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# Craig Jessop

HOD LABOUR LAW DEPARTMENT  
- BROWN BRAUDE & VLOK Inc.



NAMA 2019 National Conference



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# SCHEME EMPLOYEES

**Sources of Law and how they find Application in Body Corporates**



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# Introduction

- This Presentation will be divided into two parts.
- 
- **PART ONE : SOURCES OF LABOUR LAW AND DO THEY FIND APPLICATION IN BODY CORPORATES**
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- **PART TWO : A DISMISSAL MUST BE FAIR IN TERMS OF PROCEDURE AND SUBSTANCE**
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- The meaning of Procedural Fairness;
- The meaning of Substantive Fairness.

## **PART ONE : SOURCES OF LABOUR LAW**

In all cases where there is an Employment Relationship, the following Legislation will find application:

- Basic Conditions of Employment Act;
- Labour Relations Act;
- Employment Equity Act;
- UIF;
- Compensation for Occupational Injuries and Diseases Act;
- Occupational Health and Safety Act;
- Contract of Employment

# Basic Conditions of Employment Act

- It provides for the Basic Conditions of Employment.
- It requires that each Employee be provided with a written contract of Employment.
- This Contract of Employment must talk to the essential terms of the contract and must be consistent with the provisions of the Basic Conditions of Employment Act or provide for more beneficial terms in favour of the Employee.
- Otherwise put, an Employee cannot contract out of a term and/or condition of the Basic Conditions of Employment Act.



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- Terms not incorporated into the Contract of Employment will be read into the Contract of Employment.
- Terms normally provided for in a Contract of Employment include the following:
  - Basis of employment, i.e., permanent, temporary, fixed term;
  - General obligations of the Employee;
  - Commencement date of employment;
  - Job description of Employee;
  - Place of work;



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- Flexibility of Employee to perform various duties;
- Hours of work;
- Remuneration and deductions;
- Bonus (optional);
- **Annual leave;**
- Sick leave;
- Public holidays;
- Training – if applicable;
- Reference to Policies and Procedures;
- Searching;



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- Safety;
  - **Termination clause;**
  - Special conditions;
  - Guarantee;
  - Acknowledgement of receipt.
- 
- - Not all these terms are required by the Basic Conditions of Employment Act, but it does lend itself to certainty in terms of mutual obligations.



## • The Labour Relations Act

- This Legislation regulates the employment relationship between an Employer and an Employee.
- In terms thereof provision is made for organisational rights, dispute resolutions, protection of fairness in the work place, processes and procedures to follow in the event of strikes, lock-outs, retrenchments, et.al. and the regulation of fixed-term contracts and protection of permanent employment.

- **The Employment Equity Act**

- This Act prohibits work place discrimination.

- **UIF**

- **COID**

- This constitutes compulsory work place insurance for an accident that has arisen out of and in the course of the employment of an Employee.

- What constitutes an accident arising out and in the course of an employment of an Employee is essentially a question to be decided on the facts of each and every case and is more often than not common sense.
- An Employer in this context means and includes any person who employs an Employee.
- Once there is an employment of an Employee, then and in that event the Employer is obliged to register and pay over dues to the Compensation Commissioner.
- Should an incident thus arise in terms of which an Employee is injured, he may not institute action against his Employer given that the Statute makes provision for compensation via the Compensation Commissioner.

## • THE OCCUPATIONAL HEALTH AND SAFETY ACT

- In accordance with the provisions of Section 8 of the Occupational Health and Safety Act an Employer shall provide and maintain as far as is reasonably practicable a working environment that is safe and without risk to the health of his Employees.
- The use of substance and articles on the work place must be without risk to health and safety.
- Risk Assessments must be prepared.
- Risk must first be eliminated and if not reasonably practicable to do so, must then be mitigated.

- There must be provision of training as to the risks.
- Provision of safe work procedures and health and safety instructions.
- Compliance with safety standards must be ensured at all times and enforced.
- If the Employee commits an offence in terms of the Occupational Health and Safety Act, then and in that event the Employer is deemed to commit the offence at the same time unless the Employer can establish that what the Employee did was without collusion, tacit or otherwise and that the Employer had done everything reasonably practicable from preventing the incident from happening.

# Contract of Employment

- As referred to herein before, this would be the immediate source of the terms of the relationship between the parties.
- These terms cannot be contrary to the Basic Conditions of Employment Act and cannot provide for less favourable terms than set out in the Basic Conditions of Employment Act.

## PART ONE : CONCLUSION

- All these laws talk to an employment relationship.
- Once the Body Corporate thus employs an Employee where the payment is in kind and/or by cash and/or by way of EFT transfers, such payment must be in line with the relevant Legislation and the management of the relationship must be in accordance with the provisions of the Legislation referred to herein before.
- Thus in your capacity as an Employer, a Body Corporate must:

- Comply with the BCEA;
- Comply with the LRA;
- Comply with the Employment Equity Act and thus prevent discrimination;
- Comply with COIDA;
- Comply with OHSA.



- Non-compliance with the Basic Conditions of Employment Act may be policed and monitored by the Department of Labour.
- Non-compliance with the Labour Relations Act is managed through Dispute Resolution mechanisms via the Commission for Conciliation, Mediation and Arbitration and the Labour Courts.
- Non-compliance with the Employment Equity Act is managed via Dispute Resolution mechanisms provided for in the Legislation.
- Non-compliance with COIDA is managed by the Compensation Commissioner at times in consultation with the Department of Labour.
- Non-compliance with the Occupational Health and Safety Act provides for criminal litigation that may result in imprisonment and/or a fine.

## Part Two : A Dismissal must be fair in terms of Procedure and Substance

### • General Application of Discipline

- The Code of Good Practice as set out in Schedule 8 of the Labour Relations Act recognises that Employers and Employees should treat each other with mutual respect.
- A premium is placed on both employment justice and the efficient operation of business.
- While an Employee should be protected from **arbitrary action**, Employers are entitled to **satisfactory** conduct and work performance from their Employees. (Schedule 8, Item 1 (3)).
- In recognition of these principles the Code sets out a basic guideline as to fair reasons for dismissal.

- *“A dismissal is unfair if it is not affected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the Guidelines set out below.” (Item 2 (1))*
- The Code recognises three (3) grounds for termination of employment:
  - The conduct of the Employee;
  - The Capacity of the Employee;
  - Operational requirements of the Employer’s business.
- The application of discipline is particular to any employment relationship.

- It makes no difference whether that employment relationship is casual, temporary, fixed term and/or permanent.
- The general application of discipline in any employment relationship is guided by Disciplinary Codes.
- The importance of the Code is a direct statement to the Employees of that which the Employer finds acceptable and that which the Employer finds unacceptable.
- It should also provide the Employees with an indication of what to expect in the event of contravention of various rules.
- In general terms the application of discipline should be progressive.

- This means that it should move through various warnings resulting ultimately in dismissal.
- There may be some cases on their facts justify dismissal first up and others which warrant the progressive approach to discipline.
- The Courts have endorsed the concept of progressive or corrective discipline.
- The purpose of discipline is a means for Employees to know and understand what standards are required of them.
- Efforts should be made to correct behaviour through a system of graduated disciplinary measures such as counselling and warnings prior to dismissal.

- In principle, the number of disputes that have come my way have hallmarks of the failure to apply corrective discipline.
- That means that by the time the problem arrives upon the Lawyers desk, the Employer has already missed various opportunities to apply the progressive discipline.
- However, the reality is that the relationship by that point in time has become untenable.
- Had progressive discipline however been applied, then and in that event dismissal could normally follow.
- The failure to apply progressive discipline, however, has led to the position where the parties can no longer tolerate one another and dismissal should follow in circumstances where progressive discipline has not yet been applied.

- The failure to apply discipline therefore places the Body Corporate at risk for and in respect of litigation.
- Shortcuts are then taken to end the employment relationship in circumstances where the Employee should be given a final opportunity to correct his behaviour.
- **Requirement for Substantive Fairness**
  - Formal procedures do not have to be invoked every time a rule has been broken or a standard is not met.
  - Informal advice and correction is the best and most effective way for an Employer to deal with minor violations of ill discipline.
  - Repeated misconduct warrant warnings which in themselves should be graded according to degrees of severity.

- More serious infringements or repeated misconduct may call for a final warning or other action short of dismissal.
- Dismissal should be reserved for cases of serious misconduct and repeated offences. (Item 3 (3) Code of Good Conduct)
- Generally it is inappropriate to dismiss an Employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.
- The examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the Employer, wilful endangering of the safety of others, physical assault on the Employer, a fellow Employee, a client or customer and gross insubordination.



- Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of Section 188.
- When deciding to impose the penalty, the Employer should in addition to the gravity of the misconduct consider factors such as:
  - The Employee's circumstances – length of service – previous record – personal circumstances;
  - The nature of the job;
  - The circumstances of the infringement.
- The penalty of dismissal should be applied consistently, both historically and contemporaneously.

- **Requirements for Procedural Fairness**

- *“Normally, the Employer should conduct the investigation to determine whether there are grounds for dismissal.*
- *This does not need to be a formal Enquiry.*
- *The Employer should notify the Employee of the allegations using a form and language that the Employee can reasonably understand.*
- *The Employee should be allowed the opportunity to state a case in response to the allegations.*
- *The Employee should be entitled to reasonable time to prepare the response and to have the assistance of a Trade Union Representative or a Fellow Employee.*

- *After the Enquiry, the Employer should communicate the decision taken and preferably furnish the Employee with written notification of that decision.”*

- **Types of Dismissal**

- Misconduct
- Poor performance
- Incapacity
- Operational Requirements

- Each one has an established set of principles against which the fairness or otherwise is adjudicated.
- Is it bad performance?
- Is it misconduct?
- Is it incapacity?
- Is it Operational Requirements?

## CONCLUSION

- Although the Trustees are not paid for the time that they spend administering the interests of the Body Corporate, non-compliance with Legislation will no doubt place them at risk.

**Craig Leonard John Jessop**  
**Brown Braude & Vlok Inc.**