



PROGRAM:

SUBJECT: **MEMO! LABOUR LAW**

CODE : **BAH11B1**

DATE : 21 November 2016

DURATION: 2 HOURS

TOTAL MARKS: 100

EXAMINER: MRS C JOHNSON

MODERATOR: MR IR NEL

NUMBER OF PAGES: **FIVE (5) PAGES**

INSTRUCTIONS:

- * Write your **SURNAME** on the answer script.
- * Hand in **ALPHABETICALLY**.
- * Question papers **MUST BE HANDED IN**.
- * Answer all questions.
- * Write legibly.
- * All cellphones must be switched off.

SECTION A – TRANSFER OF BUSINESSES (Chapter 11)

1. List and briefly discuss the consequences of a transfer of a solvent business. (10)

Page 153 [10]

- 1) Automatic transfer of contracts of employment✓
 - Against common law position✓
 - Freedom of employee to choose new employer is compromised in interest of preserving job security✓
- 2) Continuation of rights and obligations✓
 - Eg collective agreements✓
 - New employer cannot unilaterally change previous/old rights and obligations✓
- 3) New employer inherits the sins of old employer✓
 - Unfair dismissal claims, unfair labour practice claims, sexual harassment claims✓ (only one ✓ for any one or all of the aforementioned is allowed)
- 4) Continuity of employment✓
 - Purpose of section 197 LRA is to protect employees in event of transfer of business✓

2. Which sections of the Labour Relations Act 66 of 1995 (LRA) governs the transfer of a business as a going concern? (2)

Page 151 [2]

- Section 197
- Section 197A

3. Discuss what the concepts “transferor” and “transferee” refer to. (2)

Page 152 [2]

- Transferor = old employer / transfers his business
- Transferee = new employer / who the business is transferred to

4. List one (1) example of a non-core activity. (1)

Page 156 [1]

- **ANY ONE OF**
- Gardening, catering, security, cleaning, HR, IT, accounting

Total Section A: [15]

SECTION B – LABOUR DISPUTE RESOLUTION (Chapter 17)

5. State the definition of Mediation/Conciliation. (6)

P223 [5]

- a process in which a commissioner or BC panelist
- Uses knowledge
- To explain legal position,
- encourages to settle
- By agreement,
- Without further delay/expenditure
- (no power to make final or binding decision)

6. Discuss the process of Mediation/Conciliation fully. (10)

P224 [10]

- Schedule a meeting
- 14 day's written notice
- CCMA appoints trained commissioner
- Dispute settled through conciliation
- Resolve dispute within 30 days of receipt of completed referral form
- 3 options that the commissioner may use to assist parties to settle
 - Mediating
 - Conducting a fact-finding exercise
 - Recommendations
- Proceedings are informal and "off the record"
- Confidential info remains confidential and what is said may not be used in later proceedings
- Conciliator introduces himself – explains process + his role in the process – hears brief description of both parties' versions – have side meetings and speak to each of the parties
- Draft settlement agreement if parties settle – both parties sign + witnesses also sign – both parties are bound – the agreement will be confirmed to have the same status as an arbitration award - or refer matter to arbitration if parties could not settle.

7. State what is a deadlock and list 6 (six) tactics that a conciliator may utilize to break a deadlock during conciliation proceedings. (6)

P225 [5]

- Deadlock is when a dispute is seemingly unable to be resolved.
- Warning parties about risk failing to settle (eg costs, court proceedings)
- Be open with parties about chances of success
- Highlight merits of reasonable settlement offer
- Suggesting a good compromise and making a recommendation regarding settlement
- Make an advisory award

8. Who is allowed to be present at conciliation proceedings? (3)

P224 [3]

- Parties generally represent themselves
- Director may represent employee
- Office bearer or trade union representative

9. Discuss fully what the certificate of outcome is and what it is proof of. (9)

P226 [9]

- Provide written proof that a dispute has been referred to conciliation ✓ and whether dispute has been settled or whether dispute remains unresolved ✓
- If conciliation fails, the certificate may be issued immediately
- Also issued if conciliation succeeded in settling the dispute
- Also give an indication of how the matter may be taken forward
- The certificate of outcome proof 3 things:
 - There was a valid referral
 - Date of referral
 - Dispute remains unresolved
- Remember the 30 days limit in which the dispute must be referred
- The description of the dispute has no legal effect – the nature of the dispute cannot be changed and parties are bound by the "real" description

10. Discuss the referral process of arbitration fully. (10)

P229 [10]

- Dispute remains unresolved after conciliation
- CCMA form 7.13 must be used
- Request for arbitration must be served properly on the other party
- CCMA to appoint an arbitrator if
 - Certificate of outcome states that dispute remains unresolved
 - Party asks within 90 days of certificate of outcome
 - Or 30 days from period of conciliation has ended (aka there was no conciliation)
 - Parties may agree to extend period
- Condonation of late referral if there is good cause shown
- CCMA to give written notice of 21 days

11. Who may be present at arbitration proceedings? (10)

P230 [10]

- In person
- Or represented by 3 other parties:
 - legal practitioner
 - director
 - office bearer or trade union representative
- Legal representation is not allowed for dismissals based on misconduct ✓ or incapacity ✓
- Legal representation is allowed in 3 (but actually 5) instances
 - Agree
 - Reasonable
 - Nature of question of law
 - Complexity
 - Public interest
- There is a duty to help unrepresented parties and warn parties of consequences of not being represented or calling witnesses or leading evidence

12. What will happen when a party fails to attend conciliation/mediation versus arbitration? (4)

P229 [2]

C/M: Matter may **not** be dismissed ✓, but a certificate of outcome should be issued ✓

P230 [2]

Arbitration:

- Dismiss case (employee does not attend)
- Postpone (employer does not attend)

13. Discuss the process to be followed in arbitration proceedings fully. (12)

P230-231 [12]

- Arbitrator to decide on process
- But it must be done fairly + quickly
- Merits of dispute must be considered
- Minimum legal formalities
- Arbitrator has a wide discretion
- Parties may address the court + give evidence + under oath + call witnesses + question or cross-examine witnesses + make concluding arguments – **no need to discuss or name each one of these items, just briefly state one or more...**

- Arbitrator must act independent and fair and
- make a factual decision with no unnecessary delay
- Inquisitorial vs adversarial (know and explain the difference between these 2!)
- Arbitrator have 14 days to issue an arbitration award
- Arbitration will go on appeal in Labour Court
- Contempt of court

14. List any 5 (five) instances when may the Con-Arb process not be followed? (5)

P233 [9]

- **ANY FIVE MAX!!!**
- Organizational rights
- Interpretation or application of collective agreements
- Workplace forums
- Non-renewal of fixed-term contracts
- Automatically unfair dismissals
- Operational requirement dismissals
- Unprotected strike dismissals
- Dismissals where employee was refused membership or was expelled from a trade union
- Entitlement to severance pay

15. Explain the jurisdiction of the Labour Court. (10)

P239 [10]

- Power or competence of a court to hear and determine an issue between parties
- Exclusive jurisdiction
 - Only court that can hear that matter
 - Labour disputes that remain unresolved at conciliation
 - Automatically unfair dismissals
 - Dismissals based on operational requirements
 - Reviews of decisions of CCMA
- Concurrent jurisdiction
 - Same powers as a High Court and
 - Either court may be approached (but not both)
 - Violation or breach of constitutional right
 - Enforcement of common law contractual rights

Total Section B: [85]

TOTAL: [100]