

MEMO

SUBJECT NAME : **INTRODUCTORY LABOUR LAW**
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DATE : **EXAMINATION – JUNE 2019**
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WEIGHT : **50 : 50**
TOTAL MARKS : **80**

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 The common-law contract of employment attributes several duties to employees. List these duties. (5)

- **The duty to enter and remain in service: (1)**
- **The duty to maintain reasonable competence: (1)**
- **The duty to further the employer's business interests: (1)**
- **The duty to be respectful and obedient: (1)**
- **The duty to behave appropriately (1)**

1.2 An Argentinian employee was dismissed by his South African employer when his residence permit expired. In order to justify the dismissal, the employer relied upon the Immigration Act 13 of 2002, which prohibits the employment of a foreign national without permission. The employer argued that the definition of "employee" contemplates or implies a valid contract of employment and that, as a result, the Labour Relations Act 66 of 1995 did not apply to the employee. Advise the employee with regards to his chances of success against his employer by referring to the judgment handed down by the Labour Court in the case of *Discovery Health Ltd v CCMA*. (8)

- **The Constitution guarantees "everyone" the right to fair labour practices (1)**
- **The law has been uncertain whether this protection extends to workers engaged in illegal contracts of employment (1)**

The court held:

- **The Labour Court considered whether the definition of employee applies only to persons employed in terms of a valid contract of employment and held that the absence of the required permission to work in South Africa did not make the employment contract invalid. (1)**
- **It noted that the Immigration Act only made the employer (and not the employee) criminally liable for such a breach and that the legislation did not stipulate that the employment contract would be void. (1)**
- **The court held that the definition of employee in the LRA does not refer directly to a contract of employment and that the LRA should be interpreted to give effect to the constitutional right to fair labour practices and the purpose of the LRA. (1)**
- **The court concluded that the employee was entitled to the protection of the LRA. (1)**
- **It is clear that a valid and enforceable contract of employment is not necessary for workers to be classified as employees and protected by the LRA. (1)**
- **The substance of the employment relationship as opposed to the legal form it takes will determine the rights and remedies of the parties. (1)**

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QUESTION 2

Thabo is a shop assistant who works six days per week from Monday to Saturday. He earns R9500 per month. His employer also requires of him to work on public holidays and occasionally on a Sunday, but does not pay him any extra remuneration. Thabo also became ill and he had to undergo surgery to remove his appendix. Upon informing his employer that he cannot work due to the surgery his employer insisted that he would have to take unpaid annual leave for the

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days he will be absent from work. As Thabo did not receive a written contract from his employer he wants to know what conditions of employment are applicable to him.

Explain in detail to Thabo what the conditions of his employment will be with regard to the following:

2.1 Overtime; (4)

- **The employer may not require or permit an employee to work overtime except in accordance with an agreement (oral or in writing) (1)**
 - **The agreement may be included in the employment contract at the beginning of the employment relationship. (1)**
 - **The employee may not work more than ten hours' overtime in one week and, in any event, an agreement as to overtime may not require an employee to work more than a total of 12 hours in one day. (1)**
 - **A collective agreement may extend the period of overtime work to 15 hours in a week, but only for a period of two months in any period of 12 months. (1)**
 - **The Labour Court, in *Maneche v CCMA*, has held that employees may not be required to work more hours than the maximum overtime prescribed by the BCEA, even though such a practice has been established at the business where they work. (1)**
 - **The employer must pay the employee one-and-a-half times the employee's normal wage for overtime worked. (1)**
 - **However, the parties may agree that the employer shall pay the normal wage for overtime and that the employee will then be entitled to 30 minutes' paid free time for every hour of overtime worked, or otherwise that the employee will be entitled to 90 minutes' paid free time for every hour of overtime worked. (1)**
- Any four of the above**

2.2 Sick leave and proof of incapacity; (5)

- **During every sick leave cycle (the period of 36 months' employment following an employee's commencement of employment or the completion of the previous sick leave cycle), an employee, is entitled to -**
 - **an amount of paid sick leave equal to the number of days that the person would have worked during a period of six weeks. (1)**
- **First six months of employment**
 - **employees are only entitled to one day's paid sick leave for every 26 days that they worked. (1)**
- **Employee will be paid at the normal rate during sick leave except in terms of an agreement that the employee will not be paid the full wage, but that the period of sick leave will be increased commensurately or in accordance with the reduction. (1)**
- **Reduced payment may not be less than 75% of the normal wage. (1)**
- **The employer is not required to pay the employee if**
 - **the employee has been absent from work for more than two consecutive days, or (1)**
 - **on more than two occasions during an eight-week period, (1)**
 - **without producing a medical certificate on request of the employer. (1)**
- **The medical certificate must be issued and signed by a medical practitioner. (1)**
- **If it is difficult for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment if it**

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failed to provide assistance to the employee to obtain a medical certificate. (1)

- NOTE - If employee receives compensation in terms of the Compensation for Injuries and Diseases Act 130 of 1983 (COIDA) for a work-related injury or disease payment for sick leave is not applicable, (1)
- except for periods during which the employee is not entitled to compensation under COIDA. (1)

Student has to deal with both sick leave and proof of incapacity

2.3 Work on Sundays and public holidays; (3)

- An employer must pay an employee who works on a Sunday at double the employee's ordinary wage for each hour worked, (1)
- unless the employee usually or ordinarily works on a Sunday (where the contract makes provision for regular Sunday work), in which case the employer must pay the employee one-and-a-half times the ordinary wage. (1)
- In terms of an agreement, the employer can also pay the employee the normal wage for work on a Sunday and grant the employee paid time-off equivalent to the extra pay that the employee is entitled to. (1)

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QUESTION 3

The applicant was a former female employee of the respondent. She was employed on an annual fixed term contract ending in December of each year. The renewal of the contract was dependent on funding as the respondent was a non-profit organisation. She had been in the employ of the respondent since 2004. In December 2008 the applicant was dismissed.

The applicant alleged that the respondent's former national director had made repeated sexual advances towards her. She had repeatedly rejected such advances. The respondent's code of conduct required that instances of sexual harassment must be reported. Despite the applicant's knowledge of such code she elected not to report the advances. She believed she had control of the situation, and could not have anticipated the consequences thereof. Following the final instance of alleged sexual harassment which she refused the applicant testified that the former national director's behaviour towards her changed. She was advised in December of 2008 that her contract would not be renewed due to her poor performance. This was the first occasion in which her alleged poor performance had been raised. Furthermore, the alleged perpetrator of the sexual harassment had, prior to this matter being heard, left the employ of the respondent, and was unable to be traced.

Following the termination of her contract the applicant raised the occurrence of the alleged sexual harassment. The respondent did not respond to these allegations, nor did the evidence reflect that the claims were investigated.

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

3.1 Would this scenario fall within the ambit of the Employment Equity Act 55 of 1998 (in other words would the Act be applicable)? Motivate your answer. (3)

The EEA (in section 6(3) of the EEA) declares the harassment of an employee or job applicant to be a form of unfair discrimination. (1)

- Harassment is prohibited if it is based on any one (or a combination of) the listed grounds. (1)
- The most prevalent forms of harassment encountered in the workplace are
 - sexual harassment, (1/2)
 - racial harassment, (1/2)

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- **sexual-orientation harassment and (1/2)**
 - **religious harassment. (1/2)**
- Max three marks**

3.2 According to the *Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005) certain factors should be considered to establish whether sexual harassment is taking place in the workplace and if the rights of an employee is being violated. List these factors. (4)

- **whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; (1)**
- **whether the sexual conduct was unwelcome; (1)**
- **the nature and extent of the sexual conduct; and (1)**
- **the impact of the sexual conduct on the employee (1)**

3.3 With reference to the given set of facts. Can an employer be held liable for the sexual harassment committed by one of its employees? Motivate your answer. (6)

- **The EEA makes the employer legally liable for acts of discrimination (including acts of harassment) committed by employees:**
 - **if the act of discrimination is committed while at work (1) (this has a broad meaning and includes work-related events outside the workplace, at conferences and on company transport); (1)**
 - **if the conduct is brought to the attention of the employer; and (1)**
 - **if the employer fails**
 - **to consult all the relevant parties (1) and**
 - **take the necessary steps (1) or**
 - **steps that were "reasonably practicable" in the circumstances to eliminate the harassment. (1)**

3.4 The obligation on employers to prevent harassment in the workplace means that employers should be proactive about putting in place steps to prevent its occurrence, and if it happens, to make sure that the issue is seriously and expeditiously dealt with. What minimum measures should an employer implement to ensure compliance with this duty? (4)

- **ensure that there is a clear workplace policy prohibiting sexual harassment; (1)**
- **ensure that grievance and disciplinary procedures exist to effectively deal with such conduct; (1)**
- **deal with complaints timeously and sensitively; and (1)**
- **comply with the 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace. (1)**

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QUESTION 4

An employee of the Department of Correctional Services was a medical practitioner involved in rendering health care services to prisoners in Pollsmoor Prison. He reported serious shortcomings in the provision of these services to the inspecting judge and the portfolio committee after his complaints to his employers, the Department of Correctional Services (DCS) and the Department of Health had no effect. As a form of punishment the employee was transferred against his will as a result of the disclosure.

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

- 4.1 Which legislation regulates the scenario as described in the set of facts above? (1)
- **The Protected Disclosures Act 26 of 2000**
- 4.2 Refer to your answer in question 4.1 above. Briefly explain the purpose of the said legislation. (3)
- **To facilitate the responsible disclosure of information by employees (1) concerning criminal and other irregular conduct on the workplace (informally known as whistle-blowing) (1)**
 - **The PDA also provides protection to employees who have made a disclosure in the prescribed way and who are subsequently subjected to an ‘occupational detriment’ (1)**
- 4.3 Assume for this question only that the disclosure was not made to the employer or any of the prescribed bodies as required by the relevant legislation, will the employee still be protected? Motivate your answer. (6)
- **If a disclosure is not made to the employer or the relevant bodies, the employee will still be protected if the disclosure was made in good faith, (1) provided that:**
 - **the employee reasonably believes that the information is substantially true (1) and**
 - **provided that the employee did not make the disclosure for personal gain; and also (1)**
 - **the disclosure was made previously to the employer but the employer did not take any action; or that (1)**
 - **the employee had reason to believe that evidence would be destroyed if the disclosure were made to the employer, or (1)**
 - **that the employee had reason to believe that he or she would suffer from an occupational detriment if the disclosure were made to the employer. (1)**

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QUESTION 5

- 5.1 Explain the onus of proof for both the employer and employee in proceedings concerning an alleged unfair dismissal. (3)
- **A employee is required to establish on a balance of probabilities the existence of the dismissal (section 192(1)). (1)**
 - **Once the existence of the dismissal is established, the employer bears the onus of proving on a balance of probabilities that the dismissal is fair (section 192(2)). (1)**
 - **To this end, the employer is required to prove that the dismissal was effected for a fair reason following a fair procedure (section 188(1)). (1)**
- 5.2 The Labour Relations Act 66 of 1995 provides for three remedies in the case of unfair dismissal. List these remedies. (3)
- **Reinstatement (1)**
 - **Re-employment (1)**
 - **Compensation (1)**

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

5.3.1 Sandy's employer is constantly shouting at her for working slowly. Sandy resigns as a result. (2)

- **Unless the working relationship has broken down and become intolerable, and Sandy cannot be expected to put up with it any longer, this would seem to be constructive dismissal. Employers are entitled to chastise their employees as long as it is not a personal vendetta to get the employee to resign. Marker apply discretion**

5.3.2 Sandile's employer constantly makes racist remarks about Sandile in his presence. Sandile is fed up with this and decides to resign. (2)

- **If Sandile's employer's conduct has caused the working environment to become intolerable this could be constructive dismissal. The CCMA will test to see whether Sandile had options other than resigning (which he might have had, as he could have referred a grievance to the CCMA/Labour Court for a determination of racial discrimination). Marker apply discretion**

5.4 An employee had been employed for four years with the same employer in terms of numerous short-term contracts (many of which had been of no more than a month or two in duration). When her employment was terminated, the employee claimed that, in view of the repeated previous renewals, she had had a reasonable expectation of renewal. Advise the employee with regards to her position in law with reference to the case of *SACTWU v Cadema Industries (Pty) Ltd*. (6)

- **The court held:**
 - **The Labour Court upheld her claim that she was in fact dismissed. (1)**
 - **The success of claiming a dismissal on the basis of non-renewal (1) depends on whether an expectation of renewal in fact existed, (1) as well as on the reasonableness of that expectation. (1)**
 - **The latter must be determined objectively, and (1)**
 - **will include a consideration of factors such as**
 - **the number of times the contract has been renewed (as in *SACTWU v Cadema Industries (Pty) Ltd*) (1)**
 - **whether the contract was re-negotiated prior to the previous renewals and (1)**
 - **the nature of the promises made by the employer. (1)**

Maximum 6

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QUESTION 6

6.1 The Labour Relations Act 66 of 1995 provides a number of reasons upon which a dismissal will be deemed automatically unfair. List three of these reasons. (3)

- **That the employee was involved in a protected strike or protest action (1)**
- **That the non-striking employee refused to do the work of a striking employee during a protected strike or a lock-out, unless necessary to protect life or health and safety (1)**
- **A refusal by employers to accept a demand in respect of any matter of mutual interest between them and their employee (1)**

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- That the employee is exercising rights or participating in proceedings in terms of the LRA (1)
- To do with the employee's actual or intended pregnancy (1)
- That the employer unfairly discriminated against an employee (1)
- Related to the transfer of a business as a going concern (1)
- Because the employee is a whistle-blower in terms of the Protected Disclosures Act 2000 (1)

6.2 Can an employer raise any defence to justify a dismissal once it has been proved to be automatically unfair? Motivate your answer. (3)

- Automatically unfair dismissals result in the infringement of fundamental and basic human rights, and the employer therefore cannot raise any defence against a claim of automatically unfair dismissal, except in the context of fair discrimination. (1)
- The reason for the dismissal is based on an inherent requirement of the job (1)
- The employee has reached the normal or agreed retirement age for persons employed in that capacity (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 Anand reports his employer to the Department of Labour as he is required to work more than the maximum working hours. He is dismissed when his employer finds out. (2)

This is automatically unfair (1) as Anand is dismissed for making a protected disclosure and exercising his rights in terms of an act/legislation. (1)

6.3.2 When Jose tells his employer that he is homosexual he is dismissed. (2)

This is discrimination on the grounds of sexual orientation (1) and is an automatically unfair dismissal. (1)

6.3.3 Sarah is dismissed when she reaches the age of 65. She feels that this is discrimination on the grounds of age. (2)

While this would appear to be discrimination on the grounds of age, it is not unfair (1) if Sarah has reached the normal or agreed retirement age. It would appear that 65 would be normal retirement age unless a later retirement age was agreed upon in her employment contract. (1)

TOTAL

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