

MEMO

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EXAMINERS : MRS ME ROSTOLL
MODERATOR : DR E FOURIE
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GENERAL INSTRUCTIONS TO STUDENTS

- 1) Answer all questions.
 - 2) Answer all questions in the SCRIPT provided.
 - 3) Write legibly.
 - 4) Number your answers carefully.
 - 5) Leave a line open between each answer (for example, between questions 1.1 and 1.2).
 - 6) Write in full sentences where applicable. Do NOT make use of “SMS speak”.
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QUESTION 1

1.1 An employment contract may terminate in a number of different ways. List two ways and briefly explain what each one entails. (4)

- **The dismissal of the employee: (1)**
 - Dismissal is regulated by the LRA and is required to be for a fair reason and in accordance with a fair procedure. The employment contract can also be terminated in other ways. (1)
- **The giving of notice: (1)**
 - An employment contract generally specifies a period of notice that must be given by the employee to terminate the employment contract.
 - In the absence of such a contractual provision - BCEA regulates the period of notice
 - four weeks must be given if the employee has been employed for one year or more;
 - two weeks, if the employee has been employed for between six months and one year;
 - one week, if the employee has been employed for six months or less.
 - However, the LRA regards the termination of an employment contract to be unfair, irrespective of the giving of notice, if there is –
 - no fair reason for the dismissal or
 - if an unfair procedure is followed. (1)
- **Expiry of a fixed-term contract: (1)**
 - When the period of time specified in a fixed-term contract expires, the contract automatically terminates.
 - In such circumstances, the employee cannot claim to have been dismissed, as the contract lapses due to the passing of time and not due to an act of the employer. (1)
- **Retirement of an employee: (1)**
 - The contract of employment terminates automatically when the employee reaches the agreed or normal retirement age
 - If employee continues to work after retirement age, the employer's right to terminate the contract remains unchanged and the contract can be terminated at any time after such date without following any dismissal procedures. (1)
- **Death of an employee or death or winding-up of employer: (1)**
 - The employment contract terminates automatically upon the death of the employee or the death or winding-up of the employer. (1)
- **Resignation of the employee: (1)**
 - The employment contract will terminate if the employee resigns.
 - Once an employee resigns and the resignation is accepted by the employer, neither party can change their mind and revoke such agreement.
 - However, if the employee resigns because working conditions become intolerable or unbearable as a result of unfair conduct on the part of the employer
 - Resignation may be regarded as a constructive dismissal and the employee is protected by the LRA. (1)
- **Automatic termination of the employment contract: (1)**

- Public servants may have their employment contracts automatically terminated when they absent themselves from work without permission for a stipulated number of days (one month for public servants generally and 14 days for teachers).
- Employment contracts terminate automatically - they are not dismissed and they have no remedy in terms of the LRA.
- Public Service Act 103 of 1994 grants a right to challenge on review the employer's decision not to reinstate them.
- These provisions only apply to the public sector. (see chapter 21)
- Employers in the private sector may not include such provisions in their employment contracts. (1)
- *Impossibility of performance: (1)*
 - If either the employer or the employee becomes permanently incapable of performing their obligations due to no fault of either party, the contract will terminate.
 - For example, if an employee is imprisoned for life, his or her employment contract will terminate.
 - However, if the decision to terminate can be attributed in some way to the employer, then it would constitute a dismissal and would have to comply with the dismissal provisions of the LRA (1)

- 1.2 A former employer, who is a booking agent and events planning company that specialised in providing artists and celebrities for appearance at corporate functions, attempted to enforce a restraint of trade clause against its former employee. The employer requested the Labour Court to restrain the employee from competing with its business for a period of three years. The employer argued that it had a legitimate interest in its relationships with the artists it represented and that such relationships needed to be protected by the enforcement of the restraint provision. The employee argued that the services of the artists were available to any person who wished to hire them and that the employer did not have an interest to protect. The employee also argued that, as the entertainment industry was the only industry in which he had skills and experience the restraint would deprive him of his livelihood.

Advise the employee with regards to his chances of success against his employer by referring to –

- 1.2.1 the general purpose and operation of a restraint of trade clause within South African; and (5)
- A restraint of trade clause may be included in an employment contract. (1)
 - This clause prevents employees from competing with an employer's business interests after their employment ends. (1)
 - A restraint provision applies regardless of whether the employee resigns or is dismissed. (1)
 - Such clauses are generally lawful, provided that they are reasonable. (1)
 - Employees may not unlawfully use trade secrets or knowledge gained during employment with the employer to further their own or another employer's interests. (1)
 - However, the employee is entitled to use general skills and knowledge gained during employment. (1)

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- A contractual clause that prevents a former employee from earning a livelihood would be contrary to public policy and unenforceable. (1)
- In deciding whether it is lawful and reasonable, a court will consider (1)
- if the employer has a legitimate interest that ought to be protected (1)
- whether the interest is being negatively affected or prejudiced (1)
- The court is then required to weigh up the conflicting interests of both the employer and employee in deciding whether to enforce the restraint clause. (1)

Any five of the above points

- 1.2.2 the judgment handed down by the Labour Court in the case of *David Crouch Marketing v Du Plessis*. (3)

The court held:

- The Labour Court held that it is not in the interest of public policy to enforce a restraint of trade clause that prevents one of the parties from earning a living. (1)
- The clause should not be used to eliminate competition, but only to protect an interest. (1)
- The court concluded that the employer did not have a protectable interest, as the pool of artists that it represented was accessible to the public. (1)

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QUESTION 2

Joanne works as a hostess at The Crown Oriental restaurant. She works six days a week. Her ordinary hours are from 12h00 to 22h00. She is allowed to take a 45-minute meal break at 18h00. She gets 15 consecutive days' annual leave, which she is entitled to take during February or March. At night, Joanne has to walk three kilometres back to her house as there is no public transport. Joanne is unhappy about her employment conditions. After she told her employer that she was pregnant, he remarked that she would only be entitled to two months' unpaid maternity leave. Explain in detail to Joanne what the conditions of her employment will be with regard to the following:

- 2.1 Annual leave; (4)
- The provisions of the BCEA on leave are not applicable to persons who
 - work less than 24 hours in a month, or
 - who are entitled to more leave than provided for in the BCEA (unless the parties agree otherwise)
 - An employer must grant an employee
 - at least 21 consecutive calendar days' paid annual leave for each year worked, or
 - by agreement one day's paid leave for every 17 days worked, or
 - by agreement one hour's paid leave for every 17 hours worked.

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- This arrangement, in making provision for pro rata leave, applies to all employees who work 24 hours or more in a month.
- The employer must grant the leave within six months after completion of the leave cycle of 12 months.
- The employer may not require the employee to take annual leave during any other leave period (annual leave may thus not be taken in the same period as maternity leave or sick leave).
- The BCEA provides that the employer must pay the employee for any period of annual leave that the employee has not taken upon termination.
Any four of the above

2.2 Maternity leave; (5)

- An employee is entitled to at least four consecutive months' unpaid maternity leave.
- An employee may commence maternity leave at
 - any time from four weeks before the expected date of birth, unless otherwise agreed, or
 - from a date which a medical practitioner or midwife certifies is necessary for the employee's health or that of the unborn child.
- An employee may not work for six weeks after the birth of her child unless a medical practitioner or midwife certifies that she is fit to do so.
- The Unemployment Insurance Act 63 of 2001
 - makes provision for the payment of maternity benefits calculated on the wage of the employee according to a graduated scale.
 - the higher an employee's wage, the smaller the percentage of the benefit that will be paid out.
- In terms of the LRA, an employer will be understood to have dismissed an employee if it refuses to allow her to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment.
- Employer will then have to prove that the dismissal was fair.
- The LRA provides that a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy.
- No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.
- During the employee's pregnancy and for a period of six months after the birth
- employer must offer her suitable alternative employment if she performs night work or
- if her work poses a danger to her or her child's health and safety.
- This is only required of the employer if it is practicable to do so.
Any four of the above

2.3 Night work; (4)

- Night work is described as work performed after 18h00 and before 06h00 the next day. (1)
- An employer can only require or permit an employee to perform night work by agreement with the employee. (1)
- The employee must also be compensated by the payment of an allowance or the reduction of working hours at another time. (1)
- If public transport is not available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift, the employer must make provision for transport (1)

- 2.4 Meal intervals and daily and weekly rest periods; (4)
- An employee is entitled to a meal interval of one hour after working continuously for five hours.
 - An employee is normally not paid for a meal interval.
 - A written agreement between employer and employee may reduce the meal interval to not less than 30 minutes.
 - The employee will benefit from this agreement since he or she could go home 30 minutes earlier at the end of the working day.
 - If the employer expects the employee to work during the meal break (this can only be required if the work is urgent and there is no other employee to do the work), the employee must be remunerated.
 - If the employee works less than six hours, an agreement in writing may dispense or do away with the meal interval.
 - An employee must enjoy a daily rest period of at least 12 hours between working days.
 - A weekly rest period of at least 36 hours must include a Sunday, unless agreed otherwise.
 - A daily rest period may by written agreement be reduced to ten hours if the employee lives on the premises and enjoys a lunch break of at least three hours.
 - The type of work done by domestic workers and farm workers is accommodated by this provision.
 - A written agreement can also make provision for the reduction of the weekly rest period to only 28 hours, provided that the rest period in the following week is extended equivalently.

Any four of the above

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QUESTION 3

The vice-chancellor of a local university overruled the selection committee's recommendation that O'Brien, a white woman, be appointed to a junior lecturing post in which she had acted in a temporary capacity for two years. The vice-chancellor instructed the committee to reconsider its decision in the light of the university's affirmative action policy. The committee reaffirmed its view that Mrs O'Brien was the best candidate, but in light of the vice-chancellor's instruction, the committee recommended the appointment of a black male candidate who had been interviewed. O'Brien claimed that she had been dismissed from the post and that she had been discriminated against as an applicant for employment. The university did not dispute that there had been discrimination on the basis of her race, but sought to justify it on the basis that it had applied its affirmative action policy in selecting the black male applicant.

PLEASE NOTE – when a question contains an assumption that assumption is only applicable to the particular question unless the context indicates otherwise.

- 3.1 Briefly explain what the constitutional concept of the right of equality is based on within an employment law context. (3)
- the achievement of equality requires
 - certain groups or persons to be treated differently (1)

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- **in order to ensure that they attain full equality (1)**
 - **with others who have not been disadvantaged (1)**
- 3.2 Discuss the primary purposes of the Employment Equity Act 55 of 1998? (4)
- **to eliminate discrimination in the workplace and, on the other hand, (1)**
 - **to make provision for affirmative action measures (1)**
 - **to redress disadvantages in employment experienced by designated groups & (1)**
 - **to ensure their equitable representation in all categories and levels in the workplace. (1)**
- 3.3 There is other legislation that also supplement the Employment Equity Act 55 of 1998 in regulating equality and discrimination within the employment relationship in South Africa. Name the relevant supplementary legislation. (2)
- **Labour Relations Act 66 of 1995 (1)**
 - **The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (1)**
- 3.4 The Employment Equity Act 55 of 1998 as well as the Labour Relations Act 66 of 1995 provide the employer with a number of possible defences or justification grounds against a claim of unfair discrimination. List these defences. (3)
- **affirmative action** consistent with the purpose of the EEA; (1)
 - distinguishing, excluding or preferring any person on the basis of an **inherent requirement of the job**; and (1)
 - the **normal or agreed retirement age** (this defence only applies to discriminatory dismissals). (1)
- 3.5 Refer to the set of facts given above. With reference to the case of *McInnes v Technikon Natal* discuss O'Brien's position in law and whether she will be successful with her claim against the university. (4)

The court held:

- **The Labour Court found that the employer's affirmative action policy did not regard race as the sole criteria where two persons were "appointable". (1)**
- **It did not justify a decision not to appoint the incumbent (1) who was the better candidate and was able to continue with the work she was already doing, particularly as the appointee had no previous teaching experience. (1)**
- **The Technikon accordingly failed to justify the discrimination as a measure designed to advance persons disadvantaged by discrimination. (1)**

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QUESTION 4

Superfine Textiles had in the past granted bursaries to the children of employees who enrolled for tertiary education. Although it was always made clear to employees that bursaries were granted at the discretion of management, applications for bursaries were never turned down. When Mark Williams' daughter passed matric with an average of 68% in 2017, he applied for a bursary for her to study law at a South African university. Management informed Mark that his daughter did not qualify as they had decided to award bursaries only to those pupils who attained an average of at least 70% in the matric exam. This decision was justified by explaining that as a result of a downturn in the profitability of the business, it was no longer affordable to grant bursaries to all who applied. Mark alleged that the employer had committed an unfair

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labour practice relating to a benefit. Management's view was that since there was no contractual entitlement to a bursary, their decision could not be regarded as an unfair labour practice and that the employee should commence strike action if he so wished, since the current dispute was a dispute of interest. Mark needs advice as to whether he can refer the dispute to the CCMA.

- 4.1 South Africa's labour legislation makes provisions for unfair labour practices committed by an employer during the course of the employment relationship. Identify the relevant legislation that regulates such practices? (1)

Labour Relations Act, 1995

- 4.2 Refer to your answer in question 4.1 above. How is an unfair labour practice defined in terms of the said/identified legislation? (4)

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;**
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;**
- (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and**
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act (Act 26 of 2000) on account of an employee having made a protected disclosure as defined in that Act.**

- 4.3 What is the difference between a dispute of right and a dispute of interest? Briefly motivate your answer by giving an example of each to illustrate the difference. (4)

- Dispute of interest: Generally a dispute about a more beneficial term or condition of employment (for example, a higher wage) to which employees have no right, but which employees want to gain from their employer; this type of dispute is generally left to collective bargaining to be solved and not to arbitration or adjudication.**
- Dispute of right: A dispute about an existing right to which employees are already entitled (for example, employees have the right not to be unfairly dismissed - if an employee is unfairly dismissed, the dispute will be referred to the CCMA for conciliation and if that fails, arbitration); employees may generally not strike about disputes of right as there are forums such as the CCMA and Labour Court to resolve these kinds of disputes.**

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QUESTION 5

- 5.1 Employees are not protected from being dismissed altogether. However, a dismissal will be justified if it is regarded as fair (in other words it was effected for a fair reason and in accordance with a fair procedure). What possible reasons can be given that would deem the dismissal to be fair? (3)

- Fair reasons for a dismissal are limited to only three possible reasons:**

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- an employee's misconduct; (1)
- an employee's conduct or capacity (often referred to as incapacity or poor work performance); or (1)
- the operational requirements of the employer (often referred to as a retrenchment). (1)

5.2 In *Solid Doors (Pty) Ltd v Theron NO*, the Labour Appeal Court held that three requirements must be present in order to establish a constructive dismissal. Identify these requirements and critically discuss what each one entails. (6)

- The employee must have terminated the contract of employment. (1)
 - The first requirement implies that claims for constructive dismissal and conventional dismissal are mutually exclusive and cannot be pleaded as alternatives.
 - If the employee resigns because he cannot stand working in a particular workplace, or with certain colleagues, or for a certain company, it is not constructive dismissal if the resentment is not due to the employer's conduct.
(1 mark for discussing the requirement)
- The reason for termination of the contract must be because continued employment had become intolerable for the employee. (1)
 - Generally, the employee would be required to exhaust all possible internal remedies before resigning and claiming a constructive dismissal.
 - Dismissal must have been the last resort (see *Ntsabo v Real Security CC*).
(1 mark for discussing the requirement)
- It was the employee's employer who made continued employment intolerable. (1)
 - There must be a causal connection between the employer's conduct (act or omission) and the employee's resignation.
 - The conduct of the employer must be examined as a whole so as to determine whether the working conditions were such that an employee could reasonably have put up with it.
(1 mark for discussing the requirement)

5.3 Indicate in each of the following scenarios whether they amount to constructive dismissal? Motivate your answer in each instance.

5.3.1 Mandy is suspected of theft and her employers wish to search her handbag. She refuses to let them and then resigns in anger. (2)

This would not be constructive dismissal (1) as Mandy's employer is entitled to search her bag if he suspects her of theft. Her working relationship was not rendered intolerable as a result. (1)

5.3.2 Sue's employer tries to kiss her at an office party. She resigns the following morning. (2)

This would be sexual harassment (1) and the resignation would constitute a constructive dismissal. (1)

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QUESTION 6

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6.1 Which dispute resolution forums may be approached by an employee who believes that his dismissal was automatically unfair? In your answer indicate the time periods that must be complied with. (6)

- **Refer the dispute to the CCMA (1) or the bargaining council (1) within 30 days of the date of the alleged unfair dismissal on order to conciliate the dispute (1)**
- **The CCMA or BC then has 30 days from the date of referral to conciliate the dispute (1)**
- **If the dispute remains unresolved after conciliation has failed, the commissioner must issue a certificate of non-resolution (1)**
- **The parties are then free to refer the matter to the Labour Court. (1)**

6.2 When will a dismissal be automatically unfair? (2)

- **Section 187 regulates this and states the following –**
 - **In dismissing an employee, the employer acted contrary to section 5 of the LRA (which is primarily concerned with an employee's right to freedom of association); or (1)**
 - **The reason for the dismissal is a reason that falls into a list of particularly despicable reasons listed in the LRA. (1)**

6.3 Indicate in each of the following scenarios whether they amount to an automatically unfair dismissal. Motivate your answer in each instance.

6.3.1 Mary misses 20 days of work during her pregnancy as she is very weak and nauseous. She is dismissed as a result. (2)

Mary is dismissed for reasons related to her pregnancy and her dismissal will be automatically unfair. As she missed only 20 days of work, which is within her sick leave entitlement, her dismissal cannot be justified on this basis. (2)

Marker apply discretion

6.3.2 Sipho leaves work early to attend a union meeting, without the permission of his employer. He is dismissed. (2)

Sipho is dismissed for leaving work without the permission of his employer and not for union membership. This will not be automatically unfair. It may be unfair if it is found that his misconduct was not sufficiently serious to justify dismissal. (2)

Marker apply discretion

6.3.3 The workers at the company embark upon a strike, without following proper procedure. They are all dismissed. (2)

It is acceptable to dismiss unlawfully striking workers. Only if lawfully striking workers were dismissed would it be an automatically unfair dismissal. (2)

Marker apply discretion

TOTAL

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