. Inclusion of a clause stating that the Union must approve of all your policies and procedures before implementation. (not a good idea.)

3. Inclusion of a clause stating that the Union must approve of all your job advertisements for vacancies, must sit in on interviews with job applicants, and must have a say in the choice of the successful applicant. (Not a good idea.)

4. Inclusion of a clause stating that the Union must represent members in disciplinary and grievance issues. (Not a good idea - a member is free to ask any fellow employee or colleague from the workplace to represent him. He is not permitted to ask a person from outside the organisation to represent him - this can only be done with the express consent of the employer.)

5. They might wish to Institute a clause stating that the Union has the right to bargain collectively on behalf of your workforce. Check carefully that there is not a bargaining Council or an employer's organization - of which you may or may not be a member - but which does engage in collective bargaining on an annual basis with a number of Unions - including the Union that you are dealing with. You must avoid a situation where there is bargaining and agreements reached through that mechanism - and then the Union comes to you and wants to bargain again direct with you for your employees. This could amount to an increase twice a year. If there is bargaining an agreement reached with a bargaining Council and/or employer's organisation and a number of trade unions which is binding on your company, then you follow that increase and nothing more.

12.5 What information do you give the Union about the company?

The information that you give the Union will simply consist of:

a. your "mission" statement, stating that you support the principle of freedom of Association.
b. a description of the nature of your business - what products you handle ; what services you provide and so on.
c. the number of employees that you have - this includes all employees from the CEO to the bottom.
d. the number of branches you have or sites on which you operate;
e. information concerning current business trends, difficulties or otherwise in the marketplace, problems and so on.
f. the manner in which you determine your conditions of employment - such as applying wage determinations, any Bargaining Council Agreements that you are a party to, any membership of an employers organisation that you might be

a party to; that you base terms and conditions of employment on the Basic Conditions of Employment Act etc.

g. how you manage Labour Relations at present - such as through the medium of terms and conditions of employment in the employment contract, company policies, rules and regulations, your disciplinary code and disciplinary procedure (sometimes referred to as a Code of Conduct) your grievance procedures and so on.

12.6 Recognition of Shop Stewards

In some cases, you may find that the Union has already elected shop stewards before they even made the first approach to you.

This of course is totally against the act and is unlawful. The Union is only entitled to elected shop stewards if they are the majority trade union.

If you find that the Union has already elected shop stewards when they are only be "representative trade union" or they are only "sufficiently representative", then you do not recognise them as shop stewards in terms of the law.
In other words, they can remain shop stewards - but they have no rights in terms of the Labour Relations Act.

12.7 Access of Union officials to company premises

Union officials have the right of access to the company's premises for the purpose of recruiting members and serving the interests of existing members.

It is important that the conditions under which they can access the premises for this purpose be clarified in a recognition or collective agreement.

Some conditions that you might wish to impose are that the Union must notify you in writing at least 7 days prior to the day on which they require access, and that access for these purposes may only be granted during your employees' tea-time and lunchtime, or after hours.

Upon arrival at your premises, they most first report to reception and the human resources manager or some other responsible official must be notified that the Union officials are or premises, and must be told of the purpose of them being on premises. Be reasonable about this - if it is possible for you to allow access during working hours without undue disruption to the work processes, then do so. If it is not possible, then you do not allow it.

But whatever arrangements are agreed to must be inserted in the Recognition or Collective agreement.

12.8 Relationship between management and the trade union

It is better to aim for an amicable or cordial relationship than to have a troublesome relationship. Have regular meetings with your shop stewards, at which there will be an exchange of information, management will give the shop stewards a report on

how the company is doing in the marketplace, any needs that there might be to reduce expenses, and matters of that nature.

There is nothing that destroys a relationship quicker than bad communication. Good communication with your workers is vital - workers want to know that they count - that they are part of the organization - and in fact they have a right to know how the company is performing in the marketplace.

Keep them informed - you will have a much happier workforce.

At these meetings, shop stewards will report to management on any problems in the workplace that need attention, any rumbles or gambling is about terms and conditions of employment, and so on.
Management must address those issues - don't leave it to smoulder into a thunder ball.

You must conduct these meetings in a businesslike manner - have a proper agenda, which includes feedback from the last meeting on any issues, and which includes starting and finishing times of the meeting.
The agenda must be distributed to shop stewards at least two days before the meeting.

12.9 Feedback to employees

It must be appreciated that shop stewards must report back to their members in the workplace - you must be prepared to facilitate these feedback meetings, and especially where workers work to a shift roster.

Module 13: The Recognition (Collective) Agreement

Example of a recognition agreement with the trade union

Recognition agreement
Entered into

Between

(Company)

And

(Trade union
On
(Date)

This Recognition Agreement shall be of force and effect for a period of 12 months from the date of signing, or until any earlier termination date for any reason recognized in law as being sufficient.

Contents

1. Objectives

The Union and the company (employer) desire to formalize and regulate their relationship and to have clearly stated rules and regulations governing that relationship.

2. General principles

The Union and the company agree that they are bound by the terms and conditions of this agreement which shall be enforceable in law.

The Union and the company accept the printable of freedom of Association.

The Union and the company agree that both shall attempt to resolve any differences firstly through negotiation, consultation and discussion.

The Union and the company agree to not discriminate against or victimise any employees on any arbitrary grounds, including Union membership or activity.

3. Recognition

3(a) The company recognises that the Union is the (majority) trade union in the workplace (or the representative trade union) in the workplace at the defined premises.

3(b) This agreement covers the company's premises (branches) situated at the following addresses OR this agreement does not cover any of the companies branches or business sites other than that stipulated elsewhere in this agreement.

3(c) It is agreed that it should be Union's membership fall below 50% plus 1, then the Union shall be accorded “sufficiently representative” rights only.

3(d) if the Union is already only “sufficiently representative” and the Union’s membership falls below 25% of the total employees on the workplace, then the Union shall no longer be recognised and this recognition agreement shall be invalid and shall be terminated immediately.

3(e) the Union undertakes that it shall not interfere with the right of the company to conduct its normal managerial functions.

4. Facilities

4(a) The company recognises that the Union has the right to access company premises to recruit members, or to otherwise serve members interests. Such access shall be granted once per month by prior arrangement with management at least 48 hours before the day on which the access is required.

4(b) upon arrival at the company premises, Union officials must report to reception and notify management of their presence on the workplace.

4(c) any other access to company premises that may be required must be arranged with management at least 48 hours prior to the required access date and time.

4(d) it is agreed that management will meet with Union officials and shop stewards on a monthly basis to discuss any business affecting the Union's members or interests in the workplace.

4(e) the company agrees that the Union is permitted to use the company notice boards for the posting of Union notices of interest to the members in the workplace.

All such notices must have the prior approval of management, and management reserve the right to disallow any notice to be posted. Nobody shall display any notices that may be interpreted as discriminatory or as derogatory in any way, or which may be seen as victimising a particular worker or class of workers.

5. Union subscriptions

5(a) the company agrees to deduct Union subscriptions from the wages of members in all instances where the member has authorised the company in writing to do so.

5(b) any member may revoke his written authorisation for the deduction of subscriptions at any time by giving the company and the Union 1 (one) month written notice thereof.

5(c) the company undertakes to limit or subscriptions deducted to the trade union not later than the 15th of the month following the deduction, together with a list of the names of each member and the amount deducted from his wages.

6. Shop stewards

6(a) the company recognises that shop stewards have the right to represent and negotiate on behalf of Union members in accordance with this and any other agreement, including in accordance with the company Disciplinary Code and Procedures, and the Code of Good Practice-Dismissal.

6(b) it is agreed between the company and the Union that the Union only has the right to elect shop stewards if it is the majority trade union in the workplace.

6(c) if the Union is not the majority Union in the workplace, the Union may slowly elect shop stewards, but those elected shop stewards shall not have any rights in terms of the Labour Relations Act.

6(d) if it is the majority trade union in the workplace, the Union may elect shop stewards only in accordance with the provisions of the Labour Relations Act.

6(e) the election of deputy shop stewards shall not be allowed.

6(f) the election of shop stewards shall take place annually on the company premises.

6(g) a shop steward may stand for re-election, subject to a maximum term of office of 2 years.

6(h) Management shall have the right of observer status at elections.

6(i) all elections shall be by a process of secret ballot, and must be supervised by the Union.

6(j) should any shop steward vacated office during a term of office, a by-election shall be held and the elected shop steward shall serve for the unexpired term of that office only.

6(k) a shop steward is free to resign from his office as a shop steward at any time, and his office shall also be declared vacant upon expiry of the period for which he was elected, or by termination of his employment with the company, or by means of a petition for his resignation which has been signed by more than 50% of the members in the workplace, or on his been promoted to a management position, or upon his ceasing to be a Union member**.**

7. Shop steward rights

7(a) a shop steward is entitled to exercise any of the rights conferred upon him in terms of the Basic Conditions of Employment Act, or the Labour Relations Act, or in terms of this or any other agreement, or in terms of the Union's constitution.

7(b) the Union undertakes to ensure that an elected shop steward is properly trained in what duties he is permitted to perform, and how he should perform those duties.

7(b) the employer is entitled to stipulate in what manner a shop steward should perform his duties, and also to reach agreement on how much paid time off the shop steward is to be allowed in which to perform is Union duties.

7(c) Management and shop stewards shall meet on a monthly basis to discuss any common interests, and preferably such meetings should also be attended by the union local organiser.

7(d) should there be more than 4 shop stewards in the workplace, the shop stewards are required to organise themselves into a committee and to elect a shop steward to act as chairperson of that committee. That chairperson shall have overall responsibility for convening meetings and liaising with management and the Union office.

8. Addresses and notices

It is agreed that the company chooses the following addresses for receiving notices and communications from the trade union:

Postal address:

Fax number

E-mail address

SMS shall not be considered to be a valid method of communication for the purposes of this Recognition Agreement.

The Trade union chooses the following addresses for receiving notices and communications from the Company:

Postal address: Fax number

E-mail address

SMS shall not be considered to be a valid method of communication for the purposes of this Recognition Agreement**.**

9. Signed for the company:

Name printed: **Designation:**
Signature:
Witness:
Date:

Signed for the trade union:
Name printed: **Designation:**
Signature:
Witness:
Date:

Module 14: Strikes and protest action

It is unfortunate that strikes or a reality - and statistics indicate that strikes are on the increase. It seems that a strike is the “new negotiation procedure.”

14.1 Definition of strike

Section 213 of the Labour Relations Act defines a strike as follows:

"Strike" means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and any reference to work in this definition includes overtime work, whether it is voluntary or compulsory."

14.2 Protest action

Protest action is defined as follows:

"Protest action means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike."

It must therefore be noted that a "strike" and "protest action" is not the same thing. Section 23 of the Constitution gives every worker the right to strike. The LRA provides a legal framework for the right given in the Constitution.

If proper procedures are followed, strikers are protected against dismissal, and interdicts and civil liability for losses caused by a strike. Section 64 of the Labour Relations Act covers strikes and lockouts, in the sense of the right to strike and recourse to lock out.

The definition of "strike" in the LRA indicates that the action must be a joint action. Secondly, the employees must take the action with the object of persuading the employer by force to agree to something, or indeed even to restrain the employer from doing something.

The action must be aimed at settling the employee's grievances-such as a grievance about wages. In other words, the action or the force must aim at settling whatever grievances the employees have.

The grievance can be a demand by employees - such as for increased wages, or may be relative to employment conditions, or any employer-employee matter.
In other words, any matter of "mutual interest" between the employer and employees.

The definition of a strike covers "work-to-rule", go-slows, sit-ins, and even a refusal by employees to handle the goods or products of a particular supplier or customer.

The definition of a strike also covers a refusal to work voluntary or compulsory overtime.

In terms of "going out on strike", the definition of strike seems to indicate that the reason for the strike must be a matter about which the employer can actually do something - in other words it must be a matter that the employer can resolve.

The solution to the matter about which the strike has been called could be something like wage increases, bonuses or a demand for bonuses, improved working conditions, or any other matter of mutual interest, and about which the employer is capable of or who has the resources to do something to resolve the issue.

There would be absolutely no point whatsoever in workers going on strike if the employer is powerless to do something about the reason for the strike. Full example, if it was a political issue - or an issue about new Labour laws which have been passed and which employees find objectionable or unfair. The employer can do nothing about such issues - therefore a strike would be pointless.

Therefore, if employees did strike on such an issue, the action would not form a strike in terms of the definition in the LRA because the action would not comply with the main aim of a strike.

The action might possibly be classed as a "protest action", but it would not be a "strike."

Before workers can strike, there is a procedure to be followed.

Step 1

Obviously, the dispute has arisen in the workplace and no doubt consultations and negotiations have taken place, but these have failed to resolve the issue.
The first step therefore is to refer the dispute for conciliation to the CCMA.

Note: workers can only strike over those issues that have been referred for conciliation. In other words, a trade union, or the employees, may not change the issues of the dispute after conciliation and during the strike.

Step 2

The employer must obtain a certificate of outcome from the CCMA, certifying that the matter remains unresolved. If a period of 30 days has passed from the date on which the referral was made, but conciliation has not yet been held, the employer can demand a certificate of outcome.

Step 3

The union must send a written notice of the commencement date of the strike to the employer. In other words the union must tell the employer when the strike will begin. This requires a minimum notice period of at least 48 hours, or if the employer happens to be a State employer, 7 days notice must be given.

The notice must specify the date on which the strike will begin, as well as the starting time of the strike.

The "strike notice" does not have to contain details of the grievances or demands or the dispute over which the strike has been called.

The reason is that the employer will be fully aware already of these details.

What if the strike does not commence at the specified date and time?
The right to strike is not removed provided that the strike commences within a reasonable period after the specified date in the notice

14.3 Limitations on the right to strike or recourse to lock out

Section 65 of the Labour Relations Act states that "no person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or lockout if:

a. that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute; and
b. that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
c. the issue in dispute is one that a party has the right to refer to arbitration or to the labour court in terms of this act;
d. that person is engaged in an essential service, or a maintenance service.

14.4 Matters about which employees may strike

Employees may strike about almost any dispute that is relevant to the workplace and the employment relationship. Strikes are about interest disputes - meaning that the dispute is not one that is regulated by any law or statute - such as wages, and many conditions of employment.

The conditions of employment such as annual leave sick leave and so on are matters of right - these are matters that are regulated by law in the Basic Conditions of Employment Act, and workers may not strike over those matters.

Interest disputes refers to the creation of new workplace rights, or even the removal of certain existing workplace rights or benefits. An example would be if the employer made a unilateral change to terms and conditions of employment - workers could strike over such a matter.

14.5 What options does the trade union have?

When the union becomes aware of the employer's intention to change, or that the employer has already made the changes, the union can send a demand to the employer that it should refrain from implementing the changes, or a demand that the employer restore the original terms and conditions of employment, until such time as the matter has being dealt with in conciliation.

Should the employer fail to comply with the demand within 48 hours of receiving it, the union can apply for an interdict, restraining the employer from implementing the changed conditions, or the union might call a strike without waiting for the conciliation hearing and without giving the employer the required 48 hours notice of commencement of the strike.

14.6 What options does the employer have?

If the workers refuse to accept the changed terms and conditions of employment, the correct procedure would be that the employer should declare a dispute and refer a dispute for conciliation.

If no agreement is reached at conciliation, the employer can institute a lockout after giving 48 hours at the notice to the union. A lockout simply means that the workers are refused entry to the workplace, in an effort by the employer to force the employees to accept the changes to terms and conditions of employment.

It is a demand by the employer to the workers that they will be permitted to return to work only upon acceptance of the employer's demand that the workers must accept the changes.

It should be noted that if the demand makes provision that if the employees refuse to obey the demand, they will be dismissed, and if the employer does dismiss workers accordingly, such dismissals will be classed as "automatically unfair" dismissals in terms of section 187 of the Labour Relations Act.

14.7 Disputes about organisational rights

Disputes arising about organisational rights may be referred to arbitration by the union, or the union can elect to strike over the matter. Obviously, any arbitration award will be final and binding on both parties.

If the union decided to strike, but the strike fails, then the union must wait for a period of 12 months before they can refer the matter to arbitration. This would apply even if the union gave notice of strike, but then decided not to go ahead with it - the 12 month waiting period would apply.

14.8 Which workers of an employer may go on strike?

In addition to the workers who are directly affected by the dispute with the employer, the union also has the right to call out on strike or its members, and even those employed in other branches or divisions of the employer, and you may not be on strike or contemplating a strike on this issue.

For example, the issue may affect only one branch of the company - but the union can call out its members in other branches to also strike over the issue.
The employees who are called out by the union to join the strike must be employed by the same employer as the affected workers.

Such a strike would form part of the primary strike and would not be a secondary strike, since the strikers are employed by the same employer.

14.9 Workers who may not strike

Workers who are employed in essential services or maintenance services may not take part in a strike.

An essential service is defined as "a service, the interruption of which in danger is the life, personal safety or health of the whole or part of the population."

A maintenance service is defined as "a service, the interruption of which has the effect of material physical destruction to any working area, plant or machinery."

Employers wishing to be declared as an essential service, must make application to the Essential Services Commission (ESC) for a determination that will declare that the employer to be an essential service or a maintenance service, or may declare only part of his business to be an essential or maintenance service.

Examples of essential services are:

- The South African Police Service.
- Municipal traffic services and policing.
- Municipal security
- Emergency health services in the public service.
- Immigration officers in grade 8 and above.
- The South African National defence Force, including civilian personnel in the Department of Defence that support the SANDF.
- The regulation and control of a traffic.
- The supply and distribution of water.
- Fire fighting services.
- Correctional services.
- The services required for the functioning of the courts.
- The generation, transmission and distribution of power.
- Blood transfusion services provided by the South African Blood Transfusion Service.
- The above list is not necessarily exhaustive.

14.10 The termination of the strike

A strike may be terminated by the union, or the strike automatically ends if the demand is met or if the dispute is resolved via some or other agreement.

For example, in one place the workers demanded that the employer abandoned in a staggered shift system, and that the demand that resulted in a strike. The employer did abandon the staggered shift system, but the strike continued. The strike ended when the employer retrenched the striking workers.

14.11 The rights of workers and the union during a protected strike (section 67 LRA)

Workers may not be dismissed for participating in a protected strike. Such a dismissal would be classed as “automatically unfair.”
However, this provision against the dismissal of workers in a protected strike does not prevent the employer for dismissing or otherwise disciplining workers for any misconduct committed during the strike, and the employer may also retrench strikers for genuine operational reasons.

14.12 Financial implications

The employer may not financially penalise striking workers - except that the rule of “no work - no pay” applies. Employers may not withdraw discretionary bonuses and other benefits from workers, and also my not offer financial rewards to non-strikers or may not offer financial reward to employees in an effort to persuade them not to participate in the strike.

The employer is still obliged to provide any payments in kind that the striking employee has the right to receive, such as accommodation, food, transport, or whatever, if the workers request it. This would imply that if the workers do not requested, the employer does not have to provide it.

However, and in our view rather strange, the employer can sue the workers in the labour court for the monetary value of any such benefits that he provided during the strike.

Further, it seems that employers should continue to play its own contributions to life and medical aid policies, housing payments, and pension or Provident funds during the strike because failure to do so would severely prejudice the workers’ rights under such policies and schemes.

By arrangement with the employer strikers may be allowed reasonable access to toilets and water. The employer may not claim any losses from the union for any financial losses incurred by the strike.

Module 15: The unprotected strike

15.1 The employer's rights and remedies during an unprotected strike

15.1.1 Payment of wages or salaries

1. No work = no pay. Workers are not entitled to be paid, even in a protected strike.

15.1.2 Replacement or “scab” labour

2. The employer may employ replacement labour if he wishes to do so. You may also use non-strikers to do the work of the strikers. However, the employer may not dismiss a non-striker who refuses to do the work of a striker. The employer can take disciplinary action - such as a written warning - but he may not dismiss that employee. To do so would constitute an automatically unfair dismissal.

15.1.3 Pickets during an unprotected strike

3. There is a prohibition on picketing during an unprotected strike. The employer or any member of the public may interdict the picket, and the police also can disperse the picketers.

15.1.4 Getting an interdict for the unprotected strike

4. The employer can apply to the labour court for an order restraining the union and the workers from participating in the strike, or even from organising an unprotected strike.

15.1.5 Consultation with the trade union

Even though the employer may have issued the strikers with an ultimatum, instructing them to return to work and resume their normal duties or be dismissed, before instituting any such disciplinary action such as dismissal, the employer should engage in consultation with the union.

The reason for this is so that the employer and the union can agree on measures to persuade the strikers to return to work and possibly avoid dismissal, and to find out from the union what the reason is for the workers embarking on an unprotected strike.

This meeting with the union actually constitutes “giving the strikers a hearing.”

Such a hearing should actually be held before the issue of an ultimatum or after the ultimatum has expired. The ultimatum should be fair and written - a verbal ultimatum is not acceptable.

The ultimatum should state:

a. inform the workers that the strike is unprotected.

b. Inform the strikers that they must return to work and
c. state a specific date and time by which they must return to work, and
d. state what the employer requires them to do - such as “ resume your normal duties.”
e. State what sanction will be imposed - such as dismissal - if the strikers do not obey the terms of the ultimatum;
f. state what disciplinary action - if any - will be taken because they embarked on an unprotected strike.

Module 16: Negotiating with Trade unions

Firstly, let us understand that negotiation takes place around issues to which the union or union members are not entitled in terms of any law.

In other words, there is no law stating that the union members are legally entitled to be given that thing.

Negotiations take place around matters of mutual interest - in other words, matters to which union members are not legally entitled, but which they would like to have. This could include almost anything where no law exists giving a union member or an employee legal entitlement to claim or be given that thing.

16.1 What is negotiation?

Negotiation is a process whereby two or more parties come together, in an effort to settle conflicts or differences in a way that will be beneficial to all the parties. The trade union wants something - and the employer wants something - thus the two parties come together to talk and hopefully reach agreement that will satisfy the wants or needs of both parties.

Negotiation is not “browbeating “, it is not “whipping the other party into submission”, it is not “we’ll show them who's boss.” Negotiation is going to the negotiation table, properly prepared, with the idea of getting your fair share.

16.2 The negotiation table

Unfortunately, judging by the increase in the number of strikes that are occurring, there are too many instances of the parties coming together at the "conflict table" and not at the "negotiation table."

16.3 Reasons for negotiation

We negotiate for many reasons - but the most common reason is centred around minimum wages, increases to wages, and other employment issues affecting the back pocket.

16.4 Requirements for negotiation

There are two main requirements for negotiation.

The first is that both parties must be willing to find a solution, or must be willing to “give and take.”

If a party to the negotiations arrives at the negotiation table with the handbrake firmly applied and locked - there can be no negotiation. Such a situation will end only in conflict.

It must also be possible to reach agreement on whatever matter is to be negotiated. For example, if a particular political situation has placed union members at a

disadvantage, it is not possible for the employer to do anything about that and therefore agreement is simply not possible. This renders any attempt at negotiation quite useless.

16.5 Negotiating a "trade-off"

The negotiation process can also result in agreement being reached on a "trade-off." An example would be where the trade union is demanding five days additional leave per annum, and the employer agrees to it provided that the members agree that they will no longer be paid double time wage rates for Sunday work and public holiday work, but only normal time rates.

16.6 There is no substitute for preparation

Proper preparation is vital - there is no substitute for good preparation.
If your preparation is sloppy, or perhaps you did not prepare at all, your negotiations will collapse.

a. You will have received in advance, a list of demands that the union is making. The list may consist of anything from one item upwards.
b. Analyse the demands carefully, in relation to your situation.
c. Make careful notes of your strategy.

For example, if you are entering into wage negotiations, and the union is demanding 15%, and you can afford only 8%, you should have worksheets and figures to show the union that you can afford only 8%. Also, employees and trade unions hold the belief that the employer's bank balance is a bottomless pit.

Producing figures to show that this is not the case might lead to convincing the trade union and the members that they should "think again." In addition, you might mention that whilst you could give a 15% increase, the money must come from somewhere - and you might be forced to retrench 30 workers in order to provide the money for such a large increase.

In addition, staying with wage increases, part of your strategy should be to ask the trade union to put down on paper their justification for believing that a 15% increase is justified.

16.7 Trade union must justify its demands

The union cannot simply come along and "demand." The employer must insist that the union properly justify their demands. In demanding a wage increase of 15%, it is not acceptable for the union to simply say “ Everything has gone up – transport, petrol, food and everything else - therefore we demand a 15% increase in wages.” That is not acceptable - the union must produce the figures - by what percentage has transport and petrol and food increased over the previous year?

That is what they must show in order to prove that the demand is fair.
Arbitrary demands are not acceptable, and you cannot negotiate on arbitrary demands.

16.8 Who should start the negotiation process?

In fact, it is always the union who starts - they make an approach with certain demands. You must insist that the list of demands must be in writing. You will then prepare for the negotiation meeting, and at the negotiation meeting it will be the union who should start the process by justifying their demands.

16.9 What is your negotiating range?

When you are negotiating financial issues - such as wages, or it might be overtime payment, night shift allowances, payment for public holiday and Sunday work, or whatever, you must have a starting point & a maximum amount beyond which you are not prepared to go. For example, on wage increases you are prepared to start with an opening offer of an increase of 6% on existing wage rates, and the maximum you are prepared to offer is 9,5%.

Have your figures ready to prove to the union that you cannot go beyond 9,5% without going into retrenchment procedures. The union on the other hand, should have their figures ready to prove to you that their demand - whatever it is - is a fair and justified demand.

16.10 The negotiation process

1. Let the union begin - ask them what percentage increase they are looking for. Obviously, they will start with a very high figure - they want to get as much as possible.
2. When they state their figure - let us say 15% - show some reaction.
3. For example, say “OUCH!!” or something like “Wow!! Don't you think that rather high?”
4. Your reaction will tell the union that they are simply way off the mark.
5. If you show no reaction at all, the union would get the message that their demand for a 15% increase does not even surprise you - and therefore they conclude that their demand is reasonable.

16.11 Do not concede too quickly

Stick to your ground. Do not give in to quickly to the union's demands.
The union, of course, will also stick to their ground. If it seems that the negotiations are nearing a deadlocked stage, then rather suggest that the negotiations be postponed to a later date - say one week ahead - to give both sides an opportunity to consider the present stage of the negotiations.

In other words, give the employer time to discuss the situation and at the union's demand at board level, and to give the union and opportunity to meet with their members and to obtain further mandate.

16.12 Avoid a strike situation

You can rest assured that even before coming to the negotiation table, the union has done the spadework regarding a strike. The union will be at that position where the

only thing remaining for them to do would be to give you the statutory 48 hours notice of the commencement of the strike.

Therefore, you must avoid a strike situation - with a strike, it is fact that nobody wins and everybody loses.

16.13 Remember to ask for proof

Remember to ask the trade union to provide you with figures to show that their demand is reasonable - you will need this information to discuss the situation with your board of directors.

In the same way, the union needs your information proving that you cannot possibly comply with the percentage increase demanded - so that they can report this to their members.

16.14 When you reconvene

When you reconvene, make sure that you come back with something new.
Make sure that you come back with something to show that you did in fact have discussions with your board of directors on the matter.

In other words, come back with some sort of proposal, or even come back with an improved offer. In other words, they demanded 15% - you offered 8% - and you now come back with a better offer of 8,75%, plus an increase on the transport allowance, or an increased shift allowance or something of that nature.

16.15 The union should also have a better offer

Similarly, when the union rejoins the negotiating table, they should come back with an improved demand - full example, stating that their members have agreed to a 12% increase instead of 15%. And so you can see that negotiation is "give and take" on both sides.

16.16 The silent technique

Sometimes, it is a good idea to employee the "silent technique."
We refer to the technique sometimes used by a wife on her husband - some or other argument has ensued, and the wife decides to exercise her right to silence.
She remains silent - not even saying simple things like "good morning" or even "good night." Sooner or later, one of the parties will break the silence - and it will usually be the husband.

You can employ the same technique in negotiations - up to a point. Such as saying to the union “We simply cannot meet your demand for a 15% increase - you need to come up with a more realistic figure that we can negotiate on.”

Then remain silent - simply stare at the union official and say nothing. Then after a suitable period of time, say perhaps up to 3 minutes, look at him and say “Well?”
You will usually then get a favourable response - the union will drop their figure.

Alternatively, adopt a stern position, stand up and gather your papers together while standing up, and stating “I need to think about this and discuss it with my directors. We can continue tomorrow morning at 9 AM.”

16.17 Does the Union have a mandate from their members?

It is unfortunately and usually the case that the union officials at the negotiation table do not have a mandate from their members to make any decisions. Full example, let us say that the demand is for 15%, and you offer 11%.

The union officials at the negotiation table do not have the authority to accept your offer - it is necessary for them to consult with the members of the union to obtain a decision.

This unfortunately does lead to delays in the negotiation process because of constant adjournments because the union officials always ask for an adjournment to “caucus with their members.”

Module 17: How to assist employees during a hearing – A guide for shop stewards or employee representatives

Many Chairpersons will agree with me that the most frustrating part of a disciplinary hearing is the lack of preparation by the representative of the accused employee. In many cases it may said that this is a way to frustrate the disciplinary process but I have found that in most of the cases it is merely as a result of a lack of training.

So who must train the Shop Steward; the union or the employer? The answer to this question can be found in section 14 (5) (b):

"Subject to reasonable conditions, a *trade union representative* is entitled to take reasonable time off with pay during working hours –

a. to perform the functions of a trade union representative, and
b. to be trained in any subject relevant to the performance of the functions of a trade union representative."

It is therefore clear that it is the duty of the union to ensure that its representatives are adequately trained in order to effectively assist other members in disciplinary hearings. I cannot comment on the quality of training that is currently provided to trade union representatives but I can confirm that it is very seldom that you will find an adequately trained trade union representative that can effectively participate in disciplinary inquiries.

This was recently confirmed in a disciplinary inquiry for one of my clients when the trade union representative uncompromisingly objected to the company calling witnesses. The representative argued that the initiator's witnesses were waiting outside the hearing room and as such they have in advance been told as to what the hearing was about. According to this representative the witnesses should not have known that they were going to testify at a disciplinary inquiry and they should've been called randomly, without notice and without any preparation by the initiator.

Situations such as the above are not only frustrating but also time consuming and counterproductive. As a result of this incident I compiled some guidelines for shop stewards in terms of disciplinary hearings.

17.1 Easy Aid for accused employees and their representatives to disciplinary hearings

Phase 1 - Employee receives notification of disciplinary hearing:

- Obtain a copy of the company's disciplinary code and familiarize yourself with the procedures outlined in this document.
- You need to ensure the accused employee did get at least 48 hours notice of the hearing or any time in excess of 48 hours as indicated in the company's disciplinary code / procedures.
- Explain the contents of the document to the accused employee and confirm that the accused employee understands the seriousness of the misconduct he or she has been charged with.

- Explain to the accused employee that he or she must be present during the disciplinary inquiry.
- Explain to the accused employee that he or she has the following rights in terms of schedule 8 of the Labour Relations Act; The code of good practice on dismissals:

  i. The right to be assisted by a fellow employee or a trade union representative.
  ii. The right to call witnesses.
  iii. The right to present evidence.
  iv. The right to cross-examine witnesses called by the initiator.

- Request the services of an interpreter in advance if such services will be required during the disciplinary inquiry.
- Make arrangements with the initiator and or the human resources department to have the witnesses released from duty to testify during the inquiry.

Phase 2 - Prepare for the hearing:

- You need to ask the accused employee what he / she believes are the reasons for the company bringing the charges against him / her.
- Ask open ended questions such as when, who, what and why.
- If the accused is indeed guilty; advise him / her that it may count in his / her favour if he / she shows genuine remorse by pleading guilty and ask for forgiveness.
- If the accused is going to plead guilty; prepare circumstances in mitigation. Circumstances in mitigation are factors that should be taken into consideration by the Chairperson in order to determine a less severe sanction. In other words circumstances that would persuade the Chairperson to consider a final written warning instead of a dismissal.
- If the accused believes that he / she is genuinely not guilty, then you will have to prepare a defence for the accused. You will have to present evidence to the Chairperson and call witnesses that will testify in the favour of the accused employee. You cannot force anybody to testify at a hearing, rather get another witness or alternative evidence.

Phase 3 - The hearing:

- The Chairperson will introduce himself and then ask all the parties present to introduce themselves.
- The hearing will normally be recorded.
- The role of the Chairperson is to listen both sides, analyze evidence presented, come to a conclusion as to whether the employee is guilty and also decide on an appropriate sanction.
- The Chairperson may ask questions to obtain clarity on the testimony of a witness or the evidence presented.
- The Chairperson will not allow shouting, threats and general unruliness during the hearing and may remove any party that makes itself guilty of

such behaviour. All requests and objections must be made to the Chairperson.

- The Chairperson will confirm the rights of the accused employee and ask the employee to plead either guilty or not guilty after reading the charges to him / her.
- If the accused employee pleaded guilty the Chairperson will normally ask the accused to explain why he / she pleaded guilty and then give the initiator the opportunity to respond.
- If the accused pleaded not guilty then the initiator will start with an opening statement (short summary of what he / she wants to prove to the Chairperson) where after the employee or its representative will give an opening statement.
- The burden of proof is now on the initiator to prove that the accused is guilty of the misconduct and will present evidence and call witnesses.
- After a witness has testified you may cross examine the witness and the initiator may re-examine the witness.
- Once the initiator has finalized its case the accused employee will be given the opportunity to present evidence and call witnesses. The initiator may cross-examine witnesses and you may re-examine your witness after cross-examination.
- The Chairperson will then ask for a closing statement. The initiator will first give a closing statement followed by the accused's closing statement. A closing statement is a short summary of what you want the Chairperson to remember and take into consideration in deciding whether the accused is guilty of the misconduct. You may not present new evidence during a closing statement.
- The hearing will now adjourn in order for the Chairperson to apply his or her mind to the matter.
- You need to ensure that you and the accused are on time for the hearing and that you will be available until the end of the hearing. It is not advisable ,nor in the interest of the person that you are representing, to ask another employee or shop steward to take over the matter unless you have fully debriefed that person on what transpired earlier during the hearing.
- Documentary evidence must be bundled and the pages must be numbered for easy reference. You will have to give a bundle of the exact same documents to the initiator as well as the Chairperson.
- Remember to only ask questions relevant to the charges. In other words only ask questions and present evidence that will prove that the accused is innocent.
- You may not ask leading questions. In other words you may not tell the witness what you want to hear. A leading question could be:

"It was a Toyota Corolla and it was blue, wasn't it?"

The correct way of asking the question is:

"What was the make and colour of the vehicle?"

- You cannot rely on hearsay evidence. A written statement from a witness is hearsay evidence, unless the witness is present during the hearing to testify. Another example of hearsay evidence is; “I was told by Piet that Jan said Sannie said to Betsie that the following happened.” Betsie (and possibly) Sannie will have to testify at the hearing.
- If 40 employees witnessed an incident you do not have to call all 40 to testify. Three witnesses should be sufficient to prove your point.

Phase 4 – The Chairperson makes his finding:

- If the Chairperson finds the accused NOT GUILTY then the matter is finalized.
- The Chairperson shall ask for circumstances in mitigation and aggravation if the accused is found GUILTY.

Phase 5 – Mitigating circumstances:

- Circumstances in mitigation are factors that should be taken into consideration by the Chairperson in order to determine a less severe sanction. In other words circumstances that would persuade the Chairperson to consider a final written warning instead of a dismissal.

Such circumstances could be

i. Age of the accused
ii. State of health
iii. Number of dependants and their age
iv. Length of service
v. Previous disciplinary record
vi. Degree of remorse
vii. Education
viii. Offer to pay
ix. Self defence
x. Necessity.
xi. Provocation.
xii. Coercion.
xiii. Lack of intent.

- During this phase new evidence may not be presented. You may also not appeal against the decision of the Chairperson at this stage.

Phase 6 – Circumstances in aggravation:

- The initiator will give reasons as to why he / she believes it is necessary for the Chairperson to consider a specific sanction such as a dismissal.
- The Chairperson is the one that decides as to what sanction will be appropriate, taking into consideration the company’s disciplinary code.

Circumstances in aggravation could include the following:

i. Seriousness of the offence.
ii. Circumstances under which it was committed.
iii. Damage to or lack of trust in the employment relationship.
iv. Prior disciplinary record.

Phase 7 - The sanction:

- The Chairperson will adjourn the hearing in order to decide on an appropriate sanction.
- The chairperson will within a couple of days make his / her decision known.

Employers are advised to train their shop stewards on how to effectively participate in a disciplinary hearing. This may be a small investment but could contribute towards healthy industrial relations in the workplace.

17.2 The deregistered trade union

In October 2009 the Department of Labour de-registered UPUSA in terms of section 106(2A) of the Labour Relations Act. UPUSA subsequently appealed against this decision in terms of section 111(3) of the Labour Relations Act.

The union argued that they are not officially de-registered until such time that the appeal application has been decided upon. The department of Labour obviously disagreed with the union and the CCMA was stuck in the middle. Some 194 cases involving UPUSA were referred to the CCMA during the period October 2009 to April 2010 with almost all of them resulting in the same argument from the employers; in terms of the CCMA rules, rule 25 (b)(3) UPUSA was not a registered trade union.

Subsequently the CCMA referred the matter to the Labour Court and the Judge Molahlehi on 27 July 2010 ruled in favour of the respondents in this matter (the Department of Labour and Harmony Gold Mining). Judge Molahlehi said;

“It is therefore my view, firstly that the general common law rule practice that an appeal stays the enforcement of a judgment pending the outcome of an appeal does not apply to decisions made by the Registrar in terms of section 106 of the Labour Relations Act.

In the premises, I make the following order:

It is declared that the appeal against the decision of the first respondent (Department of Labour) cancelling the registration of the second respondent (UPUSA) does not suspend that decision.”

It is important to remember that a deregistered union remains a trade union to which employees may belong but employers do not have to recognize this union in terms of section 21 of the Labour Relations Act; neither may they represent employees at the CCMA.