What is an unfair labour practice?

Section 23 of the Constitution of the Republic of South Africa, 1996 states that everyone has the right to fair labour practices.

Everything that an employer does that seems unfair will not constitute an "unfair labour practice". There is a "closed list" of unfair labour practices and any unfair conduct of an employer which does not expressly and specifically feature in that list cannot be classified as an "unfair labour practice".

In terms of section 186 of the Labour Relations Act 66 of 1995 (LRA), an unfair labour practice can only be any unfair conduct of an employer concerning:

- Promotion;
- Demotion;
- Probation;
- Training;
- The provision of benefits;
- Unfair suspension;
- Unfair disciplinary action other than dismissal;
- A failure to reinstate / re-employ a former employee in terms of any agreement to do so;
- An occupational detriment other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000.

An unfair dismissal can never be an unfair labour practice.

Unfair labour practices focus on what the employer does in respect of the employee's working life, during the course of the employment relationship. It is not enough that the employee alleges an intention on the part of the employer to do something – the unfair act must already have taken place. If the employment relationship ended (for whatever reason) before the alleged unfair act took place, the employee cannot claim that he or she has been subjected to an unfair labour practice.

An employee cannot commit an "unfair labour practice" against an employer.

In terms of section 191 of the LRA, if there is a dispute at the workplace regarding an unfair labour practice, an employee may lodge a dispute with the CCMA or the relevant bargaining council. The employee should first attempt to deal with the matter at the workplace by lodging a grievance.

Unfair labour practice: Promotion

As a general rule, an employer may appoint or promote employees as it deems fit.

A promotion consists of moving or elevating an employee to a higher position or post. It is usually accompanied by an increase in status, salary, possibly an increased number of subordinates *etc.*

A promotion will only be unfair if the employer acted unreasonably, in a discriminatory manner or by following an unfair procedure in exercising its discretion to promote an employee.

The managerial prerogative to promote is generally respected unless bad faith or an improper motive such as discrimination is present. The employer must come to a decision to promote, in a fair manner.

Examples of unfairness in promotion are: The employee was unfairly denied an opportunity to compete for the post; the discretion to promote was exercised arbitrarily, unjustifiably, unreasonably or in a biased manner.

Examples of situations **which do not amount to unfair labour practices (promotion)**:

- A transfer (at the same level) from one department to another is not a promotion;
- Job-grading disputes;
- Disputes about notch increases;
- Acting in a higher position does not automatically create a right to be promoted to that position; and
- Appointing an outsider to a position and not promoting a current employee.

CHECKLIST TO ENSURE FAIR PROMOTION PRACTICE

(a) The advertisement must contain accurate information about both minimum requirements and preferred experience/competencies, and these must be necessary for the job.

(b) The assessment of the candidates at the interview must relate only to the competencies required for the job.

(c) The necessary qualifications or inherent requirements for the job may not be changed after the advertisement.

(d) The successful candidate should be the person who not only meets the minimum requirements, but who scores highest in the assessment.

(e) If there is deviation from the highest scored candidate, there must be a sound reason, either operationally or for employment equity, to justify this.

(f) If there is deviation from the highest scored candidate, the successful candidate must possess the competencies needed for the job.

(g) The employer must be able to set out the reason(s) why a particular candidate is unsuccessful.

(Rycroft, A *Rethinking the requirements for a fair appointment or promotion* (2007) 28 *ILJ* 2189)

Unfair labour practice: Demotion

A demotion occurs if the change to the employee's terms or conditions of employment is such that they result in a material reduction of the employee's remuneration, responsibilities or status. A demotion does not occur merely because the employee is placed in a post involving slightly different work, especially when that work falls within the scope of the employee's duties. The mere fact that an employee's title is changed, is not necessarily proof of a demotion; something more is required. The change in the employee's position in the organisation must also entail a loss of benefits or a lowering of the employee's status.

An employer may demote an employee, provided that this is done fairly and after consultation with the employee concerned, for a valid reason.

Unfair labour practice: Probation

An employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed. The purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. The period of probation must be determined in advance and it must be for reasonable period. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment. An unreasonably long period of probation may constitute an unfair labour practice.

An employer may extend the period of probation for a reason that relates to the purpose of probation. The period of extension should not be longer than necessary to achieve its purpose.

See how to guide: Probation

Unfair labour practice: Training

This type of unfair labour practice relates to inconsistency, arbitrariness or lack of due process which infringes the rights of the employees, in respect of training to which employees have a right based on a contract. It does not relate to a mere wish or demand to be trained.

Unfair labour practice: Provision of benefits

Falling within the scope of this term is unfair conduct of an employer related to the provision of benefits, for example, discretionary bonuses, housing allowances, medical aid, retirement benefits and other allowances.

What is a benefit?

A benefit must be of a material nature, have monetary value for the employee and must constitute a cost to the employer. It is something apart from remuneration received by an employee. A benefit is therefore an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. It refers to existing advantages or privileges to which an employee is entitled. There is no legal definition of what would constitute a "benefit".

What is not a benefit?

The following are examples of what is not considered to be a benefit:

- Wages;
- Remuneration;
- A standby allowance;
- Accumulated leave;
- A claim for an increase in salary;
- An acting allowance; and
- A *pro-rata* bonus.

A subsistence and / or travel allowance does not constitute a benefit, if it is paid out only to reimburse the employee for expenses incurred during the course of carrying out their duties.

Generally, where an employer has exercised its discretion in refusing the employee access to a benefit, the fairness of that decision could be questioned and a dispute declared relating to an unfair labour practice concerning the provision of the benefit.

A dispute of interest (where an employee does not have a right to something in terms of a contract, legislation or a collective agreement) where employees simply want to improve existing benefits or acquire a new benefit, should be dealt with in terms of the collective bargaining structures and negotiation and cannot be viewed as unfair labour practices relating to provision of benefits.

An employee cannot use the unfair labour practice route to establish new contractual terms.

Unfair labour practice: The unfair suspension of an employee

Suspension envisaged under this type of unfair labour practice is where it has been used as a preventative, precautionary measure, pending an investigation.

The suspension of an employee pending a disciplinary enquiry is not meant to be punitive. No misconduct has been proved. The suspension is normally imposed to conduct an investigation and to ensure that the investigation is not compromised and that it is completed in time. An employee should not be suspended unless there are grounds for believing that the employee has committed serious misconduct and there is good reason for excluding the employee from the workplace. Employers should refrain from hastily resorting to suspending employees when there is no valid reason to do so. Suspensions have a negative impact on the affected employee and may prejudice his/her reputation, advancement and job security.

An employee is entitled to be heard before s/he is suspended in such circumstances. An employee must be given an opportunity to give reasons why s/he should not be suspended. The employer must consider those reasons, but the final decision to suspend remains that of the employer.

An employee is entitled to a speedy and effective resolution of a dispute. An employer must not abuse the process of precautionary suspension. The investigation must be concluded within a reasonable time, taking all the relevant factors into consideration and the employee must be informed without undue delay about the process that the employer is initiating. The disciplinary hearing must be initiated within a reasonable time of the employee being suspended.

An employee is entitled to full pay during the period of this type of suspension.

See template: Precautionary suspension

Unfair labour practice: Any other unfair disciplinary action short of dismissal

Examples of unfair disciplinary actions short of dismissal are unfair warnings, unfair suspension without pay and unfairly imposing short time on an employee as a disciplinary measure and not based on operational requirements.

Suspension without pay is a permissible penalty where dismissal would have been justified, were it not for mitigating factors.

See template: Record of disciplinary sanction

Unfair labour practice: A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement

This form of unfair labour practice requires the existence of an agreement that imposes an obligation on the employer to re-employ an employee. Such agreement usually requires the employer to rehire a dismissed employee if and when "suitable" vacancies arise. Whether a vacancy is "suitable" depends on the facts of each case. It may be unfair to hire a new employee instead of rehiring a previous employee in terms of an agreement.

Unfair labour practice: An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000 (PDA), on account of the employee having made a protected disclosure defined in that Act.

This form of unfair labour practice is designed to protect "whistle-blowers" who disclose information which show the employer's involvement in, for example, a criminal offence, failure to comply with the law, endangering an employee's safety or the environment, or discriminatory practices.

It deals with actions taken by an employer against an employee, amounting to an "occupational detriment", other than dismissal, in circumstances where the employee believes that in disclosing the information, s/he deserves protection and the employer should not have taken action against him/her.

Note that the protection extends to individuals who currently or previously worked for the employer; also independent contractors, consultants, agents and those rendering services to a client whilst being employed by a temporary employment service (labour broker).

An 'occupational detriment' occurs where an employee makes a protected disclosure and the disclosure results in that employee:

- Being subjected to any disciplinary action;
- Being dismissed, suspended, demoted, harassed or intimidated;
- Being transferred against his or her will;
- Being refused a transfer or promotion;
- Being subjected to a term or condition of employment or retirement which is altered or kept altered to his/her disadvantage;
- Being refused a reference, or being provided with an adverse reference, from his/ her employer;
- Being denied appointment to any employment, profession or office;
- Being threatened with any of the actions referred to above; or
- Being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

NOTE: In the amendments to the PDA on 2 August 2017, two new administrative obligations were created:

(1) Employers *must* formulate and document internal whistle-blowing procedures, and must bring this to the attention of all employees; and

(2) employers are required to respond in writing to a disclosure within 21 days and keep the employee informed of steps being taken in relation to investigating the matter.

