

-LABOUR LAW-
ACADEMY

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LLA 310
An introduction to dismissal in terms of the Labour
Relations Act, 1995

LEARNER WORKBOOK

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Outcomes

What this course teach you and what will you be able to do? On conclusion of this course a student will

- ✓ Understand the two issues in dispute in an unfair dismissal matter
- ✓ Explain the difference between termination and dismissal
- ✓ List the forms of dismissal in section 186(1)(a) of the LRA
- ✓ Distinguish between forms of dismissal
- ✓ Apply the elements of this form of dismissal
- ✓ Be able to conciliate or participate in a conciliation in a matter concerning this form of dismissal
- ✓ Apply the law to this form of dismissal in an arbitration

1. Introduction

In this discussion we look at the substance of most labour disputes, the question of the dismissal of an employee.

Disputes discussed here are not the subject of a disciplinary hearing; the dispute arises from a referral to the CCMA or council alleging -typically anyway- an unfair dismissal, when in fact as becomes clear in this course, the real dispute concerns whether the employee was dismissed.

The approach adopted here is to examine the question as it arises in a conciliation or arbitration process at the CCMA or council, in other words in the context and at the time the dispute is before the CCMA or council.

2. Issue in dispute

The allegation of 'unfair dismissal' is in fact two _____, namely-

1. That the employee was _____ and
2. That the employee's _____.

_____ in order to show that an employee has been *unfairly* dismissed the first question to be decided is whether the employee was dismissed.

This means that _____ of the dismissal arises _____:

- if the issue that an employee has been dismissed _____ and is not in dispute. This would [or should] happen in the _____ phase in an arbitration, or
- _____ has been tendered and an arbitrator has _____ that an employee has been dismissed.

This means that if it is the employer party's version that the employee has not been dismissed _____ must raise this in both conciliation and arbitration. It also means that _____ that the issue in dispute is the fairness of the employee's dismissal.

3. Termination and dismissal

It is necessary to draw a distinction between two terms.

A contract, including a contract of employment, can be _____ a term which refers to the _____ by one party, or on the reaching of a certain date or the conclusion of a transaction. In employment law we likewise refer to the 'termination' of a contract of employment.

However, the fact that a contract of employment has been terminated does not necessarily mean that the _____ has been terminated as well. Section 185 states that 'every employee has the right not to be unfairly dismissed'. While the contract may have been terminated by the employer on one of the grounds listed below, the employee may _____ allege that he has been dismissed and that his dismissal was unfair.

For example, a contract of employment can be lawfully terminated by the _____ of an employee. However, an employee who has resigned may _____ refer a dispute to the CCMA or a council _____.

There is therefore a distinction between the termination of a contract of employment and the dismissal of an employee: the termination of a contract of employment may be unlawful. Such a dispute arises in terms of the _____ over which the High Court has jurisdiction. A termination of an employee's employment _____. This dispute arises _____ and the CCMA or bargaining council has jurisdiction over such a dispute.

This discussion concerns the latter type of dispute.

4. "Dismissal" in terms of the LRA

There is a _____ between 'dismissal' and 'unfair dismissal'. The distinction is that a dispute about ' _____ ' must be based on _____ covered by the meaning of dismissal, while an _____ adds the elements of _____ fairness.

The latter always includes the former, while a _____[or agreed] before the question of the fairness of a dismissal can be canvassed.

The LRA defines “dismissal” as:

186 Meaning of dismissal

- (1) “Dismissal” means that—
- (a) an employer has terminated a contract of employment with or without notice;
 - (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
 - (c) an employer refused to allow an employee to resume work after she—
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or
 - (ii)[Sub-para. (ii) deleted by s. 95 (4) of Act No. 75 of 1997.]
 - (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
 - (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.
 - (f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

‘Dismissal’ in terms of the LRA has **six** particular and **distinct** meanings.

Distinguishing characteristics		Meanings of dismissal
Whose _____ triggers the dismissal?	The employer’s conduct	
	The employee’s conduct	
Different _____	Fixed term contract of employment	
	Permanent contracts of employment	
Contexts, or preconditions	Maternity leave	
	Employer made continued employment intolerable	
	Transfer of employment	

5. Termination of employment by the employer in terms of s 186(1)(a)

A dismissal occurs when ‘_____the contract of employment with or without notice’ – see section 186(1)(a). An employer may terminate the contract of employment because the employee committed_____, because the employee’s

_____ was poor, because the employee
was _____, and because of the _____ of the employer.

But what happens in the conciliation and the arbitration in particular if the employer says:

“But I did not dismiss you!”

The Labour Court has put it this way:

“It is incumbent upon an employee to establish on a balance of probabilities, where that employee claims to have been dismissed in terms of s 186(a), some overt act by the employer that is the proximate cause of the termination of employment.

How are disputes in which the issue in dispute is whether the employer dismissed an employee dealt with?

The first point is that the form of dismissal which s 186(1)(a) provides for takes place whether _____.

The second point is that the _____ that she or he was dismissed.

This is a key point and arises because of the provisions of the LRA itself, s 192 of which states:

192. Onus in dismissal disputes.—

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

The fact that the onus is on an employee in these types of disputes has _____ for both the conciliation and arbitration of these disputes. The _____ to the effect that the evidence of a single witness must be treated with caution, and because the law requires that the _____ on a balance of probabilities that she was dismissed

It is important to understand that, even if the employee terminated the contract of employment –or was not even, in law, an employee – a _____ to the CCMA or council alleging unfair dismissal.

6. The elements of this form of dismissal

The employee	The employer's 'defences'
I was dismissed by my employer	The employee was not dismissed

	The employee was not dismissed, the employee _____
	The employee was not dismissed, the employee _____
	The employee was not dismissed, the contract ended by _____
	The employee was not dismissed, but _____
	There was _____

If the employer did not dismiss the employee, then the _____ is that employee terminated his contract of employment, and in that case there is _____ in terms of section 186(1)(a) of the LRA, and that means the employee was _____

The common feature of all these defences is that the dismissal, or alleged dismissal took place and _____ or procedures were followed. The fact that no hearing was held **must** _____ as 'proof' that an employee was dismissed or that the dismissal was procedurally unfair.

7. Conciliation of these disputes

Let us assume the employee [Mr Govender] says:

Mr Commissioner I worked for Mr Ngwena [the employer] for three years as a waiter in his restaurant. On the 5th March this year I went to work as usual. I was not feeling well. I started to work and was serving some customers when I dropped the tray of glasses. Mr Ngwena shouted at me and told me I am stupid and that I must go. I left work and came to the CCMA the next day to report my dismissal.

The employer, Mr Ngwena then responds as follows:

Mr Commissioner I did not dismiss Mr Govender. He dropped some glasses and I got cross. I may even have shouted at him. I did not tell him to go, to leave or anything. The next thing I knew Mr Govender had left the restaurant and then I got the letter telling me to come to the CCMA.

Having heard the above the conciliator should immediately be able to **categorise this dispute**

as being about whether the employee was dismissed by Mr Ngwena.

As noted above, the onus now changes- that is Mr Govender must prove that he was dismissed.

8. The arbitration of these disputes

At the arbitration the parties are given an opportunity to give an _____ which is basically a statement of what their case is and what remedy they are seeking. The arbitrator should then _____ and hone in on the fact that the issue in dispute is whether the employee was, on a balance of probability, dismissed in terms of s 186(1)(a), and define the issue accordingly.

In an arbitration:

- There can be _____ that there was a dismissal;
- There can be _____ that because there was no hearing that the dismissal was procedurally unfair.
- The _____ in dispute is whether Mr Govender was dismissed.
- Mr Govender, the _____ that he was dismissed. This means that he must _____. Once he has done so he has the right to call any witnesses who can give relevant evidence. Thereafter Mr Ngwena the employer has the right to give evidence and call witnesses.
- Once the commissioner has made a finding on whether Mr Govender was dismissed **only then** he can proceed to determine the second issue, that is whether Mr Govender's dismissal was unfair. Only once he has found that the dismissal was unfair can a remedy be ordered.

9. An example of a CCMA award

To illustrate what I mean I include an award by myself which covers most of the issues raised in this discussion. I have changed the names of the parties and edited it slightly.

Details of hearing and representation

1. This is the award in the arbitration between Ms L Smith , the Employee, and the Employer Mr Jones trading as Jones Photographic Studios.

2. The arbitration was held under the auspices of the CCMA in terms of section 191(5)(a) of the Labour Relations Act, 1995 as amended (the "Act") and issued in terms of section 138(7) of the Act.
3. The arbitration took place on the 15 August 2024 at the CCMA in Durban.
4. Ms L Smith was present and conducted her own case while Mr Jones did likewise.

Issues in dispute

5. I determined the issues in dispute are whether Ms L Smith was dismissed and if so whether her dismissal was unfair.

Summary of evidence

6. Ms L Smith she began work on the 30 October 2008. She responded to an advert in the Daily News on 20 October 2008. She spoke to Mr Jones and they met at the ICC while Mr Jones was working taking pictures at a conference. They agreed she would come in the following day and come to the ICC and if she likes the work she can have the job. The next day she went to Suncoast Casino as directed by Mr Jones as there was a conference there. She discussed the details of her employment during breakfast. They agreed that for the first month while she was trained she would earn R 2500, and then once she started doing work that could be sold her salary would be increased – substantially, he said. She was so excited she had a job she did not clarify what this meant. She would be trained to take pictures at events of delegates, weddings and so on which could be sold. They were no art pictures. She told her that he had a driver, Wellington and she would stand on when he was off. However she was the driver for a couple of weeks. Mr Jones said he would pay the petrol but he did not fill up enough and got stuck as she ran out of petrol. She worked for Mr Jones although for the first few days she did not work. But then on the 8th November she took commercial pictures for him at the ICC. The profit was from her pictures- she took 40 pictures and each was sold for R 20 and so he made R 600. She used her own equipment a digital camera. He said he knew nothing about digital cameras. She did a wedding at the Westville campus, but he said they were terrible. Another photographer said they were beautiful. She did numerous conferences at the ICC and Elangeni and the pictures were sold. She took hundreds of pictures. Mr Jones said that he needed to draw up a contract but no contract was drawn up. She was then dismissed on Tuesday 18th November 2008. She had just come back from the print lab with pictures. They were at the ICC that day. Mr Jones asked her to ensure that the lab had printed out jumbo sheets. The lab was very busy and she was told that the jumbo sheets would be done the next day. She told Mr Jones this but he would not listen to her and insisted they must be printed. She went back to the lab with another employee Judith Mkhize who had a seizure while at the lab. Everyone panicked and eventually she stopped but was confused. This was an epileptic fit. She phoned Mr Jones and told her that she is taking her to the hospital. He said she must leave her and deliver the package to a client, Ms Naidoo a bride. She was told again to leave her and that he would call an ambulance for Judith Mkhize. She went to deliver the DVD at Maydon Wharf. She was then told about Mr Jones business practices in the consumer watch blog. She then told to come back to the ICC. Mr Jones had not called an ambulance for Judith Mkhize, this was two hours late. He said that it was not his problem. She was shocked by this. He hung up the phone. She drove back to the lab and was told that another employee of Mr Jones had collected her and taken her back to the ICC. She went back to the ICC and found that Judith Mkhize was working again. She could not believe this. Judith Mkhize was instructed to carry equipment but she did it instead. She came back with the equipment and was furious and crying. Mr Jones said "What's wrong you look sick maybe you should just go home". It seemed inconsequential that Judith Mkhize had a fit. She said that Judith Mkhize should go home. She refused to leave and said that she would wait for Judith Mkhize. She waited for Judith Mkhize, and when she came to the car Judith Mkhize could not remember what happened. Mr Jones sent another employee to collect her media tag which was needed to come into the venue. She then went home. She was not told where to come to work the next day as usually took place. Mr Jones does not have a company premises, but they meet him at the venues or near the venues. She no longer had a clearance for the ICC. On the 19th she spoke to Mr Jones. She got voice mail regarding the memory stick which he wanted back. The tone of this message was very aggressive. She was asleep at the time. She went to the doctor as she was so stressed. She came back from the doctor at about 11. Her mother spoke to him and was very rude to her. He did not want her to come to the ICC and wanted her to leave it at the lab. She was not comfortable with this. Her parents decided to go to the Department of Labour due to Mr Jones statements. They went there and Mr Jones was phoned and there was a discussion about whether she could keep the equipment and they refused to keep it. She still has the equipment – a video tripod, a graduation gown, cap, a qualification gown, a picture. She was

fined as she was told to park in a loading zone. Mr Jones said he would pay for it but did not and so she had to pay it. She was given no breaks, for tea lunch and had to work in the evenings.

7. In response to questions as to where she was dismissed. Ms Smith said she was dismissed as she was not told to where to come to work on the 19th November 2008, and from the fact that her security media clearance at the ICC was removed. At the labour department he said that he no longer requires her services. He filled in her UIF form. He refused to meet her when she offered to come to the ICC to give him his equipment. She was willing to come to work. She was never told where to come. She said that Mr Jones told her not to come to the ICC and to leave the equipment at the lab, and did not have a chance to ask where she should go that day to work as he put the phone down on her. It was evident to her that her services were no longer required. She was told by the department of labour that he does not require his services and was told the same thing when she came to the CCMA.

8. Mr Jones then put it to her that he did not remove her badge. Ms L Smith said that another employee, Wesley told her to that he was told to take her badge off. Mr Jones said that he did not fire her, or take her badge away personally.

9. Mr Smith was then called to give evidence. He is the father of Ms Smith. He said that his daughter was employed as a part time photographer. She worked long hours which he was told was the nature of the business. A voice mail was sent to his daughter's phone which he heard. The message was to return the disk. He took her to the doctor as she was ill. He said he only her one side of the conversation-what his wife said. He then said that he heard the conversation on the speaker phone. Mr Jones refused to speak to his wife.

10. Ms L Smith said that she told Mr Jones that she had been to the doctor when she was asked why she was not at work. The medical certificate puts her off work to the 21 November 2008. Ms L Smith said she willing to come to work despite having a sick note. She said she does not stay away from work she has a passion for photography.

11. Mr Jones said he is the owner of Sydney Studio. Ms L Smith was an embarrassment by crying in public at the ICC. He wanted her to go to the car and recover. He did not ask for the card as this would cause a problem for himself as she had photos on her. She disappeared with the disk. He had to go and retake pictures and was embarrassed by this. The next morning she was supposed to come to the ICC to pick him up. He did not have the opportunity to talk to her as she disappeared on the 18th. He was concerned as delegates wanted to know where the photographs were. They were supposed to be on display at the ICC. He called her mom and asked where Ms L Smith was and was told she has gone to the doctors and so he asked for the disk to be dropped at the ICC. At about 10 or 11 he got a call from the department of Labour insisting that he pay her. He told the guy from the department that she has not worked a month, and has his equipment and his disk. He was threatened by this official. He has suffered losses and to retake photographs of delegates. He was phoned again by the official who accused him again so he refused to talk to him. He got other calls from the department as well. He still does not have the equipment from her. He did not dismiss her at any time. There was no need to dismiss her.

12. In response to questions Mr Jones said the memory sticks belong to her but the pictures of his clients on the disk are his. Mr Jones said that he has not seen the pictures. Mr Jones denied that he sent Wesley to fetch her security card or remove the badge. He did not need the badge and could not use it. Mr Jones denied that he told a labour department official that he said that he no longer requires her services. The conference was to finish on the 23 and so it was understood that she would be there. It was her job to come and hand in the disk, not to wait for his call.

Analysis of evidence

13. An employee who alleges that she was dismissed must prove, on a balance of probabilities, that she was dismissed.

14. There is no evidence that Mr Jones dismissed Ms L Smith. Her case is that I should draw the inference from other facts that she was dismissed by him. These facts are that her media badge was removed from her – this is disputed by Mr Jones, and principally that she was not told to come back to work.

15. In my view the inference that she was dismissed is not the only or most reasonable inference that can be drawn from these facts. While Mr Jones may be the callous and uncaring employer Ms L Smith painted him to be in the light of what happened with and to Judith Mkhize, this does not add to the inference I am required to make.

16. In my view Ms L Smith has failed to show that she was dismissed.

Award

17. For the above reasons I order as follows:-
1. The application is dismissed.

-LLA-