

UNFAIR LABOUR PRACTICE REMOVES THE BALANCE OF EQUALITY



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The definition of ‘unfairness’ does not feature in the Labour Relations Act (LRA). However, I propose that ‘unfairness’ can be identified in line with the legislation if employers infringe on an employee’s entrenched rights, take a one-sided approach to an issue, implement unnecessary measures and/or act inappropriately under given circumstances.

It is therefore important to understand how the concept of ‘unfairness’ is applied in labour law. Examining the concept of ‘unfairness’ in labour practice involves referencing the LRA, but incorporating how arbitrators interpret it at the CCMA, bargaining councils and private dispute resolution bodies.

Section 186(2) of the LRA defines “unfair labour practice” as “any unfair act or omission that arises between an employer and an employee involving:

- a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) 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, 2000, on account of the employee having made a protected disclosure defined in that Act.”

The word “unfair” is mentioned several times in the definition. For example, under paragraph (b) of the definition, it refers to “...any other unfair disciplinary action...”. However, without explaining what ‘unfair’ means, the entire definition of unfair labour practices is meaningless. ‘Unfair’ labour practices are illustrated in the following cases:

In *Bosman vs SA Police Services* (2003 5 BALR 523), Bosman was selected as the second-best candidate for a promotion. However, another candidate, a ‘Black’ Woman, was selected for the position. However, the arbitrator found that the failure to promote Bosman was unfair and ordered the employer to promote Bosman. The ‘unfairness’ decision here was made on the basis that:

- > Bosman was the best candidate and therefore had the right to be promoted; and
- > the decision to promote the other candidate was inappropriate as she was not the best one. Furthermore, there was no proof that her promotion would have served the purpose of Affirmative Action.

In *Tsaperas & Another vs Clayville Cold Storage (Pty) Ltd* (2002 11 BALR 858), the arbitrator found that the suspension without pay of employees constituted an unfair labour practice. The employer was ordered to pay the suspended employees the remuneration that was withheld. The basis for ‘unfairness’ in this case is that, at the time of suspension, the employees had not been found guilty of any misdoings and could therefore not be punished.

In *Van Amstel vs Eskom* (2002 19 BALR 995), the CCMA found that the employer’s removal of the employee’s travel allowance was unfair. The ‘unfairness’ here lies in infringing an employee’s right to a benefit for which he qualified. There was no legitimate reason for depriving him of this benefit.

At the root of many, if not all, ‘unfair’ practices is an employer’s attempt to gain something. There is nothing wrong per se with an employer gaining something, as long as the employee does not lose out unfairly as a result. Thus, an employer is entitled to protect its interests or save money by disciplining an employee or changing the employee’s benefits, providing the discipline has merit or the loss to the employee is justifiable.

As always, the challenge for the employer is to judge whether its actions have merit and are justifiable. Due to the complexity of the law, such judgements cannot be made through guesswork. Therefore, every employer must obtain comprehensive and in-depth expertise in labour law through a reputable labour law expert, including training of all levels of management in the application of labour law.

Source of reference
www.labourlawadvice.co.za