

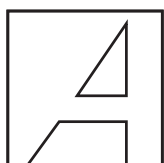
NAMIBIAN LABOUR LEXICON
VOLUME 2 (REVISED EDITION)
THE LABOUR ACT, 2007
A to Z

***A Guide to the Understanding and Application of the
Labour Act, 2007 (Act No.11 of 2007)***

Compiled by
Dr. J.W.F. van Rooyen

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Please note that the views expressed herein are not necessarily those of the Konrad Adenauer Foundation.



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FOREWORD

It gives me much pleasure to write the foreword to the Namibian Labour Lexicon Volume 2 (Revised Edition). A publication of this nature contributes admirably to the better understanding and proper implementation of one of the country's most wide-ranging and significant pieces of legislation: The Labour Act, 2007 (Act No.11 of 2007). The Lexicon complements other existing publications on the topic by its comprehensiveness and depth of analysis. It furthermore serves to create additional public consciousness of the existence and importance of the Act, thus promoting compliance and awareness of rights and obligations on the part of all role-players and stakeholders in employment.

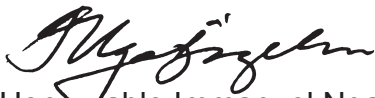
The promulgation and coming into operation of the Labour Act, 2007 ushered in a new era in employment relations: An era in which greater emphasis is being placed on fair labour practices and speedy resolution of disputes through focussed conciliation and simplified arbitration in which the stakeholders themselves play the main role. Employers, employees, trade unions and employers' organisations are being encouraged to co-operate in achieving their own in-house instruments to forge conducive relations. Where disputes do arise these same parties are called upon to take up the lion's share in resolving them, facilitated by the able mechanisms provided for in the Act.

The coming into operation of the new Labour Act heralded the dawn of a revitalized employment dispensation in our country, in which equity, compassion and fairness go hand in hand with hard work, productivity and genuine job satisfaction. Together with targeted human resources development and enlightened managerial leadership, the combination of these vital factors is a prerequisite for a decent work environment and sustained socio-economic development. With an appropriately tailored legal framework at their disposal, the social partners are superbly equipped to launch themselves with increased vigour into their respective roles. These roles should always be well synchronised, so that Government, employers, workers and their various organisations, complement one another in tripartite harmony -constantly striving for a better future for all.

Whereas we should always be positive and forward looking in our appraisals, we must also be realistic. In the domain of labour and employment relations we know that while there are many common goals and a shared sense of national identity, invariably there would also be certain differences in views

and interests amongst different groups and individuals. These obviously need to be effectively reconciled, or at least be kept within acceptable limits. The Labour Act, 2007 is particularly well suited to achieve that goal and to serve as a balanced and practical source of instruction on how to maintain equitable, healthy labour relations. In this quest, the revised Volume 2 of the Namibian Labour Lexicon serves as a well conceived aid to the proper observance and implementation of the Law. Its user-friendly format and the inclusion of the Regulations and Rules add considerably to its value.

The publishers of this updated handbook, and particularly the Namibian Resident Representative of the Konrad Adenauer Foundation, Dr. Anton Bösl, deserve our hearty thanks for a fine initiative. I look forward to the book's wide dissemination in all our Regions and to its extensive use by everybody involved in the sphere of employment.



Honourable Immanuel Ngatjizeko, MP
MINISTER OF LABOUR AND SOCIAL WELFARE
Windhoek, 21 February 2011

PREFACE

The Labour Act, 2007 embodies the conclusion of several years of intensive deliberations and meticulous drafting by a team of experts in consultation with the social partners. The initial process of probing and brainstorming began back in 1997 some months after a protracted, devastating strike at a major base metal mine at Tsumeb, in the northern regions of Namibia.

Concerned citizens at the time were in agreement that the labour relations system, and more particularly, the then prevailing statutory industrial relations framework, was in need of a drastic overhaul. It was recognized that future socio-economic development in the country depended much on an equitable, stable employment environment in which individuals and enterprises alike could unfold their full productive potential.

The Ministry, then still with the designation of Ministry of Labour, approached the International Labour Office for assistance, which in turn secured the necessary financing from the Swiss Government. Thus the establishment of what came to be known as the ILO Swiss Project, which eventually played an important role in revising not only Namibia's labour legislation, but also that of other sub-continental countries such as Botswana, Lesotho, Mozambique and Swaziland.

A tripartite task force consisting of representatives of the Ministry, the Namibian Employers' Federation (NEF) and the National Union of Namibian Workers (NUNW) was assembled to guide the experts' drafting initiative. Early in the process the group decided on a set of benchmark principles, which were to steer the ensuing drafting initiative. These included the requirements that the new labour law must be efficient yet simple, be impartial, have high quality outcomes, be user friendly, cost effective and accountable.

In addition, the statute had to reflect Namibia's commitment to international labour standards and the quest to launch its young economy on a steady path of entrepreneurial expansionism. The initial draft was eventually submitted to the Labour Advisory Council and from there followed the normal course of legislation through Cabinet, Parliament, Presidential approval and final promulgation in the *Government Gazette*.

The new Labour Code emerging from this painstaking process in its initial format as the Labour Act, 2004 succeeded, in large measure, to capture all the aforementioned vital elements. In it, Namibia now had a highly focussed labour statute capable of efficiently addressing the multiple demands of modern employment relations.

Seizing the opportunity to assist in its successful operation the Konrad Adenauer Foundation in conjunction with the Namibian Institute for Democracy published a book on the new statute in December of that year. The publication formed the second in a series and was titled *Namibian Labour Lexicon Volume 2 The Labour Act, 2004 A to Z*.

Launched by the Minister of Labour on 10 December 2004, the book was very well received and in big demand. It was used as a manual for guidance on the new Labour Act and played an important part in training the role players in employment relations, including Government officials in the Labour Inspectorate and the Office of the Labour Commissioner.

Unfortunately, however, the Labour Act, 2004 (Act No. 15 of 2004), could not be comprehensively implemented due to some unintended anomalies and various technical inadequacies brought about, inter alia, by a redrafting of the text into plain language.¹

The Ministry of Labour and Social Welfare consequently embarked upon a revision of the entire Statute. In the course of doing so, it was decided to submit an entirely new Bill rather than only correcting the Act. The required changes were found to be simply too many to be dealt with effectively in the form of a normal legislative amendment.

Hence, the promulgation of the Labour Act, 2007 (Act No. 11 of 2007), on 31 December 2007. The Act came into operation on 1 November 2008, through Government Notice No. 260 of 2008 issued by the Minister of Labour and Social Welfare, the Honourable Immanuel Ngatjizeko, in terms of section 143 of the Labour Act, 2007.

Promulgation of the Labour Act, 2007 and repeal of the Labour Act, 2004 required the revision and updating of the previous Labour Lexicon Volume 2. That has now been accomplished with the publication of this edition as the *Namibian Labour Lexicon Volume 2 (Revised Edition) The Labour Act, 2007*

¹ As a result, the Labour Act, 1992 (Act No.6 of 1992), continued to remain in force until 31 October 2008, with only limited administrative sections having been replaced by the interim Labour Act, 2004.

A to Z. Besides the summarised discussion of the Act itself, the volume also contains the full texts of the Labour General Regulations: Labour Act, 2007; and the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner: Labour Act, 2007 promulgated by the Minister on 31 October 2008.

Whilst care has been taken to ensure accuracy of contents and interpretation, the Lexicon should not be regarded or utilized as legal authority for action contemplated under any of the laws referred to, or as infallible source of instruction. Neither the compiler nor the publisher accept liability or responsibility for damages (whether actual or potential) or any other prejudice resulting from any incorrect statement of law, procedure, data or practice set out in this work.

Finally, a more general comment in closing: While not all provisions of the Act have been equally enthusiastically embraced by all affected stakeholders, it must be remembered that ours is a multifarious society which needs to sensitively reconcile the sometimes still widely differing views and values of its diverse inhabitants. Besides, no law is cast in stone. In this respect labour law is a good example of a particularly fluid area of constant legislative flux and refinement. That applies to virtually all progressive democratic societies constituting the developed and the developing nations of the World – Namibia is no exception.

ACKNOWLEDGEMENTS

The publishers of this text and its compiler, wish to gratefully acknowledge the participation and contributions of several individuals and organisations to the Namibian Labour Lexicon Volume 2, The Labour Act, 2007 (Revised Edition), A to Z. Particular thanks are due for the willing support and varied inputs of the following persons:

Hon. Immanuel Ngatjizeko, MP, Minister of Labour and Social Welfare; Mr Peter Mwatile Permanent Secretary of the Ministry; Adv. Vicky Ya Toivo, Personal Advisor to the Minister; Mr Bro-Mathew Shinguadja, Labour Commissioner; Mr Herbert Jauch on behalf of the Labour Resource and Research Institute (LaRRI); and Mr Tim Parkhouse, Secretary-General, Namibian Employers' Federation (NEF).

The publishers, furthermore, acknowledges the kind permission of the Namibia Institute for Democracy (NID) for the reproduction of certain parts of the Namibian Labour Lexicon Volume 2 The Labour Act, 2004 A to Z, which have not been affected by the promulgation of the Labour Act, 2007.

Lastly, we wish to express our appreciation to John Meinert Printing for the printing and binding of the book and to Mrs Laetitia van Rooyen for her able secretarial assistance in completing the Lexicon manuscript.

HOW TO USE THE LEXICON

The *Namibian Labour Lexicon Volume 2 (Revised Edition) The Labour Act, 2007 A to Z*. has been compiled as an additional implementation aid for all persons and organisations affected by the Statute, be they employers or employees, public servants, trade unions or employers' organisations.

The detailed summary of the various provisions are presented in alphabetical order and grouped in clusters of related concepts where appropriate. Reference is made at the end of the summarised inserts to any applicable regulation issued by the Minister and which should be read in conjunction with the relevant provision of the Act. Where there is no cross-referencing to a regulation the relevant provision stands on its own although regard must be had to related provisions or possibly applicable common law principles and case law.

Numerous summarised inserts are followed by a box of explanatory discussion and commentary on the preceding provision. The boxed discussions are not part of the summarised law, but rather intended as contextual background to facilitate understanding and implementation or simply to highlight certain important aspects.

A timely Indication is given of whether the substance of a provision is new, moderately changed, or largely unchanged in relation to the Labour Act, 1992 by placing the symbols 'N', 'M' or 'U' at the end of each section heading. Where only part of the contents of a provision has been changed such changes are mentioned separately in the boxed discussions.

Several cross references have also been made to the *Namibian Labour Lexicon Volume I Essential Expressions* for further information on a topic or expression for readers to consult if they wish. Such cross-referencing is indicated after a word or phrase in *italics* followed by ">NLL1" and a page number in brackets. Items only prefixed with an arrow symbol ">" are considered elsewhere in this volume. If there are two consecutive arrows it means the reader should first turn to the main topic category and then to the subcategory for the item referred to.

While the Lexicon is intended primarily as a reference manual on particular topics, readers may also find it a useful aid to gain a more comprehensive understanding and knowledge of the Act by actually reading it in full like they would any other book.

LABOUR ACT, 2007
A to Z

**A Guide to the Understanding and Application of the
Labour Act, 2007 (Act No.11 of 2007)**

*(The symbols 'N', 'M' and 'U' at the end of section headings in
the Lexicon refer to content of the Labour Act, 2007 in general
comparison to the Labour Act, 1992 and stand for 'New',
'Modified' and 'Unchanged')*

LABOUR ACT, 2007 (ACT NO.11 OF 2007)

A

Accommodation (sec.28) (M) – An employee who is required to live at the place of employment or to reside on any premises owned or rented by the employer is entitled to adequate *housing* supplied by the employer including *sanitary and water facilities*. In the case of an employee required to reside on *agricultural* land the employer must, in addition:

- Provide suitable *accommodation* for the employee's *spouse and dependent children*;
- permit the employee to keep *livestock* and to *cultivate land* to meet the reasonable needs of the family; or
- alternatively, by agreement, provide the family with sufficient *food* to meet their reasonable needs; or
- as a second alternative, and also by agreement, pay the employee an *additional allowance* to buy such food.

An employer who terminates the employment of an employee who is required to live at the place of employment or to reside on any premises owned, leased or provided by the employer may not require the employee to vacate the said premises or place unless -

- in the case of an employee residing on agricultural land, the employer gives the employee three months written notice to vacate; or
- in the case of other employees the employer gives the employee at least one month's written notice to vacate the accommodation.

Notwithstanding such notice, if an employee has referred a dispute to the Labour Commissioner alleging an unfair dismissal within 30 days following the termination of employment the employer may not require the employee to vacate the premises until the dispute has been resolved.

Discussion: It is important to note that the provision contemplates two categories of employees entitled to accommodation: Employees required to live on agricultural land and employees required to live on employers' premises which do not constitute agricultural land, and that the benefits for the two in terms of this section differ. Furthermore, from the context of the provision, and being a basic condition of employment, it is to be understood that the benefits mentioned are free of charge, although their value in certain instances may be taken into account when evaluating remuneration packages (>Remuneration). Agricultural sector employers

should, in addition, take cognizance of the existence of any *collective agreements* or *wage orders* which may have been published in the *Government Gazette* and which set out minimum levels which have to be met with regard to these benefits.

Changes: The requirement to give a certain period written notice to an employee to vacate accommodation upon termination of employment is new, as is the stipulation allowing an employee to remain even longer if a complaint of unfair dismissal has been lodged. However, quite apart from this stipulation in the Labour Act, it is common fair practice to give a person reasonable notice if accommodation needs to be vacated. Under normal circumstances a period of up to three months in this regard is not excessive. A problem can, nevertheless, arise if some serious incident has occurred involving the employee who may thus pose a security risk to the employer. Continued occupation of accommodation under such circumstances could become intolerable. The employer may then be obliged to seek an alternative solution. This would ideally take the form of some mutually agreed arrangement in lieu of continued occupation of the accommodation by the dismissed employee.

Administration of regulations – > Regulations, administration of

Agricultural employees – > Accommodation

Annual leave (sec.23) (M) – Leave entitlement of an employee is four consecutive weeks with full remuneration in respect of each annual leave cycle, calculated as follows:

| <u>Number of days in ordinary work week</u> | <u>Annual leave entitlement in working days</u> |
|---|---|
| 6 | 24 |
| 5 | 20 |
| 4 | 16 |
| 3 | 12 |
| 2 | 8 |
| 1 | 4 |

The term “ordinary work week” above means the number of days per week ordinarily worked by an employee.

Employers must observe the following rules with regard to the granting of annual leave:

1. If an employee does *not normally work a fixed number of days* per week, leave is calculated on the basis of the average number of days worked per week over the 12 months prior to the commencement of a new annual leave cycle multiplied by four.
2. A leave cycle is *twelve months* calculated from the date of appointment and is repeated after each completion of 12 months.
3. The *employer may determine* [this should be in consultation with the employee] when annual leave is to be taken, but it should not be taken later than four months after the end of the leave cycle or at the most six months after the end of the cycle if the employee has so agreed in writing.
4. The employer may grant an employee *occasional paid leave* which leave is deducted from the annual entitlement.
5. An employee who is remunerated by direct deposit into an account receives leave payment on the *normal pay date*, whereas other employees receive their leave payment on the *last working day before commencement of leave* unless they request payment also to be on the normal pay date.
6. Annual leave *may not run concurrently* with sick leave, maternity leave or compassionate leave.
7. An *additional day* of paid leave must be granted *for each public holiday* which falls on a working day during the leave period.
8. An employee *may not work* for the employer *whilst on leave*.
9. Payment of money *in lieu of leave* is prohibited, except upon termination of employment.
10. An employer may not in terms of section 30 (*>Termination of employment on notice*) give notice of termination of employment to an employee during any period of leave to which an employee is entitled, nor may an employer allow such notice to run concurrently with any period of leave.

Discussion: In terms of section 37, upon termination of employment an employee is entitled to full payment for any period of annual leave due for a completed annual leave cycle as well as to accrued leave for an uncompleted leave cycle. Accrued leave for an incomplete annual leave cycle is calculated on a pro rata basis depending on the number of full months worked during that incomplete annual leave cycle. The employee does not qualify for such accrued leave of an uncompleted leave cycle if (except if for a lawful reason) no due notice of termination or payment in

lieu of notice has been given by the employee to the employer.

Payment for leave due for a completed leave cycle must, however, be paid regardless of whether notice has been given or payment has been effected by the employee in lieu of notice.

Changes: There are three departures from the previous situation regarding annual leave as formerly applicable under the Labour Act, 1992: Two of them comparatively minor, the third more far-reaching.

The first change is the automatic forfeiture of accrued leave for an uncompleted leave cycle if no proper notice has been given, referred to under 'Discussion' above.

Secondly, item 5. above represents a slight change from the previous situation prevailing under the Labour Act, 1992, in that an employee formerly had the choice of either receiving leave money before going on leave or to receive payment on the normal remuneration date. This no longer applies to an employee who is remunerated by direct deposit into an account. Such an employee will simply continue to receive his/her remuneration at the normal pay interval as usual, irrespective of whether on leave or not.

The third change consists of an increase in the number of paid annual leave days to which employees were entitled under the Labour Act, 1992. Employees working a five day week were previously entitled to 18 paid days leave per annum and employees working a 6 day week were entitled to 21 paid days leave per annum. This has now been changed to 20 and 24 paid days leave, respectively. The manner in which annual leave entitlement is formulated in the new Act is more explicit than in the previous wording and leaves little room for misinterpretation. The inclusion of a separate but related provision for employees working irregular days per week is also a notable enhancement.

Appeals of arbitration awards – >Arbitration of disputes

Application of Act (sec.2) (U) – The Labour Act, 2007 with limited exceptions, *applies to all employers and to all employees* in all economic sectors and throughout all the Regions of the territory of the Republic of Namibia.

The *only exceptions* are the Namibian Defence Force; the Namibian Police Force; the Namibian Central Intelligence Service; the Prison Service; and a municipal police service. However, in the case of these organisations

section 5 of the Act (Prohibition of discrimination in employment) is equally applicable.

With regard to the Apprenticeship Ordinance, 1938, the Merchant Shipping Act, 1951 and any law on the employment of persons in the State, special provisos exist. The Minister of Labour and Social Welfare may by notice in the Government Gazette declare any provision in these laws inoperable if they relate to remuneration or conditions of employment and are in conflict with the Labour Act, 2007. The Minister may also additionally or alternatively declare that any provision of the Labour Act, 2007 does apply with any modification specified by the Minister. However, in respect of any such provisions in these other laws regarding which the Minister has made no such declaration and which contain provisions more favourable than the Labour Act, 2007 such provisions are applicable to the employees concerned, but if they are less favourable than similar provisions of the Labour Act, 2007 the Act prevails.

Discussion: The intention of the legislature in making the Labour Act, 2007 so widely applicable is clearly aimed at providing protection to the greatest segment of the Namibian workforce reasonably possible. But there are certain exceptions to the Act's inclusiveness as indicated above, and some voices have gone up in the past expressing concern about the situation, particularly with regard to prison services.

Why certain sectors are excluded

Justification for having excluded certain limited sectors from the full ambit of the Labour Act, 2007 can be traced, *inter alia*, to the provisions of ILO Convention No.158 of 1982 (Convention Concerning Termination of Employment at the Initiative of the Employer), of which Namibia is a signatory. Article 1, Paragraph 4. of the Convention stipulates that –
“4. In so far as is necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisation of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.”

Furthermore, Article 1, Paragraph 5. of the Convention states that –
“5. In so far as is necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the Convention or certain provisions

thereof other limited categories of employer persons in respect of which special problems of substantial nature arise in the light of particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.”

Indeed, it is widely accepted international practice to exclude certain strategic categories of state employees such as the police and armed forces, which have particular significance for a country's security and public safety, from the general labour legislation regime. Such services are usually governed by specifically focused statutory instruments which also include employment related matters, as is the case in Namibia. Nevertheless, some hold the view that a feasible alternative could be to have prison services, for example, covered by general labour legislation, but to be declared 'essential services' and thereby precluding the right to potentially risky industrial action by such employees.

Foreign Mission personnel and NGO's

The situation of foreign mission personnel employed at embassies, high commissions etc, is not spelt out in the Act and can give rise to uncertainty as to whether its conditions of employment are applicable or not. Accredited foreign mission officials are covered by the protocols of the Geneva Convention, in terms of which, whilst such persons are expected to respect the laws of the host country, they are not subject to them. In practice, foreign emissaries are employed under the laws of their native countries and the provisions of the Labour Act, 2007 are not applicable.

As far as Namibian citizens employed by foreign missions are concerned, the provisions of all Namibian legislation, including the Labour Act, 2007 do apply. Matters such as leave, overtime, public holidays, social security, termination, etc., should, therefore, correctly be dealt with in accordance with the provisions of the local legislation. If it were to come to a dispute, however, the situation is not so clear cut. Certainly, Labour Ministry officials could assist by means of mediating a solution in an informal manner. But if such attempts were to fail, the employer might have to be approached along diplomatic channels to have the matter amicably resolved. The normal formal dispute resolution mechanism would mostly not apply.

Non-Governmental Organisations, or NGO's, are normal employers for the purposes of the Labour Act, 2007 and their employees enjoy all the protections of the Act as in the case any other Namibian employee. Non-Namibian citizens employed by NGO's need to have work permits, as would be applicable to any other employer employing such personnel, and the Labour Act, 2007 also applies to them.

Arbitration agreement – >Private Arbitration

Arbitration procedure – >Arbitration of Disputes and >Private Arbitration

Arbitration of Disputes (Chapter 8: Part C and D) –

Sections 84 to 91, appearing as entries A. to H. below, deal with arbitration of disputes.

Discussion: The alternative dispute resolution method of *arbitration* (>NLL 1 pp.61 & 129) is one of the centre pieces of the Labour Act, 2007. It introduces an entirely rethought and modernized official approach to the resolution of labour disputes in Namibia, replacing the former district labour court system. Arbitration is a process by which a dispute is submitted to a non-judicial third party who hears the case of the disputing parties in order to expeditiously determine the matter by making a binding award. Sections 84 to 90 of the Act relate to compulsory arbitration under the auspices of the *Labour Commissioner* and section 91 relates to voluntary *private arbitration* (>NLL 1 p.154).

A. Definitions (sec.84) (M) – Dispute is defined under section 82(1) as –

- (a) a complaint relating to the breach of a contract of employment or a collective agreement;
- (b) a dispute referred to the Labour Commissioner in terms of section 45 of the *Affirmative Action (Employment) Act, 1998 (Act 29 of 1998)* [these are affirmative action related disputes arising between employees or their representatives on the one hand and *relevant employers* (>NLL 1 p.113) on the other];
- (c) any dispute referred to in terms of section 82(16) [subsection (16) refers to an unsuccessfully conciliated dispute which the parties have agreed is to be referred to arbitration by the conciliator];
- (d) any dispute that is required to be referred to arbitration in terms of the Labour Act, 2007.

Changes: The definition of dispute has been amplified and adjusted to fit in with the requirements of dispute resolution by arbitration as per the Labour Act, 2007. Reference to the Arbitration Act, 1965 previously appearing in the Labour Act, 1992 has been removed. All labour dispute

arbitration, whether under the auspices of the Labour Commissioner or private arbitration, is consequently done within the framework and according to the provisions of this Act, and any applicable guidelines, codes of good practice or code of ethics issued by the Minister of Labour and Social Welfare as contemplated in section 137 of the Act.

B. Arbitration (sec.85) (N) – This section establishes arbitration tribunals as contemplated in Article 12(1)(a) of the Namibian Constitution, for the purpose of resolving labour related disputes.

Arbitration Tribunals

Arbitration tribunals operate under the auspices of the Labour Commissioner and have jurisdiction to hear and determine any dispute or other matter arising from the interpretation, implementation or application of the Labour Act, 2007. An arbitration tribunal has the power to make any order that it is authorised to make in terms of any provision of the Act.

Arbitrators

The Minister appoints arbitrators to perform the duties and function and to exercise the powers conferred on arbitrators in terms of the Act. Such appointments are done subject to the laws governing the public service and may be on a fulltime or part-time basis. The Minister may also appoint part-time arbitrators *from outside* the public service subject to such terms and conditions as he/she may determine. Any appointments may be withdrawn by the Minister on good cause shown.

The Labour Commissioner designates individuals appointed by the Minister as Arbitrators to hear and determine disputes. An arbitrator must be independent and impartial in the performance of his/her duties in terms of the Act.

Part-time arbitrators from outside the public service are paid fees and allowances at a rate determined by the Minister with the approval of the Minister of Finance, which fees and allowances may differ in respect of different categories of arbitrators as decided upon by the Minister.

[See Regulation 17: *Appointment of conciliators and arbitrators*]

C. Resolving disputes by arbitration through Labour Commissioner (sec. 86) (N) – Determining employment related disputes by arbitration involves several main phases aimed at eventual fair resolution of the subject of disagreement.

Referral of dispute

Any party to a dispute may refer the dispute in writing to the Labour Commissioner or any labour office of the Ministry. In the case of alleged unfair dismissal the referral must be done not later than six months after the dismissal. Any other type of dispute must be referred within one year after the date of the cause of action. A copy of the referral must be served on the other party(ies) to the dispute.

Designation of Arbitrator

The Labour Commissioner will designate an arbitrator to arbitrate the dispute and will notify the parties of the arbitrator and the place, date and time of the arbitration hearing.

Conciliation

An arbitrator is obliged to first attempt to settle the dispute by means of conciliation, i.e., by prevailing upon the parties, and assisting them, to come to a voluntary resolution of the dispute. [This is viewed as the preferred outcome of the matter, as neither party would feel coerced into accepting a result with which it disagrees.]

If conciliation fails the arbitrator must commence to determine the dispute through formal arbitration.

Procedure

Whilst the arbitrator is guided by arbitration rules formulated by the *>Committee for Dispute Prevention and Resolution*, the arbitrator has a discretion to conduct the hearing in a manner he/she considers appropriate in order to determine the dispute **fairly and quickly**. In doing so the arbitrator must deal with the substantial merits of the dispute with the **minimum of legal formalities**.

The arbitrator has the additional powers to –

- *Subpoena* (>NLL 1 p.163) any person to attend an arbitration hearing;
- administer an oath or accept an affirmation;
- question witnesses; and
- suspend arbitration proceedings and resume conciliation instead if the parties agree.

A person who ignores a subpoena or refuses to answer a question by the arbitrator commits an offence and is liable on conviction to a maximum fine of N\$10000.00 and/or 2 years imprisonment.

Rights of Parties

A party to a dispute has the right to –

- Give evidence;
- call witnesses;
- question witnesses of the other party; and
- address concluding remarks.

Representation

A party to a dispute -

- may appear in person at the arbitration hearing;
- if the party is an *>employee*, he/she has the right to be represented by a fellow employee, or by an office bearer or an official of his/her registered trade union;
- if the party is an *>employer*, he/she/it has the right to be represented by an office bearer, or by an official of a registered employers' organisation; and
- if the party is a *juristic person* (*>NLL 1 p.144*) it has the right to be represented by an employee of that entity.

Representation by Legal Practitioner

An arbitrator may permit a lawyer to represent a party in arbitration proceedings if both parties to the dispute agree; or, if at the request of a party, the arbitrator is satisfied that the dispute is of such complexity that it is appropriate for the party to be represented by a lawyer and that the other party will not be prejudiced thereby (negatively affected).

Representation by any Other Individual

An arbitrator may also permit any other individual to represent a party in arbitration proceedings if both parties agree; or, if at the request of a party, the arbitrator is satisfied that representation by the individual will facilitate the effective resolution of the dispute or attainment of the objectives of the Act; that the individual meets prescribed requirements; and that the other party to the dispute will not be prejudiced. In deciding whether to permit representation of a party by any other individual as contemplated above, the arbitrator must take into account applicable guidelines issued by the Minister under section 137 of the Act.

Award

The arbitrator must issue a signed award with brief motivation in support of his/her decision within *30 days* of the conclusion of the arbitration proceedings. In making the award the arbitrator must bear in mind any code of good practice or guidelines published by the Minister. Arbitrators are empowered to make any appropriate arbitration awards including:

- *Interdicts* (>NLL 1 p.142);
- Orders to remedy a wrong;
- *Declaratory orders* (>NLL 1 p.135);
- Orders of reinstatement;
- Awards of compensation; and
- Orders for costs.

An arbitrator may only include an order for costs in the award if a party, or the person who represented the party in the arbitration proceedings, acted in a frivolous manner (silly, petty, not being serious) or in a vexatious manner (having insufficient reason and seeking mainly to annoy the other party) by proceeding with the dispute, defending the dispute or by acting in such a manner during the proceedings.

[See Regulation 20: *Referral of dispute to arbitration*; Regulation 21: *Request for representation at conciliation or arbitration*; and Regulation 27: *Proof of service of documents*]

Discussion: Arbitration under Chapter 8, Part C of the Labour Act, 2007 provides the statutory framework for an easily accessible, public funded and efficacious means to deal with labour disputes of right, whether of a collective or an individual nature. In taking over the functions of the former district labour courts in this regard, arbitrations by the Office of the Labour Commission seek to remove the shortcomings of the former system, thus contributing to a more equitable and stable employment environment. Certainty in this regard is an essential prerequisite for socio-economic development and was one of the principal considerations leading to the drafting of a Labour Act, 2007.

Speeded-up process and need for preparedness

In similar vein, it is evident that the architects of the Act were intent on having disputes involving alleged unfair dismissal resolved as soon as possible in the best interest of all parties, and not to allow such matters to remain in limbo or to be inordinately drawn out. Thus the time limit of 6 months for the referral of such disputes and no specific provision for recourse to condonation which could encourage the institution of complaints outside the prescription period. (This does not, however, mean that a party is barred from submitting an application for condonation of late referral to an arbitrator. That can still be done in compliance with Part 6 of *The Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, 2008* >Regulations (boxed discussion.))

Furthermore, although the Act does not specifically say so, it does appear from its context that arbitration should proceed immediately (possibly even the same day) after attempts at conciliation have broken down. Obviously the arbitrator has a measure of discretion to adjourn proceedings if there are compelling reasons to do so. However, parties to a dispute coming up for arbitration should be thoroughly prepared and ready to lead evidence straight away, in the event of conciliation failing. Alternatively, they must come to the proceedings with a proper mandate for a negotiated settlement and be willing to concede or compromise in the course of conciliation.

A party may also apply for postponement in accordance with the *Rules Relating to the Conduct of Conciliation and Arbitration*, although approval of such postponement is left to the discretion of the Arbitrator. Whatever the case may be, the *con/arb* (>NLL 1 p.69) approach of Chapter 8 obliges employers to be much more focussed in dealing with labour disputes than previously.

Representation

On the issue of representation of parties at arbitration, the freedom to choose any representative of choice which was granted to litigants in the district labour court by the Labour Act, 1992, has been curtailed in compulsory arbitration under the Labour Act, 2007. This was done upon proposal by the social partners during the initial brainstorming phase when amendments to the former Labour Act were being explored. The parties agreed that the playing field in dispute resolution needed to be levelled, and the whole process to be speeded up by simplification thereof: Focus should hence forth be on the merits of a case rather than on technicalities frequently introduced by lawyers and consultants. In terms of the new Act, it is only under special circumstances that a legal practitioner or other person may represent a party to a dispute, subject to the arbitrator's approval. On the other hand, parties belonging to a registered trade union or employers' organisation have access to representation by officials or office bearers of such bodies.

The right to legal representation at proceedings before a Tribunal established by law as provided for in Article 12 (*Fair Trial*) of the Namibian Constitution, is thus not absolutely recognized in the Labour Act, 2007. The situation is somewhat mitigated by the fact that under compulsory arbitration the parties have the right to note an appeal against an award on a question of law (or if the dispute relates to a fundamental right on a question of law and/or fact) or to make application for review on procedural grounds to the Labour Court.

Significantly, the role of trade unions and employers' organisations is

much enhanced by the rules for representation. Clearly this contributes to the strengthening of these bodies and simultaneously also the institutions of collective bargaining and tripartism in Namibia.

The other main alternative for representation at arbitration, namely, that parties represent themselves, will require that they become more adept with arbitration procedures. This should eventually result in more hands-on skills and insight into the dynamics of dispute prevention and resolution, particularly on the part of employers, on whom normally rests the onus of proof. Self-representation by employers certainly appears to be the preferred approach within the spirit and intent of the Labour Act, 2007.

Regulations and Rules

Any party involved in arbitration, either as Applicant (usually an employee or former employee) or as Respondent (usually the employer or former employer) must have regard to the Regulations and Rules issued by the Minister. They, *inter alia*, give more specific instructions on procedures prior to-, during-, and subsequent to arbitration, including the official forms to be used by the Labour Commissioner and the parties involved. The Regulation and Rules constitute part of the legal framework within which the arbitration takes place. Both the Regulations and Rules are dealt with in the boxed discussion under the item *>Regulations (Sec.135)* further on in the Lexicon

Simplified procedure and main forms

The procedure for a typical, straightforward referral of a dispute to the Labour Commissioner, and determining thereof by an arbitrator, can be summarised as follows:

- i) The process commences with the Applicant completing a *>Form LC 21 Referral of Dispute to Conciliation or Arbitration* (Annex I) and serving it on the Respondent. The LC 21 contains information on the nature of the dispute and particulars of the Applicant and Respondent. It should also have an outline of steps taken to resolve the dispute attached to it.
- ii) The Applicant makes an affidavit *>Form LG 36 Proof of Service of Documents* (Annex 1) and files it together with a copy of the LC 21 with the Labour Commissioner. A copy of the LG 36 must also be served on the Respondent.
- iii) Should one or both of the parties to the dispute wish to apply to the arbitrator for permission to be represented by a legal practitioner or other person such as a consultant this must be done on *>Form LC 29 Request for Representation at Conciliation or Arbitration in Terms of Section*

82(13) or Section 86(13) (Annex I). No formal application is required if representation is to be done by an official or office bearer of a registered trade union or registered employers' organisation of which the Applicant/ Respondent is a member.

iv) The Labour Commissioner designates a competent person as arbitrator to determine the dispute.

v) The Labour Commissioner or a designate completes >Form LC 28 *Notice of Arbitration Hearing* (Annex I) containing information on the arbitrator, date, time and venue of the arbitration event and serves it on the parties. Unless the parties agree otherwise they must be given at least 14 days notice of the hearing.

vi) Should any of the parties require the services of an interpreter; want any witnesses to be subpoenaed; or wish to apply for postponement; this must be done as directed on form LC 28.

vii) On the appointed time and date the arbitrator attempts to resolve the dispute by conciliation, failure of which, he/she commences formal arbitration. The arbitration is fully recorded and usually follows the pattern of explanation of the procedure by the arbitrator; opening statements by the parties; testimony of witnesses; cross-examination of evidence by the opposing party and the arbitrator; and finally, closing arguments by both the Respondent and Applicant.

viii) The arbitrator weighs the evidence and arguments presented and forwards a written, motivated award to the parties within 30 days of the arbitration event.

D. Effect of arbitration awards (sec.87) (N) – All awards are binding, unless of an advisory nature such as a declaratory order, and may be made an order of the >Labour Court upon filing in the Court by an affected party or by the Labour Commissioner. Any money amount forming part of an award earns interest from the date of the award at prescribed rates, unless the award provides otherwise.

E. Variation and rescission of awards (sec.88) (N) – An arbitrator may change or revoke an award at own instance or upon application by a party within 30 days after service of the award. This may be done if an award was wrongly made in the absence of a party; or if it is ambiguous or contains an error or omission; or if it was made because of a mistake on the part of both parties.

F. Appeals or reviews of arbitration awards (sec.89) (N) – A party to a dispute may note an *appeal* (>NLL 1 p.129), or make application for *review* (>NLL 1 p.160), to the Labour Court against an arbitrator's award.

Types of appeal

Appeals may be noted on any questions of law, or in certain cases involving fundamental human rights and protections, on a question of fact or law, or both fact and law (full appeal).

Types of review

Reviews may involve alleged defects in the arbitration proceedings in relation to the lawful duties of an arbitrator; gross *irregularities* by the arbitrator in the conduct of the *proceedings*; or in the arbitrator overstepping his/her powers. The Act also provides for a situation where it may be alleged that an award has been improperly obtained, i.e., involved corruption.

Procedure and timeframe

Appeals must be noted in accordance with the Rules of the High Court *within 30 days* after the award has been served on the party intending to appeal. Applications for review must also be made within 30 days unless the alleged procedural shortcoming involves corruption in which case the applicant has 6 weeks as from the date on which the corruption was uncovered. The Court may, however, condone the late noting of an appeal on good cause shown.

Suspension of award

When an appeal is noted, or an application for review is made, this has the effect that any part of the award that is adverse to the interest of an employee is suspended (is not put into operation for the time being), but any part of the award that is unfavourable to the interest of the employer remains unchanged. However, an employer has the right to apply to the Labour Court to have such adverse effects suspended.

In considering such an application the Court must consider any *irreparable harm* that would result to either the employee or the employer if the award, or part of it, were to be suspended or not suspended. If the balance of irreparable harm favours neither the employer nor the employee conclusively, the Court must determine the matter in favour of the employee.

In taking a decision regarding a suspension of an award pending the final determination of the appeal or review, the Court may order that all or part of the award be suspended or may attach certain conditions to its order. This could include (but is not limited to) requiring a monetary award to be

provisionally paid into Court, or that an employer be obliged to continue paying an employee's salary pending the final determination of the appeal or review even though the employee is not working for the employer during that time.

Setting aside of award

If the Labour Court, in response to an appeal or application for review, decides to set an award aside it may –

- determine (judge) the dispute which had originally been before an arbitrator in any manner which it considers appropriate; or
- make any award it considers appropriate about the procedures to be followed to determine the dispute; or
- refer the matter back to the arbitrator or direct that a new arbitrator be designated.

It follows that if an appeal to, or an application for review by, the Labour Court fails the arbitrator's award is upheld and becomes fully enforceable.

Intervention by the Minister

When an appeal is noted or an application for review is made and the appeal or review involves the interpretation, implementation or application of the Act, the Minister may intervene in the proceedings on behalf of the State if the Minister considers it necessary for the effective administration of the Act.

Discussion: What is meant by a *question of law* includes the interpretation, manner of application, failure to observe, etc., of any relevant statutory or common law rule, including promulgated regulations and guidelines and court precedent applicable to the matter at hand. A *question of fact*, on the other hand, refers to actual things or occurrences that are known, or are claimed, to exist, relating to the case. In terms of this section, therefore, appeals not specifically relating to human rights and protections will only be permitted to be directed at questions of law and not to involve the factual or substantive merits of a case as such.

The concept of *irreparable harm* as stipulated in this section, means that the Court is obliged by the Act to adopt a stance markedly advantaging an employee in this regard. Only under a very stringent set of circumstances will an employer be able to prevent an adverse award to be suspended whilst appealing against it, whilst in the case of an employee appealing or making application for review, the suspension of an award favouring the employer is virtually automatic.

G. Enforcement of awards (sec. 90) (N) – If a party does not comply with the terms of an arbitration award the other party may apply to a labour inspector to take such steps as may be necessary to enforce compliance, including the institution of execution proceedings (legal seizure and sale of property of the defaulting party).

[See Regulation 22: Application to enforce arbitration award]

H. Private arbitration (sec.91) (N) – The Labour Act, 2007 provides for referral of a dispute to voluntary *private arbitration* (>NLL 1 p.154) as an alternative to compulsory arbitration by the Labour Commissioner.

Arbitration Agreement

For this purpose parties to an existing-, or a potential future dispute may agree in writing to refer the matter to arbitration in accordance with the provisions of section 91 of the Act. Such an Arbitration Agreement includes a clause in a collective agreement, framed in accordance with section 73, providing for future disputes between parties to be referred to private arbitration.

If any party to an Arbitration Agreement refers a dispute that should be referred to private arbitration to the Labour Commissioner, the Labour Commissioner is obliged to refer the dispute back for private arbitration in accordance with the agreement.

Arbitrator

In case the person initially agreed upon by the parties to be the private arbitrator as part of the Arbitration Agreement is, for any reason, unable to act in that capacity, the parties may appoint another arbitrator. If the parties fail to reach consensus on this aspect, the Labour Court may, upon application appoint an arbitrator on their behalf. Under normal circumstances the appointment of an arbitrator may only be terminated if both parties to the agreement concur. The appointment of an arbitrator may, however, be set aside by the Labour Court on good cause shown.

Powers of the Private Arbitrator

A private arbitrator is empowered in terms of the Act to:

- *Subpoena* persons to appear at an arbitration hearing;
- administer oaths or accept affirmations of witnesses;
- *question* any individual on any issue relevant to the matter being heard;
- *suspend* arbitration proceedings and conciliate instead if the parties agree; and

- generally to **conduct the arbitration** in a manner which he/she deems appropriate in order to determine the dispute **fairly and quickly** whilst dealing with the substantial merits of the dispute **with a minimum of legal formalities**.

Rights of parties in private arbitration

A party to a dispute has the right to –

- give evidence;
- call witnesses;
- question witnesses of the other party; and
- address concluding remarks.

Representation

A party to a dispute in private arbitration may appear in person or to be represented by anybody of his/her choice at the arbitration proceedings, subject to what the parties agreed to in the Arbitration Agreement. The Act does not impose any restriction on parties to private arbitration regarding representation as it does in the case of compulsory arbitration.

Award

Unless the Arbitration Agreement provides otherwise, the arbitrator must issue a signed award with motivation in support of his/her decision within **30 days** of the conclusion of the arbitration proceedings. The parties may, however agree that the award be made in shorter period.

Subject to the *terms of reference* set out in the Arbitration Agreement, a private arbitrator is empowered to make any appropriate arbitration award including –

- (a) an *interdict* (>NLL 1 p.142);
- (b) an order to remedy a wrong;
- (c) a *declaratory order* (>NLL 1 p.135);
- (d) an order of reinstatement;
- (e) an award of compensation; and
- (f) an order for *costs* (>NLL 1 p.134) (*not* restricted only to situations where a party has acted frivolously or vexatiously as in the case of compulsory arbitration).

Effect of arbitration awards

All private arbitration awards *are binding*, unless they are intended to be of an advisory nature such as a declaratory order, and may be made an order of the >Labour Court upon filing in the Court by a party affected by the award. Any money amount forming part of an award earns interest from the date of the award at prescribed rates, unless the award provides otherwise.

Variation and rescission of awards

In terms of the Act, an arbitrator in private arbitration, similar to the situation in compulsory arbitration, may change or revoke an award at own instance or upon application by any party within 30 days after service of the award, if wrongly made in the absence of a party; or if it is ambiguous or contains an error or omission; or if it was made because of a mistake on the part of both parties.

Reviews of private arbitration awards

A party to a dispute may make application for *review* (>NLL 1 p.160), to the Labour Court against an arbitrator's award.

Types of review

Reviews may involve alleged defects in the arbitration proceedings in relation to the lawful duties of an arbitrator; gross *irregularities* by the arbitrator in the conduct of the *proceedings*; or in the arbitrator overstepping his/her powers. The Act also provides for a situation where it may be alleged that an award has been improperly obtained, i.e., involved corruption.

Procedure and timeframe

Applications for review must be made within 30 days unless the alleged procedural shortcoming involves corruption in which case the applicant has 6 weeks as from the date on which the corruption was uncovered.

Suspension of award

When an application for review is made, this has the effect that any part of the award that is adverse to the interest of an employee is suspended (is not put into operation for the time being), but any part of the award that is unfavourable to the interest of the employer remains unchanged. However, an employer has the right to apply to the Labour Court to have such adverse effects suspended.

In considering such an application the Court must consider any *irreparable harm* that would result to either the employee or the employer if the award, or part of it, were to be suspended or not suspended. If the balance of irreparable harm favours neither the employer nor the employee conclusively, the Court must determine the matter in favour of the employee.

In taking a decision regarding a suspension of an award pending the final determination of the review, the Court may order that all or part of the award be suspended or may attach certain conditions to its order. This could include (but is not limited to) requiring a monetary award to be provisionally paid into Court, or that an employer be obliged to continue

paying an employee's salary pending the final determination of the review even though the employee is not working for the employer during that time.

Setting aside of award

If the Labour Court, in response to an application for review, decides to set an award aside it may refer the matter back to the arbitrator or direct that a new arbitrator be designated.

It follows that if an application for review by the Labour Court fails the arbitrator's award is upheld and becomes fully enforceable.

Intervention by the Minister

When an application for review of a private arbitration award is made and the review involves the interpretation, implementation or application of the Act, the Minister may intervene in the proceedings on behalf of the State if the Minister considers it necessary for the effective administration of the Act.

Termination of Arbitration Agreement.

An Arbitration Agreement terminates only by consent of all parties to the agreement or by an order of the Labour Court.

The agreement does not terminate through the death, sequestration or winding up of any party, but in such circumstances an arbitration that has commenced must be kept in abeyance until an executor, administrator, curator, trustee, liquidator or judicial manager has been appointed.

Discussion: Private Arbitration under Chapter 8, Part D of the Labour Act, 2007 is intended to make the benefits of conventional arbitration accessible to stakeholders as a complementary alternative to compulsory arbitration as provided for in Part C. Both forms of arbitration as appearing in the Labour Act are innovative in the sense that they constitute new approaches in Namibia's evolving statutory labour dispute prevention and settlement repertoire.

The nature of private arbitration

Arbitration in its traditional application, that is, in the manner and sense in which it is ordinarily understood and practised, is by its very nature a voluntary, private procedure for the speedy resolution of civil disputes.

Although it is common all over the World to have a statutory framework within which formal arbitration takes place (such as, for example, is provided by the Arbitration Act (Act 42 of 1965), the essential elements of

arbitration are confidence by all parties in the ability and impartiality of the arbitrator; privacy; flexibility of procedure and finality of outcome.

It is these elements which make ordinary arbitration, despite initial costs involved, attractive to disputing parties which seek to avoid the rigid, often drawn out, processes involved in judicial litigation. Even as far as costs are concerned, arbitration can be considered a cheaper option than litigation could potentially be in the long run, if the often huge expenses involved in instructing counsel in protracted court action and potential appeal proceedings are considered.

Distinguishing Features

The main aspects distinguishing private arbitration from compulsory arbitration in the context of the Labour Act, 2007, either directly or by implication, include the following attributes:

- For the purpose of private arbitration parties can either pro-actively draw up and sign a future orientated Arbitration Agreement (terms of reference and manner to deal with a potential future dispute) ahead of time; or they can choose to draw up an Arbitration Agreement on an *ad hoc basis* to deal only with a current dispute.
- the parties can mutually choose any suitable person as an arbitrator;
- the parties may avail themselves of external assistance to arrange the preliminary formalities of the arbitration if they so wish;
- the arbitration proceedings may be held in private and at any venue, and on any date and time they may decide upon;
- the parties may be represented at arbitration by anybody of their choice;
- the arbitrator is not obliged to first attempt to conciliate the dispute before commencing arbitration proceedings;
- in making the award the arbitrator is not bound by guidelines issued in terms of section 137;
- the award may be kept confidential;
- the award is not subject to appeal but can be reviewed by the Labour Court on procedural grounds; and
- whereas compulsory arbitration is a service offered to the public free of charge by the State, private arbitration involves costs which the parties may agree to carry as they deem fit.

Apart from the initial cost factor, a potential drawback of private arbitration is that the award may not become known by the public – even if it is a good award from which others may benefit – if the parties decide to keep it confidential.

Arbitration Agreement

The Arbitration Agreement consists of a formal document, drawn up and entered into on a voluntary basis by two or more parties who have a labour related relationship such as an employer and an employee or registered trade union and an employer.

The document's main clause and stipulation is a formal accord between the parties to submit a given labour related dispute between them to a third outside party for fair adjudication and a binding award which the parties agree to accept. The agreement may include the name of a specific person who is to act as arbitrator or may indicate the method to be followed in having such a person appointed.

The agreement must either clearly spell out the specific dispute which is to be determined by the arbitrator in a current instance or must describe what kinds of future disputes are to be determined by the arbitrator should they occur.

The Arbitration Agreement can also include other terms of reference such as powers of the arbitrator in making an award, format of the award, time limits, discovery, other procedural aspects to be complied with or allowed, choice of venue, confidentiality, possibility of appeal, duration, etc.

It follows that an Arbitration Agreement for private arbitration can be a fairly simple and straightforward document of intention, or it can be a quite elaborate and prescriptive protocol. Whatever the case, it must comply with the provisions of section 91 of the Labour Act, 2007.

However, neither the Regulations and Rules prescribing procedure to be followed for arbitration in terms of section 86; nor the official forms which have been prescribed for that purpose, are applicable to arbitration conducted in terms of section 91

Arbitrator – >Definitions and Interpretation

Automatic termination of contracts of employment (sec.32) –
>Termination of employment

Award – >Arbitration of Disputes

B

Basic Conditions (sec.9) (M) – All matters dealt with in Chapter 3 of the Labour Act, 2007 constitute basic conditions of employment and under Parts B to F form five main categories:

1. Remuneration –

- (a) Calculation of wages (sec.10)
- (b) Payment of remuneration (sec.11)
- (c) Deductions and other acts concerning remuneration (sec.12)
- (d) Wage order (sec.13)
- (e) Exemption from wage order (sec.14)

2. Hours of work –

- (a) Continuous shifts (sec.15)
- (b) Ordinary hours of work (sec.16)
- (c) Overtime (sec.17)
- (d) Meal intervals (sec.18)
- (e) Night work (sec.19)
- (f) Daily spread-over (sec.20)
- (g) Weekly rest period (sec.20)
- (h) Sunday work (sec.21)
- (i) Public holidays (sec.22)

3. Leave –

- (a) Annual leave (sec.23)
- (b) Sick leave (sec.24)
- (c) Compassionate leave (sec. 25)
- (d) Maternity leave (sec.26)
- (e) Extended maternity leave (sec.27)

4. Accommodation –

Provision of accommodation (sec.28)

5. Termination of employment –

- (a) Period of employment (sec.29)
- (b) Termination on notice (sec.30)
- (c) Payment in lieu of notice (sec.31)
- (d) Automatic termination (sec.32)
- (e) Unfair dismissal (sec.33)
- (f) Redundancy (retrenchment) (sec.34)
- (g) Severance pay (sec.35)

- (h) Transportation on termination (sec.36)
- (i) Payment on termination (sec.37)
- (j) Certificates of service (sec.37).

A basic condition of employment as provided for in the Act *automatically forms a term of any employment contract*, whether it is specifically mentioned in the contract or not. However, if there is any other law also regulating a certain class of employees (such as apprentices), and if such a law contains a more favourable provision, that provision will apply to the employees in question. If, however, that other law's provision is less favourable, the Labour Act's provision on that specific aspect will apply. Where a contract of employment, or a collective agreement, contains a more favourable condition of employment than the Act, then the more favourable term will have precedence.

A basic condition of employment can be altered by *>exemption or variation* granted by the Minister in accordance with the provisions of section 139, and will apply to the extent altered by the exemption or variation.

Discussion:

It is important to note that whenever a provision in Chapter 3 uses the phrase "*an employer must*" or "*the employer must*"; or the phrase "*an employer must not require or permit an employee*" or "*the employer must not require or permit an employee*"; or words to that effect, it means that the employer is under obligation to literally do what the provision requires.

That remains so even if the employee agrees or even requests the employer to deviate from the provision, such as for example, be willing to work on a Sunday for ordinary pay or take less annual leave than the law requires. That would constitute what is sometimes known as 'contracting out' and is unlawful under the Act unless an exemption has been granted by the Minister as contemplated in section 139. The reason for this is that the Act seeks to protect employees and job seekers (who may be desperate to find employment) from potential exploitation which would neither be in their own nor in the public interest.

The term "*must*" which in the Labour Act, 2007 generally replaces the term "shall" used in the Labour Act, 1992 is peremptory (obligatory) and must be interpreted as such. The term "*may*" where it appears in the Act usually indicates some degree of option, i.e., the person it is directed at can, but is not obliged to, do as indicated in the provision, depending on circumstances and/or level of discretion allowed in the wording.

Changes: Several basic conditions appearing in Chapter 3 are new or have been modified to some extent in relation to the previous Act. Where this is the situation the relevant discussion of the item is indicative thereof.

Basic wage – >Definitions and interpretation

C

Calculation of remuneration and basic wages (sec.10) (M)

– For the purposes of the Act remuneration can be either based on a specific *time interval* (such as hourly wages or monthly salary) or on any *other measurable basis* (such as production related piecework or sales commission).

In the latter case the employee is considered – for the purpose of *calculation of different types of benefits* provided for in the Act – to be remunerated on a weekly basis. The *weekly remuneration or basic wage* is obtained by adding the employee's earnings for the preceding 13 weeks (3 x 4.333 weeks) and dividing the total by 13. If the employee has worked less than 13 weeks the total earnings of that lesser period is divided by the actual number of weeks worked to obtain the (average) weekly remuneration or basic wage.

To calculate the comparable *hourly, daily, weekly or monthly* remuneration or basic wage of an employee who is paid either on an hourly, daily, weekly (including piecework/commission payment), fortnightly or monthly basis, as the case may be, use the following method: Refer to the Table below and locate the horizontal line for the employee's applicable pay period. Read across on that line to the vertical column for the desired comparable remuneration or basic wage and apply the formula set out in the cell or block of the Table where the line and column cross each other.

TABLE 1 – CALCULATION OF REMUNERATION AND BASIC WAGES

| | To calculate hourly rates | To calculate daily rates | To calculate weekly rates | To calculate monthly rates |
|---|---|--|---|---|
| Employees whose remuneration is set by the hour | | Multiply the hourly rate by the number of ordinary hours of work each day. | Multiply the hourly rate by the number of ordinary hours of work each week. | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the day | Divide the daily rate by the number of ordinary hours of work each day. | | Multiply the daily rate by the number of ordinary days of work each week. | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the week | Divide the weekly rate (or calculated weekly rate) by the number of ordinary hours of work each week. | Divide the weekly rate (or calculated weekly rate) by the number of ordinary days of work each week. | | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the fortnight | Divide the fortnightly rate by two times the number of ordinary hours of work each week. | Divide the fortnightly rate by two times the number of ordinary days of work each week. | Divide the fortnightly rate by two. | Calculate the weekly rate, then multiply the calculated weekly rate by 4,333. |
| Employees whose remuneration is set by the month | Divide the monthly rate by 4,333 times the number of hours ordinarily worked each week. | Divide the monthly rate by 4,333 times the number of days ordinarily worked each week. | Divide the monthly rate by 4,333. | |

Note:

- i) 'ordinary hours' may not exceed the statutory *>ordinary hours of work* and do not include overtime.
- ii) 'ordinary days' means the normal fixed number of days an employee works per week.

Certificate of employment/service – *>Termination of employment*

Child labour, prohibition and restriction of – *>Fundamental Rights and Protections*

Closed shop – *>Recognition and Organisational Rights of Registered Trade Unions >C. Deductions of trade union dues*

Codes of good practice – *>Guidelines and codes of good practice*

Collective agreement – *>Definitions and Interpretation*

Collective Agreements (Chapter 6 Part D) – Sections 70 to 73, appearing as entries A. to D. below, deal with collective agreements.

Discussion: Collective agreements between employees and employers and their representative organisations are fundamental to the labour relations regime continued and reinforced by the Labour Act, 2007.

A *collective agreement (>NLL 1 p.63)* is a formal document intended to *constitute a binding contract* between one or more registered trade unions on the one hand and one or more employers, one or more or more registered employers' organisations, or one or more employers and one or more employers' organisations, on the other hand. It represents a voluntary accord relating to a specific set of circumstances or competing interests between consenting legal persons. The terms of the agreement must satisfy certain basic requirements in order to be valid and must be similarly understood by both parties. There are two main categories: *procedural agreements* and *substantive agreements*.

Procedural Agreement

A procedural agreement regulates the relations between the parties, i.e., management, union, shop stewards and employees – its most common form in industrial relations is the *recognition agreement*. Procedural

collective agreements are usually applicable indefinitely, i.e., they are not limited to any specific period of time.

The act of recognition per se, that is, recognition of a registered trade union as exclusive bargaining agent by an employer or employers' organisation, need not necessarily be done in terms of a long formal procedural agreement as has hitherto usually been the case. Regulation 11(2) of the Labour General Regulations: Labour Act, 2007, provides for recognition through the mere completion of Form LC 11 of the Regulations by an employer or employers' organisation and submitting it to the relevant union with a copy to the Labour Commissioner.

Substantive Agreement

Substantive collective agreements mostly involve tangible aspects with financial implications relating to conditions of employment such as wages, allowances and incentive bonus schemes and are usually applicable for a fixed period of time. Certain clauses of a substantive agreement, such as items relating to hours of work or pension may, however, be of a more permanent nature in that they become conditions of employment once agreed upon.

Although not yet common in Namibia, one can also have a combined procedural and substantive agreement covering all aspects in one document.

A. Legal effect of collective agreements (sec.70) (U) – Once signed by the duly authorised representatives of all the parties a collective agreement is applicable for the full period stated therein and is legally binding on –

- (a) the parties to the agreement;
- (b) the members of the registered trade union that is party to the agreement;
- (c) the members of any registered employers' organisation that is party to the agreement;
- (d) all employees in the *bargaining unit* (>NLL 1 p.130) if the union has been recognized as an *exclusive bargaining agent* (>NLL 1 p.139) *in terms of sec. 64*); and
- (e) all employees, employers, registered trade unions and employers' organisations to whom the agreement has been extended by the Minister of Labour by notice in the *Official Gazette* in terms of section 71.

A collective agreement relating to terms and conditions of employment automatically changes the contents of all contracts of employment affected thereby: cessation of membership of a union or employers' organisation does not nullify its binding effect. Nevertheless, a collective agreement does not prevent an employer agreeing to more favourable conditions of employment, unless the agreement specifically forbids it, and provided the employer enters into such a contract of employment in good faith and without undermining collective bargaining or the status of the union involved.

B. Extension of a collective agreement (with an exclusive bargaining agent) to non-parties (sec.71) (U) – The parties to a collective agreement are entitled to approach the Minister to extend the agreement to all employers and employees in their specific industry or economic sector. If so approached in the prescribed manner, the Minister will publish the request in the *Official Gazette* and invite objections within a period not exceeding 30 days. Copies of any objections received will be served on the parties to the application who are required to respond to the objection no later than within 14 days.

If after consideration of all inputs the Minister is satisfied that – the collective agreement does not conflict with any law; is, on the whole, no less favourable than the conditions of employment previously applicable; and contains an appropriate arbitration procedure to resolve potential disputes – he is obliged to extend the agreement for a fixed period of time to all other relevant employers and employees by publication in the *Gazette*. The Minister may extend the period of applicability of the collective agreement in the prescribed manner, if approached to do so by the parties.

[See Regulation 14: *Request to extend collective agreement to non-parties to the agreement*]

C. Exemptions from an extended collective agreement (sec.72) (M) – A dissatisfied employer, or any other person, who is bound by a collective agreement which has been made applicable to an entire economic sector, may formally apply to the Minister to be excused from its provisions. The Minister, if satisfied that special circumstances exist justifying the request, *may wholly or partly exempt the applicant* by notice in writing (subject to any conditions he/she may hold as appropriate) and inform the parties to the collective agreement accordingly.

[See Regulation 15: *Application for exemption from extension of collective agreement*]

Change: The previous Act specifically provided for the parties to the collective agreement, or the person who applied for an exemption, to note an appeal to the Labour Court against any decision made by the Minister in this regard. The new Act is silent on such a possible course of action, which, however, does not mean that right to do so has been removed.

D. Disputes arising from application, interpretation or enforcement of collective agreement (sec.73) (M) – A collective agreement must contain a clause providing for an arbitration procedure in accordance with Chapter 8 Part C (compulsory arbitration), or in accordance with Chapter 8 Part D (private arbitration), which the parties to the agreement must set in motion in the event of a dispute arising concerning its implementation. Such a clause is not necessary if provision has been made in another collective agreement (usually a procedural recognition agreement) for the resolution of disputes amongst the parties.

If a collective agreement does not contain an arbitration clause; is inoperative; or one of the parties hampers the resolution of the dispute in terms of the agreement, the Labour Commissioner may be approached. The latter then has the discretion to either refer the dispute to an arbitrator to arbitrate the dispute in terms of Part C of Chapter 8, or to refer the matter for arbitration in accordance with part D of Chapter 8.

Collective bargaining → *Registration of trade unions and employers' organisations (Rights of registered trade unions and registered employers' organisation)*

Changes: Previously there was no compulsion to have an arbitration clause in a collective agreement, although in order to apply to have a collective agreement registered by the Labour Commissioner there had to be a clause providing for the settling of disputes, which could, however, be limited to mediation or referral to conciliation if the parties so preferred.

Committee for Dispute Prevention and Resolution (Chapter 9 Part B) – Sections 100 to 103, appearing as entries A. to D. below, deal with the Committee for Dispute Prevention and Resolution.

Discussion: The Committee for Dispute Prevention and Resolution is a new statutory body established to assist in numerous ways to promote labour peace and facilitate the speedy settlement of individual and employment-related conflict. More particularly, the Committee, established under section 97(1)(a) of the Act as a Committee of the >Labour Advisory Council, is a specialist body created for the purpose of recommending rules for the conduct of conciliation and arbitration and a code of ethics for such practitioners. It also has various other important functions including reviewing the performance of the Office of the Labour Commissioner on a regular basis and reporting thereon.

A. Functions of Committee for Dispute Prevention and Resolution (sec.100) (N) – The functions of the Committee are to recommend to the Labour Advisory Council:

- Rules for conciliation and arbitration.
- Policies and guidelines for dispute prevention and resolution.
- A code of ethics for conciliators and arbitrators appointed in terms of sections 82 and 85, respectively.
- Qualifications for and appointments of conciliators and arbitrators in terms of sections 82 and 85.

The Committee must also:

- Regularly review the performance of dispute prevention and resolution by the Labour Commissioner and report thereon to the Labour Advisory Council (LAC).
- Report to the Labour Advisory Council on the activities of the Labour Commissioner.
- Perform any other function assigned to it by the Act or by the Labour Advisory Council.

B. Composition of Committee for Dispute Prevention and Resolution (sec.101) (N) – The seven members Committee for Dispute Prevention and Resolution is composed of a chairperson designated or appointed by the Labour Advisory Council (LAC) in consultation with the Minister and six other individuals:

- two persons representing the interests of registered Employers' Organisations, one of whom must be a member of the LAC;
- two persons representing the interests of registered Trade Unions, one of whom must be a member of the LAC; and

- two persons representing the interests of the State, one of whom must be a member of the LAC, and both these persons to be appointed or designated in consultation with the Minister.

Discussion: Where a prospective member of the Committee is a member of the Labour Advisory Council he/she is designated by the Labour Advisory Council to serve on the Committee. Where such a candidate is not a member of the LAC he/she is appointed from outside by the LAC to serve on the Committee. Designated members, therefore, serve simultaneously on both the LAC and the Committee, whilst appointed members serve only on the Committee

C. Terms of office and conditions of membership (sec.102)

(N) – A member of the Committee for Dispute Prevention and Resolution who is also a member of the Labour Advisory Council holds office for as long as that member is a member of the LAC. If not a member of the LAC the person holds office for 3 years and may be re-appointed at the end of that period. A member who is not in the employment of the State qualifies for the payment of allowance for attending meetings as well as travel and subsistence reimbursement.

D. Procedures of Committee for Dispute Prevention and Resolution (sec.103) (N) – The Committee is empowered to make its own rules for the conduct of its meetings.

Compassionate leave (sec. 25) (N) – An employee is entitled to five days compassionate leave on full remuneration during each 12 months period of employment if there is a death or serious illness in the family. ‘Family’ in this context means a parent, husband, wife, child, grandparent, brother, sister, father-in-law or mother-in-law of the employee.

The five days do not form part of annual, sick or maternity leave; are not transferrable from one period of 12 months to the next; and do not entitle the employee to any additional remuneration upon termination of employment. The section requires the Minister to prescribe the form and manner in which such leave may be applied for by an employee and any other information which may be required to support an application [such as, for example, a death certificate, medical certificate, an affidavit, or certificate by a registered social worker or pastor].

[See Regulation 5: *Compassionate leave*]

Conciliation of Disputes (Chapter 8 Part B) – Sections 81 to 83, appearing as entries A. to C. below, deal with the conciliation of disputes.

Discussion: *Conciliation* (>NLL 1 p.70) is a process by which a third party assists two disputing parties to settle their differences by reaching a mutually acceptable solution. In terms of section 1, conciliation includes *mediating* a dispute; conducting a *fact finding* exercise; and making an *advisory award* if it will enhance the prospects of settlement or if the parties to the dispute so agree. Conciliation replaces the function of conciliation boards as provided for in the previous Labour Act, 1992.

A. Definitions (sec.81) (N) – The following types of disputes may be conciliated in accordance with the provisions of the Act:

- Dispute of interest (meaning any dispute concerning a proposal for new or changed conditions of employment, but does not include a dispute that is required to be resolved by adjudication in the Labour Court or by arbitration).
- A complaint relating to affirmative action contemplated in the Affirmative Action (Employment) Act, 1998.
- A dispute affecting the national interest referred for conciliation by the Minister, or a dispute relating to a review or declaratory order referred for conciliation by the Labour Court.

B. Resolution of disputes through conciliation (sec.82) (N) – Determining employment related disputes through conciliation involves several steps aimed at eventual settling of the matter by mutual agreement.

Conciliators

The Minister appoints conciliators to perform the duties and function and to exercise the powers conferred on conciliators in terms of the Act. Such appointments may be on a fulltime or part-time basis. The Minister may also appoint part-time conciliators *from outside* the public service subject to such terms and conditions as he/she may determine. Any appointments may be withdrawn by the Minister on good cause shown.

The Labour Commissioner designates individuals appointed by the

Minister as conciliators to try to resolve by conciliation any dispute referred to the Labour Commissioner in terms of the Act.

Part-time conciliators from outside the public service are paid fees and allowances at a rate determined by the Minister with the approval of the Minister of Finance.

Referral of dispute

Any party to a dispute may refer the dispute in the prescribed form directly to the Labour Commissioner or to any labour office in the different regions. A copy of the referral must be served on the other party(s) to the dispute.

Designation of Conciliator

The Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve the dispute will designate a conciliator to attempt to resolve the dispute through conciliation and will notify the parties of the conciliator and the place date and time of the first conciliation meeting.

Procedure

The conciliator must attempt to resolve the dispute through conciliation within 30 days of the referral, or any longer period agreed to by the parties. If the party who referred the dispute fails to attend the meeting the period is extended to the date that is 30 days after the meeting. If the other party fails to attend the conciliation the 30 day period lapses immediately on the date of the intended conciliation.

Whilst the conciliator is guided by conciliation rules formulated by the Committee for Dispute Prevention and Resolution, he/she must determine how the conciliation is to be conducted and may require that additional meetings be held within the relevant 30 day period.

A conciliator has the power to *subpoena* (>NLL 1 p.163) any person to attend a conciliation meeting, administer an oath or accept an affirmation and may question any individual about any matter relevant to the dispute. A person who ignores such a subpoena or refuses to answer a question by the conciliator commits an offence and is liable on conviction to a fine and/or imprisonment.

Representation

A party to a dispute -

- may appear in person at the conciliation proceedings hearing;
- if the party is an >employee, he/she has the right to be represented by a fellow employee, or by a member, an office bearer or an official of his/her registered trade union;

- if the party is an *>employer*, he/she/it has the right to be represented by a member, an office bearer, or official of his/her registered employers' organisation; and
- if the party is a *juristic person* (*>NLL 1 p.144*) it has the right to be represented by a director, member or employee of that entity.

Representation by Legal Practitioner

An conciliator may permit a lawyer to represent a party in conciliation proceedings if both parties to the dispute agree, or, if at the request of a party, the conciliator is satisfied that the dispute is of such complexity that it is appropriate for the party to be represented by a lawyer and that the other party will not be prejudiced (negatively affected).

Representation by any Other Individual

A conciliator may also permit any other individual to represent a party in conciliation proceedings if both parties agree; or, if at the request of a party, the conciliator is satisfied that representation by the individual will facilitate the effective resolution of the dispute or attainment of the objectives of the Act; that the individual meets prescribed requirements; and that the other party to the dispute will not be prejudiced.

In deciding whether to permit representation of a party by any other individual as contemplated above, the conciliator must take into account applicable guidelines issued by the Minister under section 137 of the Act.

Unresolved disputes

The conciliator issues a certificate to the effect that a dispute is unresolved if he/she believes that there is no prospect of settlement at that stage of the dispute, or if the 30 day period has elapsed. If the parties at this juncture so agree, the dispute can be referred to arbitration for final determination. Other options include lawful *>strike and lockout*. Whatever the decision, a conciliator remains seized of the dispute until it is settled and must continue efforts to have it resolved.

[See Regulation 17: Appointment of conciliators and arbitrators; Regulation 18: Referral of dispute to conciliation; Regulation 21: Request for representation at conciliation or arbitration; and Regulation 27: Proof of Service of documents]

C. Consequences of failing to attend conciliation meetings (sec.83) (N) – If the Labour Commissioner has referred a dispute for

conciliation and the party who referred the matter to the Labour Commissioner fails to attend the meeting, the initial 30 days period is extended to a date that is 30 days after the intended conciliation. If the other party fails to attend the conciliation the 30 day period lapses immediately on that date.

In any other dispute referred to conciliation the conciliator may dismiss the matter if the party who referred the dispute fails to attend a conciliation meeting. On the other hand, the conciliator may determine the matter if the other party to the dispute fails to attend a conciliation meeting.

If the Labour Commissioner, upon application by the defaulting party, is satisfied that there were good grounds for the failure to attend, he/she may reverse the decision of the conciliator and conciliation can again proceed as originally intended.

[See Regulation 19: *Application to reverse decision of a conciliator*]

Contracts entered into by State for provision of goods and services (sec.138) (U) – An employer who is issued with a licence, permit, grant or concession by the State in terms of any law on mining and minerals, wild life, environment and tourism, or fisheries, or who enters into a contract with the State for the provision of goods or services, must give a written undertaking that relevant employees are employed on terms and conditions *no less favourable* than –

- those provided for in a *collective agreement* in that industry; or
- those prevailing for *similar work* in the industry and the region in which the employees are employed; or
- those prevailing in the *nearest appropriate region*, if similar work is not performed in that specific region.

Disputes regarding compliance with such an undertaking may be determined by the Labour Court upon application by any person, including the Minister of Labour and Social Welfare.

Constitution of the Republic of Namibia¹ – The Namibian Constitution referred to at the beginning of the >*Preamble* to the Labour Act, 2007, is the supreme law of the nation embodying the fundamental principles, institutions, rights and obligations according to which its inhabitants are governed.

¹ The Constitution of the Republic of Namibia was unanimously adopted by the 72 member democratically elected multi-party Constituent Assembly on the eve of Namibian independence and was promulgated in Government Gazette No.2 of 21 March 1990

Discussion: *The Namibian Constitution* constitutes the legal foundation of all spheres of public and private life. As such the Constitution covers a wide range of topics fundamental to statehood and societal wellbeing. It also represents the basic terms of reference for most labour-related matters.

Fundamental Human Rights and Freedoms (Chapter 3)

Chapter 3 of the Namibian Constitution is of particular relevance in this regard. The Chapter deals with various group- and person orientated normative concepts, all of which are vital for the survival of plural democracy. Briefly, the Chapter's Articles touching most directly on labour/employment concerns are the following:

- *Protection of Fundamental Rights and Freedoms (Art.5)*

This Article proclaims that the fundamental rights and freedoms enshrined in the Constitution shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of Government and its agencies, and where applicable to them by the natural and legal persons in Namibia.

- *Respect for Human Dignity (Art.8)*

The Preamble to the Namibian Constitution opens with the words "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace ..." This solemn sentiment forms the foundation of all civilized social intercourse including equitable employment relations. It gains additional resonance by the pointed declaration in Article 8 that "The dignity of all persons shall be inviolable", i.e., it is never to be infringed or dishonoured.

- *Slavery and Forced Labour (Art.9)*

The fundamental prohibition of slavery and forced labour enunciated in Article 9 is largely self-explanatory and forms a core value of modern employment principles.

- *Equality and Freedom from Discrimination (Art. 10) and Apartheid and affirmative action (Art.23)*

The linked themes of these two Articles find expression not only in section five of the Labour Act, 2007 (Prohibition of discrimination and sexual harassment in employment), but even more significantly, an entire statute has been dedicated to the subject (the Affirmative Action (Employment) Act No. 29 of 1998).

- *Fair Trial (Art. 12)*

Article 12 of the Namibian Constitution reflects and enshrines, amongst others, what is known in law as natural justice. The concept refers to fundamental, universal principles of natural moral law which must be observed in the adjudication of criminal and civil cases. The principles include prior notice of the nature of an accusation against any person; opportunity for the accused to prepare for defence and to state his/her case; and hearing of the matter by an impartial adjudicator. The Article also refers to more specific aspects implied by the foregoing such as the calling of witnesses, cross-examination and entitlement to representation of choice.

In labour matters the rules of natural justice apply not only in formal labour-related trials by courts and tribunals established by law, but generally also to internal disciplinary hearings and appeals.

- *Children's Rights (Art. 15)*

Important aspects of Article 15 of the Namibian Constitution find expression in section 3 of the Labour Act, particularly in so far as they relate to minimum age of legal employment and protection of children in such employment.

- *Administrative Justice (Art. 18)*

Article 18 of the Constitution stipulates that administrative bodies and officials shall act fairly and reasonably and comply with relevant common law and statutory requirements. Any deeds and decisions by them are answerable to a competent Court if challenged by an aggrieved party. Also this principle is echoed in various provisions of the Labour Act.

- *Fundamental Freedoms (Art. 21)*

Article 21 is the source of several prominent provisions in the Labour Act, 2007. Amongst others, the multifaceted clause determines that all persons have the right to freedom of association including freedom to form and join associations or unions, including trade unions; freedom to assemble peaceably and without arms; freedom of speech and expression; freedom to practice any profession, or to pursue any occupation, trade or business; and freedom to withhold labour without being exposed to criminal penalties. These rights form the basis of Chapters 6 and 7 of the Act which deal with Trade Unions and Employers' Organisations and Strikes and Lockouts, respectively.

Principles of State Policy (Chapter 11)

The other most important chapter of the Namibian Constitution from an employment and labour relations perspective, is Chapter 11 on 'Principles of State Policy'. The Chapter's opening provisions contained in Article 95, declare that the State shall actively promote and maintain the welfare of the people by adopting policies aimed, inter alia, at:

- Protecting health and safety at the workplace;
- securing equality of opportunity for women and their entitlement to maternity benefits;
- active encouragement of independent trade unions;
- membership of the ILO and, where possible, adherence to its Conventions and Recommendations;
- provision of social security benefits;
- ensuring that workers are paid adequate levels of remuneration (the phrase used is 'a living wage'); and
- encouragement of the population to influence Government policy by debating its decisions (linking up to the idea of tripartism).

Most, if not all, of these policy aspects have been taken up in appropriate statutory measures and other official instruments. The rest of Chapter 11 is dedicated to foreign relations (including respect for international law and treaty obligations) and economic matters (mixed economy concept, diverse forms of ownership, etc.) which, although they have important implications for employment, do not directly affect labour administration as such.

Other Chapters of the Namibian Constitution also committed to topics touching on actual or potential labour content, include those dedicated to the institutions of the Ombudsman (Chapter 10) and the Public Service Commission (Chapter 13).

In addition, Article 144 of Chapter 21 (Final Provisions), states that unless otherwise provided by the Namibian Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law of Namibia. This means, amongst others, that ratified ILO Conventions become part of the Nation's domestic law.

Protection

From the foregoing it is clear that labour and employment matters, and aspects connected thereto, feature very prominently in the Namibian Constitution. The Constitution explicitly articulates the moral principles

which act as a guiding matrix for labour legislation and practice in the country. Any actions by the State, employers, trade unions or any other individuals or organisations, which may be construed as contravening any of its stipulations, can be contested in Court. The Constitution simultaneously provides a shield against excesses of any kind, irrespective of whether such excesses emanate from the private or public sectors. The full text of Chapter 3 and Chapter 11 of the Namibian Constitution – the contents of which are variously reflected in the provisions of the Labour Act, 2007 and also find expression in many other spheres of policy formulation and application by Government and the social partners – appears as an Appendix to the Namibian Labour Lexicon Volume 2 (*first edition*) The Labour Act, 2004, A to Z.

Constitutions of trade union or employers' organisation – >Trade Unions and Employers' Organisations

Continuous shift – >Definitions relating to Basic Conditions of Employment

Conventions of the International Labour Organisation

– The conventions and recommendations of the International Labour Organisation referred at the close of the >*Preamble* of the Labour Act, 2007.

Discussion: Conventions are formal international tripartite instruments (or agreements) adopted by the International Labour Organisation (ILO) to guide member countries in developing appropriate labour policies, laws and practices. Also referred to as international labour standards, ILO Conventions and Recommendations constitute the backbone of modern labour legislation. That is particularly the situation in the case of new labour jurisdictions which exist in a number of Southern African countries, including Namibia. A thorough study of the Labour Act, 2007 reveals that elements of numerous Conventions and Recommendations have been taken up in its various provisions. In addition, numerous elements of other ILO instruments (labour standards) are taken up in ancillary labour-related legislation, such as the Employees' Compensation Act, 1941, Social Security Act, 1994, the National Vocational Training Act, 1994, and the Affirmative Action (Employment) Act, 1998.

International labour standards embody the end-result of extremely painstaking deliberations by the nations of the world on critical labour and social issues. In the form of Conventions they constitute international

treaties which are binding and enforceable under international law for signatory countries which have to adapt their policies, laws and practices accordingly. In the form of Recommendations they carry strong practical and moral persuasiveness for ILO member States without, however, embracing the element of compulsion that characterises Conventions. Recommendations are meant as guidelines and usually go into more detail on any given topic than do Conventions. It is not uncommon to have both a Convention and a Recommendation adopted on the same theme. In other instances, the ILO passes only a Convention, or as happens more often, only a Recommendation.

When a Convention has been adopted by the International Labour Conference in Geneva, member countries are invited to ratify it. Ratification consists of presenting the instrument to a country's legislature for perusal and formal adoption. The relevant country is then obliged to bring its legislation, policy and practice into line with the provisions of the Convention concerned. Taking due consideration of the fact that the nations of the world vary considerably in terms of social and economic development modern ILO Conventions are phrased in a manner to allow ratifying countries some flexibility in their application, without losing the core purpose of the instrument.

Having the character of international law, State judiciaries may take cognizance of the contents of ratified Conventions in handing down judgements. Any litigating party can likewise take recourse to the provisions of such instruments in legal argument before Court. Furthermore, ministries of labour take into account the spirit of ratified Conventions in executing their various responsibilities. Equally, collective bargaining is influenced by the contents of such standards, as any of the negotiating parties can justifiably have regard to the principles embodied therein.

In short, ILO Conventions form an integral part of the labour and industrial relations systems of virtually all nations of the world. Knowledge of the purpose and nature of these instruments is essential for the implementation of the laws and policies involved. ILO Conventions officially ratified by Namibia to date, are the following:

- Forced Labour Convention, 1930 (C. 29 of 1930);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (C. 87 of 1948);
- Right to Organise and Collective Bargaining Convention, 1949 (C. 98 of 1949);
- Equal Remuneration Convention, 1951 (C. 100 of 1951);
- Abolition of Forced Labour Convention, 1957 (C. 105 of 1957);
- Discrimination (Employment and Occupation) Convention, 1958 (C.

111 of 1958 ;

- Minimum Age Convention, 1973 (C. 138 of 1973);
- Tripartite Consultation (International Labour Standards) Convention, 1976 (C. 144 of 1976);
- Labour Administration Convention, 1978 (C. 150 of 1978);
- Termination of Employment Convention, 1982 (C. 158 of 1982); and
- Worst Forms of Child Labour Convention, 1999 (C. 182 of 1999).

The spirit and intent of these ratified Conventions are not only reflected in the provisions of the Labour Act, 2007 but also find expression in several other areas of policy formulation and application by Government and the social partners.

Costs – >Labour Court

Cultivation of land – >Accommodation

D

Daily spread-over and weekly rest period (sec.20) (M) – “Spread-over” is defined in section 8 as “... the period from the time an employee first starts work in any one 24 hour cycle to the time the employee finally stops work in that cycle”. According to this definition the meal interval and any other interlude of inactivity in between the time a person first reports for duty and finally goes home [such as in the case a restaurant worker who may work a morning and an afternoon shift], are part of the spread-over.

An employer, in terms of section 20, may not require or permit an employee to work a spread-over of more than 12 hours, except in the case of an employee performing *>urgent work*. In the latter instance an employee would be performing remunerated *>overtime*.

An employer may also not require or permit an employee to work without a weekly interval of at least 36 consecutive hours of rest.

Discussion: The prohibition of work on Sundays for the majority of employees has the effect of ensuring that they automatically enjoy a weekly rest period. However, in the many instances where an employee may be lawfully required to work on a Sunday, the consequence could be that such an employee may have to work seven days a week, and possibly do so for extended periods of time. Section 20 ensures that such unacceptable practices are legally prohibited. The 36 consecutive hours rest period would normally constitute two nights and a day (or for somebody working night shifts two days and a night).

Changes: No specific provision for a weekly rest period existed in the previous legislation other than a Sunday.

Declaration of continuous shifts (sec.15) (U) – The Minister of Labour and Social Welfare is authorised to declare any operation as a continuous operation (24 hours, 7 days per week) by notice in the *Government Gazette*, thus permitting the performance of *continuous shifts of no longer than 8 hours each* under prescribed conditions. The notice must be amplified by the Minister through any other available means to ensure that the parties whose interests are affected thereby duly receive the information.

Deductions and other acts concerning remuneration (sec.12) (M) – An employer shall not make any deduction from an employee's

remuneration unless the *employee agrees to it in writing* and the subtraction is not *in aggregate* more than *one third* of the employee's remuneration. Cumulative subtractions performed in terms of any law (such as tax and social security), or in terms of a court order (such as a fine or garnishee order for debts), are not subject to the one-third limitation and are calculated separately from other deductions.

Other prohibitions

An employer *shall also not* –

- levy a fine on an employee unless authorised by statute or collective agreement;
- accept repayment of any remuneration paid to an employee;
- allow an employee to acknowledge receipt for more pay than actually received;
- require an employee to buy goods from a shop owned or managed on behalf of the employer, or to utilize the employer's services in lieu of remuneration; or
- require an employee to pay more for goods supplied by the employer than the price paid by the employer plus reasonable overheads (acquisition costs).

Permitted deductions

Permitted deductions, authorised by the employee, up to a total of one third of an employee's remuneration *are limited to* –

- rent for accommodation provided by the employer;
- goods sold by the employer;
- money loaned by the employer;
- contributions to employee benefit funds; or
- trade union fees.

Deductions may also be made by the employer if required or permitted under any collective agreement or in terms of any arbitration award – these may, however, together with all the deductions authorised by the employee, not exceed one third of the employee's remuneration.

All lawful subtractions made by the employer from an employee's remuneration must be paid to the receiving person in time, and according to any other requirements pertaining to the deductions.

Reduced-hours or short-time

Unless there is a provision in a contract of employment or collective agreement to the contrary an employer may, for operational reasons or other reasons recognised by law, give written notice to an employee of the employer's intention to require the employee to *work fewer hours* than

usual for a period not exceeding 3 months. The employer is entitled to correspondingly reduce the employee's remuneration by up to one half of his/her basic wage during this period.

The reduction of ordinary hours of work may be extended for additional periods not exceeding three months by written agreement between the employer and employee or the employee's registered trade union, in the case of an exclusive bargaining agent.

Deduction of trade union dues – >Recognition and Organisational Rights of Registered Trade Unions

Discussion: The so-called 'reduced-hours' or 'short-time' provision (section 12(6)) permits an employer to give written notice to an employee of the employer's intention to require the employee to *work fewer hours* than usual as a temporary measure. It is implied that the notice should be given a reasonable period before the reduced hours are to commence and that there should be a good reason for wanting to do so (such as temporary lack of manufacturing raw materials or unforeseen mechanical breakdown). When an employer resorts to this short term adjustment measure, remuneration may be decreased by *up to one-half* of the normal basic wage. It follows that even if employees temporarily work no hours at all at the behest of the employer, they must still be paid at least one-half of their basic wage plus other benefits for the duration of the arrangement.

It should be noted that the provision does not require the employer to obtain any prior authorisation from the employees involved or from anybody else before such reduced remuneration is paid, neither does anybody except the employees themselves have to be notified about the introduction of short hours and the corresponding deductions from their normal pay. However, it is good practice and advisable to consult properly with the employees involved (and their union) beforehand. If the reduced-hours are to be extended beyond three months, consultation/negotiations on the issue becomes obligatory.

Changes: Generally, the provisions of section 12 do not differ much from previous stipulations. The main exception is that formerly an employer was permitted to levy a fine against an employee for any act or omission committed by the employee in the course of employment by way of lawful disciplinary action taken against the employee. Fines may no longer be levied unless authorised by statute or a collective agreement.

The section provides for an employer to make deductions from an employee's remuneration if required or permitted to do so under a collective agreement, for example, deduction of trade union dues, or in

terms of an arbitration award, whether the employee has agreed thereto or not. This is a new provision.

The short-time provision introduces a number of changes from the previous situation under the Labour Act, 1992. These include the limitation that reduction of hours and corresponding pay is subject to any provision in a contract of employment or collective agreement to the contrary (i.e., may not be done if these prohibit such measures); no time limit for short-hours was previously mentioned; there was no reference to 'operational reasons' for instituting reduced-hours; and formerly deductions were limited to a third of remuneration instead of one-half of basic wage.

Definitions and Interpretation (sec.1) (M) – Definitions applicable to the entire Labour Act, 2007 have, for the most part, been incorporated in the alphabetical discussion of the relevant provision to which they refer. However, for ease of reference, the definitions are repeated here verbatim as appearing in the first section of the Act. Insertions in square brackets are not part of the definitions but have been made to indicate the name of a specific section referred to by the section number appearing as part of the definition.

Arbitration – means arbitration proceedings conducted before an arbitration tribunal established in terms of section 85 [*Arbitration*];

Arbitrator – means an individual appointed as such in terms of section 85 [*Arbitration*];

Collective agreement – means a written agreement concerning the terms and conditions of employment or any other matter of mutual interest, concluded by –

- (a) one or more registered trade unions, on the one hand, and
- (b) on the other hand –
 - (i) one or more employers;
 - (ii) one or more registered employers' organisations; or
 - (iii) one or more employers and one or more registered employers' organisations;

Conciliation – includes -

- (a) mediating a dispute;
- (b) conducting a fact finding exercise; and
- (c) making an advisory award if-

- (i) it will enhance the prospect of settlement; or
- (ii) the parties to the dispute agree.

Conciliator – means an individual appointed as such in terms of section 82 [*Resolution of disputes through conciliation*];

Committee for Dispute Prevention and Resolution – means the Committee established in terms of section 97(1)(a) [*Committees*] [*of the Labour Advisory Council*];

Dispute – means any disagreement between an employer or an employers' organisation on the one hand, and an employee or a trade union on the other hand, which disagreement relates to a labour matter;

Dispute of interest – means any dispute concerning a proposal for new or changed conditions of employment employment, but does not include a dispute that this Act or any other Act requires to be resolved by –

- (a) adjudication in the Labour Court or other court of law; or
- (b) arbitration;

Employee – means an individual, other than an independent contractor, who -

- (a) works for another person and who receives, or is entitled to receive, remuneration for that work; or
- (b) in any manner assists in carrying on or conducting the business of an employer;

Employer – means any person, including the State who –

- (a) employs or provides work for, an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual; or
- (c) permits an individual to assist that person in any manner in the carrying on, or conducting that person's business;

Employers' organisation – means any number of employers associated together for the principal purpose of regulating relations between those employers and their employees or the employees' trade unions;

Essential Services Committee – means the committee established in terms of section 97(1)(b) [*Committees*] [*of the Labour Advisory Council*];

Exclusive bargaining agent – means a trade union that has been recognised as such in terms of section 64 [*Recognition as exclusive bargaining agent of employees*];

Individual – means a natural person;

Labour Commissioner – means the individual appointed as Labour Commissioner in terms of section 120 [*Appointment of Labour Commissioner and Deputy Labour Commissioner*”];

Labour Court – means the court referred to in section 115 [*Continuation and powers of Labour Court*];

Labour inspector – means an individual appointed as a labour inspector in terms of section 124 [*Appointment of inspectors*];

Legal practitioner – means an individual admitted to practice as a legal practitioner in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995);

Lockout – means a total or partial refusal by one or more employers to allow their employees to work, if the refusal is to compel those employees or employees of any other employer to accept, modify or abandon any demand that may form the subject matter of a dispute of interest;

Medical practitioner – means an individual who is registered as such in terms of the Medical and Dental Professions Act, 2004 (Act No. 10 of 2004) and includes an individual who is registered as a nurse or midwife in terms of the Nursing Professions Act, 2004 (Act No. 8 of 2004);

Minister – means the Minister responsible for Labour;

Ministry – means the Ministry responsible for Labour;

Office-bearer – in relation to a trade union or employers’ organisation, means an individual, other than an official, who holds any office in that trade union or employers’ organisation and includes a member of a committee of that trade union or employers’ organisation;

Official – in relation to trade union or employers’ organisation means a person employed as a secretary, assistant secretary or any similar capacity, whether or not in a full-time capacity;

Permanent Secretary – means the Permanent Secretary of the Ministry responsible for Labour;

Premises – includes any building or structure, or part of it, whether above or below the surface of the land or water, or any vehicle, truck, vessel or aircraft;

Prescribed – means prescribed by regulation in terms of this Act;

Public holiday – means any public holiday referred to in or declared under the Public Holidays Act, 1990 (Act No. 26 of 1990);

Registered – in relation to a trade union or employers' organisation, means a trade union or employers' organisation registered in terms of Chapter 6;

Remuneration – means the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;

Spouse – means a partner in a civil marriage or a customary law union or other union recognised as a marriage in terms of any religion or custom;

State – includes a regional council, local authority or any body created by law over which the State or Government of Namibia has some control over because of shares held in or funds made available to that body by the State or Government of Namibia;

Strike – means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers' organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest;

This Act – includes any regulation made under it;

Trade union – means an association of employees whose principal purpose is to regulate relations between employees and their employers;

Wages Commission – means the Commission referred to in section 105 [Continuation of Wages Commission];

Wage order – means a wage order made in terms of section 13 [Wage order].

Definitions Relating to Basic Conditions of Employment (sec.8) (M) – Definitions applicable specifically to Chapter 3 of the Labour Act, 2007 have for the most part been incorporated in the alphabetical

discussion of the relevant provision to which they refer. However, for ease of reference, they are repeated verbatim below as appearing in section 8 (1)7. Insertions in square brackets are not part of the definitions but have been made to indicate the name of a specific section referred to by the section number appearing as part of the definition.

Annual leave cycle – means the period of 12 consecutive months' employment with the same employer immediately following –

- (i) an employee's commencement of employment; or
- (ii) the completion of the last annual leave cycle;

Basic wage – means, for the purpose of calculating any basic condition of employment, that part of an employee's remuneration in money including the cash equivalent of payment in kind, if any, as calculated in terms of section 10 [*Calculation of remuneration and wages*], paid in respect of work done during the hours ordinarily worked but does not include –

- (i) allowances, including travel and subsistence, housing, motor vehicle, transport and professional allowances, whether or not based on the employee's basic wage;
- (ii) pay for overtime as defined in section 8(f) [*Definitions relating to basic conditions of employment*];
- (iii) additional pay for work on a Sunday or a public holiday;
- (iv) additional pay for night work, as required in terms of section 19 (1) [*Night work*];
- (v) payment in respect of pension, annuity or medical benefits or insurance;

Continuous shift – means a shift in a continuous operation, as permitted by the Minister in terms of section 15(1) [*Declaration of continuous shifts*];

Incapacity – means an inability to work owing to any sickness or injury;

Monetary remuneration – refers to that part of the remuneration that is paid in money;

Overtime – means time worked in excess of the hours an employee ordinarily works in any ordinary working day but does not include any work done on –

- (i) a Sunday, if it is not an ordinary working day for that employee; or
- (ii) a public holiday;

Security Officer – means an employee who -

- (i) controls, checks and reports on the movements of individuals, vehicles and goods through a checkpoint or at any other place; or
- (ii) protects persons or property;

Sick leave – means any period during which the employee is unable to work due to incapacity;

Sick leave cycle – means -

- (i) the period of 36 consecutive months' employment with the same employer immediately following –
 - (aa) an employee's commencement of employment; or
 - (bb) the completion of the last sick leave cycle; and
- (ii) includes any period, or combination of periods, not exceeding a total of 36 weeks, during which an employee is on annual leave, sick leave or any other absence from work on the instructions, or with the permission, of the employer;

Spread-over – means the period from the time an employee first starts work in any one 24 hour-cycle to the time the employee finally stops work in that cycle;

Urgent work – means -

- (i) emergency work, which if not attended to immediately, could cause harm to or endanger the life, personal safety or health of any person or could cause serious damage or destruction to property
- (ii) work connected with the arrival, departure, loading, unloading, provisioning, fuelling or maintenance of –
 - (aa) a ship;
 - (bb) an aircraft; or
 - (cc) a truck or other heavy vehicle used to transport passengers, livestock or perishable goods;

Week – in relation to an employee, means a period of 7 days within which the working week of that employee falls;

Weekly interval – means the interval between the end of one ordinary working week and the start of the next.

For the purpose of paying basic wages, an employer may not pay to an employee in-kind payment except by agreement between the employer and the employee or in terms of a collective agreement. (sec. 8 (2))

The Minister must prescribe the portion of basic wage that may be paid in-kind pursuant to any agreement and the manner of calculation of the cash equivalent value of an in-kind payment. (sec. 8 (3))

[See Regulation 2: *Portion of basic wage that may be paid in-kind and value of in-kind payments*]

Delegation of powers (sec.141) (U) – In terms of this section the key functionaries identified in the Act, namely, the Minister of Labour and Social Welfare, the Permanent Secretary and the Labour Commissioner, may assign any power conferred upon them by the Act to any official of the Ministry, with the exception of –

- the power to delegate authority;
- the power to make regulation; and
- the power to issue codes of good practice, guidelines for the proper administration of the Act, or any amendment of these.

Disability – *>Fundamental Rights and Protections >Prohibition of discrimination in employment*

Disclosure – *>Employer and employers' organisation unfair labour practices*

Discrimination in employment, prohibition of – *>Fundamental Rights and Protections*

Dismissal arising from collective termination or redundancy – *>Termination of employment*

Dispute – *>Definitions and Interpretations*

Disputes affecting the national interest (sec. 80) (N) – According to section 80 the Minister may, if he/she considers it in the national interest, decide on one of two main courses of action:

- The Minister may request the Labour Commissioner to *appoint a conciliator* to conciliate the dispute or potential dispute; or
- The Minister may, in consultation with the Labour Advisory Council, *appoint a panel of persons* representing the interests of employers, employees and the State to investigate any industrial conflict, or potential conflict, for the purpose of reporting and making recommendations to the Minister.

A panel appointed by the Minister to investigate an industrial conflict or latent conflict situation is vested with similar powers to those of a conciliator, including the right to subpoena, to administer oaths and to question any individual about matters relevant to the dispute or potential dispute.

Discussion: Major labour disputes have the potential to cause substantial damage to the future viability of an enterprise, a group of enterprises, or even an entire industry. They can simultaneously seriously curtail workers' security of income and may eventually threaten the very means of their livelihood on a massive scale.

In addition, intermittent industrial strife casts a dark shadow on a country's image as an attractive investor destination, and can be a contributing catalyst for economic decline and insidious poverty. It is for these reasons that the legislature has deemed it fit to empower the Minister responsible for Labour to become pro-actively involved in resolving industrial conflict when it threatens to get out of hand, or to take early preventative measures when signs of such a possibility become discernible.

A conciliator or panel of persons appointed for this purpose would be selected from persons with proven capability and credibility in the sphere of industrial relations, and preferably also with intimate knowledge of the industry concerned. Furthermore, it could be expected that such a panel, in addition to its investigating and reporting task, would also perform a conciliatory role in the course of its enquiry.

Different forms of industrial actions generally form part of the social dynamics of a democratic society. They need only to be managed properly in order to mitigate the negative affects thereof.

Dispute of interest – >Definitions and Interpretations

Dispute of right – >Definitions and Interpretations >Dispute

E

Employee – >Definitions and Interpretation

Employer – >Definitions and Interpretation

Employers' organisation – >Definitions and Interpretation

Employment decision – >Fundamental Rights and Protections >Prohibition of discrimination and sexual harassment in employment

Essential service – >Essential services, designation of

Essential Services Committee (sec.104) (N) – The Essential Services Committee is established as one of two standing committees of the >Labour Advisory Council under the provisions of section 97(1). [Employees involved in essential services are prohibited from striking whilst employers of such employees are prohibited from resorting to lockouts. Disputes in essential services must be resolved by conciliation and/or arbitration.]

Functions

The Committee's functions are to:

- Recommend the designation of essential services to the Labour Advisory Council (LAC) in terms of section 77.
- Determine disputes in this regard and make recommendations thereon to the LAC.

Composition and term of membership

The Committee consists of chairperson who is a member of, and is designated by, the Labour Advisory Council and four other individuals with expertise in labour law and labour relations designated or appointed by the Labour Advisory Council. An appointed member holds office for 3 years and may be re-appointed. A designated member holds office for as long as he/she remains a member of the LAC.

Conditions of appointment and procedures

A member who is not in the employment of the State qualifies for the payment of allowance for attending meetings as well as travel and subsistence reimbursement. The Committee may make its own rules for the conduct of its work.

Essential services, designation of (sec.77) (N) – The Essential Services Committee, established under section 97(1) of the Act, must

recommend to the Labour Advisory Council (LAC) the designation of all or part of a service to be essential if, in the opinion of the Committee, the interruption of that service would endanger the life, personal safety or health of the whole or any part of the population of Namibia. [Employees involved in essential services are prohibited from striking whilst employers of such employees are prohibited from resorting to lockouts. Disputes in essential services must be resolved by conciliation and/or arbitration.]

Procedure

The procedure by the Committee to recommend designating a service or part thereof as an essential service entails the following steps:

1. Notice in the *Government Gazette* of the investigation it intends conducting with a view to possible declaration of a service or part thereof as an essential service. The notice must –
 - indicate the service in question;
 - invite interested parties to submit written submissions; and
 - state the date, time and venue of a possible public hearing of the matter.
2. Enabling any interested party to inspect any written representations made pursuant to the notice.
3. Holding of a public hearing, if the Committee so desires, at which persons who made written submissions may elaborate on these through oral representations.
4. Decision, after due consideration of all the facts, whether or not to recommend designation of the whole or part of the service that was the subject of the investigation as an essential service.
5. Forwarding a report and recommendation to the LAC.
6. Publishing a notice in the *Gazette* if it does designate the service or part thereof as an essential service.

The LAC must, after considering the report of the Essential Services Committee, forward its recommendations to the Minister.

The Minister can decide whether or not to accept the recommendations. If the Minister does, the Minister must publish a notice of designation of that essential service in the *Gazette*. The section emphasises that in making such a decision the Minister is not “bound by or obliged” to follow the recommendation of the Labour Advisory Council.

The notices in the *Gazette* referred to above must be amplified by the Essential Services Committee or the Minister, as the case may be, through any other available means to ensure that the parties whose interests are affected by the notices duly receive the information

The Essential Services Committee may recommend to the LAC to vary or cancel the designation of any essential service by following similar steps of consultation and deliberation as indicated above.

Disputes about designation as essential service

Disputes regarding whether or not employees or an employer are engaged in an essential service may be referred in writing to the Committee, with confirmation that a copy of the referral has been served on all parties involved. The Committee is then obliged to follow a similar procedure as above in making a recommendation on the matter to the LAC with the final decision to be taken by the Minister.

Urgent Application

In a situation where a party to a dispute of interest asserts that the dispute pertains to a service that should be designated as an essential service, that party must refer the matter to the Essential Services Committee for urgent consideration no later than the date on which the dispute is referred to the Labour Commissioner for conciliation. The Committee must deal with the matter and forward its recommendation to the LAC within 14 days, which must likewise forward its recommendation to the Minister within 14 days.

The Minister must decide whether or not to designate the whole or part of the service as an essential service and must communicate the decision to the parties within 14 days from the date of receipt of the recommendation from the LAC. No strike may be conducted by a trade union, and no lock-out may be engaged in by an employer, pending the Minister's decision.

Essential services, disputes in (sec.78) (N) – In a situation of an industrial dispute of interest where the parties are prohibited to strike or lockout due to the fact that they are engaged in essential services as recommended by the Essential Services Committee and approved by the Minister, any such party is entitled to refer the dispute to the Labour Commissioner. It should be noted that the dispute referred to here is not about a question of whether or not the service should be classified an essential service, but rather about the substantive dispute, such as a wage dispute, itself,

Having been satisfied that a copy of the notice of a dispute has been served on all parties, the Labour Commissioner, may refer the dispute to an arbitrator to arbitrate the dispute in terms of Part C of Chapter 8 (compulsory arbitration), or the Labour Commissioner may refer the matter for arbitration in accordance with Part D of Chapter 8 (private arbitration, if the parties have agreed to this).

Evidence (sec.133) (U) – In any legal proceedings in terms of the Labour Act, 2007 the following principles shall apply:

- In a case where there is a dispute about the age of an individual with no satisfactory proof at hand, a labour inspector's opinion of the probable age of that individual will be presumed to be his/her age.
- An interested party who does not accept this estimation may, at own expense, require the individual to appear before and be examined by a medical practitioner whose certification on the matter will constitute conclusive proof of the age of that person for the purpose of the proceedings.
- A statement or entry in a book or document kept by an employer or found on the employer's premises, as well as any copy thereof, is admissible in evidence against the employer as admission of the facts stated in the document, unless it is proved that entry was not made by the employer or somebody on the employer's behalf.
- If it is alleged that an employer failed to pay an employee at a rate of pay prescribed in terms of the Act – with proof that the employee was in the employ of the employer and that the provision prescribing the rate of pay binds the employer – it will be presumed, unless the contrary is proved, that the employer did fail to pay the employee as required.

Exclusive bargaining agent – *>Definitions and Interpretation*

Exemption from a wage order – *>Wage order, exemption from*

Exemptions and variations (sec.139) (M) – Exemptions from and variations of provisions of Chapter 3 of the Act (basic conditions of employment) may be granted to an employer or a class of employers by the Minister as set out here below. Sections 35 (severance pay) and 38 (the manner in which disputes regarding basic conditions of employment are to be dealt with) are excluded from such flexibility.

Exemption

Before the Minister of Labour and Social Welfare considers an application for exemption the Minister must be satisfied that employees affected by the proposed exemptions or their trade unions have been duly consulted. An exemption must be in the prescribed form –

- indicating the employees or category of employees affected;
- including any conditions under which the exemption is granted;
- stating the period of the exemption, which may be made retrospective but not earlier than the date of application; and

- be published in the *Government Gazette* if applicable to a whole class of employers.

The exemption may be amended or be withdrawn by the Minister, and if published in the *Government Gazette*, the amendment or withdrawal may also only be done by notice in the Gazette. All notices relating to exemptions must be amplified by the Minister through any other available means to ensure that the parties whose interests are affected by the notices duly receive the information. Any person who is dissatisfied by the granting, amendment or withdrawal of an exemption, or with its period of applicability, may appeal against the decision to the Labour Court.

Variation

Variations of basic conditions of employment provisions by the Minister are dealt with in similar manner as indicated above for exemptions, except that the Minister is also called upon to consult the Labour Advisory Council as part of the process.

[See Regulation 26: *Application for exemption or variation*]

Discussion: The term *exemption* in the above context basically means that an employer is excused or set free from the obligation to comply with a certain statutory condition of employment. The term *variation* signifies a change or departure – to a lesser or greater extent – from a statutory condition of employment as pertaining to a specific employer or class of employers as determined by the Minister.

It goes without saying that any application for an exemption or a variation must be justifiable and well motivated. The exact exemption or variation requested should be precisely indicated with reference to the relevant section(s) and subsection(s). It is general practice in labour administration that exemptions and variations must usually be reciprocated by a *quid pro quo* ‘something for something’ arrangement, in the sense that an employee giving up an existing employment benefit, such as a meal break, would be compensated for it by, for example, being paid overtime in lieu of the break and/or being permitted to have a meal whilst on duty.

The consultation aspect is a vital prerequisite and should be done as completely and thoroughly as circumstances permit. Written proof thereof – and ideally formal agreement by the union or those affected, or at least by the majority of such persons – should accompany the application.

Extended maternity leave – >Maternity leave, extended

F

Family responsibility – >Fundamental rights and protections >Prohibition of discrimination and sexual harassment in employment

Food – >Accommodation

Forced labour, prohibition of – >Fundamental Rights and Protections >Prohibition of Forced labour

Freedom of association – >Fundamental Rights and Protections >Freedom of Association

Fundamental Rights and Protections (Chapter 2) – Sections 3 to 7, appearing as entries A. to E. below, deal with Fundamental Rights and Protections.

Discussion: The chapter on fundamental rights and protections addresses some very basic >human rights (NLL 1 p.141) issues which find resonance in certain of the >Core Conventions (NLL 1 p.133) of the >International Labour Organisation (NLL 1 p.92), most of which have been ratified by Namibia. The Core Conventions are the following:

- Forced Labour Convention, 1930 (C. 29 of 1930);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (C. 87 of 1948);
- Equal Remuneration Convention, 1951 (C.100 of 1951);
- Right to Organise and Collective Bargaining Convention, 1949 (C. 98 of 1949)
- Abolition of Forced labour Convention, 1957 (C. 105 of 1957);
- Discrimination (Employment and Occupation) Convention, 1958 (C.111 of 1958);
- Minimum Age Convention, 1973 (C.138 Of 1973); and
- Worst Forms of Child Labour Convention (C. 182 of 1999).

A. Prohibition and restriction of child labour (sec.3) (U) –

The Act forbids any person from employing a child and from requiring or permitting it to work in any circumstances prohibited in terms of section 3. The essential particulars of this provision are as follows.

1. Children under the age of 14 years

A child under the age of 14 years *must not be employed under any circumstances at all*. In other words, this is an explicit all-encompassing blanket prohibition with not even the Minister having the authority or right to permit any exceptions at all.

2. Children aged at least 14 but under 16 years

Children in this age category may not be employed in respect of any work done between the hours of 20h00 and 07h00 or on any premises where:

- Work is done underground or in a mine;
- construction or demolition takes place;
- goods are manufactured;
- electricity is generated, transformed or distributed;
- machinery is installed or dismantled; or any work-related activities take place that may place the child's health, safety, or physical, mental, spiritual, moral or social development at risk.

A child under 16 may also not be employed in any circumstances contemplated in *Article 15(2) of the Namibian Constitution*. This article determines that:

Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purpose of this Sub-Article children shall be persons under the age of sixteen (16) years."

Furthermore, such children may not be employed in any circumstances specifically prohibited by the Minister of Labour and Social Welfare by regulation.

3. Children aged at least 16 but under 18 years

Children in this age category may also not be employed in respect of any work done between the hours of 20h00 and 07h00 nor for work specified next to the five bullets above, except insofar as the Minister by regulation in accordance with sec.3(5) may permit.

4. Persons aged at least 18 and above

Individuals in this category are not regarded as children for the purpose of the Labour Act, 2007 and may be employed to perform any lawful type of work within the regulatory parameters of the Act.

Penalty

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N\$20 000.00 and/or up to 4 years imprisonment.

Discussion: The topic of child labour is a very sensitive global concern, with countless blatantly exploitative abuses being the order of the day in many developing countries, particularly in parts of Asia, Latin America and Africa. Exploitation also occurs in other parts of the world but usually not so manifestly and mostly at lower levels of frequency.

It has been recognized by the ILO that there is a difference between the worst forms of child labour (as dealt with in Convention No.182 of 1999 concerning the Prohibition and Immediate Action for the Elimination of the worst Forms of Child Labour) and the traditional forms of child labour. Due recognition has also been given as to what amounts to child labour and child work. The latter being accepted as being necessary for, and to be applied only to, the upbringing of a child.

Impacting variables

Cultural, pedagogic and other considerations play a significant role when it comes to keeping children occupied, particularly in rural communities. But often there is a blurred line between what would represent acceptable forms of teaching a child to be a useful member of the family or community in which he/she lives, on the one hand, and what would actually represent reprehensible forms of child labour, on the other.

Parents or guardians are obviously entitled to tutor their children in routine household and related family chores. However, they have to be careful not to overstep the limits of what can reasonably be considered light educative menial work as opposed to arduous labour.

An additional, more recently emerging, problem is that of AIDS orphans trying to provide for themselves and siblings. Should they be equally disallowed from doing so?

These are all sensitive, intricate issues placing a big responsibility on parents, teachers and community leaders and, indeed, on the Nation as a whole. But as far as employers are concerned, the provisions of section 3, properly read within the broader context of the Act, serves as a clear

guideline as to what is, and what is not, permissible when it comes to youth employment.

It should be borne in mind in this respect, that where a child from 14 to 17 years of age is legally employed, even in a casual or temporary capacity, that individual is an employee within the full meaning of the Act and enjoys all the rights, benefits and protections stipulated in it. In addition, the normal common law principles pertaining to *employment contracts* >(NLL 1 p.137), would also apply (in as far as they have not been amended by statutory law), with all the relevant rights and obligations which they entail for the relationship between an employer and an employee.

B. Prohibition of forced labour (sec.4) (U) – Any person, whether an employer or not, is prohibited from directly or indirectly causing, required or permitting any individual to perform forced labour. Forced labour includes

-
- “(a) *any work or services performed or rendered involuntarily* by an individual under threat of any penalty, punishment or other harm to be imposed or inflicted on or caused to that individual by any other individual, if the first-mentioned individual does not perform the work or render the service;
 - (b) any work, performed by an *employee’s child* who is under the age of 18 years, if the work is *performed in terms of an arrangement* or scheme in any undertaking between the employer and the employee;
 - (c) any work performed by any individual because that individual is for any reason subject to the *control, supervision or jurisdiction of a traditional chief or headman* in that chief’s or headman’s capacity as chief or headman.” (own emphases)

Discussion: Section 4. is closely founded in the provisions of the ILO’s Forced Labour Convention, 1930 and the Abolition of Forced Labour Convention, 1957 both of which have been ratified by Namibia. Forced labour has elements of slavery where people are considered or treated as human property; to do the bidding of others against their will and mostly without compensation. Whilst outlawed in most countries the practice continues in various forms around the world.

Again, social and cultural consideration can play a role, as would be the case where an individual performs work by virtue of subservience to a traditional leader, or where a child is obliged to carry out chores at home or

at school (such as weeding a flower bed or picking up debris in the yard). In the first instance, the Act outlaws such conduct outright, irrespective of socio/cultural considerations. In the second instance (tasks assigned to a child by family, friends or a teacher), reasonableness and common sense should prevail. In other words, justifiable and reasonable social, cultural and pedagogic considerations would obviously continue to have their rightful place, unless explicitly prohibited by law.

Penalty

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N\$20 000.00 and/or up to 4 years imprisonment.

C. Prohibition of discrimination and sexual harassment in employment (sec.5) (M)

– The Act forbids a person to discriminate in any employment practice against any individual on the basis of:

- Race, colour, or ethnic origin.
- Sex, marital status or family responsibilities.
- Religion, creed or political opinion.
- Social or economic status.
- Degree of physical or mental disability.
- AIDS or HIV status.
- Previous, current or future pregnancy.

In this regard, *it is* discrimination to differentiate between two or more *employees* who do work of equal value, or between two or more *applicants for employment* who seek work of equal value.

It is not discrimination to –

- *select any person* for purposes of employment or occupation according to reasonable criteria, including but not limited to, the *ability, capacity, productivity and conduct* of that person or in respect of the *operational requirements and needs* of the particular work or occupation in the industry concerned.
- distinguish, exclude or prefer any individual *on the basis of an inherent job requirement*;
- take *affirmative action measures*;
- take any measures *approved by the Employment Equity Commission* in terms of the Affirmative Action (Employment) Act, 1998;
- temporarily *reassign a pregnant employee to other duties* which are suitable to her pregnant condition, provided there is no reduction in remuneration or any other benefits; or

- employ a person who as a consequence of a disability is incapable of performing certain duties or functions connected to the position or which is so prohibited by law.

Definitions

'AIDS' is defined as the Acquired Immune Deficiency Syndrome, a human disease which is caused by the Human Immunodeficiency Virus (HIV) and which is characterised by the progressive destruction of the body's immune system.

'*Employment decision*' can take on a wide range of activities and encompasses both pre-employment and in-the-job employment situations. In this respect it includes access to vocational guidance, training, placement services, advertising, recruitment, selection, appointment, promotion, demotion and transfer. An employment practice also refers to remuneration, conditions of employment, benefits, security of tenure, discipline, suspension and termination of employment and dismissal arising from retrenchment.

'*Family responsibility*' means the responsibility which an employee has towards a family member who may be a parent, spouse (husband or wife), son or daughter who, regardless of age, needs the care and support of the employee.

'HIV' is defined as the Human Immunodeficiency Virus, a virus that weakens the body's immune system, ultimately causing AIDS.

'*Person with disability*' is defined as an individual who suffers from any persistent physical or mental limitation that *restricts* that individual's preparation for, entry into or participation or advancement in employment or in an occupation.

'*Racially disadvantaged persons*' means persons who belong to a racial or ethnic group which formerly had been or still are, directly or indirectly disadvantaged in the sphere of employment as a consequence of social, economic or educational imbalances arising out of racially discriminating laws or practices before the independence of Namibia.

'*Work of equal value*' refers to work that is broadly the same and requires comparable skills, abilities and responsibilities from employees working within a similar environment.

Sexual harassment

Section 5, in addition, expressly forbids sexual harassment of an employee or prospective employee by any person. Where sexual harassment does occur and an employee resigns as a result thereof, the resignation constitutes constructive dismissal and entitles the employee to remedies available to an employee who has been unfairly dismissed.

For the purpose of the section, 'sexual harassment' is defined as any unjustifiable behaviour of a sexual nature which infringes on the dignity of

an employee, and undermines equality in employment, in a situation where either the victim has made it known to the offender that his/her behaviour is offensive, or where the offender should have been aware that the conduct is unacceptable under the circumstances.

Disputes

Disputes alleging discrimination which arise from an employer's lawful implementation of affirmative action must be decided in favour of the employer.

Discussion: The elimination of unfair discrimination at the workplace has been a fundamental social justice objective of human rights activists for many years, both prior and subsequent to Namibia's independence. Most informed observers would agree that, overall, the situation improved dramatically after the country's decolonisation and methodical implementation of employment equity programmes in the public and private sectors. Nevertheless, discrimination in various guises has not been totally eradicated, hence the continued need for legislative intervention.

The stipulation that it is not discrimination to distinguish, exclude, or prefer any individual on the basis of an inherent job requirement, carries an important principle, which is indispensable for productive efficiency. Maintaining proper work performance standards and selecting those who are objectively best suited for a job, have nothing to do with unfair discriminatory conduct characterised by favouritism, bigotry and prejudice. However, when there is a lack of due process, or performance criteria seem unreasonably high, suspicions of veiled unfair discrimination will soon be aroused.

Disability in the sense used in this provision is usually understood as a serious physical or mental limitation which puts the individual at a distinct disadvantage at the workplace in comparison to non-disabled colleagues or candidates for employment. Such an individual would, however, be able to perform the required functions of a post satisfactorily, with some special training and/or form of adaptation of the workplace, or some other reasonable form of assistance or aid.

Changes: The previous Act did not carry a definition of '*racially disadvantaged person*'. The definition in the present Act is based largely on the formulation contained in the Affirmative Action (Employment) Act, 1998.

AIDS or HIV status and pregnancy are new additions to the list of grounds

which may not be used as a reason for discrimination in employment. The inclusion of HIV/AIDS is indicative of concern about the stigmatisation of affected persons which impacts negatively on their chances to find and retain regular employment. Compliance with the provision should not be problematical to employers, although some guidance may be needed regarding employees who have become physically incapable of performing the duties and functions for which they were employed.

The addition of '*previous, current or future pregnancy*' to the list of prohibited discrimination, seeks, inter alia, to counteract the potential negative impact on the employment of younger women due to the added cost factor of expanded maternity benefits.

The previous prohibition of discrimination on grounds of sexual orientation is absent in the present text.

The former reference to the banning of harassment in employment or occupation per se, has also been omitted. Instead, sexual harassment has been explicitly prohibited reflecting concern about suspected widespread abuse of this nature at the workplace. Apart from the statutory prohibition it is expected that sexual harassment will also be dealt with in the >guidelines and codes of good practice to be published in terms of section 137.

D. Freedom of association (sec.6) (U) – In terms of section 6 of the Act, an employer may not discriminate against an employee or somebody seeking employment because of that person's –

- membership of a trade union or participation in the lawful activities of a trade union;
- exercising of any right conferred by the Act;
- disclosure of information he/she is entitled to, or legally required, to give; or
- refusal to do something unlawful.

Conversely, a trade union (or an employers' organisation) may not discriminate against an individual on grounds of race, sex, religion, social status, etc, with regard to admission, suspension or termination of membership; election or removal from office; and organisational activities.

Discussion: *Freedom of association* (>NLL 1 p.84) is a fundamental human right allowing a country's inhabitants, including employees and employers, to associate with each other and to establish or join organisations such as political parties, religious denominations, trade unions, em-

ployers' organisations, or any other lawful political, economic or cultural bodies of their choice. In labour relations the concept, more particularly, means that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Freedom of association is an indispensable prerequisite for effective collective bargaining and the expression of voluntaristic industrial democracy, the core institution of our collective labour law. The concept requires deep understanding and appreciation of the importance of inter-linkages in good labour relations. As with most other employment related concepts, the spirit in which freedom of association is nurtured and implemented is often more important than the formal codification thereof.

E. Disputes concerning fundamental rights and protections (sec.7) (N) – Disputes relating to alleged discrimination in employment, freedom of association or any matter dealt with in the Act *and* Chapter 3 of the Namibian Constitution (Fundamental Human Rights and Freedoms) may be referred to the labour Commissioner.

Having been satisfied that a copy of the dispute has been served on all parties, the Labour Commissioner, may refer the dispute to an arbitrator to resolve the dispute through arbitration. In the case of a dispute involving alleged discrimination, the Labour Commissioner has the option of first referring the matter to conciliation and only refer the matter to arbitration if conciliation should fail.

The foregoing notwithstanding, an aggrieved party has the right to take legal action on any alleged fundamental right infringement through the Labour Court instead of following the arbitration or conciliation/arbitration route.

G

General Provisions (Chapter 10) (M) – Miscellaneous matters not dealt with in any other part of the Act. Each is discussed separately in the Lexicon under the appropriate alphabetic heading. The headings are as follows:

- Contracts entered into by the State for provision of goods and services (sec.138);
- Delegation of powers (sec.141);
- Evidence (sec.131);

- Exemptions and variations (sec.139);
- Guidelines and codes of good practice (sec.137);
- Labour hire, prohibition of (sec. 128);
- Legal Assistance (sec.140);
- Liability for contravention of this Act by manager, agent or employee (sec.132);
- Limitation of liability (sec.134);
- Preservation of secrecy (sec.131);
- Records and Returns (sec.130);
- Regulations (sec.135);
- Regulations, administration of (sec.136);
- Repeal of laws, transition and consequential amendments (sec.142);
- Service of documents (sec.129); and
- Short title and commencement (sec.143).

Guidelines and codes of good practice (sec.137) (N) – This section authorises the Minister of Labour and Social Welfare, after consulting the Labour Advisory Council, to issue *codes of good practice* and *guidelines* for the proper administration of the Act as well as a code of ethics for conciliators and arbitrators. Such guidelines include guidelines on dispute prevention and resolution for application by the Labour Commissioner and the users of his/her services. The Minister is likewise empowered to change or replace any such codes or guidelines. Both actions are taken by publication in the *Government Gazette*.

Discussion: Codes and guidelines of this nature constitute what is known as *soft law* (>NLL 1 p.162) and must be taken into account by any person interpreting the Act (such as a court or an arbitrator) or applying it (such as an employer or labour inspector). While following such soft law is not obligatory, any deviation there from must be convincingly explained and motivated if an employer were to be challenged on its departure from the declared norm.

The existence of codes and guidelines place a high responsibility on employers to comply with fair labour practices and procedures, since a defence of ignorance or lack of technical expertise in human resources related matters is largely obviated. For this reason enforcing agents, such as the Ministry of Labour and Social Welfare and its labour inspectors, arbitrators and the Labour Court will justifiably expect employers to be much more conversant with proper and fair labour practices than has been the case heretofore.

To date, two such codes of good practice have been issued by the Minister. A Code of Good Practice on Industrial Actions (Strikes and Lockouts) and a Code of Good Practice on Picketing. Both appeared in *Government Gazette No. 4361 of 19 October 2009*, Government Notice No.208 of 2009.

H

Health, Safety and Welfare of Employees (Chapter 4)

– Sections 39 to 47, appearing as entries A. to I. below, deal with the health, safety and welfare of employees.

Discussion: Health, safety and welfare of employees constitute integral elements of conditions of employment, work environment and work related conduct. Both the employer and the employee have a duty to maintain standards suitably conducive to human wellbeing. During the past two and a half centuries Industrial history has gone through various stages of almost total disregard for the vital role of a healthy and safe work environment to the detriment of countless suffering workers and their dependants.

Even today, health and safety at the workplace is still often not accorded the priority it deserves both from a humanitarian and a good business practice perspective. It is, therefore, hardly surprising that the Labour Act places such a high premium on this aspect of the employment relationship. The Act itself, as well as the *>Regulations* framed there under, go into extensive detail on significant matters relating to occupational health, safety and welfare.

A. Employer duties to employees (sec.39) (U) – The Act enumerates 9 primary responsibilities which an employer has towards his/her employees in terms of occupational health and safety and which form the basis of a multitude of ‘secondary’ rules which derive there from. The basic employer duties are to:

- Provide a *safe working environment* that is *without risk to health* and that has *adequate facilities* for the welfare of employees.
- Provide and maintain *industrial premises, machinery, tools, systems* and *work processes* that are safe and without risk.

- Provide and maintain *safe entry and exit places* from work.
- Provide employees with adequate personal *protective clothing and equipment*.
- Provide employees with *information and training to work safely and without risk to health*.
- Ensure that the transport, use, handling and storage of *hazardous substances* (>NLL 1 p.89) is safe and without risk to health.
- Ensure that employees are given *instructions and supervision* to work safely and without risk to health.
- Ensure that the *organisation of work*, including hours of work and meal breaks are such that they do not adversely affect employees' health.
- Take *any other prescribed steps* [as well as reasonable steps even if not prescribed] to ensure the safety, health and welfare of employees at work.

Should something nonetheless go wrong, the employer has the duty to *immediately report* any accident, or occurrence of any occupational disease, to a labour inspector in the prescribed manner.

B. Employer duties to persons other than employees (sec.40)

(U) – An employer's responsibility for health and safety goes further than only towards employees. He/she has a statutory duty to conduct the business operation in a manner that as far as is reasonably practicable also does not place *any customers, visitors or any other non-employees* on the premises at any risk to their health and safety. Towards this end the Minister of Labour and Social Welfare is authorised to require, by regulation published in the *Government Gazette*, an employer to inform such persons of any potential risk to their health or safety that might exist on the premises.

C. Employee duties (sec.41) (U) – Employees, too, have certain fundamental responsibilities regarding health and safety which they are required by law to perform. These take on three main forms:

- Every employee has a duty to *take reasonable* (>NLL 1 p.157) *care* to ensure the employee's *own* safety and health in the workplace.
- Every employee has a duty to take reasonable care to ensure the safety and health of *any other person* who may be affected by the employee's activities at work.
- Every employee has a *duty to cooperate with the employer* to perform any obligation imposed under Chapter 4 of the Labour act, 2007 (Health, Safety and Welfare of Employees), as well as in terms of the Regulations Relating to the Health and Safety of Employees at Work, 1997.

Discussion: Infringement of these provisions by employees are usually seen in a very serious light by employers, since the employer carries the ultimate responsibility for health and safety at the workplace. Any untoward incident caused by an employee's negligence can have numerous adverse consequences for the enterprise and those employed by it. It is therefore not uncommon to have an appropriate health and safety clause in an employer's *disciplinary code* (>NLL 1 p.75) and procedure as well as in employment contracts.

D. Dangerous place of work, employee's right to leave (sec.42) (U) – An employee has the right to leave a duty station or even a work area which the employee has reasonable cause to believe is hazardous and contains a threat to his/her health or safety until the situation has been remedied. If such conditions prevail, the employee must immediately inform the employer thereof. The employee who has removed him/herself from a dangerous place of work is entitled to normal pay and other conditions of employment during the period of absence.

Discussion: It is important to note that the provision requires an employee to have *reasonable* cause to believe that dangerous conditions prevail before being entitled to remove him/herself from the place of work. Insufficient reason for the employee to have left the workplace could lead to the absence not being remunerated, and may, depending on circumstances, also lead to disciplinary action being instituted against such a person.

E. Health and safety representatives, election of (sec.43) – (U) Employees at a workplace are entitled to elect health and safety representatives to tend to their interests in this sensitive sphere. Where there are more than 10 employees but less than 101, and regardless whether they are trade union members or not, they may elect one representative from amongst themselves. They may elect one additional representative for each additional 100 employees or part thereof. An employer and employees or trade union may agree to a greater number of health and safety representatives if they so desire.

A health and safety representative is elected in the prescribed manner (with the employer providing reasonable facilities for this purpose), holds office for two years and is re-electable thereafter.

The employer is required to grant a health and safety representatives reasonable paid time off during working hours in order to perform their functions, as well as reasonable leave of absence to attend off-premise health and safety meetings and training courses provided that payment for such leave of absence lies in the employer's discretion. These rights of a health and safety representative are subject to the provisions of a possible collective agreement, and any reasonable conditions by the employer that are necessary to ensure the effective operation of the enterprise.

[See Regulation 6: *Election of health and safety representatives*]

F. Health and safety representative, rights and powers of (sec.44) (U) – Health and safety representatives are entitled to perform the following functions:

- *Collect* information.
- *Inspect* workplaces at reasonable times.
- *Investigate* potential hazards, complaints about safety, health or welfare and causes of accidents and diseases at work.
- Make representations to the employer, and a labour inspector.
- Perform any other functions agreed to by the *>health and safety committee* or provided for in a collective agreement.

G. Information, duty to provide (sec.45) (M) – An employer *is obliged* to provide a health and safety representative with sufficient relevant information so as to enable him/her to perform the required functions and maintain or improve conditions of safety, health and welfare at the workplace. The employer must consult with the representative on applicable policy and in respect of any changes to the content, process or organisation of work that may affect the health, safety or welfare of employees. The representative should at any reasonable time be allowed to carry out relevant inspections as well as to have access to a labour inspector if necessary.

The above notwithstanding, an employer is *not obliged* to supply information that:

- Is not related to the represented employees;
- is prohibited by law from being disclosed (such as certain health information);
- is private and personal;
- may be detrimental to the business for reasons not related to health and safety;
- or
- is legally privileged (disclosure protected by law, such as confidential information shared with a physician or lawyer).

Changes: Whereas an employer was previously also duty bound to provide a health and safety representative with the necessary information to be able to perform his/her task, this duty has now been amplified although simultaneously qualified as indicated.

H. Health and safety committees (sec.46) (U) – At a workplace with more than 100 employees a health and safety representative may request the employer to establish a health and safety committee consisting of the elected health and safety representative/s, an equal number of persons appointed by the employer and any additional individuals agreed to by the committee.

The committee – which may make its own rules for meetings – is entrusted with the *monitoring* of the application of health and safety rules and regulations, *advising* the employer on any health and safety matter and the performance of any *other function agreed to* it by the committee and the employer.

I. Health and safety provisions: resolution of disputes (sec. 47) (N) – A party to a dispute concerning a health, safety or welfare matter is entitled to refer it to the Labour Commissioner. Having been satisfied that a copy of the dispute has been served on all parties, the Labour Commissioner must refer the dispute to an arbitrator to resolve the matter through arbitration.

Hours of Work – >Continuous shift (sec 8); >Declaration of continuous shifts (sec.15); >Ordinary hours of work (sec.16); >Overtime (sec.17);>Meal intervals (sec.18); >Night work (sec.19); >Daily spread-over and weekly rest period (sec. 20); >Work on Sundays (sec.21; >Public holidays (sec.22)

Housing – >Accommodation

I

Incapacity – >Definitions relating to Basic Conditions of Employment

Interdicts – >Strikes and lockouts

Introductory provisions – >Definitions and interpretation

J

Jurisdiction of the Labour Court – >Labour Court

Jurisdiction of arbitrators – >Arbitration of Disputes

K

L

Labour Advisory Council (Chapter 9 Part A) – Sections 92 to 99, appearing as entries A. to H. below, deal with the Labour Advisory Council.

Discussion: The Labour Advisory Council (LAC) is a statutory tripartite body originally established under the previous Labour Act, 1992 (Act 6 of 1992) with the main purpose of advising Government on labour legislation and other related labour matters. Whilst the composition and administration of the Council have remained unchanged its powers and functions have been extended to support the new dispute prevention and resolution system introduced by the Act.

A. Continuation of Labour Advisory Council (sec.92) (U) – In terms of section 92 of the Labour Act, 2007 the Labour Advisory Council established by section 7 of the Labour Act, 1992 remains in place subject to the provisions of Chapter 9 Part A.

B. Functions of Labour Advisory Council (sec.93) (M) – The Labour Advisory Council *must investigate and advise* the Minister of Labour and Social Welfare on the following labour-related issues:

- Collective bargaining;
- policy in respect of basic conditions of employment and health, safety and welfare at work;
- prevention and reduction of unemployment;
- ILO issues;
- issues raised by any association of states of which Namibia is a member;
- labour legislation including –
 - amendments to the Labour Act and any other relevant law;
 - laws aimed to achieve the objects of Article 95 of the Namibian Constitution (Promotion of the Welfare of the People); and
 - laws to give effect to Namibia's international law obligations;
- codes of good practice;
- collection and compilation of information and statistics relating to the administration of the Act;
- the designation of essential services;
- rules for the conduct of conciliation and arbitration in terms of Chapter 8 Part C;
- policies and guidelines on dispute prevention and resolution for application by the Labour Commissioner and users of those services;
- the performance of activities by the Labour Commissioner;
- code of ethics for conciliators and arbitrators appointed in terms of Chapter 8 Part C;
- qualifications and appointment of conciliators and arbitrators appointed in terms of Chapter 8 Part C; and
- any other labour matter that the Council considers useful to achieve the objects of the Act or is referred to it by the Minister.

In addition to the above, the LAC may nominate the members of the panels appointed by the Minister to prevent or resolve disputes in the national interest.

Lastly, the Council must report annually to the Minister on its activities.

Discussion: Since the inauguration of the first Labour Advisory Council (LAC) on 6 May 1993, the Council has addressed itself to various issues of importance to labour administration in the country. Its specialist tripartite composition makes it an ideal vehicle for social dialogue: to contribute to the national debate between Government, employers and employees on labour-related matters with a view to promoting equity, efficiency

and socio-economic development. The expanded range of functions bestowed upon the LAC in terms of the Labour Act, 2007 its enhanced role in tripartite deliberations and its amplified investigatory and advisory capacity, add significantly to its stature and relevance in this regard.

Changes: The Labour Advisory Council was previously called upon “... to make such investigations *as it may deem necessary*, and to advise the Minister ...” Now, in terms of section 93, the LAC “... *must* investigate and advise the Minister ...” There is, therefore, a more peremptory emphasis regarding its role, requiring a more pro-active approach to labour issues than in the past.

The functions of the LAC have been expanded by inclusion of the new powers to, inter alia:

- a) advise the Minister on the designation of essential services;
- b) nominate persons for appointment to tripartite panels to deal with *>disputes affecting the national interest*;
- c) designate/appoint members to the *>Committee for Dispute Prevention and Resolution*;
- d) designate/appoint members to the *>Essential Services Committee*;
- e) nominate two members to the *>Labour Court Rules Board*; and
- f) investigate and advise the Minister on *>codes of good practice*; policies and guidelines on dispute prevention and resolution for application by the Labour Commissioner and users of those services; the performance of activities by the Labour Commissioner; and qualifications and appointment of conciliators and arbitrators.

The LAC’s previous advisory role pertaining to vocational training and apprenticeship has been removed. These latter aspects are now part of the portfolio of a different Ministry (*Ministry of Higher Education, Training and Employment Creation* (>NLL 1 p.103).

C. Composition of Labour Advisory Council (sec.94) (U) – The 13 member Labour Advisory Council is a high profile body the members of which are appointed by the Minister. The Council is comprised of –

- the Chairperson;
- 4 persons representing the State;
- 4 persons representing trade unions; and
- 4 persons representing the interests of employers’ organisations

Appointments in the last two categories are made from nominations by registered trade unions and employers' organisations. Additional individuals without voting rights may be co-opted to the Council with the approval of the Minister.

D. Terms of office and conditions of membership (sec.95) (U) – Members of the Labour Advisory Council are appointed for 3 years but may be re-appointed at the end of a term of office.

A member of the LAC who is not in full time employment of the State may be paid allowances for attending meetings, travel and subsistence at a rate determined by the Minister of Labour and Social Welfare with the consent of the Minister of Finance.

E. Removal of members and filling of vacancies (sec.96) (U) – The Minister is empowered to remove a member of the Labour Advisory Council from office on various counts, including in a situation where the Minister has cause to believe that the member is no longer fit or able to discharge the functions of his/her office. A new appointment must then be made in the prescribed manner to fill the vacancy for the unexpired term of office.

F. Committees (sec.97) (M) – The Labour Advisory Council has two permanent statutory committees: The *>Committee for Dispute Prevention and Resolution* and the *>Essential Services Committee*. In addition, the LAC may establish other committees to assist it, which must comprise at least 2 members of the Council but may include any number of other individuals.

Changes: The establishment of the Committee for Dispute Prevention and Resolution and the Essential Services Committee are new additions to the previous committee structure of the LAC.

G. Meetings (sec.98) (U) – Meetings of the Labour Advisory Council are held according to the following stipulations:

- (a) The chairperson decides the date, time and place of meetings but is also obliged to call a meeting on the written request of at least 4 members or on the request of the Minister.
- (b) The chairperson presides over all meetings when present. If the appointed chairperson is absent, the members may elect a chairperson from amongst their number to chair the meeting.
- (c) The majority of the members of the LAC constitute a quorum (i.e., 7 members if no vacancy, or not more than one, vacancy).

- (d) A decision of the majority of members present at a meeting of the LAC is a decision of the Council.
- (e) In case of a tied vote, the chairperson has a casting vote in addition to a deliberative vote.
- (f) A vacancy on the LAC does not affect the validity of Council decisions.
- (g) The LAC may make rules for the conduct of its meetings.
- (h) Meetings must be recorded in writing.

H. Administration of Labour Advisory Council (sec.99) (U) –

Administrative and clerical work of the Labour Advisory Council is performed by staff of the Ministry of Labour and Social Welfare made available by the Permanent Secretary. The Permanent Secretary may also designate an official to serve as secretary to the Council. In addition, the LAC is entitled to appoint personnel from outside the Ministry in consultation with the Permanent Secretary and approval by the latter of the conditions of employment of such staff.

Labour Commissioner (Chapter 9 Part E) – Sections 120 to 122, appearing as entries A. to C. below, deal with the Labour Commissioner.

Discussion: The statutory position, or office, of Labour Commissioner has been markedly enhanced in the new Labour Act in comparison to its former powers and functions. As such the office constitutes the key linch-pin around which virtually the entire dispute prevention and resolution system of the new labour law revolves.

A. Appointment of Labour Commissioner and deputy (sec.120) (M) –

The Minister of Labour and Social Welfare is vested with the responsibility to appoint a Labour Commissioner and Deputy Labour Commissioner both of whom are required to be *competent to perform the functions of conciliation and arbitration*, and who are by virtue of their office a conciliator and arbitrator for the purposes of the Act. The appointments are done subject to the laws of the public service.

Changes: The position of Deputy Labour Commissioner is a new addition to the office of the Labour Commissioner as well as the specific requirement that both incumbents must be proficient conciliators and arbitrators.

B. Powers and functions of the Labour Commissioner (sec.121) (**M**) – The functions of the Labour Commissioner are to:

- Attempt through conciliation or by giving advice *to prevent disputes* from arising;
- attempt through conciliation *to resolve disputes*;
- *arbitrate disputes* that remain unresolved after conciliation where the Act requires this or the parties agree;
- *register disputes* from employees *and* employers over contraventions, the application, interpretation or enforcement of the Act and to take appropriate action;
- *take appropriate action* upon receipt of complaints – including arbitration;
- *report* on activities to the Minister;
- *advise* on dispute procedure;
- *offer to attempt to resolve* disputes not referred to his/her office;
- *intervene* in applications for urgent interdicts;
- *apply*, on own initiative, to the Labour court for a declaratory order with regard to the interpretation or application of any provision of the Act; and
- *provide* employers' organisations and trade unions with advice and training on matters relating to the objects of the Act, including procedures for the prevention and resolution of disputes; design and content of collective agreements; and dismissal procedures.

Changes: Whilst the previous position of Labour Commissioner had been created primarily to deal with collective relations, including dispute resolution through the establishment of conciliation boards, the powers and functions conferred on that office in terms of section 121 and other provision of the Labour Act, 2007 are considerably wider. Virtually all items listed above represent new or extended functions. In addition to being the new focal point for the lodging of virtually all labour related disputes, whether pertaining to collective or individual disputes and whether such disputes are disputes of interest or disputes of right, there is a new emphasis on dispute prevention and pro-active interventionism, including actions before the Labour Court.

The office of the Labour Commissioner effectively replaces the district labour court system, handling all types of labour cases previously adjudicated at the magistrates' court level. Conciliation and arbitration are the main methods put at the disposal of the Labour Commissioner by the Act to deal with disputes. The Labour Commissioner and his/her Deputy are assisted by specially trained conciliators and arbitrators attached to the Office.

Other new functions of the Labour Commissioner include applying to the Labour Court for a declaratory order on any matter; the appointment of conciliators, for retrenchment disputes if requested to do so by one of the parties; the determining of disputes concerning fundamental rights and protections; the determining of disputes regarding the health, safety and welfare of employees; the determining of disputes in designated essential services; and the conducting of ballots relating to *agency shop* (>NLL 1 p.60) trade union dues.

It is important in this regard to note that whilst the Labour Commissioner is entrusted with the resolution of *disputes*, labour inspectors are, inter alia, tasked with the investigation and facilitation of the resolution of labour/employment related *complaints*. The objective in this respect is to optimise the voluntary resolution of complaints by the disagreeing parties before they escalate into disputes necessitating formal conciliation and/or arbitration.

C. Labour Commissioner may delegate certain powers and functions (sec.122) (**U**) – The Labour Commissioner is entitled to delegate any function enumerated in sec.121 to any official of the Ministry of Labour and Social Welfare, subject to conditions he/she may deem appropriate. A delegation can be amended or revoked at the pleasure of the Commissioner.

Labour Court (Chapter 9 Part D) – Sections 115 to 119, appearing as entries A. to E. below, deal with the Labour Court.

Discussion: Although the district labour court system established under the previous Labour Act, 1992, has been abolished with the repeal of that Act, the Labour Court continues to play a crucial role in determining labour matters in the new dispensation.

A. Continuation and powers of Labour Court (sec.115) (U)
– In terms of section 115 of the Labour Act, 2007, the Labour Court is established as a division of the High Court, subject to the provisions of Chapter 9 Part D.

Change: Whereas the Labour Court was previously constituted essentially on an *ad hoc* basis when a judge or acting judge of the High Court of Namibia was designated by the Judge President for the period of the hearing of one or several cases, the Labour Court has now become a permanent institution constituted on a senior level as a Division of the High Court comprising more than one judge.

B. Assignment of judges of Labour Court (sec.116) (M) – The Judge-President must assign suitable judges to the Labour Court, each of whom must be a judge or an acting judge of the High Court.

C. Jurisdiction of the Labour Court (sec.117) (M) – The Labour Court is vested with exclusive jurisdiction to hear and determine the following matters:

- *Appeals* from decisions of the Labour Commissioner and arbitration awards made in terms of section 89 (compulsory arbitration)..
- *Reviews* of arbitrators' awards and decisions of the Minister, the Permanent Secretary, the Labour Commissioner or any other body or official, including a decision of a body or official provided for in terms of any other Act, provided the decision concerns a matter within the scope of the Labour Act.
- *A declaratory order* in respect of a provision of the Act, a collective agreement, an employment contract or a wage order.
- *Urgent interdicts.*
- *Orders for the enforcement of arbitration agreements.*

The Court is empowered to generally deal with all matters necessary or incidental to its functions under the Act concerning any labour matter, whether or not governed by the provisions of the Act or any other law or the common law.

The Court may refer certain disputes to the Labour Commissioner for conciliation, or request the inspector General of the Namibian Police to provide a situation report on any danger to life, health or safety of persons arising from a strike or lockout.

Changes: The jurisdiction of the Labour Court has remained essentially intact, with the exception that appeals and reviews largely originate from arbitration awards as opposed to district labour court judgements in the

past. New additions are the power to refer certain disputes to the Labour Commissioner for conciliation or arbitration; the power to request the Inspector General of the Police for a situation report; and certain requirements to be met before granting *>urgent interdicts*.

D. Costs (sec.118) (U) – The Labour Court is generally prohibited from making an order for *costs* (*>NLL 1 p.134*) against a litigating party in a matter before it, unless that party has acted *frivolously* or *vexatiously* by instituting, proceeding with, or defending those proceedings.

F. Rules of Labour Court (sec.119) (M) – In terms of section 119 of the Labour Act, 2007 the Labour Courts' Rules Board established by section 22 of the previous Labour Act, (Act No. 6 of 1992) remains in place as the Labour Court Rules Board (no apostrophe) subject to the provisions of Chapter 9 of Part D of the Act. The Board, however, has been expanded from five to seven members and is comprised of –

- a High Court judge designated by the Judge-President as chairperson;
- two legal practitioners with labour law proficiency appointed by the Judge-President;
- a representative of the Ministry of Justice;
- a representative of the Ministry of Labour and Social Welfare; and
- two persons nominated by the Labour Advisory Council.

The Labour Court Rules Board must advise the Judge-President on rules of the High Court to regulate the conduct of proceedings in the Labour Court aimed at the speedy and fair disposal of its work. Where a matter is not dealt with in the Labour Court Rules, the Rules of the High Court of Namibia apply.

Changes: Apart from the slight difference in the name, other changes effected to the Labour Court Rules Board are the addition of two individuals nominated by the Labour Advisory Council (thus seven members as opposed to the previous five members of the Board). Previously also, provision was made for the remuneration of members not employed by the State; rules for the proceedings of the Board (quorum and voting procedure); and the nature of the rules to be made by the Board were circumscribed (and therefore, restricted). All these aspects have been omitted in the present Act.

Labour Court Rules Board – >Rules of Labour Court

Labour hire, prohibition of (sec.128) (N) – This section of the Labour Act, 2007 was struck down as unconstitutional by the Supreme Court of Namibia on 14 December 2009. Section 128, therefore, does not form an operative part of the Labour Act and will not be summarised or discussed here. A replacement for the section is expected in due course in the form of an amendment of the Act to be tabled in Parliament.

Labour Inspectorate (Chapter 9 Part F) – Sections 123 to 127, appearing as entries A. to E. below, deal with the Labour Inspectorate.

Discussion: The Labour Inspectorate is a division of the Ministry of Labour and Social Welfare and Social Welfare commissioned with the responsibility of overseeing and, where necessary, enforcing employment related provisions of the Labour Act, or any decision, award or order made in terms of it.

Although the Inspectorate has *wide coercive powers*, in some areas virtually equalling, or even surpassing, those of the police, sound labour administration policy calls for a *strong advisory and mediatory role* of its officials. Such an approach is in line with the crucial principle of voluntarism enshrined in modern labour relations philosophy as well as with the policy of dispute prevention emphasised in the Labour Act, 2007.

A. Interpretation (sec.123) (N) – For purposes of interpretation of the provisions of Chapter 9 Part F (Labour Inspectorate); the term *employer* includes any person -whom the employer has contracted to perform work on its behalf and/or who is in charge of premises where employees work. Secondly, the term *object*, where it appears in the relevant text, includes any article or substance.

Discussion: The broadening of the definition of ‘employer’ for the purpose of the labour inspectorate’s operations, effectively extends ‘employer’ to include managerial/supervisory staff engaged through employment hire services. The definition also includes managerial and supervisory staff as well as subcontractors in charge of premises.

B. Appointment of inspectors (sec.124) (U) – The Minister of Labour and Social Welfare is vested with the responsibility to appoint labour inspectors, subject to the rules of the public service, to implement the Act or any decision, award or order made in terms of it. The Permanent Secretary, on the other hand is required to issue each inspector with a certificate confirming the appointment. The Permanent Secretary, moreover, is empowered to suspend or withdraw the appointment of a labour inspector.

C. Powers of inspector (sec.125) (U) – The statutory powers and functions of a labour inspector determine that such an official may:

At any reasonable time *enter any premises* and -

- *order* that the premises or any part thereof may not be disturbed as long as reasonably necessary to search it;
 - *search* for and examine any relevant object;
 - *seize and make copies* thereof;
 - *take* samples of any object;
 - *take* measurements, readings, recordings or photographs; and
 - *question* any person on the premises;
- *order* any person to appear before him/her at a specified date time and place to be questioned;
 - *require* an employer to produce any document or object and explain aspects about it;
 - *examine, make a copy or take a sample of, or seize* any such document or object;
 - *require* an employee to pay an employee any remuneration owed;
 - *enforce* arbitration awards made under the Act;
 - *give directions* on where notices required in terms of the Act are to be posted;
 - assist any person in settling any complaint, referral or application, or assist in the complaint, application or referral itself;
 - require a member of the police to assist in the exercise of these powers; and
 - request any individual to assist as an interpreter or otherwise in the exercise of these powers.

When entering and searching premises a labour inspector must observe certain procedural formalities, act like a police official and as if any document or object involved is linked to an offence. A receipt must be issued for any document or object seized, and if asked for identification a labour inspector must be able to produce the certificate of appointment as labour inspector issued by the Permanent Secretary.

A police official or other individual assisting a labour inspector in performing his/her duties may accompany the inspector as if being a labour inspector him- or herself. The person in charge of an employer's premises is obliged to provide facilities reasonably required by a labour inspector to exercise his/her responsibilities whilst conducting an inspection.

[See Regulation 23: *Order to appear before a labour inspector*]

D. Powers to issue compliance order (sec.126) (N) – This provision authorises a labour inspector, who has reasonable grounds to believe that an employer is not complying with any matter prescribed in the Act, to issue a compliance order to that employer in a prescribed form. The effect hereof would be that the employer would be compelled to comply with the order, unless an appeal is noted against the order with the Labour Court within 30 days. The employer would then be entitled to withhold compliance with the order until the Court has decided the matter.

[See Regulation 24: *Compliance order*]

E. Offences in relation to inspectors (sec.127) (M) – Failure to heed the stipulations of Chapter 9 Part F (Labour Inspectorate) constitutes a criminal transgression. More specifically, it is an offence to –

- (a) hinder or obstruct a labour inspector;
- (b) refuse to answer a question put by an inspector;
- (c) furnish false or misleading information;
- (d) fail to obey a compliance order; and
- (e) to impersonate (pretend to be) a labour inspector.

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N\$10 000.00 and/or up to 2 years imprisonment.

Labour Institutions (Chapter 9) – Chapter 9 of the Act deals with seven specialized institutions which constitute the major functional components of Namibia's labour relations system.

Discussion: Each statutory labour institution is considered separately under the appropriate alphabetic heading. The institutions comprise the following:

- I. Committee for Dispute Prevention and Resolution (subcommittee of the LAC)**
- II. Essential Services Committee (subcommittee of the LAC)**
- III. Labour Advisory Council (LAC)**
- IV. Labour Commissioner**
- V. Labour Court**
- VI. Labour Inspectorate**
- VII. Wages Commission**

Not reflected in this list of specialized institutions is the one most indispensable institution of relevance to employment relations in Namibia, namely the *Ministry of Labour and Social Welfare* itself (>NLL 1 pp.94, 103 & 115). The Ministry responsible for Labour constitutes the coordinating and controlling administrative hub of all the other labour institutions and is referred to, directly or by implication, in various sections of the Act. Other crucial statutory labour-related institutions also falling under the control of the Minister of Labour and Social Welfare are the *Social Security Commission* (>NLL 1 p.41) and the *Employment Equity Commission* (>NLL 1 p. 82), each of which functions under a separate statute and is not discussed in the present volume of the Lexicon. *Trade unions* (>NLL 1 pp.118, 120 & 163) and *employers' organisations* (>NLL 1 pp.79, 80 & 137), which can also be thought of as major labour institutions of a specific kind, are dealt with separately in Chapter 6 of the Act >*Trade Unions and Employers' Organisations*.

Leave – >Annual leave (sec.23); >Maternity leave (sec.26); >Maternity leave, extended (sec.27); >Sick leave (sec.24)

Liability for contravention of Act by manager, agent or employee (sec.132) (U) – In terms of this section both the employer (which could either be a *natural person* (>NLL 1 p. 152) or a *juristic person* (>NLL 1 p.144) and the manager, agent or employee of the employer who commit a contravention of any provision of the Labour Act are held liable, i.e., accountable for the offence.

An employer would not be held liable if it could be proven on a *balance of probabilities* (>NLL 1 p.129) that the act or failure to act omission was done without the permission of the employer; that the employer had taken all *reasonable* (>NLL 1 p. 157) steps to prevent such a contravention; and that the deed or omission was beyond the scope of authority or course of employment of the contravener.

Discussion: An employer, whether a natural person such as a shop owner or farmer, or a juristic person such as a ministry, parastatal, company or close corporation, will be obliged to have clear policies, procedures and rules in place regulating employment matters to avoid accusations under sec.132. At the very least, managers, employees or agents dealing with human resource issues should not only have access to the Labour Act and its Guidelines and Codes of Good Practice, but should also be trained in the correct understanding and applications of their contents in as far as applicable to the employer in question. Employees should be well acquainted with policies, procedures and rules applicable to them. Proof of this, in the form of signed and initialled contracts of employment, conditions of employment, disciplinary codes and procedures, etc, as well as proof of induction and other appropriate training where necessary, should be readily available.

The *burden of proof* (>NLL 1 p.130) or *onus* (>NLL 1 p.153) rests upon the employer to prove his/her innocence in this respect, and mere instructions forbidding a contravention are not sufficient on their own.

Liability, limitation of (sec.134) (U) – All officials of the Ministry of Labour and Social Welfare are protected against any wrongdoing occurring in good faith in the performance of their duties and are not subject to any personal civil liability as a result thereof. This protection against possible civil claims applies to the Permanent Secretary, the Labour Commissioner and Deputy, a conciliator, arbitrator, labour inspector and any staff member of the Ministry.

Criminal transgressions such as bribery and corruption are clearly excluded from the limitation of liability provision. Certain civil *delicts* (>NLL 1 p.135) such as libel would also be excluded, unless the defence of such conduct having been exercised in good faith succeeds.

Livestock – >Accommodation

Lockout – >Definitions and Interpretation

Long title – The full title of the Labour Act, 2007 (Act No.11 of 2007) as opposed to the >*short title*. The long title is presented in its entirety below.

ACT

To consolidate and amend the labour law; to establish a comprehensive labour law for all employers and employees; to entrench fundamental labour rights and protections; to regulate basic terms and conditions of employment; to ensure health, safety and welfare of employees; to protect employees from unfair labour practices; to regulate the registration of trade unions and employers' organisations; to regulate collective labour relations; to provide for the systematic prevention and resolution of labour disputes; to establish the Labour Advisory Council, the Labour Court, the Wages Commission and the labour inspectorate; to provide for the appointment of the Labour Commissioner and the Deputy Labour Commissioner; and to provide for incidental matters.

Discussion: Similar to the preamble, the long title of an Act is not usually part of the statute itself, appearing as it does preceding the table of contents. However, it is indicative of the main thrust of a law and the principal areas covered by it. The long title of the Labour Act, 2007 is slightly shorter than that of the Labour Act, 1992 and its content is also somewhat different, but not entirely so. The long title, similar to the >*Preamble*, does not make any mention of alternative dispute resolution, nor, more specifically, of conciliation and arbitration. The reference to "... systematic prevention and resolution of labour disputes ...", nevertheless, is a direct allusion to these key processes imbuing the Act. The mentioning of both the Labour Commissioner and the Deputy Labour Commissioner at the end of the title reinforces the pivotal role which this Office must perform in the amended labour relations dispensation.

M

Maternity leave (sec.26) (M) – Maternity leave applies to all female employees who have completed six month's continuous service in the employment of an employer.

- An employee's maternity leave entitlement comprises 12 weeks maternity leave commencing 4 weeks before her expected date of confinement as certified by her medical practitioner and extending 8 weeks after her actual date of confinement.
- Should the child's birth occur before the initial 4 weeks are over, she is entitled to the balance afterwards to make up full 12 weeks maternity leave.

- The employee must provide the employer with two medical certificates: the first regarding the expected date of confinement and the second confirming the actual date of birth upon her return to work.
- All provisions of the employment contract remain in force during maternity leave and the employer is obliged to pay the employee her full remuneration except the basic wage.
- The Social Security Commission established in terms of the Social Security Act, 1994, must pay the employee the portion of the employee's basic wage as prescribed in terms of that Act.
- Unless an employer has offered an employee comparable alternative employment which she has unreasonably refused, he or she may not dismiss the employee during or at the end of maternity leave for reasons of redundancy or on any grounds linked to her pregnancy, delivery or her resulting family status or responsibility.

Discussion: It should be noted that in accordance with the wording of section 26(1) (a) and (b) of the Act, if the actual date of confinement is later than the initial expected date the employee is entitled to maternity leave for that longer period as well, which means she would be entitled to more than 4 weeks maternity leave prior to giving birth. Furthermore, the fact that an employee had been on maternity leave for longer than 4 weeks prior to the actual date of confinement, does not diminish the 8 weeks maternity leave an employee is entitled to after the actual date of confinement. Such an employee would therefore be entitled to more than 12 weeks maternity leave in total with all benefits provided for in this section.

It needs to be pointed out additionally, that in accordance with section 19. Of the Act, a female employee may not be required or be permitted to do any night work for 8 weeks before an expected date of confinement or for 8 weeks thereafter. This period may be increased upon certification by a medical practitioner that the health of the mother or infant so demands.

Changes: Section 25 no longer provides for a 12 month waiting period for new employee before she qualifies for maternity leave as had been the case before. The qualifying period has been decreased to 6 months. This was done in order for this section to be in line with the Social Security Commission (SSC) qualification which stipulates that an employee becomes entitled to benefits six months after becoming an active member.

If birth occurs earlier than the expected date of confinement, the remaining balance of the four weeks pre-natal maternity leave to which

the employee is entitled is to be taken together with the eight weeks postnatal maternity leave to which an employee is entitled.

An employee is entitled to full remuneration (total value of all payments in money or kind) as opposed to only medical aid and pension scheme benefits paid by the employer and a portion of basic wage paid by the SSC as was previously the case.

Maternity leave, extended (sec.27) (N) – This is a another new condition of employment introduced in the Labour Act, 2007 and focuses on the not uncommon but also not very frequent circumstance where a mother, foetus or child, or both the mother and foetus or child, experience complications. If a medical practitioner certifies this to be the case the employer must grant the employee additional paid maternity leave of up to one month in excess of the 12 weeks ordinary maternity leave, or grant accrued sick leave which the employee has at her disposal. If the accrued sick leave is less than a month the balance to make up a full month must also be granted if so required in terms of the medical certificate.

Extended maternity leave can be applicable either before or after confinement but must run immediately before or immediately following ordinary maternity leave. If a medical practitioner certifies the need for both post- and antenatal extended maternity leave, the two periods run concurrently, i.e., will not be more than one month in total. The same rules apply for payment of full remuneration (less basic wage) and employment security as do for ordinary *>maternity leave*.

Meal intervals (sec.18) (U) – In terms of this provision, work must be interrupted after 5 hours for a meal interval of at least one hour.

- The hour may be shortened, but not by more than 30 minutes, if the employee agrees and the Permanent Secretary has been informed accordingly.
- An employee must not work during the meal interval and does not receive pay for this rest period, unless it is longer than 90 minutes in which case payment is due for the portion exceeding one hour.
- Work is regarded as continuous unless interrupted by an interval of one hour or such shorter period agreed upon.
- A driver of a motor vehicle who does no work other than remaining in charge of the vehicle and its load during the meal interval is regarded as not working for the purpose of this section.
- Section 18 does not apply to an employee engaged in *>urgent work*; to a security officer; or to an employee working a *>continuous shift*.

Discussion: For the purpose of this section the concept of ‘continuous work’ (third bullet) is used to determine five hour spans of work after which a meal interval is obligatory. Thus, for example, if there is only a 15 minute tea break after three hours of work, a full meal interval must be allowed after another one hour 45 minutes. If there is an agreed interval of 30 minutes (of which the Permanent Secretary has been duly notified) after three hours of work, the next meal interval will only be due five hours after the end of the 30 minute interval.

The concept of continuous work is also applicable to shift arrangements allowing for uninterrupted activities such as mining operations, power generation and water purification and where temporary cessation of work and relinquishing of duties to allow for meal breaks would not be feasible.

N

Namibian Constitution – >*Constitution of the Republic of Namibia*

Night work (sec. 19) (U) – Night work refers to any work done between eight-o-clock (20h00) in the evening and seven-o-clock (07h00) in the morning.

- For work done during hours falling in this period additional remuneration of six percent (6%) of the employee’s hourly rate must be paid.
- If the work being performed constitutes overtime, the employee whilst entitled to overtime pay, is not entitled to the additional six percent night work allowance.
- A female employee may not be required or permitted to do any night work for 8 weeks before an expected date of confinement or for 8 weeks thereafter. This period may be increased upon certification by a medical practitioner that the health of the mother or infant so demands.

Notice – >*Termination of employment* >*Termination of employment on notice*

O

Ordinary hours of work (sec. 16) (U) – Weekly ordinary hours of work are limited to a maximum of 45 hours per week for ordinary employees; 60 hours per week for a security officer or an employee working in emergency healthcare services; or to the maximum number of hours prescribed by the Minister in the case of an employee working in a continuous shift.

Daily ordinary hours of work are limited to nine hours on any day, if the employee works for five days or fewer per week or eight hours on any day, if the employee works for more than five days in a week. A security officer or an employee working in emergency healthcare services may not work more than 10 hours per day if working six days a week or 12 hours per day if working five or fewer days per week.

Employees who serve the public may be required to work up to 15 minutes additional time per day but not more than a total of 60 additional minutes a week to perform such duties after completion of ordinary working hours.

Except in the case of a security officer, a meal interval granted in terms of section 18 does not count as part of the ordinary hours of work.

Overtime (sec.17) (M) – Overtime refers to time worked in excess of the hours an employee ordinarily works in any ordinary working day. An employer must not require or permit an employee to work overtime other than on the following terms:

- Overtime shall only be performed in accordance with an agreement between the employer and the employee and must be remunerated at a minimum rate of one and one-half (1½) times the employee's basic hourly wage.
- Overtime is limited to a maximum of 3 hours per day and 10 hours per week.
- Overtime on a Sunday, if Sunday is an ordinary working day for an employee, must be paid at a minimum rate of double the employee's basic hourly wage.
- The Permanent Secretary may increase the statutory overtime limits if approached by an employer to do so and if the employees affected thereby agree. In such an instance the Permanent Secretary must issue a notice stipulating the conditions attached to the approval.
- Section 17 does not apply to an employee who is performing urgent work as defined under section 8, except in so far as that any such overtime must be remunerated at a one and one-half times rate.

Discussion: The payment of correct overtime requires accurate time-keeping records and clear employer policy on matters such as who is allowed to work overtime; under what conditions; and according to which prior authorisation and procedures. In this regard it should be noted that, save for the exception mentioned in the last bullet, section 17 applies to all employees, regardless of job category or seniority. Time off in lieu of overtime worked is not provided for in the provision.

Direct overtime payment to highly remunerated managerial and professional staff can also be a contentious issue. One possible lawful way of dealing with problematical situations of this nature would be to seek certain *>exemptions* in accordance with the provisions of section 139 of the Act for this purpose. In any event, policy rules on overtime should also specifically address the situation of senior personnel in order to prevent, or at least to limit, potential future disputes.

Changes: Previously overtime payment had to be calculated on hourly remuneration (including, for example, any monthly allowances), whereas in the new Act overtime is calculated on hourly basic wage. In the past employers had a problem to calculate overtime based on remuneration, since, for example, it is difficult to determine precisely what a car-, cell- or housing allowance would be per hour. The simplified formula obviously also has economic advantageous in reducing operational costs.

P

Payment instead of notice – *>Termination of employment*

Payment of remuneration (sec.11) (U) – This section deals with the prescribed manner in which remuneration must be paid to an employee.

- Such payment must not happen later than one hour after completion of the ordinary working hours on the agreed upon pay day which can be daily, weekly fortnightly or monthly.
- Payment must be made in cash, or if the employee agrees, by cheque or direct deposit into an account.
- Payments in cash or by cheque must be done in a sealed envelope. All payments of remuneration must be accompanied by a written statement of particulars relating to the payment.
- No payment may be made at any place where intoxicating liquor is sold or at any place of amusement on such premises, unless the employee is employed there.
- In the case of an employee whose contract of employment is terminated before the normal pay day, the employer must pay the employee on the day on which such termination becomes effective.

[See Regulation 3: *Written statement of particulars of monetary remuneration*]

Payment on termination and certificates of employment – >Termination of employment

Period of employment – >Termination of employment

Person with disability – >Fundamental Rights and Protections >Prohibition of discrimination in employment

Preamble – The introductory part of the Labour Act, 2007 preceding the statutory provisions proper. It is reproduced in its entirety here below.

PREAMBLE

To give effect to the constitutional commitment to promote and maintain the welfare of the people of Namibia in Chapter 11 of the Constitution; and

To further a policy of labour relations conducive to economic growth, stability and productivity by -

- promoting an orderly system of free collective bargaining;
- improving wages and conditions of employment;
- advancing individuals who have been disadvantaged by past discriminatory laws and practices;
- regulating the conditions of employment of all employees in Namibia without discrimination on grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status, in particular ensuring equality of opportunity and terms of employment, maternity leave and job security for women;
- promoting sound labour relations and fair employment practices by encouraging freedom of association, in particular, the formation of trade unions to protect workers' rights and interests and the formation of employers' organisations;
- setting minimum basic conditions of service for all employees;
- ensuring the health, safety and welfare of employees at work;
- prohibiting, preventing and eliminating the abuse of child labour;
- prohibiting, preventing and eliminating forced labour; and
- giving effect, if possible, to the conventions and recommendations of the International Labour Organisation;

NOW THEREFORE BE IT ENACTED by the Parliament of the Republic of Namibia as follows: [The Act proper commences at this point with Chapter 1 Introductory Provisions]

Discussion: A preamble is not really part of a statute itself but rather a reflection of the underlying normative values and the social, economic and political context in which the law was conceived and framed. It expresses the general intention of the legislature for coming up with such an Act of Parliament. As such a preamble assists those affected by the statute as well as the courts, or any other adjudicating tribunals appointed to oversee its correct application, to understand the spirit and intent in which the law should be administered.

Significantly, the Preamble to the Labour Act, 2007 commences with reference to the *>Namibian Constitution* and closes with reference to *>conventions and recommendations* of the *International Labour Organisation* (*>NLL 1 p.92*).

As far as content is concerned, the preamble of the Labour Act, 2007 is essentially similar to the preamble of the Labour Act, 1992, with the exception of the additional mention of the prohibition of forced labour in the preamble of the new Act.

The preamble is constructed around two principal objectives: First, to promote and maintain the *welfare* of the people; and second, to further a policy of labour relations conducive to *economic growth, stability* and *productivity*. These fundamental intertwined developmental goals need to be constantly borne in mind by all stakeholders and role players in the implementation of the Act.

The eleven directive clauses or 'mission statements' following on the objectives indicate how the Act's overall goals are to be achieved, each either finding expression in specific chapters, parts or sections of the Act, or generally permeating the entire statute.

There is no direct mention of the new emphasis on prevention of disputes or, of the conciliation/arbitration approach in the new dispensation. Presumably these are implied in different parts of the preamble and/or are sufficiently catered for in the *>long title* of the Act.

Preservation of secrecy (sec.131) (U) – Confidential information acquired in the course of performing a function in terms of the Labour Act may not be disclosed unless the disclosure is –

- made with the consent of the person involved; or
- made with the consent of the Minister of Labour and Social Welfare who must be satisfied that the information is of a general nature and in the public interest; or
- authorized by the Act or any other law, or by a court order.

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N\$10 000.00 and/or up to two years imprisonment.

Prevention and Resolution of Disputes – >*Disputes affecting the national interest*; >*Conciliation of Disputes*; >*Arbitration of Disputes*

Private arbitration – >*Prevention and Resolution of Disputes*

Public holidays (sec.22) (M) – An employer is not allowed require or permit an employee to work on a public holiday except for the purpose of –

- urgent work;
- carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a public holiday;
- domestic service in a private house;
- health and social welfare care and residential facilities including hospitals, hospices, orphanages and old age homes;
- work on a farm required to be done on that day;
- work in which continuous shifts are worked; or
- any activity approved by the Permanent Secretary upon application by an employer if the employees involved agree.

Employers must observe the following rules with regard to public holidays:

1. If a public holiday falls on a day on which an employee would ordinarily work, the employer must pay an employee who does not work his/her ordinary remuneration for that day.
2. If an employee works on such a day, the employer must pay the employee his/her ordinary daily remuneration plus that employee's basic hourly wage for each hour worked.
3. Alternatively, the parties can agree that the employee be paid his/her ordinary daily remuneration plus one-half the employee's basic hourly wage for each hour worked on that day and be granted an equal paid time off from work during the next working week.
4. An employee who works on a public holiday which falls on a day other than the employee's ordinary work day must be paid double his/her hourly basic wage for each hour worked.
5. An employee who does not work on a public holiday who fails to report for work either on the day before a public holiday or the day thereafter without a valid reason, is not entitled to his/her ordinary daily remuneration for the public holiday.

6. Where the majority of hours worked on a shift fall on a public holiday, all the hours are deemed to have been worked on the public holiday – where the majority of hours fall on an ordinary working day the majority of hours are deemed to fall on the ordinary working day.

Discussion: In the past there has been uncertainty as to whether the time off referred to in paragraph 3. above, must be paid time or not. The argument being, that if so, it would mean that such an employee would effectively be remunerated 2½ times for the work performed on a public holiday (1½ times for the hours worked on that day plus another 1 times for the hours off in the following week for having worked the previous public holiday). However, the reference in section 37(1)(b) of the new Act (*>Payment on termination*) to “... any *paid time off* that the employee is entitled to in terms of sections 21(6) or 22(5) ...”, refers to paid time off if choosing 1½ pay rate for work on a Sunday or public holiday. The two sections (22 and 37) read together, thus remove any ambiguity in this regard and confirm that this payment option indeed amounts to a remuneration rate of 2½ times ordinary pay. Choosing the option of double pay without time off in the following week is, therefore, the less costly of the two alternatives.

The specific reference to “... hotel, boarding house or hostel ...” in subsection 22. (2)(b) is problematical as many other types of establishments and operations in the hospitality and tourism industries which also need to render services on public holidays are thus excluded. The situation requires an exemption or variation for such employers to be able to operate legally on Sundays and public holidays.

Changes: The main change from the previous situation is the distinction between *ordinary daily remuneration* to which an employee is entitled for a public holiday irrespective of whether or not the employee worked that day, and the additional *basic hourly wage* for each hour worked on a public holiday to which an employee is entitled.

The provision which stipulates that an employee who works on a public holiday which falls on a day other than the employee’s ordinary work day must be paid double his/her *hourly basic wage* for each hour worked is also new.

In the past, as in the case of overtime, employers had a problem to calculate additional payments based on remuneration, since, for example, it is difficult to determine precisely such allowance per hour.

Q

R

Racially disadvantaged person – >Fundamental Rights and Protections;
>Prohibition of discrimination in employment

Rations – >Accommodation

Reduced hours – >Deductions and other acts concerning remuneration

Recognition agreement – >Recognition and Organisational Rights of Registered trade Unions; >Recognition as exclusive bargaining agent of employees

Recognition and Organisational Rights of Registered Trade Unions (Chapter 6 Part C) – Sections 64 to 69, appearing as entries A. to F. below, deal with recognition and organisational rights of registered trade unions.

A. Recognition as exclusive bargaining agent of employees (sec.64) (M) – Recognition results in an appropriate *bargaining unit* (>NLL 1 pp.63 & 130), being entitled to negotiate a collective agreement with the employer on any matter of mutual interest as the *exclusive bargaining agent* (>NLL 1 p.139) of the employees in the bargaining unit.

Requirements for recognition

A trade union which wants to be recognized as an exclusive bargaining agent by an employer or employers' organisation – giving it the sole right to bargain on behalf of employees – is obliged to satisfy certain requirements. It must:

- Be registered in accordance with the provisions of the Labour Act;
- represent the majority of employees in an appropriate bargaining unit, i.e., category of employees and be able to prove it;
- request recognition by the employer in the prescribed form; and
- provide the Labour Commissioner with a copy of its application and proof of service.

Response to application

An employer must respond to a request for recognition within 30 days in the prescribed form indicating that it recognises the union or that it refuses to do so, either because it disputes the appropriateness of the proposed bargaining unit, or it disagrees that the union represents the majority of employees in that unit. If the employer refuses recognition for these reasons, or does not respond within 30 days, the union may lodge notice of a dispute with the Labour Commissioner whilst serving copies of the notice on the employer.

Resolving recognition disputes

The Labour Commissioner will make arrangements for the appointment of an arbitrator to resolve the dispute through arbitration. The arbitrator will determine whether or not the union represents the majority of employees and/or whether the bargaining unit is appropriate. In determining the latter the arbitrator must take the organisational structure of the employer into account and seek to promote orderly and effective collective bargaining with a minimum of fragmentation of an employer's organisational structure. Once recognized, the union has a duty to represent the interests of all employees in the bargaining unit, whether or not they are union members, for the purpose of negotiations with the employer.

Withdrawal of recognition

When a trade union no longer represents the majority of employees in a bargaining unit, the employer is required to give the union 3 months notice to acquire a majority and withdraw recognition if it fails to do so. A party to a dispute regarding withdrawal of recognition may refer it to the Labour Commissioner for arbitration and any appropriate determination.

[See Regulation 11: *Request for recognition of trade union as exclusive bargaining agent*; and Regulation 12: *Notification to registered trade union to acquire majority representation*]

Discussion: Recognition in industrial relations is the formal process of an employer contractually recognizing a registered trade union which represents the majority of employees as an exclusive bargaining agent upon application by the union. The ensuing *recognition agreement* is a procedural collective agreement regulating the relations between the trade union, union workplace representatives (shop stewards) and the employer. Being of a contractual nature, the terms of the agreement are negotiated

between the participating parties and careful attention needs to be paid to the details thereof.

Besides the aspect of recognition itself, matters dealt with in a recognition agreement can include definitions of key concepts including a definition of “bargaining unit”, “constituency” and “management”; trade union access to company premises; union dues; employer collection fees; number of shop stewards (>‘*workplace union representatives*’) and shop steward elections, -training, -leave, -facilities, -duties, -rights and -obligations; consultation and negotiation policy and topics; disciplinary-, grievance-, retrenchment- and dispute procedures; strikes; picketing; and withdrawal of recognition. Other important human resources issues such as health and safety and affirmative action policy, can also be incorporated into the recognition agreement although that is less common. The policy consideration in this regard being that if all or most of the above issues are properly agreed upon by the parties, future disputes should be minimised.

Procedural collective agreements, although subject to negotiated amendment, are usually semi-permanent in nature and remain in place for as long as the parties so desire and maintain their representative status.

Notwithstanding the foregoing, the act of recognition per se, that is, recognition of a registered trade union as exclusive bargaining agent by an employer or employers’ organisation, need not necessarily be done in terms of a detailed formal procedural agreement as has hitherto usually been the case. Regulation 11(2) of the Labour General Regulations: Labour Act, 2007 provides for recognition through completion of Form LC 11 of the Regulations by an employer or employers’ organisation and submitting it to the relevant union with a copy to the Labour Commissioner. Submission of Form LC 11 is compulsory for recognition in terms of the Regulations, but such recognition does not necessarily have to be accompanied by an additional detailed procedural agreement as contemplated above, although that would be preferable for the reasons mentioned.

Changes: The main modification in the new dispensation in as far as recognition is concerned is the simplification of the procedure as provided for in the Regulations and the provision that disputes are generally dealt with by arbitration instead of by the Labour Court. The proviso on withdrawal of recognition is also a new addition.

B. Trade union access to the premises of the employer (sec.65) (U) – An authorised representative of a *registered recognized union* may request permission to enter an employer’s premises during working hours to recruit members or to perform any legitimate trade union

function. It may also request permission to hold a meeting of members at the premises outside working hours. In either case an employer may not unreasonably refuse such a request.

A representative of a registered but *not recognized union* may request permission to enter an employer's premises outside working hours to recruit members, to perform any legitimate trade union function or to hold a meeting of members. Such permission should similarly not unreasonably be withheld.

However, the employer may require the union representative to properly identify himself as such, and to impose any reasonable conditions which have to be met by the representative when entering the employer's premises taking into account the effective performance of the employer's operations..

C. Deductions of trade union dues (sec.66) (M) – A trade union which is recognised as an exclusive bargaining agent is entitled to have its member's union fees deducted from their wages by the employer and paid over to it, if the employees have authorised the deductions in writing, or if a provision in a collective agreement authorises such deductions. An employer may also voluntarily, if requested to do so in writing by an employee, deduct trade union fees due to any other registered union.

A provision in a collective agreement between an employer and a union recognised as an exclusive bargaining agent to deduct union fees from all members in the bargaining unit remains in force for 3 years. However, it may be withdrawn earlier if a majority of employees affected by the provision in the collective agreement vote in favour of having it invalidated in a ballot conducted by the Labour Commissioner. The latter is obliged to conduct a ballot if 25% of the employees affected by the provision in the collective agreement request the Commissioner to do so.

Where Union fees are being deducted on the strength of a signed authorisation by an employee, an employer must stop such deduction within one calendar month of being notified by the employee to cancel the authorisation.

An employer may retain a collection fee of 5% of the total monthly amount deducted from employees and must pay the balance to the union within seven days together with a statement reflecting the names of the employees, the amounts deducted and the date thereof.

Changes: A significant change with regard to deduction of trade union dues has been the introduction in this section of the slightly modified *agency shop* (>NLL 1 p.60) provision whereby a clause in a collective agreement between an employer and a union can compel an employee

to allow the deduction of union dues from his/her remuneration regardless of whether or not he/she is a union member and has authorised such a deduction. The provision seeks to oblige so-called 'free-riders' to pay for the benefits they derive from a union's collective bargaining with an employer. The rationale being that free-riders benefit from improved conditions of employment which a union has successfully negotiated with the employer and, therefore, should contribute financially towards the union's costs.

A common form of an agency shop agreement is for the dues deducted from non-union employees to be paid into some kind of employee benefit fund such as an employee dependants study fund. Section 66 is silent on this aspect. The section does also not indicate what happens after the deduction agreement lapses after three years. Presumably the union would have the right to re-negotiate the agency shop agreement with the employer if it still has majority representation in the defined bargaining unit.

Agency shop is similar to, but not quite as far-reaching, as the better-known *closed shop* (>NLL 1 p.63) scenario in which all employees covered by a recognition agreement between an employer and a union are obliged to be members of that union; and new recruits must first sign up with the relevant union before they may be appointed by the employer. Closed shop is not applicable here and, also, although agency shop arrangements have been part of modern labour relations dispensations in some countries, the concept is new in Namibia.

D. Workplace union representatives (sec.67) (M) – A workplace union representative (also known as a *shop steward* (>NLL 1 p.114) in common parlance), is an elected union member from amongst employees who holds office for two years and may stand for re-election. The employer is required to provide reasonable facilities for such elections.

At any workplace employees who are members of a registered trade union have the right to elect from amongst themselves –

- 1 workplace union representative, if there are from 5 to 25 members;
- 2 representatives, if there are from 26 to 50 members;
- 3 representatives, if there are from 51 to 100 members
- 4 representatives, if there are more than 100 members
- an additional representative for every additional 100 members on top of the first 100 members.

Workplace union representatives have the following functions:

- To make representations to the employer regarding any matter relating to terms and conditions of employment of their fellow members, and any >redundancy related dismissal of employees.
- To represent fellow members in disciplinary proceedings.
- To perform any other function that may be provided for in a collective agreement.

The employer must grant workplace representatives reasonable paid time off during working hours in order to perform their legitimate functions as well as reasonable leave of absence to attend union meetings or training courses, for which payment lies in the employer's discretion.

[See Regulation 13: *Election of workplace union representatives*]

Changes: The only material change from the former position is that section 67 allows one more workplace union representative if there are more than 100 union members than had previously been the case.

E. Organisational rights in collective agreements (sec.68) (U)

– Employers or registered employers' organisations and registered trade unions are at liberty to conclude collective agreements which extend or give better effect to the rights of a registered trade union than provided for in the Act.

F. Disputes concerning certain provisions of this Chapter (sec.69) (N)

– Disputes relating to Chapter 6 Part A (Trade Unions and Employer's Organisations); Part B (Registration of Trade Unions and Employers' Organisations); and Part C (Recognition and Organisational Rights of Registered Trade Unions) can be referred to the Labour Commissioner for conciliation, failure of which the matter is dealt with by recourse to arbitration. Disputes concerning recognition of a registered union are referred directly to arbitration.

Records and returns (sec. 130) (U) – In terms of this section employers are obliged to keep record for at least 5 years of each employee's –

- (a) name, sex, age and occupation;
- (b) date of commencement of employment;
- (c) date of termination of contract of employment and the reason therefore;

- (d) remuneration payable;
- (e) actual remuneration paid;
- (f) all periods of absence including annual leave, sick leave and maternity leave; and
- (g) any other information that may be required by the Permanent Secretary.

These records must be kept for 5 years after the termination of employment for whatever reason, and must be made available to the Permanent Secretary upon request.

A person who contravenes or fails to comply with this section is liable on conviction to a maximum fine of N\$10 000.00 and/or up to two years imprisonment.

[See Regulation 25: *Records and returns*]

Registration of Trade Unions and Employers' Organisations (Chapter 6 Part B) – Sections 57 to 63, appearing as entries A. to G. below, deal with the registration of trade unions and employers' organisations.

Discussion: The term registration in the present context refers to the act of formally recording the particulars of an organisation and legitimising it for the purpose of, inter alia, ensuring that it fulfils certain minimum requirements and operates in an orderly, lawful manner. Registration also bestows certain legal rights and protections on an organisation and its members and ensures the keeping of important data.

A. Requirements for registration (sec.57) (U) – A trade union or employers' organisation that has adopted a constitution in accordance with the requirements of section 53 of the Labour Act, (*>Constitutions of trade union or employers' organisation*) may apply to the Labour Commissioner for registration in the prescribed form. The application must be accompanied by three copies of its constitution each certified by the chairperson and secretary. The Labour Commissioner, who may require further particulars, must consider the application and register the applicant if it meets the requirements of section 53. Should registration be refused, the Commissioner must give written notice to that effect stating the reason for the refusal. The Minister may expand the requirements for registration by regulation

[See Regulation 8: Registration of trade union or employers' association]

B. Effect of registration of trade union or employers' organisation (sec.58) (U) – Registration bestows the legal status of a *juristic person* (>NLL 1 p.144) upon the relevant trade union or employer's organisation. A member, office bearer, or official of such a body is not personally accountable for any liability or obligation incurred in good faith by the organisation merely because of being a member, office bearer or official.

C. Rights of registered trade unions and registered employers' organisations (sec.59) (U) – A registered trade union has the right to:

- (i) Initiate a case and represent its members in proceedings in terms of the Labour Act;
- (ii) access an employers premises subject to reasonable conditions;
- (iii) have union fees deducted on its behalf;
- (iv) form federations with other unions;
- (v) affiliate to and participate in federations;
- (vi) affiliate to and participate in international workers organisations;
- (vii) make contributions to and receive funds from such organisations;
- (viii) if an exclusive bargaining agent, to negotiate and enter into a collective agreement with an employer or employers' organisation; and
- (ix) report disputes to the Labour Commissioner.

A registered *employers' organisation* has the right to:

- (i) Initiate a case and represent its members in proceedings in terms of the Labour Act;
- (ii) form federations with other employers' organisations
- (iii) affiliate to and participate in federations;
- (iv) affiliate to and participate in international employers' organisations; and
- (v) make contributions to and receive funds from such organisations.

Discussion on Collective Bargaining: Item (viii) above refers to the right of a registered trade union, if it is an exclusive bargaining agent, to negotiate and enter into a collective agreement with an employer or an employers' organisation. Such negotiations are usually referred to as *collective bargaining* (>NLL 1 pp.64 to 69). Although the Labour Act, 2007 contains no separate section dealing with collective bargaining as

such, the concept is fundamental to its purpose and spirit and is also prominently mentioned in the statute's *>Preamble*.

For this reason, and because of the major importance of free and orderly collective bargaining to our country's economic growth and stability, this box goes into more detail than usual in explaining the topic.

Nature and origin of CB

Of all the different components jointly comprising industrial relations, the concept of collective bargaining is probably the most basic. Not only does collective bargaining represent the corner-stone institution of modern IR systems, it also embodies certain core values, primary norms and dynamics essential to society in general. Without these, conducive management-union relations, as we know them today, would be virtually unthinkable.

Collective bargaining essentially refers to the procedure in which employer and employee representatives meet formally on an equal footing, to negotiate in good faith with the aim of reaching a mutually acceptable agreement on employment-related matters. Joint implementation and administration of what has been collectively agreed upon is usually also regarded as part of institutionalised collective bargaining. The latter can entail either substantive issues, such as wages and conditions of employment, or procedural matters, such as union recognition and discipline.

The term 'collective bargaining' was first coined by the prominent British industrial relations pioneer couple, Beatrice and Sidney Webb, in the late nineteen-hundreds. Whilst initially regarded as a tool best suited for the attainment of socialist objectives, it soon became apparent that this had been a somewhat erroneous inference. *Bona fide* collective bargaining has proven over the years to be much more appropriate to the conditions of constitutional democracy, complemented by the flexible framework of a market economy.

The ILO and CB

As the global custodian of the workplace and its stakeholders, the International Labour Organisation has always had a particular interest in institutionalised collective bargaining. Together with the parallel concept 'freedom of association', collective bargaining has been hotly debated at the Organisation's various forums throughout the years, and has been the subject of numerous, sometimes controversial, reports and other publications.

The main point of departure for the ILO in this regard is the *Declaration of Philadelphia, 1944* (>NLL 1 p.7) which supplemented important aspects of the Organisation's 1919 Constitution. Article III(e) of the Declaration proclaims the ILO's commitment to promote "...the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures."

It is significant that both the ILO Constitution and the Declaration of Philadelphia were inspired subsequent to world shattering events which had gravely threatened the existence of civil society. The former emerged as Part XIII of the post-World War I Treaty of Versailles, and the latter was drafted in the closing phases of World War II. Both texts reaffirm the basic truth that equitable socio-economic advancement is essential to the preservation of peace and prosperity amongst the world's nations. And as seen above, institutionalised collective bargaining is accorded a key role towards this objective.

Principal instruments

The principles enunciated in the aforementioned documents are automatically applicable to all ILO member states, whilst also forming the point of departure for the international labour standards enshrined in numerous Conventions and Recommendations. Chief amongst those of relevance to collective bargaining are the Freedom of Association and Protection of the Right to Organise Convention (C. 87 of 1948); and the Right to Organise and Collective Bargaining Convention (C. 98 of 1949).

The two Conventions, (each formally ratified by Namibia) belong to the most notable protocols ever passed by the ILO. Although work-place related, they give expression to fundamental human rights tenets, the furtherance of which are indispensable for the preservation of pluralist democracy. And although primarily directed at the promotion of workers' interests and trade unionism, the same protection and rights automatically apply also to any other type of associations, including business enterprises and employers' organisations.

The Right to Organise and Collective Bargaining Convention puts emphasis on two essential elements: Ratifying governments are required to put measures in place which promote the development and utilization of collective bargaining machinery; and secondly, such collective bargaining shall be of a voluntary nature. The latter aspect implies the full autonomy of the negotiating parties.

Other important ILO instruments concerning collective bargaining

are the Collective Agreements Recommendation (R. 91 of 1951); the Voluntary Conciliation and Arbitration Recommendation (R. 92 of 1951); and the Collective Bargaining Convention (C. 154 of 1981). The instruments incorporate guidelines on wage negotiation procedures, the formulation, interpretation and implementation of collective agreements, the establishment and functioning of voluntary dispute resolving mechanisms, and various other matters applicable to the promotion of free and voluntary collective bargaining.

National law

Collective bargaining in most countries is governed by strict rules and formalities, some of which may be prescribed by law, others which have become prevalent through custom and precedent. The actual process of collective bargaining is, in addition, influenced by various situational factors which more specifically determine its general character, the path and pattern of negotiations, and the final outcome. In Namibia, the statutory framework and basic rules, either explicit or implied, are mainly contained in Chapter 6 of the Labour Act, 2007.

Criteria and Guidelines for CB

Probably the most basic requirement, which permeates all other facets, is that both parties must be honestly intent to find a fair and reasonable solution to the problem at hand. All their efforts and actions must be aimed at eventually arriving at a mutually acceptable settlement of the item under discussion. This, in essence, is largely what is meant by the simple phrase 'good faith bargaining'. If such honest intent is lacking, and either of, or both, the parties approach the bargaining table with a view to wreck the talks, to assume a rigid 'take it or leave it', posture, or to employ any of a variety of deceitful tactics, then obviously good faith is lacking and negotiations are sure to fail.

Assuming that both parties are desirous of reaching a reasonable settlement (which, fortunately, in practice is the case more often than not), then there are a number of basic guidelines which ought to be followed to expedite the bargaining process.

First and foremost, each party should prepare thoroughly for the task ahead. That would mean obtaining data about relevant macro economic indices such as remuneration levels in comparable sectors; standard of living; labour market availability in the job categories concerned; inflation rates (past, current and projected); interest rates; and other national economic indicators predicting prospects for business growth, stagnation or decline.

Parallel to researching external data, a thorough analysis needs to be made of internal company related economic, financial and human resources policies and parameters.

Has business been satisfactory or slow, and what are the expectations for the months ahead? What were the company's financial statements like for the previous year and what did the auditors have to say? Are there any anomalies in the general wage structure or remuneration of certain individuals? Are remuneration levels market-related, to what extent have they been affected by the cost of living and to what degree has that been offset by other benefits? What is the unit cost of labour, and are there prospects of improving productivity in order to raise both profits and standards of living?

This and other information would enable both parties to obtain clear insight into company performance and employee needs, and to make rational yet equitable salary/wage decisions in readiness for the impending negotiations.

Mandate levels

A mandate comprising both a preferred incremental level and a final upper level ceiling (on the part of the employer); and both a preferred increment and a final lower floor level (on the side of the union), should then be obtained by the two parties, from their principals/constituency respectively.

The preferred level of the employer should represent fair and reasonable increments under existing circumstances. This would constitute a fine balance between divergent factors and competing interests which have to be sensibly reconciled with each other.

The employer's upper level would represent the ceiling at which the balance starts to become unstuck if exceeded. Wage hikes beyond such a limit would jeopardise the viability of the undertaking, and hence could be disastrous for the company, shareholders and employment security.

During the ensuing collective bargaining the company would, therefore, endeavour its utmost to steer negotiations towards acceptance of its preferred level, proceeding beyond that point to the final upper limit only as a last resort.

By contrast, the union would strive to attain its preferred level but would usually be negotiable until its floor level has been reached. Any concessions beyond that point would have to be supported by a fresh mandate from its members.

Ideally, the upper and lower acceptable levels of the employer and trade

union, respectively, would have an overlap, and a mutually acceptable outcome to the negotiations can then be arrived at somewhere along the range of the overlap.

Practical preparations for CB

Another aspect of getting ready for collective bargaining concerns matters such as the composition and role-allocation of the negotiating team, timing, location, facilities, seating arrangements and so forth. There should generally not be more than four, maximally six persons, on each side with roles such as chief spokesperson, keeper of minutes, and specialist advisors (finance, human resources) determined beforehand. The CEO would usually not be directly involved. On the employees side there would normally be one sometimes two, union officials and from two to four workplace union representatives (shop stewards).

The negotiations should preferably be scheduled several weeks after the close of the financial year (availability of audited statements) and at least one month before the annual wage increments are due - sufficient days, and hours per session, should be set aside beforehand in mutual consultation with the union. The venue must be easily accessible to all parties (management, union and shop stewards), have good seating arrangements in a comfortable room, be safe from outside disturbances, and should possess facilities such as a caucus room, photocopy machine, telephone/fax and a kitchenette for refreshments. Physically inadequate settings engender stress and enhance tensions, no matter how well the parties may have prepared otherwise.

Negotiations

When the day arrives for talks to commence, it is advisable that each team meets separately some time beforehand to update themselves on issues and strategy. Modes of address should be polite and friendly but respectful and formal: excessive familiarity is to be avoided.

Speech and body-language should be sincere and relaxed: no theatrical posturing or raising of voice, regardless of what the other party may say or do. Participants must remain self-restrained and rational and not try to score cheap points at somebody else's expense causing them to lose face. Keeping the atmosphere positive right from the start ensures meaningful exchange of views and concerns.

If an unexpected problem suddenly emerges, or talks become strained and emotional, a call for an adjournment is indicated. Both sides should allow temperatures to cool down; exercise some creative diplomacy, and come up with plausible compromise solutions to the problem.

Opening statements by the chief negotiators on both sides are followed by consensus on the agenda and administrative affairs. Thereafter, the party which initiated the negotiations (usually the union) will present and motivate its case first.

Having obtained clarification on any ambiguities or vague aspects in the union presentation, management would usually withdraw to the caucus room at this stage to study the union's position and prepare a detailed response to each matter raised. The union would normally similarly excuse itself to caucus once management has responded, and the negotiations would continue in this fashion until agreement has been reached on all the items

Bargaining phases

Conventional collective bargaining is seldom concluded in one day, it usually follows a set pattern covering three sessions or more:

First, the opening phase – involving exchange of essential background information, detailed motivation and tabling of initial demand and counter offer positions.

Second, the actual bargaining phase – mostly involving an almost ritualistic give and take paradigm during which the parties slowly edge closer to one another (but occasionally involving a more creative exploratory exercise in which parties seek to accommodate each other in important areas).

Third, the closing phase – the frequently tense finale when parties struggle desperately to bridge the remaining gap: each trying to gain a last bit of advantage, before the deal is finally clinched and signed.

Depending on the level of trust developed between employer and employees/union; sincerity of negotiators; and reasonableness of the mandates, negotiations can, however, be concluded more expeditiously. It is a goal worth pursuing. Apart from the time saved, such negotiating outcomes are less prone to implementation hiccups. They are symptomatic of maturity which is usually also perceivable in other spheres of the employment relationship.

Lastly, there is a slowly growing trend for collective bargaining to be aimed at a two or even three year substantive agreement. That is quite common in industrialised nations such as in Europe and the United States.

This approach too, is worthwhile, but also depends much on the qualitative nature of the employment relationship. An added impediment is the often rather volatile nature of economic determinants in a developing country such as hours. This can make accurate long-term forecasting difficult; which imparts an element of risk to entering into long-term contractual commitments.

D. Obligations of registered trade unions and registered employers' organisations (sec.60) (U)

A registered trade union as well as a registered employers' organisation is obligated to –

- (i) maintain a prescribed register of members;
- (ii) keep proper books of account;
- (iii) prepare a statement of income and expenditure and a financial balance sheet at the end of each financial year;
- (iv) cause its books of account to be audited and a report to be prepared annually by a public accountant and auditor;
- (v) make the statement of income and expenditure, the financial balance sheet and the audit report available to its members, and submit an annual return to the Labour Commissioner, within 6 months after the end of its financial year; and
- (vi) submit the statement of income and expenditure, the financial balance sheet and the audit report to a meeting of members in accordance with its constitution.

[See Regulation 9: *Register maintained by registered trade unions or registered employers' organisation*; and Regulation 10: *Annual return of registered trade union or employers' organisation*]

E. Failure to comply with obligations under Part B (sec.61)

(U) In a situation where the Labour Commissioner has reason to believe that a registered trade union or employers' organisation is not complying with its obligations under sec.60, he/she must notify that body in writing and give it opportunity to respond.

After considering any representations received, the Commissioner may issue a compliance order to rectify the shortcoming/s. Failure to comply with a compliance order may result in the Labour Commissioner cancelling registration, or applying to the Labour Court for an order to compel the trade union or employers' organisation to comply, which may include an order suspending its registration pending compliance.

F. Failure to comply with constitution or election requirements

(sec.62) (U) – If a registered trade union or employers' organisation is not complying with any provision of its constitution the Labour Commissioner, or a member of that body may apply to the Labour Court for an order to compel it to comply, or to cancel its registration, or for such further relief as the Court may deem necessary.

If a violation or material irregularity occurs in connection with an official election, the Labour Commissioner or a member of that trade union or employers' organisation may apply to the Labour Court for an order -

- declaring the election null and void;
- directing the holding of a further election as specified;
- providing for interim arrangements; or
- for such further relief as the Court may deem necessary.

G. Appeals from decision of Labour Commissioner (sec.63)

(U) – Any party who is dissatisfied with a decision taken by the Labour Commissioner under Part B may appeal to the Labour Court.

Reduced hours – >*Deductions and other acts concerning remuneration*

Redundancy – >*Termination of Employment* >*Dismissal arising from collective termination or redundancy*

Regulations (sec.135) (M) – The Minister of Labour and Social Welfare is authorised to make regulations, after consulting the Labour Advisory Council, on any matter required or permitted to be prescribed by the Labour Act, or that may be required in order to achieve the objects of the Act. Without limiting the powers of the Minister in this regard, the section specifically mentions 46 crucial *health, safety and welfare* related matters in respect of which the Minister may make regulations. These entail any aspect relating to the –

- a) measures to be taken to secure the safety and the preservation of the health and welfare of employees at work, including sanitation, ventilation and lighting in, on or about premises where machinery is used or building, excavation or any other work is performed by employees;
- b) duties of occupiers of such premises, users of machinery, builders, excavators and employers and employees in connection therewith;
- c) accommodation facilities and conveniences to be provided on such premises by occupiers for employees while they are working, resting or eating therein;
- d) clothing, safety devices and protective articles to be provided by employers, builders, excavators occupiers of premises and users of machinery for employees who handle specified articles in the course of their work or who are employed in specified activities under specified conditions;

- e) first-aid equipment to be provided by occupiers of premises, users of machinery, builders and excavators, and the employment of persons who hold specified qualifications in first-aid, and the provision of ambulances and other health care facilities;
- f) steps to be taken by the owners of premises used or intended for use as factories or places where machinery is used, or by occupiers of such premises or by users of machinery in connection with the structure of such buildings or otherwise in order to prevent or extinguish fires, and to ensure the safety, in the event of fire, of persons in such buildings;
- g) medical examination of persons in relation to occupational health;
- h) conditions of work of employees in, on or about any premises where in the opinion of the Minister concerned special provision is necessary to safeguard the physical, moral or social welfare of such employees;
- i) returns, statistics, information and reports which shall be furnished in relation to premises, machinery, building work, excavation work, and employees, and the times at which, the manner in which, and the persons by whom such returns, statistics, information and reports shall be furnished, and the records which shall be kept;
- j) conditions governing the erection, installation, working and use of any machinery and the duties, responsibilities and qualifications of the user or person in charge of or erecting, such machinery;
- k) reporting of accidents, the submission of notices of dangerous occurrences and occupational diseases, the manner of holding inquiries in connection therewith and the procedure to be followed at such inquiries;
- l) conditions governing the construction, erection, alteration or taking down of scaffolding or cranes;
- m) conditions governing building work and excavation work, including the steps to be taken in connection with timbering, underpinning and shoring up;

- n) precautions to be taken by builders or employees to prevent persons being injured by falling articles;
- o) lighting of building work and the safeguards to be used in connection with electrical equipment;
- p) stacking of material on or near the site;
- q) necessary qualifications of a crane driver or hoisting appliance operator;
- r) provision of equipment and the precautions necessary where persons employed on building or excavation work are in risk of drowning;
- s) safety, health, hygiene, sanitation and welfare of persons employed in or about mines, including sea-bed operations, and generally of persons, property and public traffic;
- t) grant, cancellation and suspension of certificates of competency to employees in certain industries in respect of operations to be performed by them;
- u) submission of notices of commencement and cessation of any operations;
- v) submission of notices of appointment of employees in industries to which the provisions of paragraph t) applies;
- w) functions of officers acting in the administration of this Act;
- x) making and keeping of plans of any premises relating to health and safety measures in, on or about such premises and the depositing of copies thereof in such office as may be specified in such regulations;
- y) protection and preservation of the surface of land and of buildings, roads, railways and other structures and enclosures on or above the surface of the land, and the conditions under which any such buildings, roads, railways, structures and enclosures may be undermined or excavated;
- z) prohibition or restrictions in relation to the making or use of roads or railways or other travelling ways over, or the erection or use of buildings or other structures over areas which have been undermined or excavated;

- aa) making safe of undermined ground and of dangerous slimes and tailing dams, dams, waste dumps, ash dumps, shafts, holes, trenches or excavations of whatever nature made in the course of prospecting or mining operations, posing a risk to safety and health, the imposition of monetary and other obligations in connection with such safe-making on persons who are or were responsible for the undermining of such ground or the making of such slimes and tailing dams, dams, waste dumps, ash dumps, shafts, holes, trenches or excavations or for the dangerous condition thereof, who will benefit from such safe-making;
- ab) assumption by the State of responsibility or co-responsibility for such safe-making as mentioned in paragraph (aa) in particular cases;
- ac) conditions upon which machinery may be erected or used;
- ad) generation, transformation, transmission, distribution and use of electricity;
- ae) prevention of outbreak of fire and precautions to be taken against heat, dust, noise and vibration in, on or about any premises or in connection with any operations;
- af) precautions to be taken against irruption or inrush of water or other liquid matter into workings;
- ag) transport, handling, storage and application of explosives in connection with any operations and the mixing of substances to make explosives in any working place which are not contrary to the provisions of any other law;
- ah) conveyance of persons and materials;
- ai) movement of vehicles;
- aj) fees to be payable by persons applying for any other certificates mentioned in paragraph (t) or on their admission to an examination for any such certificate;
- ak) particulars of workers in safety and health management;
- al) provision of disaster management and rescue services;

- am) prevention and combating of pollution of the air, water, land or sea which arises or may possibly arise in the course of any operations involved in any works or after such operations have ceased, and the imposition of monetary and other obligations;
- an) conservation, rehabilitation and safe-making of land disturbed by any operations;
- ao) disposal of waste rock, its stabilization, prevention of run off of any reclamation;
- ap) fees which shall be payable for any inspection under these regulations;
- aq) regulation or prohibition of noise and vibration generated in the workplace;
- ar) manufacture, storage, transport and labelling of chemicals and other hazardous substances;
- as) registration or licensing of industries specified in such regulations for purposes of securing the health and safety of employees employed in such industries; and
- at) rules for the conduct of conciliation and arbitration in terms of this Act.

Section 135 permits different regulations to be framed by the Minister in respect of different industries and different employees employed by them. Such regulations may also prescribe penalties for the contravention of a regulation. A person who contravenes or fails to comply with a regulation is liable on conviction to a maximum fine of N\$20 000.00 and/or up to 4 years imprisonment.

Discussion: The previous Labour Act, 1992 had a similar provision and in terms of it Regulations relating to health and safety matters were promulgated in 1997. In terms of item 2(2) of the >*Transitional Provisions* of the Labour Act, 2007 any regulation promulgated in terms of the Labour Act, 1992 or the 2004 Act, remains in force as if it had been promulgated under the Labour Act, 2007 as from the effective date (date on which the regulations came into operation). This also applies to the 1997 health and safety Regulations which remain in force.

The Minister has also made additional regulations under section 135 of the Labour Act, 2007, relating to general labour matters and also regulations containing rules relating to the conduct of conciliation and arbitration before the Labour Commissioner.

It is vital that employers obtain copies of the all the above regulations since they contain numerous legal prescriptions and have a direct impact on the day to day running of the human resources function of their enterprises.

Regulations Relating to the Health and Safety of Employees, 1997

The Regulations Relating to the Health and Safety of Employees at Work appearing in Government Notice No.156 of 1997 (*Government Gazette* No. 1617 of 1 August 1997), made by the President under section 101. of the Labour Act, 1992, replaced the former Factories, Machinery and Building Work Ordinance, 1952, and came into operation on 31 July 1997. The Regulations have not been repealed and pertain to all employers and all employees in Namibia, irrespective of economic sector, size of the enterprise or type of employment contract. The Regulations are divided into the following Chapters, Parts and Divisions:

- Chap.1. - Rights and Duties of Employers
- Chap.2. - Administration
- Chap.3. - Welfare and Facilities at Workplaces
- Chap.4. - Safety of Machinery

- Part I General Safety of Machinery

- Part III Safety of Machinery
 - A. Elevators
 - B. Escalators
- Chap.5. - Hazardous Substance
- Chap.6. - Physical Hazards and General Provisions
 - A. Physical Hazards
 - B. General Provisions
 - C. Protective Equipment
- Chap.7. - Medical Examinations and Emergency Arrangements
 - A. Medical Surveillance
 - B. First Aid and Emergency Arrangements
- Chap.8. - Construction and Safety

- Chap.9. - Electric Safety
- A. Electrical Machinery
 - B. Maintenance
 - C. Installation

Whilst the Ministry responsible for labour, through its Labour Inspectorate, is the main implementing agency of the Regulations, other Ministries have also been assigned responsibility for certain provisions indicated in a Schedule to the Proclamation.

Following hereinafter is a concise overview of some of the most important aspects in as far as they involve the responsibilities and duties of employers and employees with regard to health and safety at the workplace.

A. General Duty of *Employers* in Terms of the Act

To take all such steps as prescribed by the Regulations in order to secure the safety, health and welfare at work of all employees and as far as practicable to ensure also that other persons are not exposed to hazards.

B. General Duties of *Employees* in Terms of the Act

To take reasonable care for the health and safety of him/herself and of other persons (e.g. colleagues and customers) and to co-operate with the employer in the maintenance of occupational health and safety standards.

C. General Duties of *Employers* in Terms of the Regulations

- Identify, eliminate or reduce hazards
- Provide personal protective equipment
- Provide health and safety training to employees
- Ensure sub-contractor compliance with Regulations
- Supply and maintain safety equipment, facilities and protective clothing free of charge
- Ensure that employees use such equipment
- Prepare and review a written health and safety policy and programme.

D. Functions and Duties of *other Role-players* (Act and Regulations)

- The *chief executive* must ensure that the enterprise complies with the Regulations.
- All work must be performed under a *supervisor* who is competent in health and safety matters applicable to the tasks.
- Depending on factors such as size of workforce and safety risk, a *safety officer* is to be appointed to monitor compliance with policy, Act and Regulations.

- If ten or more employees so request then a workplace *safety representative* shall be elected by them to assist with health and safety matters.
- Similarly, if requested, the employer shall establish a workplace *safety committee* comprising an enterprise representative, the elected representative, and any other relevant person to advise on health and safety matters.

Labour General Regulations, 2008

The *Labour General Regulations: Labour Act, 2007 (Act No. 11 of 2007)* appearing in Government Notice No.261 of 2008 (*Government Gazette* No. 4151 of 31 October 2008), made by the Minister of Labour and Social Welfare under section 135. of the Labour Act, 2007, came into operation on 1 November 2008. The Regulations pertain to all employers and all employees in Namibia, irrespective of economic sector, size of the enterprise or type of employment contract. The 28 Regulations and three accompanying Annexures are arranged as follows (each has an indication to which section of the Act it refers):

1. Definitions
2. Portion of basic wage that must be paid in-kind and calculation of the value of in-kind payments [sec.8]
3. Written statement of particulars of monetary remuneration [sec.11]
4. Exemption from wage order [sec.14]
5. Compassionate leave [sec.25]
6. Election of health and safety representatives [sec.43]
7. Change in constitution of registered trade union or registered employers' organisation [sec.54]
8. Registration of trade union or employers' organisation [sec.57]
9. Register maintained by registered trade union or registered employers' organisation [sec.60]
10. Annual return of registered trade union or employers' organisation [sec.60]
11. Request for recognition of registered trade union as exclusive bargaining agent [sec.64]
12. Notification to registered trade union to acquire majority representation [sec.64]
13. Election of workplace union representatives [sec.67]
14. Request to extend collective agreement to non-parties to the agreement [sec.71]
15. Application for exemption from extension of a collective agreement [sec.72]

16. Notice of commencement of strike or lockout [sec.74]
17. Appointment of conciliators and arbitrators [secs.82 & 85]
18. Referral of dispute to conciliation [sec.82]
19. Application to reverse decision of conciliator [sec.83]
20. Referral of dispute to arbitration [sec.86]
21. Request for representation at conciliation or arbitration [secs.82&86]
22. Application to enforce arbitration award [sec.90]
23. Order to appear before a labour inspector [sec.125]
24. Compliance order [sec.126]
25. Records and returns [sec.130]
26. Application for exemption or variation [sec.139]
27. Proof of service of documents [secs.82 & 86]
28. Commencement of regulations

ANNEXURE 1 Particulars of monetary payments (Particulars to be indicated on envelope or statement when remuneration is paid to an employee)

ANNEXURE 2 Forms 1- 36 (Forms prescribed by, and to be used in conjunction with, different regulations)

ANNEXURE 3 Records and returns by employers (Records to be kept by employers at an address in Namibia)

FORMS (Regulations)

- LM 1 Application for exemption from wage order
- LM 2 Exemption from wage order
- LS 3 Application for compassionate leave
- LC 4 Application for change in constitution of trade union or employers' organisation
- LC 5 Certificate of approval of changes to constitution
- LC 6 Application for registration of trade union or employers' organisation
- LC 7 Certificate of registration as trade union or employers' organisation
- LC 8 Register of members of trade union or employers' organisation
- LC 9 Annual return of registered trade union or employers' organisation
- LC 10 Request for recognition as exclusive bargaining unit
- LC 11 Notice of recognition or refusal of recognition by employer or employers' organisation
- LC 12 Referral of dispute concerning recognition to Labour Commissioner
- LC 13 Notice to trade union to acquire majority representation
- LM 14 Request for extension of collective agreement

- LM 15 Invitation for objections to extension of collective agreement
- LM 16 Declaration of extension of collective agreement
- LM 17 Application for exemption from extended collective agreement
- LM 18 Exemption from extended collective agreement
- LC 19 Notice of industrial action
- LM 20 Certificate of appointment as conciliator or arbitrator
- LC 21 Referral of dispute to conciliation or arbitration
- LC 22 Designation of conciliator
- LC 23 Notice of conciliation meeting
- LC 24 Certificate of resolved dispute
- LC 25 Certificate of unresolved dispute
- LC 26 Application to reverse conciliator's decision
- LC 27 Designation of arbitrator
- LC 28 Notice of arbitration hearing
- LC 29 Request for representation at conciliation or arbitration in terms of section 82(13) or 86(13)
- LS 30 Application to labour inspector to enforce arbitration award
- LS 31 Order to appear before labour inspector
- LS 32 Compliance order of labour inspector
- LP 33 Form in which information is submitted to the Permanent Secretary
- LM 34 Application for exemption or variation from Chapter 3
- LM 35 Declaration of exemption or variation from Chapter 3
- LG 36 Proof of service of documents

Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, 2008

The Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, 2008: Labour Act, 2007 (Act No. 11 of 2007) appearing in Government Notice No.262 of 2008 (*Government Gazette* No. 4151 of 31 October 2008), made by the Minister of Labour and Social Welfare under section 135. of the Labour Act, 2007, came into operation on 1 November 2008.

The Rules essentially replace the Rules of the District Labour Court which are repealed by Rule 38 in view of arbitration before the Labour Commissioner having replaced the previous District Labour Court System. The 39 Rules are divided into seven Parts and are complemented by 15 prescribed forms linked to the rules.

PART 1 PRELIMINARY

1. Definitions and interpretations

PART 2 SERVING AND FILING DOCUMENTS

2. Contact details of Offices
3. Office hours
4 Calculation of time periods
5. Signing of documents
6. Service of documents
7. Proof of service of documents
8. Filing of documents with Labour Commissioner
9. Service by registered post
10. Condonation for late delivery of documents

PART 3 CONCILIATION OF DISPUTES

11. Referral of dispute to conciliation
12. Notice of conciliation
13. Confidentiality of conciliation proceedings

PART 4 ARBITRATION OF DISPUTES

14. Referral of dispute to arbitration
15. Notice of arbitration
16. Consolidation of disputes to arbitration
17. Referral of class disputes to arbitration
18. Conduct of arbitration proceedings
19. Effect of complaint lodged with Labour court upon pending arbitration
20. Arbitrator must attempt to conciliate dispute
21. Arbitration award
22. Enforcement of arbitration award
23. Appeals to, and reviews by, the Labour Court

PART 5 PROVISIONS THAT APPLY TO CONCILIATION AND ARBITRATION

24. Venue for conciliation or arbitration
25. Representation of parties
26. Disclosure of documents
27. Failure to attend conciliation or arbitration proceedings

PART 6 APPLICATIONS

- 28. Manner in which applications may be brought
- 29. Postponement of arbitration hearing
- 30. Joining of parties to, and dismissal of parties from proceedings
- 31. Correction of citation of a party
- 32. Variations or rescission of arbitration awards or rulings

PART 7 GENERAL

- 33. Condonation for failure to comply with rules
- 34. Recording of arbitration proceedings
- 35. Issuing of summons
- 36. Payment of witness fees
- 37. Costs
- 38. Repeal of rules of District Labour Courts and savings
- 39. Commencement of rules

FORMS (Rules)

- LC 12 Referral of dispute concerning recognition to Labour Commissioner
- LC 21 Referral of dispute to conciliation or arbitration
- LC 23 Notice of conciliation meeting
- LC 28 Notice of arbitration hearing
- LC 29 Request for representation at conciliation or arbitration in terms of section 82(13) or 86(13)
- LS 30 Applications to Labour Inspector to enforce arbitration award
- LG 36 Proof of service of documents
- LC 37 Notice of class complaint
- LC 38 Application
- LC 39 Opposition to application
- LC 40 Notice of joinder
- LC 41 Notice of appeal from arbitrator's award
- LC 42 Request to summon witness
- LC 43 Summons
- LC 44 Notice of application hearing

Regulations, administration of (sec.136) (U) – The President is empowered to assign the administration of the provisions of any regulation to the Minister responsible for Labour; any other member of the Cabinet; partly to one member of the Cabinet and partly to another; or to different members of the Cabinet in so far as the regulations relate to different specified functions.

The President may prescribe the powers and functions to be exercised by any member of the Cabinet and require the exercise of a function after consultation or with the concurrence of a member of the Cabinet.

Remuneration – >Calculations of remuneration and basic wage (sec.10); >Deduction and other acts concerning remuneration (sec.12); >Definitions and interpretation (sec.1); >Exemption from a wage order (sec.14); >Payment of remuneration (sec.11); >Wage order (sec.13)

Repeal of laws, transition and consequential amendments (sec. 142) (N) – This section repeals the Labour Act, 1992 (Act 6 of 1992) and the Labour Act, 2004 (Act No.15 of 2004) subject to the >Transitional provisions set out in Schedule 1 of the Labour Act, 2007.

The section also amends technical wording of subsection (2) of section 45 of the Affirmative Action (Employment) Act, 1998, in connection with the referral of affirmative action related complaints to the Labour Commissioner.

In addition, section 142 amends section 1 of the Social Security Act, 1994, by inserting the words “other than an independent contractor” in the definition of ‘employee’ similar to the definition of ‘employee’ in the Labour Act, 2007 (> Definitions and Interpretation) and deleting the words “for more than two days in any week”. The significance of the latter deletion is that social security provisions will no longer exclude so-called casual employees formerly defined as employees working for two days or less per week.

Retrenchment – >Termination of Employment >Dismissal arising from collective termination or redundancy

Reviews of arbitration awards – >Arbitration of Disputes

S

Sanitary and water facilities – > Accommodation

Schedule – >Transitional provisions

Security Officer – >Definitions relating to basic conditions of employment.

Service of documents (sec.129) – (U) The term service in the context of this provision refers to the delivery of documentation by one party to another, in connection with a lawsuit, conciliation- or arbitration proceedings, or any other situation in which a party is required to provide another party with certain documents at his/her address.

A document includes any notice, referral or application required to be served in terms of the Act, except documents served in relation to a Labour Court case, and an address includes a person's residential or office address, post office box number, or private box of that employee's employer.

A document may be served upon a party by –

- personal delivery;
- registered mail;
- leaving it with an adult at the relevant address; or
- facsimile transmission in the case of a company.

Unless the contrary is proved, a document sent by mail will be considered to have been received by the person to whom it was addressed at the time it would, in the ordinary course of post, have arrived at its destination.

Severance pay – >*Termination of Employment*

Sexual harassment – >*Fundamental Rights and Protections >Prohibition of discrimination and sexual harassment in employment*)

Shifts, continuous (sec.15) (U) – a continuous shift means a shift in a continuous, normally 24 hour per day, seven hours per week, operation. The Minister of Labour and Social Welfare may declare any operation to be a continuous operation by notice in the *Government Gazette*, and permit the working of continuous shifts in respect thereof. The Minister may prescribe any conditions in respect of shifts, provided that *no shift may be longer than eight hours* in a continuous operation.

Short hours – >*Deductions and other acts concerning remuneration*

Short title and commencement (sec.143) (N) – The short title of the Act is the Labour Act, 2007 and it comes into operation on a date determined by the Minister of Labour and Social Welfare by notice in the *Government Gazette*. Different dates may be determined in respect of different provisions of the Act.

Discussion: The Labour Act, 2007 (Act No.11 of 2007) officially came into operation on 1 November 2008 through Government Notice No.260 of 2008, promulgated in *Government Gazette* No.4151 of 31 October 2008. The Notice was signed by the Honourable Immanuel Ngatjizeko, Minister of Labour and Social Welfare.

Sick leave (sec.24) (M) – non-accumulative leave intended as a form of social protection of employees incapable of attending work and performing their duties due to illness or injury.

During the first 12 month's employment an employee is entitled to one day sick leave for every 26 days worked.

As from the second year of employment an employee is entitled to 30 working days sick leave per 3 year sick leave cycle if the employee works not more than five days a week, and to 36 working days sick leave per 3 year sick leave cycle if the employee works more than five days a week. An employee who ordinarily works less than five days per week is entitled to sick leave calculated on a pro rata basis.

Sick leave entitlement of an employee who does not work a fixed number of days per week is calculated annually on the basis of the average number of days worked per week over the previous 12 months.

An employee is entitled to normal remuneration for each day of legitimate sick leave taken.

An employer is not required to pay an employee for sick leave if the employee is absent from work for more than two consecutive days and fails to produce a medical certificate. The same applies if an employee qualifies for payment in terms of the Employee's Compensation Act, 1941; or is entitled to payment for sick leave from a fund in respect of which the employer makes an equal contribution; or to the extent that the employee has the right to compensation for sick leave under any other legislation.

Sick leave does not form part of annual, compassionate or maternity leave; is not accrued; is not paid out at termination of employment; and lapses at the end of each 3 year cycle.

Changes: One day sick leave for every 26 days worked during the first year of employment applies to all employees. Previously a distinction was made between employees working five days per week (one day for every five weeks) and employees working six days a week (one day for every month), but the new formula has virtually the same effect as before.

The explicit pro rata provision for employees working less than five days a week as well, as the provision for employees contractually working irregular days per week, are new.

The provision that sick leave need not be paid for more than two consecutive days absence without presentation of a medical certificate remains as before. However, the previous limit – that for a period of eight weeks following the second payment of sick leave to an employee within eight weeks an employer is not obliged to pay sick leave in respect of

any further absence from work without a medical certificate – has been removed.

Previously, an employee was also entitled to sick leave when absent from work due to incapacity but ‘incapacity’ was defined as inability to work owing to sickness or injury other than sickness or injury caused by an employee’s own misconduct. This qualification is no longer applicable and ‘>incapacity’ in the present Act is defined as any inability to work owing to any sickness or injury.

The explicit stipulation that sick leave does not form part of annual, compassionate or maternity leave; is not accrued and be paid out at termination of employment; and lapses at the end of each 3 year cycle, is also new. Formerly these aspects were rather implied than stated.

Sick leave cycle – >Definitions relating to Basic Conditions of Employment

Spread-over – >Daily spread-over and weekly rest period

Strikes and Lockouts (Chapter 7) – Sections 74 to 79, appearing as entries A. to F. below, deal with *strikes* (>NLL 1 p. 116) and *lockouts* (>NLL 1 p. 149).

Discussion: Industrial action in the form of a lawful strike is a last resort measure for employees (usually assisted by a registered trade union) to bring pressure to bear on an employer to accept their interest-related demands (such as salary increases). Similarly, a lawful lockout can be viewed as a final option for an employer to try to compel employees to accept its interest-related offer for a settlement (such as a lower salary increment than that demanded by a union or a changed, less beneficial, condition of employment).

A *strike* in terms of the Labour Act, 2007 “... means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, any other employer or an employers’ organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute of interest.”

A. Right to strike or lockout (sec.74) (M) – Parties to a >dispute of interest have the right to strike or lockout if certain procedural conditions are satisfied:

- The dispute must have been referred to the Labour Commissioner for conciliation.
- The party has attended the conciliation meetings convened by the conciliator, but the dispute remains unresolved at the end of a period of 30 days from the date of referral; or
 - for a longer period if the dispute remains unresolved because the party who referred the dispute to the Labour Commissioner fails to attend the conciliation hearing and the period is extended to 30 days after a conciliation meeting eventually does take place; or
 - for a shorter period if the responding party to a dispute does not attend conciliation and the 30 day period is reduced to end on the date when conciliation would have taken place.
- After the end of the applicable period contemplated under the second bullet, a party has given 48 hours notice of the commencement of a strike or lockout in the prescribed form to the Labour Commissioner as well as to the other party to the dispute.
- The strike or lockout is conducted in concurrence with agreed rules, or rules determined by the conciliator which are in accordance with any guidelines or code of good practice published by the Minister.

[See Regulation 16: Notice of commencement of strike or lockout]

Discussion: The above conditions must be fully met in order for a strike or lockout to be regarded a lawful and protected strike or lockout for the purposes of the Act. However the provisions of section 75 (>Prohibition of certain strikes and lockouts) and section 76 (>Strikes and lockouts in compliance with this Chapter) must also be borne in mind and be fully complied with.

Code of Good Practice on Industrial Actions and Picketing, Labour Act, 2007

With regard to the last bullet above, note should be taken at this is point that the Minister of Labour and Social Welfare has issued two codes of good practice on this topic. A Code of Good Practice on Industrial Actions (Strikes and Lockouts) and a Code of Good Practice on Picketing. Both appeared in *Government Gazette No. 4361 of 19 October 2009*, Government Notice No.208 of 2009. Any party involved in, or potentially

facing, industrial action in the form of a strike and/or lockout must have regard to these codes, which constitute what is known as 'soft law' >*Guidelines and codes of good practice*.

Changes: The new strike procedure differs markedly from the previous situation. The main innovations entail the various 30 day periods referred to in the section and the variations thereof; the requirement that the 48 hours notice of intention to strike or lockout must be in the prescribed form (this enables such information as intended date, time, duration and place of industrial action to be specified); the requirement that the strike or lockout must conform to certain rules; and the potential role of the conciliator in determining strike/lockout rules. (In terms of section 82.(17) (a) of the Act, moreover, the conciliator remains seized of the dispute, i.e. must attempt to assist the disputing parties to come to agreement even though conciliation has failed and a course of industrial action has been embarked upon.)

B. Prohibition of certain strikes and lockouts (sec.75) (U)

– A strike or lock out is *unlawful* under any one or more of the following conditions:

- If the procedural requirements of sec.74. (>Right to strike or lockout) have not been complied with.
- When the dispute is of a nature where a party has the right to refer the matter to arbitration or adjudication in terms of the Act.
- When the parties to the dispute have agreed to refer the matter to arbitration.
- Where the issue in dispute is governed by an arbitration award or a court order.
- When the dispute is between parties who are engaged in a designated essential service.

C. Strikes and lockouts in compliance with this Chapter

(sec.76) (M) – Participation in a lawful strike or lockout has several consequences for the disputing parties:

- A participating party does not commit a *delict* (>*NLL 1 p.135*) or a breach of contract and an employee may not be dismissed for striking.
- An employer is not obliged to remunerate an employee who does not work during a strike or a lockout.
- An employee, member or official of a registered trade union

may, in furtherance of a strike, hold a picket at or near the place of employment for the purpose of peacefully communicating information; and to persuade employees not to work.

- An employer may not require an employee who is not participating in a strike to do the work of a striking employee, unless the work is necessary to prevent any danger to the life, personal safety or health of any individual.
- An employer may not hire any individual for the purpose of performing the work of a striking or locked-out employee.
- An employee is entitled to resume employment within 3 days of the date that a strike or lockout ended or that the employee became aware or could reasonably have become aware of the end of a strike or lockout, unless the employee has been dismissed for a valid and fair reason.
- An employer may not institute civil legal proceedings against any other person for participating in a strike or lockout, unless those proceedings concern an act constituting defamation or a criminal offence.

Discussion: The above principles summarise the consequences of industrial action undertaken in compliance with the Labour Act, 2007. Where the relevant provisions of the Act are not complied with, a strike or lockout does not become illegal in the sense of constituting a criminal transgression, but the protection afforded by the Act falls away. This means that in the case of an unprocedural strike, employees not only receive no remuneration for the duration of the strike, but they may eventually also face lawful dismissal and, in addition, they and/or their union may be sued in a civil court for potential damages. An employer instituting an unprocedural lockout could face claims of unlawful withholding of remuneration and/or unfair dismissal.

Changes: Whilst an employer, as in the past, may generally not oblige another non-striking employee to do the work of a striking employee (although they may do so voluntarily), the employer is now also prohibited from employing outside units (so-called scab-labour) to do the work of striking or locked out employees in an effort to maintain operations. The rationale behind this purposeful policy consideration is that such replacement labour undermines the legitimacy and effectiveness of a legal strike and creates confrontation between legally striking employees and the temporary replacements.

D. Designation of essential services (sec.77) (N) – >Essential services, designation of

E. Disputes in designated essential services (sec.78) (N) – >Essential services, disputes in

F. Urgent interdicts (sec.79) (M) – In terms of this provision the Labour Court is barred from granting an urgent order prohibiting an unlawful strike, picket or lockout unless certain conditions have been met:

1. The applicant in the matter must have given written notice of its intention to apply for an interdict and copies of all relevant documents, to the respondent.
2. The applicant must have served a copy of the notice and the application on the Labour Commissioner.
3. The respondent must have been given reasonable opportunity to be heard by the Labour Court before a decision is made.

The Labour Court, before giving judgement in the matter, may request the Inspector General of the Police to give a situation report regarding the unlawful strike, picket or lockout.

Changes: The main changes with regard to urgent interdicts in relation to the previous Act, is that the a copy of an application for an interdict must be served on the Labour Commissioner in addition to the respondent; and that the respondent must be afforded reasonable opportunity to state its case before the Court takes a decision. Previously the Court could, in certain circumstances, grant an interim interdict without the respondent having had an opportunity to be heard. The stipulation that the respondent must be provided with copies of all documents which have a bearing on the application is also a new requirement.

Sunday work – >Work on Sundays

T

Table of Contents – >Annex I: Labour Act, 2007 (Act No.11 of 2007): Table of Contents

Termination of Employment (Chapter 3 Parts F & G) – Sections 29 to 38, appearing as entries A. to J. below, deal with termination of employment and diverse related topics.

Discussion: The concept ‘termination’ as used in the Labour Act, 2007 includes dismissal and resignation. The term ‘dismissal’ applies to *any* termination of employment of an employee by an employer. The fundamental principle applicable to this Part is that all dismissals must be in accordance with a *fair procedure*, and for a *valid* and *fair reason*, else the dismissal can be legitimately challenged. See also the boxed discussion on “Unfair disciplinary action (sec.48)” under alphabetical entry “U” further below.

A. Period of employment (sec.29) (U) – An employee’s period of employment includes:

- a) The time that the employee has worked for the employer.
- b) All leave granted.
- c) Any period of suspension.
- d) Where reinstatement has occurred, the period from the date of dismissal to the date of reinstatement.
- e) Any period of lawful participation in a strike or lockout.

B. Termination of employment on notice (sec.30) (M) – Where a contract of employment may be terminated on notice, the following rules must be observed by the employer and/or the employee, as the case may be:

1. Periods of notice of termination of employment by either an employee or an employer, must be at least –
 - 1 day, if an employee has been employed for 4 weeks or less;
 - 1 week if the employee has been employed for more than 4 weeks but not more than 1 year; and
 - 1 month if the employee has been employed for more than 1 year.
2. The employer and employee may agree to a longer period of notice, provided that it is of equal duration for both parties.

3. Notice must be given in writing with an indication of the reasons (if the termination is by the employer) and the date on which the notice is given.
4. In the case of an employee –
 - working 4 weeks or less, notice may be given on any working day.
 - working for more than 4 weeks but not more than a year, notice must be given on or before the last working day of the week; and
 - working for longer than a year, notice must be given on or before the 1st or the 15th day of the month.
5. An illiterate employee may resign by giving verbal notice.
6. Notice by an employer shall not be given during a period of any type of leave granted in terms of the Act, nor may an employer permit such notice to run concurrently with any kind of leave.
7. An employer has the right to dismiss an employee without notice, or payment in lieu thereof, for any cause recognised by law.
8. A dismissed employee always has the right to dispute the lawfulness or fairness of his/her dismissal.
9. An employer is entitled to waive any right to notice conferred by section 30.

Discussion: Verbal notice of intention to resign by an illiterate employee should preferably be given, or should at least afterwards be confirmed, in the presence of a reliable witness. That is advisable in order to avoid any possible doubt or misunderstanding in this respect and in case of a future dispute regarding the particulars of the resignation.

Dismissal by the employer without notice or payment in lieu thereof, constitutes extreme disciplinary action and is usually reserved only for a very serious offence such as theft, fraud, sabotage, assault, gross insubordination and sexual harassment with aggravating circumstances. Such a dismissal must be preceded by a full and proper disciplinary hearing; with all procedural requirements having been met; sufficient evidence of guilt having been established; and with mitigating circumstances having been taken into due consideration.

Changes: The legal situation regarding notice remains much as before, except that the Act specifically requires the reasons for dismissal to be stated by the employer in all cases. Where only one week notice is required, the notice must be given on or before the last working day of the week – previously such notice had to be given on or before the usual payday.

The previous Act prohibited both the employer and employee from giving notice during an employee's period of absence on annual leave, sick leave or maternity leave, and also prohibited any such leave to run concurrently with a period of notice. The current provision applies only to notice given by an employer.

C. Payment instead of notice (sec.31) (U) – Should an employer for any reason so prefer, the employer may pay an employee in lieu of notice – being the amount the employee would have received had he/she worked during the period of notice. Similarly, an employer has the right to waive notice given by an employee, but must then also pay the employee's remuneration in lieu of the notice. An employee, on the other hand, also has the right not to give the required period of notice but must then pay the employer an amount equivalent to the remuneration which the employer would have paid, if the employee had worked during the period of notice.

D. Automatic termination of contracts of employment (sec.32) (U) – A contract of employment terminates one month after –

- the death or sequestration of the employer, if the employer is an individual;
- the date on which the employer is wound up, if the employer is a juristic person; or
- the date on which a partnership is dissolved.

An executor, administrator, liquidator or partner may give notice to terminate an employee's contract of employment in accordance with the Act, or a collective agreement, at any time during the course of the above mentioned period of a month. An employee whose services are terminated in accordance with this section is a preferent creditor in respect of any remuneration or monies payable.

E. Unfair dismissal (sec.33) (U) – Irrespective of whether or not notice has been given, an employer is prohibited from dismissing an employee without a **valid and fair reason** and without following a **fair procedure**, the latter being subject to any code of good practice issued by the Minister of Labour, or the procedures set out in sec.34 (*>Dismissal arising from collective termination or redundancy*) if the dismissal is in connection with retrenchment. A dismissal is automatically unfair if it happens because an employee –

- a) discloses information that the employee is legally entitled or required to disclose;

- b) refuses to do anything that an employer must not lawfully permit or require an employee to do;
- c) exercises any right conferred by the Act or the terms of a contract of employment or collective agreement;
- d) belongs or has belonged to a trade union;
- e) takes part in the formation of a trade union;
- f) participates in the lawful activities of a trade union outside working hours, or with the consent of the employer, within working hours, or performs the functions of a shop steward as contemplated in section 67 (4).

It is unfair to dismiss an employee because of such employee's sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status.

In any proceedings concerning dismissal, once dismissal has been established by a former employee, the *onus* (>NLL 1 p.153) resides with the employer to prove that the dismissal was fair.

Discussion:

The Labour Act, 2007 does not go into any detail regarding what a '*valid and fair reason*' and a '*fair procedure*' entails. It is expected that the Minister will issue a code of good practice on termination of employment, inter alia, also incorporating this aspect, in due course. However, the basic principles of fair disciplinary action and dismissal are well known and have been elaborated upon in numerous court judgements and other authoritative texts.

Valid reason

A reason is valid if it can be proved by resorting to factual evidence. In other words a dismissal will be unfair if the employer is not able to prove the reason for the dismissal. The burden of proof in this regard lies with the employer.

It is sufficient for an employer to prove a reason on the balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. Determining which of the contending versions is the

Fair reason

A fair reason for dismissing an employee depends on the kind of reason and the seriousness of the reason. Such reasons would include –

- employee misconduct related to employment;

- employee incapacity, whether performance or health related;
- employee incompatibility;
- the unsuitability of a probationary employee; and
- the operational requirements of an enterprise.

In addition to the nature of the reason, the reason must also be sufficiently weighty and sufficiently serious to justify dismissal.

Fair procedure

Before an employer can dismiss an employee, the employer must process the dismissal fairly. In general this means that the employer must –

- give the reason for the proposed dismissal to the employee before making the decision to dismiss;
- give the employee an opportunity to respond to those reasons before making a decision to dismiss; and
- permit the employee to be represented in the proceedings

It should be noted also that different reasons for dismissal call for different kinds of procedures. *>Dismissal arising from collective termination or redundancy >Unfair disciplinary action*

Automatically unfair dismissal

Providing for a dismissal to be automatically unfair if it happens for a reason mentioned in a) to f) above, is an indication of the degree of seriousness in which the legislature looks upon such an act by an employer, and the level of protection it wishes to bestow on employees in this regard. However, an allegation of this nature, if denied by the employer, would still have to be determined by due process of arbitration or judicial litigation in which all parties enjoy their normal constitutional, statutory and common law rights.

Negotiated termination

It should be noted that the rules of fair dismissal contemplated above change somewhat when it comes to a negotiated termination of employment, where termination of the employment contract occurs by mutual consent between the employer and the employee. This form of dissolution of the employment contract constitutes neither dismissal nor resignation in the ordinary sense.

Essentially done in terms of *common law* (*>NLL 1 p.131*) principles, stringent requirements must be observed in order for such a termination agreement to be lawful. These include, but are not limited to, a suitable

representative for the employee, especially if the individual is illiterate or of lower educational background; full understanding and acceptance of the terms of the agreement (usually including a reasonable *quid pro quo*, or settlement amount by the employer); absence of any coercion or deception; and a suitably drafted, signed and witnessed memorandum of agreement.

Again, as with any other category of termination of employment, an aggrieved party has the right to contest the validity of such an agreement through the appropriate channels.

F. Dismissal arising from collective termination or redundancy

(sec.34) (M) – This section deals with the reduction of the workforce for reason of reorganisation, or for reason of the transfer, discontinuation, or reduction of a business due to economic or technological considerations. In any such intended dismissal an employer is required to follow the procedure set out hereinafter:

Notification

The employer must notify the Labour Commissioner and the relevant trade union if it has been recognised as an exclusive bargaining agent at least 4 weeks before the time of the intended dismissals. If no recognition agreement exists with a trade union the employer must notify, the workplace representatives (shop stewards) and the employees instead. The notification must also contain the reasons for the reduction in the workforce; the number and categories of employees affected; and the date of the intended dismissal.

The minimum notification period may be shorter if it is not practicable to do so within the period of 4 weeks.

Disclosure of information

All relevant information necessary for the trade union or shop stewards/employees to engage effectively in the negotiations must be disclosed. However, an employer is not obliged to disclose information that is legally privileged; is prohibited by law or a court order from being disclosed; or is confidential and may cause substantial harm to the employer if disclosed.

Negotiation

The parties must negotiate in good faith on:

- Alternatives to dismissal.
- How to minimise the dismissals.

- The criteria for selecting the employees to be dismissed.
- The conditions on which the dismissals are to take place.
- How to avert the adverse effects of the dismissals.

Depending on the outcome of the negotiations, an employer must select the employees to be dismissed due to redundancy either according to the selection criteria agreed upon, or in the absence of such an agreement according to selection criteria that are fair and objective.

Disputes

Where pursuant to the negotiations no agreement can be reached between the parties, any one of the parties may refer the matter to the Labour Commissioner within one week after expiry of the notice period. The Commissioner must appoint a conciliator to assist the parties to resolve the dispute. The conciliator has up to 4 weeks as from the date of the referral to do so. The employer must continue to negotiate in good faith and may not dismiss employees before the end of the 4 weeks provided for conciliation, unless the dispute has been settled or has been otherwise disposed of.

Disguised transfer

If there is a disguised transfer or continuance of an employer's operation which employs or employed employees who are to be dismissed or were dismissed in terms of this section, the employees or their collective bargaining agent have the right to apply to the Labour Court for appropriate relief. Such relief can include an order directing the restoration of the operation; directing the reinstatement of employees; or awarding lost and future earnings.

"Disguised transfer or continuance" for the purpose of this section includes any practice or situation whereby an employer who runs or operates any business purports to have gone out of business or to have discontinued all or part of its business operations, when in fact those business operations are continued under another name or form or are carried out at another location, without the employer disclosing the full facts to the affected employees or their collective bargaining agent (trade union with whom a recognition agreement exists).

An employee is also entitled to refer a dispute of unfair dismissal or failure to bargain in good faith to the Labour Commissioner in respect of the employee's retrenchment.

Penalties

An employer who contravenes or fails to comply with this section commits an offence and is liable on conviction to a maximum fine of N\$10 000.00 and/or up to two years imprisonment.

Discussion: In view of the serious unemployment situation holding sway throughout Namibia, any redundancy exercise (also commonly referred to as retrenchment) needs to be approached cautiously and with the necessary sensitivity. It should genuinely be a route of last resort, and only be considered after all other alternatives have been fully explored by all parties concerned. Management has the prime responsibility in this respect, since as custodian of the enterprise it is usually in the best position to know of possible implementable options combining both organisational efficacy and employment security.

Strategic planning well ahead of time, with blueprints linked to early warning indicators for different economic scenarios, can position an enterprise to deal with a fluctuating socio-economic environment in a pro-active fashion. Controlled downsizing based on the dynamics of natural attrition, or expansion into new markets and new lines of business to make up for a slump in activity elsewhere, can, for example, serve as regulating mechanisms obviating the need for abrupt decisions to retrench staff.

However, should retrenchment, indeed, become unavoidable, the provisions and spirit of this section of the Act, require that a delicate balance be maintained between corporate exigencies on the one hand, and employment security, including humanitarian considerations for affected employees and their dependants, on the other.

The philosophy behind the stipulated timelines applicable to a redundancy exercise, is to send a message to the parties to approach the matter with due responsibility and to emphasise that genuine negotiations are critical otherwise the financial and other consequences can be very serious.

Changes: Section 34 contains a number of provisions which did not apply in the previous dispensation and which need to be noted by employers. The entire process is more interactive and transparent and places greater emphasis on the need for agreement between the parties than before.

The Labour Commissioner as well as affected parties must be informed at least 4 weeks ahead of time – previously there was no time prescription regarding notification of the Labour Commissioner.

The compulsory conciliation provision is a totally novel approach and can result in the entire retrenchment process lasting for up to 9 weeks which could place a considerable additional financial burden on a faltering enterprise. [It is important to note, furthermore, that in the event of conciliation failing and no agreement is reached at the end of the second 4 weeks provided for this purpose and an employer then goes ahead with the dismissals, an aggrieved party (i.e., the relevant union

or the affected employees) could still lodge a claim of unfair dismissal, potentially resulting in the matter being referred to arbitration, further drawing out the process.]

The concept of disguised transfer or continuance of an enterprise and the enormous potential consequences thereof are similarly new and far-reaching.

Other important new additions to the retrenchment procedure are the stipulations on disclosure, alternatives to dismissal, minimisation of dismissals, selection criteria and the requirement for *good faith negotiations* (not merely the requirement to "... *afford* such trade union, workplace union representative or the employees concerned *an opportunity to negotiate* ...", as had previously been the case).

Finally, it should be noted that an employer can be penalised in several manners for non-compliance with provisions of this section: Labour Court order; arbitration award; and/or criminal conviction up to a maximum of N\$10 000 and/or two years imprisonment.

G. Severance pay (sec.35) (M) – Severance pay consists of an amount equal to at least 1 week's remuneration for each year of continuous service with the employer, calculated on the present level of earnings of an employee. An employee who has completed 12 months of continuous service is entitled to severance pay if:

- The employee is dismissed;
- the employee dies while employed; or
- the employee resigns or retires on reaching the age of 65 years.

An employee does not qualify for any severance pay if:

- The employee is dismissed on grounds of misconduct or poor work performance;
- the employee unreasonably refuses reinstatement;
- the employee resigns or retires before reaching the age of 65 years; or
- the employee unreasonably refuses to accept employment on terms no less favourable than those applicable, immediately before the termination of employment with –
 - the surviving spouse, heir or dependant of a deceased employer within one month of the death of the employer; or
 - one or more of the former partners within one month of the dissolution of the partnership, if the employer was a partnership.

The calculation of the length of an employee's service for the purpose of severance pay is subject to the following rules:

1. If upon the death of an employer the employee is employed by the surviving spouse, heir or dependant, the employee retains service acquired before the employer's death.
2. In a case where a partnership has been dissolved and the employee is employed by a former partner, the employee retains service acquired before the dissolution.
3. Where the employer's business has been transferred to another person and the employee continues in the service of that business after transfer, the employee retains service acquired before the transfer.
4. In the case of a seasonal worker who has worked for the same employer for two or more successive seasons, the service is regarded as continuous provided that the period of service is made up of the periods actually worked.
5. Continuous service includes any period of employment contemplated in sec.29 (*>Period of employment*).

Payment of severance pay in accordance with section 35 does not affect an employee's right to any other benefits that the employer is obliged to pay.

Where employment is terminated by death in the absence of a will, the employee's surviving spouse, or if there is no spouse, the employee's children, must receive the severance pay. If there is no spouse, nor children, the money gets paid into the estate.

Discussion: Some employers have difficulty in interpreting this section. The wisest approach would be to opt for direct, literal interpretation, i.e., to do exactly what the section says and not to attempt to read between the lines. That does of course not prevent an employer and employee to agree on anything which is more beneficial to the employee than provided for in this section. For example, where an employee retires or resigns at 60 and, therefore, before reaching the age of 65 years as provided for in this section, the employer may voluntarily agree to pay severance nonetheless, but is not obliged to do so.

The use of the term 'dismiss' may also be misunderstood. When used in the Labour Act, the term means termination of employment by an employer for any reason whatsoever. Therefore, termination for medical incapability, for example, would also entitle an employee to severance. The only exceptions are dismissal for misconduct or poor work performance as indicated above. When a person has been appointed on a fixed term

contract severance is also not applicable (unless the parties agreed to it) since the contract terminates through the elapse of time and not through dismissal or resignation.

The section refers to severance pay being calculated on remuneration. Employers, therefore, must base their calculations on the total value of all payments in money or in kind relating to the employee's present earnings, including any monthly allowances or other regular payments made or owing to an employee. Put another way, severance pay is basically the equivalent of 4.333 of an employee's current monthly gross earnings for each completed year.

Changes: The severance pay provision is essentially unchanged in substance, except for the exclusion of recognition for contributions by the employer to a pension fund, or any other type of savings on behalf of the employee by an employer, which become payable to the employee upon termination of service. Formerly, if such contribution equalled or exceeded the calculated amount for severance, severance pay was not obligatory.

Another slight change is that severance pay is not applicable in a case of a fair dismissal on grounds of misconduct and poor *work performance*. Previously it had not been applicable in cases of misconduct and *incapability*. In this regard it should be noted that one of the main purposes of severance pay is to cushion the effects of employer initiated termination where the employee has no culpability. Therefore, as with retrenchments it would be grossly unfair for an employee to lose benefits because of chronic illness, for example, while at the same time facing a dark future of unemployment through no fault of his/her own.

H. Transportation on termination of employment (sec.36) (M)

– If the services of an employee are terminated during the first 12 months of employment at a place other than where the employee was recruited, the employer must transport the employee to the place of recruitment or pay him/her an amount equal to the costs of such transport.

The benefit does not apply when an employee unreasonably refuses reinstatement.

Change: This provision did previously not apply in a situation where an employee has been fairly dismissed on grounds of misconduct or incapability.

I. Payment on termination and certificates of employment

(sec.37) (M) – An employee whose services have been terminated is entitled to payment by the employer –

- for any work done prior to termination;
- >notice;
- >annual leave entitlements;
- paid time off for >Sunday work or >public holiday(s) work performed (if applicable);
- >severance pay (if applicable); and
- >transport allowance (if applicable)

Leave for an incomplete annual leave cycle is calculated on a pro rata basis. The employee does not qualify for such pro rata accrued leave of an uncompleted leave cycle if no notice or payment in lieu of notice has been given by that employee to the employer.

Payment for leave due for a completed leave cycle must, however, be paid regardless of whether notice has been given or payment has been effected by the employee in lieu of notice.

Payment on termination of employment must be done in the usual >payment of remuneration manner (including payslip, etc.) on the day of termination.

The termination must be accompanied by a *certificate of service* containing the following information:

- a) Full name of the employee;
- b) name and address of the employer;
- c) description of the industry/sector in which the employer is engaged;
- d) date of commencement and date of termination of employment;
- e) employee's job description/title;
- f) remuneration amount at date of termination; and
- g) reason for termination: *only if the employee so requests.*

The employer is at liberty to, but not obliged, to additionally provide an employee a testimonial or other certificate of good character.

Changes: The provisions in this section are largely unchanged. A slight but significant modification exists in the stipulation that an employer is not required to pay pro-rata leave for an uncompleted leave cycle if an employee has not given proper notice.

J. Disputes concerning this Chapter (sec.38) (N) (Chapter 3): *Conditions of employment and termination*] – Disputes involving the application, interpretation or alleged non-compliance or contravention of basic conditions of employment, including any matter related to the termination of employment, may be referred to the Labour Commissioner in writing by any of the affected parties. A copy of the referral must be served on the other parties.

The Labour Commissioner will then make arrangements for the appointment of an arbitrator to resolve the dispute in accordance with Part C of Chapter 8 of the Labour Act, 2007 (>*Arbitration of disputes*).

Trade union – >*Definitions and Interpretation*

Trade Unions and Employers' Organisations (Chapter 6 Part A) – Sections 52 to 56, appearing as entries A. to E. below, deal with establishment and winding up of trade unions and employers' organisations.

Discussion: A *trade union* (>NLL 1 pp.118 to 122) is an organised association of workers formed for the protection and promotion of their common interests. The concept is defined more specifically in the Labour Act, 2007 as “...an association of employees whose principal purpose is to regulate relations between employees and their employers” (section1).

An *employers' organisation* (>NLL 1 pp.79 & 80) is an association consisting of employers in a given economic sector whose principal purpose is the regulation of relations between employers, employees, trade unions and the State with a view to enhance the productivity and welfare of all. The concept is defined in the Act as “... any number of employers associated together for the purpose, of regulating relations between those employers and their employees or the employees' trade unions” (section1).

A. Definitions relating to Chapter 6 (Trade Unions and Employers' Organisations) (sec. 52) (N) – Definitions provided in section 52 have, for the most part, been incorporated in the discussion of the relevant provision to which they refer. However, for ease of reference, they are repeated verbatim below as appearing in the Labour Act, 2007.

Authorised representative – means any person authorised to represent a registered trade union or any office-bearer or official;

Employer's premises – means any premises under the control of the employer where work is done or the employees are accommodated;

Fee – means an entry fee, a periodic membership fee, a levy, or any other monetary amount owed by a member of a trade union to that union in terms of its constitution;

Registered trade union – includes one or more trade unions acting jointly, or a federation of trade unions, for the purposes of Parts A and B of Chapter 6;

Workplace – means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, each of those operations constitutes a separate workplace.

B. Constitutions of trade unions or employers' organisations (sec.53) (U) – A trade union or employers' organisation that intends to register under the Labour Act, 2007 must adopt a constitution that meets the statutory requirements set out below.

The relevant constitution must:

- a) State the name of the association;
- b) state its objects;
- c) describe the industry or industries it represents;
- d) prescribe the qualifications for admission to membership;
- e) provide for membership fees and the method for determining them and other payments by members;
- f) establish the circumstances and procedure for the termination of membership which must include an opportunity for the member to be heard and a right of appeal;
- g) prescribe that –
 - a member in good standing is a member who is not more than 3 months in arrears with the payment of any fees due in terms of the constitution;
 - only a member in good standing may nominate candidates for any office or vote or be voted for in an election of an office-bearer or official; and

- no person who has been convicted of an offence of which dishonesty is an element and for which that person has been sentenced to imprisonment without an option of a fine, may stand for election as an office-bearer;
- h) state the –
 - functions of its officials and office bearers;
 - procedures for the appointment or election of officials and office-bearers;
 - terms of appointment of its officials and office bearers; and
 - circumstances and manner in which officials and office-bearers may be removed from office;
- i) prescribe the procedure for nomination and election of workplace representatives and health and safety representatives;
- j) prescribe that –
 - there must be at least one general meeting of members every three years;
 - general meetings of members must be open to all members; and
 - the procedure for convening and conducting meetings of members and meetings of office bearers, including the quorum for meetings and the manner in which minutes are to be kept;
- k) establish the manner in which ballots are to be conducted;
- l) provide for the banking and investing of funds;
- m) establish the purpose for which funds may be used;
- n) provide that no payment may be made to an official or employee without the prior approval of its governing body granted under the hand of its chairperson, except for their salaries and the expenses incurred by them in the course of their duties;
- o) provide for the acquisition and control of property;
- p) determine the date for the end of its financial year;
- q) prescribe a procedure for affiliation, or amalgamation, with other trade unions or employers' organisations, as the case may be;
- r) prescribe a procedure for changing the constitution; and
- s) prescribe a procedure by which it may be wound up.

In meeting the above requirements, the constitution of a trade union or employers' organisation must, furthermore:

- Not be in conflict with the Namibian Constitution or any other law;
- Not hinder or the attainment of the objects of any law; and
- Not evade any obligation imposed by any law.

The Labour Commissioner is authorised to notify any such association that he has reason to believe that its constitution does not comply with the

statutory requirements, and to call on the body to make representations in that regard or to redraft its constitution in order to meet requirements. After considering such representations or redrafted constitution the Commissioner may inform the party that the constitution meets requirements, or inform the party that it does not meet the prescribed requirements.

C. Changing the constitution of a registered trade union or registered employers' organisations (sec.54) (U) – If a registered trade union or employers' organisation intends to change any aspect of its constitution the Labour Commissioner should be formally approached for approval in that regard. This would entail submission of the relevant prescribed form, 3 copies of the resolution containing the wording of the amendment and a certificate by the chairperson certifying that the resolution was passed in accordance with the constitution.

The Labour Commissioner, who may require further information in support of the application, must consider the application. If the Commissioner is satisfied that the amendments meet all requirements, they are approved by the issuing of an appropriate certificate to the trade union or employers' organisation. If the Commissioner refuses approval, that must be done by written notice in which the reasons for refusal are provide.

[See Regulation 7: Change in constitution of registered trade union or registered employers' organisation]

D. Winding up of trade unions or employers' organisations (sec.55) (U) – This section provides for the closing down, or dissolving, of a registered trade union or employers' organisation by order of the Labour Court. The association itself, a member, the Labour Commissioner or a person (in the case of insolvency) may apply to the Court for such winding up upon good cause shown. In the case of eventual insolvency, the Insolvency Act, 1943 (Act No. 16 of 1943) is applicable, although any reference in that Act to "the court" shall be interpreted as a reference to the Labour Court.

E. Appeals from decision of Labour Commissioner (sec.56) (N) – Any person dissatisfied with a decision of the Labour Commissioner made with regard to Part A of Chapter 6 of the Labour Act (Trade Unions and Employers' Organisations) may appeal to the Labour Court against the decision.

Transitional Provisions – The Schedule to the Labour Act, referred to in section 142 (*>Repeal of laws, transition and consequential amendments*) governs the transition from the administration of the Labour

Act, 1992 and the Labour Act, 2004 to the administration of those matters under the Labour Act, 2007. Items 1. to 17., appearing below, deal with the applicable transitional provisions.

Discussion: Transitional provisions in an Act allow for the smooth transition, or passage, from the previous statutory regime to a new dispensation put in place by a new law. It is often not practically possible, or in some instances desirable, to have the changeover occur immediately, or virtually automatically. For instance, there is usually a need to first orientate and educate those affected by the new law and to put in place the necessary administrative structures.

With the Labour Act, 2007 that was catered for by the fact that in terms of section 143 (*Short title and commencement*) the Act, and different provisions thereof, come into operation after promulgation on dates determined by the Minister. It was, therefore, possible to allow for a certain elapse of time between the publishing of the Act and its coming into operation.

However, in addition to an orientation interval it was also necessary to put in place practical measures to allow for the completion or rounding off of matters such as applications, conciliation boards, litigation, etc, initiated under the previous Act.

Equally, provision had to be made for the continuation without interruption of certain powers, offices, measures, authorisations, entitlements, rights and obligations from the old system to the new. These and related aspects are suitably provided for in the 18 'items' (not to be confused with 'sections' as in the Act proper) appearing in the Schedule of Transitional Provisions appended to the Labour Act, 2007. Although the items do not form part of the Act itself, they are invested with equal legal authority.

1. Definitions (item 1) – In the Schedule 'effective date' means the date on which the Act, or any section of it, came into operation as determined by the Minister in terms of section 143. Any reference in the Schedule to 'previous Act' means the Labour Act, 1992 reference to '2004 Act' means the Labour Act, 2004 and reference to 'this Act' means the Labour Act, 2007.

2. General preservation of rights, duties, regulations, notices and other instruments (item 2) – In terms of item 2 of the Schedule the following rights, duties, regulations, notices and other instruments emanating from the previous Act must be dealt with as set out hereinafter:

- Any right or entitlement enjoyed by any person, or obligation imposed on any person, in terms of a provision of the previous Act that has not been fulfilled immediately before the effective date must be considered to be a right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of the new Act, as from the date that the right, entitlement or obligation first arose.
- Any regulation promulgated in terms of the previous Act remains in force as if it had been promulgated under the new Act as from the effective date. [For example, the Regulations Relating to the Health and Safety of Employees at Work promulgated in *Government Gazette* No. 1617 of 1 August 1997 remain applicable to all employers and employees in Namibia.]
- Any official form prescribed for use in terms of the previous Act can be used for a similar purpose under the new Act until a new form has been provided.
- A notice given by a person to another person in accordance with the previous Act is to be considered as notice given in terms of any comparable provision of the new Act, as from the date that the notice was given under the previous Act.
- An agreement between an employee and employer, a request or an authorisation given by an employee to an employer, in terms of the previous Act, and in effect immediately before the effective date, remains in force, as if it had been made in terms of the new Act.
- Permission given by a person to another person in terms of the previous Act, and in effect immediately before the effective date, remains in force, as if it had been made in terms of the new Act.
- An assignment by the President in terms of sec.102(1) of the previous Act [assignment of the administration of provisions or regulations to different Ministers], remains in force.
- A document, that before the effective date, had been served in accordance with sec.113 of the previous Act (service of documents by an official of the Ministry of Labour on another person), must be regarded as having been served for the purpose of the new Act.
- An order of the Labour Court, a district labour court, or a labour inspector and in effect immediately before the effective date, remains in force.

- An exemption granted by the Minister in terms of sec.114 of the previous Act [exemption to employer regarding certain basic conditions of employment] is deemed to have been granted in terms of the corresponding provision of the new Act, and remains in force.
- A delegation of authority made in terms of sec.115 of the previous Act [delegation of power to an official of the Ministry of Labour], and in effect immediately before the effective date remains in force until it is withdrawn.

3. Continuation of time (item 3) – When it is necessary for the purpose of the Act to refer to a period of time, or to calculate a period of time, the calculation can legitimately extend to a date before the effective date where so required by the relevant circumstances. [For example, when calculating the amount of severance pay to which an employee is entitled who has been employed since 1995, severance must be counted as from that year until the date of termination].

4. Applications and notices concerning continuous work and overtime hours (item 4) – A notice by the Minister in the *Government Gazette* concerning continuous work and in operation immediately before the effective date remains in force until its expiry date.

An application made to the Permanent Secretary with regard to extended overtime, and pending at the effective date, must be proceeded with as if an application under the new Act. A notice by the Permanent Secretary increasing maximum overtime remains in force until its expiry date.

5. Applications and notices concerning Sunday or public holiday work (item 5) – An application made to the Permanent Secretary concerning Sunday work which is still pending at the effective date must be proceeded with as if is an application under the new Act.

A notice concerning work on Sundays or public holidays issued by the Permanent Secretary and in effect immediately before the effective date, remains in force until its expiry date.

6. Remuneration deposited with Permanent Secretary (item 6) – Despite the repeal of the previous Act, sections 44(2)(b) and (c) relating to monies paid to the Permanent Secretary by an employer for payment to an employee by court order, or otherwise, shall remain in force for 6 months and 3 years, respectively, as from the effective date.

7. Health and safety representatives (item 7) – A health and safety representative holding office, and a health and safety committee in operation,

immediately before the effective date remain in place after the coming into effect of the new Act. Any rules made by the committee continue to remain in force.

8. Registration of trade unions and employers' organisations (item 8) – Matters related to the registration of trade unions and employers' organisations are dealt with as indicated below:

- An application by a trade union or employers' organisation for registration, or for the amendment of its constitution that was pending immediately before the effective date, must be proceeded with in terms of the new Act.
- A trade union or employers' organisation that was registered in terms of the previous Act, immediately before the effective date, continues to be registered in terms of the new Act.
- A certificate of registration issued to a trade union or employers' organisation and valid immediately before the effective date continues to be valid as if it had been issued in terms of the new Act, subject to the new Act and any conditions attached to it at the time it was issued.
- An application to be recognised as an exclusive bargaining agent and pending immediately before the effective date must be proceeded with under the provisions of the new Act.
- A registered trade union that was recognised as an exclusive bargaining agent immediately before the effective date continues to be an exclusive bargaining agent after the effective date.
- A workplace union representative holding office immediately before the effective date continues to hold office, and the term of the representative ends at the expiry of 2 years, measured as from the date on which the representative was most recently elected to office.

9. Collective bargaining (item 9) – Matters related to collective bargaining are dealt with as indicated below:

- The provisions appearing under >Collective Agreements (Part D of Chapter 6) apply equally to a collective agreement whether entered into before or after the effective date.
- An exemption from a collective agreement granted by the Minister that was in effect immediately before the effective date, continues to be in force.

- The extension of a collective agreement by the Minister that was in effect immediately before the effective date continues to be in force.
- An exemption from an extension of a collective agreement granted by the Minister continues to be in force.
- A request to the Minister for an exemption from the provisions of a collective agreement in terms of sec. 69(3) of the previous Act, that has not been granted immediately before the effective date lapses and is a nullity in terms of the new Act.
- A request to the Minister for an extension of a collective agreement, that has not been granted immediately before the effective date must be proceeded with.
- A request to the Minister for an exemption from the extension of a collective agreement in terms of sec. 70(5) of the previous Act that has not been granted immediately before the effective date must be proceeded with.
- A dispute that was pending before the Labour Commissioner or before a conciliation board immediately before the effective date, must be proceeded with in terms of the provisions of the new Act, subject to any directions given by the Labour Commissioner as to the fair and reasonable transition from the previous Act to the new Act.

10. Strikes, lock-outs and essential services (item 10) – A strike or lockout that was underway or for which notice had been given in terms of the previous Act, immediately before the effective date, continues to be governed by the relevant provisions of the previous Act, unless the parties agreed that the strike or lockout must be governed by the provisions of the new Act.

An essential service designated in terms of the previous Act, remains an essential service subject to the authority of the Essential Services Committee to recommend the variation or cancellation of that designation.

11. Wages Commission, Wage orders and exemptions (item 11) – Matters related to a Wages Commission, wage orders, and exemptions there from, immediately before the effective date remain in effect as if done under the new Act.

An appeal to the Labour Court from the granting of an exemption pending before the court at the effective date, must be concluded as if the previous Act had not been repealed.

12. Labour Commissioner and Labour Inspectors (item 12) – The person who immediately before the effective date was appointed as Labour Commissioner continues to be the Labour Commissioner subject to the new Act and any conditions attached to his/her appointment in terms of the previous Act.

An individual who immediately before the effective date was appointed as labour inspector continues to be a labour inspector subject to the new Act and any conditions attached to his/her appointment in terms of the previous Act. Such a person's certificate of appointment by the Permanent Secretary also continues to remain valid.

13. Labour Advisory Council (item 13) – Matters related to the Labour Advisory Council (LAC) are dealt with as indicated below:

- The person who immediately before the effective date was the chairperson of the LAC, remains the chairperson for 3 years measured as from the date on which that individual was most recently designated by the Minister to hold that office.
- Other serving members immediately before the effective date, remain in office for 3 years measured as from the dates on which they were most recently appointed.
- Rules made by the LAC and in effect immediately before the effective date remain in force.
- Statutory committees of the LAC in effect immediately before the effective date remain in operation.
- The person formally appointed and serving as Secretary of the LAC immediately before the effective date, continues to be the Secretary of the Council.

14. Labour Court (item 14) – Matters related to the Labour Court are dealt with as indicated below:

- A judge of the High Court, who at the effective date, is seized of a matter arising under the previous Act, remains seized of that matter until it is concluded.
- Section 16 of the previous Act (Constitution of the Labour Court) continues to apply in respect of any matter coming before the Labour Court in terms of the new Act, until such time as the Judge-President first appoints members of the Court.

- A person who was a member of the Labour Courts' Rules Board immediately before the effective date ceases to be a member as from that date.
- Rules made by the Labour Courts' Rules Board and in effect immediately before the effective date remain in force in so far as they are applicable to proceedings in terms of the new Act, subject to repeal, amendment or replacement by the new Labour Court Rules Board.

15. Pending disputes (item 15) – 'Pending disputes' for the purpose of this item refer to matters that have been filed with the registrar of the district labour court, or the Labour Court, and have been issued a case number. Such disputes are to be dealt with as indicated below:

- A dispute that was pending immediately before the effective date *must be concluded* by the relevant court in terms of the old Act.
- A dispute that arose under circumstances that occurred before the effective date but was not pending before a district labour court, or the Labour Court, as the case may be, on the effective date, *must be dealt with in terms of the new Act.*
- An alleged unfair dismissal dispute that occurred before the effective date but was not pending, the cause of action of which occurred more than 6 months but less than 12 before the effective date, *must be dealt with in terms of sec.24 of the previous Act*, to determine when the dispute is barred due to the passage of time. [Section 24 of the previous Act stipulates that no proceedings shall be instituted after the expiration of a period of 12 months as from the date on which the cause of action has arisen, or the contravention or failure in question has taken place, or from the date on which the party instituting such proceedings has become or could reasonably have become aware of such cause of action or contravention or failure, as the case may be, except with approval of the court on good cause shown]
- An appeal or review allowed from a matter that was pending *must be proceeded with* in terms of the provisions of the previous Act.

16. References in other laws (item 16) – As from the effective date any reference in any law to a provision of the previous Act, must as far as possible, be read as if it were a reference to the corresponding provision in the new Act

Similarly, as from the effective date any reference in any law to a district labour court must be read as if it were a reference to the Labour Commissioner

if it concerns a matter in respect of which the new Act provides for a referral to the Labour Commissioner, or to the Labour Court, in any other case.

Any reference in any law to the Labour Court, Labour Advisory Council, or Wages Commission must be read as a reference to each such body respectively, as constituted under the new Act.

17. Resolution of other transitional matters (item 17) – The final item of the Schedule provides for dealing with areas of uncertainty arising from the implementation of the Labour Act, 2007. In a situation of this nature a party may apply to the Labour Court for a *declaratory order* (>NLL 1 p.135) and the Court may make any order that is just and reasonable, including an order applying a provision of the previous Act, despite its repeal.

A party making such an application must serve notice thereof on the Permanent Secretary, the Labour Commissioner and on any other persons with an interest in the order sought. All these officials and persons will then each have the rights of a party in the matter before the Court.

Transport allowance – >Termination of employment

Transportation on termination of employment (sec.35) – >Termination of employment

U

Unfair dismissal – >Termination of employment

Unfair Labour Practices (Chapter 5) – Sections 48 to 51, appearing as entries A. to E. below, deal with unfair labour practices.

Discussion: The concept of an unfair practice generally refers to any employment-related act or omission, perpetrated by an employer, employers' organisation, employee or by a trade union which is detrimental to healthy labour relations, employee welfare and legitimate employer objectives.

A. Unfair disciplinary action (sec.48) (U) – This section simply stipulates that disciplinary action taken against an employee in contravention of section 33 (>Unfair dismissal) constitutes an unfair labour practice.

Discussion: Whereas section 33 is directed at *dismissal in general* (any kind of termination of employment by an employer), section 48 is concerned with *discipline* (>NLL 1 p.73) which *can* lead to dismissal but not necessarily so. Before disciplinary action can be viewed equitable in the eyes of the law, three basic conditions have to be complied with. As in the case of fair dismissal, there must be a *valid and fair reason* for such disciplinary measures taken; and the action itself must be in compliance with a *fair procedure*.

Valid reason

The *validity consideration* refers to the factual circumstance surrounding purported misconduct. In other words, it points to the requirement that sufficient objective evidence must be available to substantiate the occurrence of an alleged offence on a convincing balance of probabilities. Subjective hunches and suspicions are insufficient to declare an employee guilty of wrongdoing. In other words the reason for disciplinary action must be lawful in terms of the Labour Act; the employer's disciplinary code; and/or in terms of the common law.

Fair reason

Fair reason essentially has regard to the requirement that whatever the disciplinary steps decided upon after establishment of proof of guilt, they must be appropriate and fair under the circumstances and be consistently applied. That is to say, disciplinary measures should match the seriousness of an offence and should not be applied haphazardly.

Discipline concerned with rules

A chairperson of a disciplinary hearing, as well as an arbitrator or a court of law must essentially consider six aspects to determine whether discipline meets the requirement of a *valid and fair reason*. It must be established whether:

- a) A rule regulating conduct in, or of relevance to, the workplace was involved; if so,
- b) whether the rule was reasonable;
- c) whether the rule was known to the accused employee, or whether he/she ought reasonably to have had knowledge of it;
- d) whether the rule was consistently applied in the past;
- e) whether in the specific case being investigated the rule was infringed; and

- f) whether the disciplinary measure decided upon is the appropriate sanction for the contravention of the rule under the specific circumstances applicable to the case.

Remedial focus

In this respect it must again be emphasized that disciplinary action should in the first place be of remedial nature. It is not a question of punishing an employee in the sense of applying retribution for an infraction. It is rather a matter of attempting to remedy and to positively influence improper workplace conduct. After all, a lot of time and expense has usually been invested in recruiting, training, motivating etc., of the employee concerned – quite apart from the fact that an employee has an inherent right to be treated fairly. Thus in many cases suitable counselling is all that is lacking in order to ensure normalization of performance patterns.

Should unacceptable behaviour persist despite recourse to remedial efforts on the part of management, sterner measures would have to be considered. Certain types of shop-floor offences, on the other hand, such as those involving distinct dishonesty, violence, or gross insubordination, are so prejudicial to the employment relationship that they commonly necessitate summary dismissal at a first occurrence. In such cases counselling and warnings would usually be insufficient to restore impaired trust and confidence.

Fair procedure

Fair disciplinary action is based on the principles of *natural justice* (>NLL 1 p.152).

Natural justice is a fundamental legal concept underlying fair enquiry of alleged transgression made against an individual(s). It is based on universal natural moral law (what is right and wrong). In Roman Law (aspects of which form part of our common law) this is expressed by two main tenets: *Audi alteram partem* “hear the other side”; and *nemo iudex in propria causa* “no one may judge his own cause”

The principles comprise or imply certain main elements which must be observed in the fair adjudication of a case. The elements include –

- being informed of nature of accusation;
- opportunity for the accused to prepare for defence;
- right of representation;
- hearing of the accusation by an impartial adjudicator;
- opportunity to defend, put questions and state own case; and
- being given a reasoned judgment.

The level of formality of the procedure is determined by the seriousness of the alleged misconduct. Thus where the possibility exists that an employee may be given a final written warning or even be dismissed a full disciplinary hearing needs to be held. Conversely, where the enquiry would result in a verbal warning or first written warning less formality would normally be required, as long as the employee is still afforded opportunity to state his/her case before a disciplinary measure, or the withholding thereof, is decided upon.

B. Employee and trade union unfair labour practices (sec.49)(M) –

Employee unfair labour practices

It is an unfair labour practice for an employee to engage in any conduct that subverts (undermines) orderly collective bargaining or which constitutes intimidation of any person.

Trade union unfair labour practices

It is an unfair labour practice for a registered trade union to –

- a) refuse to bargain collectively in a situation where the Labour Act or a collective agreement require the union to do so;
- b) bargain in bad faith;
- c) engage in conduct that subverts orderly collective bargaining;
- d) engage in conduct that intimidates any person; or
- e) not fairly represent an employee in any bargaining unit in respect of which the trade union is recognised as the exclusive bargaining agent.

These prohibitions must not be construed as preventing any person from participating in a lawful strike, picket or lockout that is in compliance with provisions of the Act.

Changes: Use of the expression ‘unfair labour practice’ in conjunction with certain forms of prohibited conduct pertaining to employees and trade unions is an innovation in the Act, as well as the specific proscription of bad faith bargaining. For the rest the contents of this section do not differ substantially from the previous Act.

C. Employer and employers' organisation unfair labour practices (sec.50) (M) –

Employer and employers' organisation unfair labour practice

It is an unfair labour practice for an employer or for a registered employers' organisation to –

- a) refuse to bargain collectively in a situation where the Labour Act or a collective agreement require the employer or organisation to do so;
- b) bargain in bad faith;
- c) fail to disclose relevant information that is reasonably required by workplace union representatives to perform their functions;
- d) fail to disclose relevant information that is reasonably required by a recognised trade union to consult or bargain collectively in respect of any labour matter;
- e) unilaterally alter any term or condition of employment
- f) seek to control any trade union or federation of trade unions;
- g) engage in conduct that subverts orderly collective bargaining; or
- h) engage in conduct that intimidates any person.

Disclosure

An employer is not required to disclose information if it is –

- legally privileged;
- prohibited by any law or court order from being disclosed;
- confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
- if it is private personal information relating to an employee, unless the employee consents to the disclosure of the information.

Disputes about disclosure

A dispute regarding disclosure may be referred to arbitration for determination. It must then first be established whether or not the information is relevant. If it is relevant but legally privileged or prohibited by law or a court order from being disclosed, then it may not be divulged.

If the arbitrator decides that the information is relevant but is confidential or constitutes private personal information relating to an employee, the arbitrator must balance, or weigh up, the harm that disclosure is likely to cause against the harm that the failure to disclose is likely to cause. If the arbitrator decides that the balance of harm favours disclosure, the latter may order disclosure subject to conditions designed to limit the harm likely to be caused to the employee or employer.

When making an order, the arbitrator must take into account any previous breach of confidentiality in respect of information disclosed to the workplace union representative or trade union, and may refuse to order the disclosure

of the information for a period of time. In a dispute about alleged breach of confidentiality, the arbitrator may also order the withdrawal of the right of disclosure for a period.

Changes: Use of the expression 'unfair labour practice' in conjunction with certain forms of prohibited conduct pertaining to employers and employers' organisations is an innovation in the Act, as well as the specific proscription of bad faith bargaining. Furthermore, the portion dealing with disclosure introduces a new concept to Namibian statutory collective relations with the intention to promote transparent negotiations in which there is optimal sharing of relevant information to enable rational, realistic decision making.

E. Disputes concerning this Chapter (sec.51) (N) – Disputes involving the application, interpretation or alleged non-compliance or contravention of any matter related to unfair labour practices as set out in Chapter 5, may be referred to the Labour Commissioner in writing by any of the affected parties. A copy of the referral must be served on the other parties.

The Labour Commissioner will then make arrangements for the designation of an arbitrator to resolve the dispute in accordance with Part C of Chapter 8 of the Labour Act, 2007 (>*Arbitration of disputes*).

If a dispute concerning an alleged unilateral alteration of a term or condition of employment is referred to the Labour Commissioner within 30 days following the alteration, the employer must restore such term or condition of employment as of the date of the alteration or refrain from effecting such alteration until the dispute is resolved or settled in terms of this Part or is otherwise disposed of.

An employer who contravenes or fails to comply with the foregoing provision relating to alleged unilateral alterations commits an offence and is liable on conviction to a maximum fine of N\$10 000.00 and/or up to two years imprisonment.

Urgent interdicts – >*Strikes and Lockouts*

Urgent work – >*Definitions relating to Basic Conditions of Employment*

V

Variation and rescission of awards – >*Arbitration of disputes*

W

Wages Commission (Chapter 9 Part C) – Sections 105 to 114, appearing as entries A. to J. below, deal with the *Wages Commission*. Sections 13 and 14 dealing with *wage orders*, appear as entries K. to L.

A. Continuation of Wages Commission (sec.105) (U) – In terms of sec.105 of the Labour Act, 2007, the Wages Commission established by section 84 of the Labour Act, 1992 remains in place subject to the provisions Chapter 9 Part C.

The Wages Commission may be constituted by the Minister of Labour whenever the latter may decide to do so or at the request of a trade union or employers' organisation.

B. Functions of Commission (sec.106) (U) – The functions of the Wages Commission are to investigate terms and conditions of employment, including remuneration, and to report back to the Minister for the purpose of making a *wage order*.

C. Composition of Commission (sec.107) (M) –The Wages Commission consists of at least three but not more than five members appointed by the Minister. In addition to the chairperson, there must be at least one member nominated by a registered trade union and one member nominated by a registered employer's organisation.

Changes: The only change is the potential enlargement of the Wages Commission from three members to five members.

D. Terms of office of members of Commission (sec.108) (U) – The Minister is empowered to remove a member of the Wages Commission from office on various counts, including in a situation where the Minister has cause to believe that the member is no longer fit or able to discharge the functions of his/her office. A new appointment must then be made in the prescribed manner to fill the vacancy for the unexpired term of office.

E. Meetings of Commission (sec. 109) (U) – The chairperson of the Wages Commission decides the date, time and venue of meetings of the Commission. A majority of members of the Commission constitutes a quorum and decisions are taken by majority vote of members present at a meeting.

F. Administration of Commission (sec.110) (U) – The Permanent Secretary is responsible for providing staff of the Ministry to perform administrative and clerical work for the Wages Commission and may also designate an official to serve as secretary. In addition the Commission may engage persons to assist it in the performance of its functions after consultation with the Permanent Secretary.

G. Terms of reference of Commission (sec.111) (U) – The Minister determines the terms of reference of the Wages Commission including the *industry or area* to be investigated; the *categories of employees*; and the matters to be investigated relating to terms and conditions of employment.

The terms of reference are published by notice in the *Government Gazette* inviting written representations from interested parties. In addition to the notice the Minister is required to publish the information through other available means to ensure that stakeholders are well aware of the investigation.

H. Powers of Commission (sec.112) (U) – The Commissions Act, 1947 (Act No.8 of 1947), read with any changes required by the context, applies to the Wages Commission in the performance of its functions. Its members, or a person formally authorised by it, may exercise the same powers conferred on a labour inspector in the performance of its functions.

I. Matters to be considered in investigation (sec.113) (U) – In performing its work, the Wages Commission is obliged to take cognizance of Article 95 of the Namibian Constitution (Promotion of the Welfare of the People) in as far as it relates to labour matters.

The Commission must, furthermore, consider all representations submitted to it by interested parties as well as all relevant matters including the –

- ability of employers to carry on business on a profitable basis if any specific recommendation is made in a wage order;
- cost of living in Namibia or any part of it;
- minimum subsistence level in any area of the country;
- value of board, lodging or other benefits provided by employers to employees; and
- any other matter determined by the Minister.

J. Reports of Commission (sec.114) (U) –

Findings and recommendations

Upon completion of an investigation the Wages Commission prepares a report to the Minister which consists of its findings and recommendations, subject to its terms of reference. The recommendations must cover:

- Minimum *remuneration*;
- the *amount* of any increase or reduction in remuneration;
- the *basis* upon which remuneration is to be determined;
- the prohibition of payment of *remuneration in kind*;
- the *deduction* to be made, permitted or prohibited from remuneration;
- *where, when* and *how* remuneration is paid;
- what *employment records* an employer is required to keep, for how long and in what form;
- the prohibition of, or regulation and remuneration of, certain kinds of work, whether on the employer's premises or off it, including *outwork, task-work, contract work or piecework*; and
- *any other matter* connected or incidental to any matter contemplated in the above.

Minority report

A dissenting member who does not agree with the Wages Commission's report, or any part of it, may submit a minority report to the Minister, and the fact of minority disagreement must also be recorded in the main report.

Publishing of Report

The Minister may publish the Commission's report, or information contained in it, but may not include information relating to financial statements or trade practices of an employer in such a publication.

K. Wage order (sec.13) (M) – After considering a report and recommendations of the Wages Commission, the Minister may, in terms of this section, make a wage order fixing wages and other conditions of employment for employees in a given industry and/or area in accordance with the Commission's recommendations. The order must be published by notice in the *Government Gazette*, and becomes effective as from a date specified in the *Gazette*.

The wage order is binding on all employers and employees described in the notice. It remains binding until suspended or cancelled by the Minister; amended or replaced by a new or amended wage order; or is superseded by a collective agreement.

In addition to the notice the Minister is required to publish the information through other available means to ensure that stakeholders are informed of the wage order.

The Minister is not obliged to make a wage order that has been recommended by the Wages Commission, and should he decide against it, any person who maybe aggrieved by such a decision may apply to the Labour Court for a review of the decision.

Changes: The Labour Act, 1992 stipulated that if the Minister deems it expedient to make a wage order, it "... shall be in accordance with ..." the recommendations of the Wages Commission. The new Act permits the Minister to modify the recommendations.

Previously, if the Minister decided not to make a wage order recommended by the Wages Commission, he was required to submit the report of the Commission to the National Assembly together with the reasons for his decision. This reporting mechanism has been removed in the new Act.

L. Exemptions from wage order (sec.14) (M) – The Minister may, upon application, exempt any person from the provisions of a wage order if satisfied that the conditions of employment of the employees concerned are not substantially less favourable than those contained in the wage order; or if the Minister is satisfied that special circumstances exist that justify the exemption in the interest of the affected employees.

An exemption by the Minister must be in the prescribed manner and may include any conditions under which it is granted.

The Permanent Secretary must inform all affected persons of the exemptions. The Minister may amend or withdraw an exemption.

[See Regulation 4: Exemption from wage order]

Change: The previous Act mentioned that a person aggrieved by the granting of an exemption had the right to note an appeal to the Labour Court. No such recourse is mentioned under this section.

Week – *>Definitions relating to Basic Conditions of Employment*

Weekly rest period – *>Daily spread-over and weekly rest period*

Work of equal value – *>Prohibition of discrimination in employment*

Work on Sundays (sec.21) (U) – An employer is not allowed to require or permit an employee to work on a Sunday except for the purpose of

- >urgent work;
- carrying on the business of a shop, hotel, boarding house or hostel that lawfully operates on a Sunday;
- domestic service in a private house;
- health and social welfare care and residential facilities including hospitals, hospices, orphanages and old age homes;
- work on a farm required to be done on that day;
- work in which continuous shifts are worked; or
- any activity approved by the Permanent Secretary upon application by an employer if the employees involved agree.

Employers must observe the following rules with regard to public holidays:

1. An employee who works on a Sunday is entitled to double that employee's basic hourly wage for each hour worked on that day.
2. Alternatively, the parties can agree that the employee be paid one-and one-half the employee's basic hourly wage for each hour worked on that day and be granted equal paid time off from work during the next working week.
3. In the case of an employee who ordinarily works on a Sunday, the employer must pay the employee's daily remuneration plus the hourly basic wage for each hour worked.
4. Where the majority of hours worked on a shift fall on a Sunday, all the hours are deemed to have been worked on the Sunday – where the majority of hours fall on an ordinary working day the majority of hours are deemed to fall on the ordinary working day.

Discussion: In the past there has been uncertainty as to whether the time off referred to in paragraph 2. above, must be paid time or not. The argument being, that if so, it would mean that such an employee would effectively be remunerated 2½ times for the work performed on a Sunday (1½ times for the hours worked on that day plus another 1 times for the hours off in the following week for having worked the previous Sunday. However, the reference in section 37(1)(b) (>Payment on termination) of the new Act to "... any *paid time off* that the employee is entitled to in terms of sections 21(6) or (6) or 22(5) ..." refers to paid time off if choosing 1½ pay rate for work on a Sunday or public holiday. The two sections (21 and 37) read together, thus remove any ambiguity in this regard and confirm that this payment option indeed amounts to a compensation rate of 2½ times ordinary pay.

It is important to note under this section the distinction made between remuneration and basic hourly wage. The latter does not include any additional monetary items such as allowances or pension contributions or medical aid benefits. The former, on the other hand, represents the entire monthly package to which an employee is entitled. Only employees who normally work on a Sunday as part of their ordinary weekly hours, receive one portion of their Sunday pay in the form of remuneration. All other Sunday pay is calculated on basic wage only.

The specific reference to "... hotel, boarding house or hostel ..." in subsection 21.(2)(b) is problematical as many other types of establishments and operations in the hospitality and tourism industries which also need to render services on Sundays are thus excluded. The situation requires an exemption or variation for such employers to be able to operate legally on Sundays and public holidays.

X

Y

Yearly leave – >*Annual leave*

Young workers – >*Child Labour*

Youth employment – >*Child Labour*

Z

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ANNEXES

ACT

To consolidate and amend the labour law; to establish a comprehensive labour law for all employers and employees; to entrench fundamental labour rights and protections; to regulate basic terms and conditions of employment; to ensure the health, safety and welfare of employees; to protect employees from unfair labour practices; to regulate the registration of trade unions and employers' organisations; to regulate collective labour relations; to provide for the systematic prevention and resolution of labour disputes; to establish the Labour Advisory Council, the Labour Court, the Wages Commission and the labour inspectorate; to provide for the appointment of the Labour Commissioner and the Deputy Labour Commissioner; and to provide for incidental matters.

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LABOUR GENERAL REGULATIONS: LABOUR ACT, 2007 (ACT NO. 11 OF 2007)

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Definitions

1. In these regulations, any word or expression to which a meaning has been given in the Act bears that meaning, and unless the context otherwise indicates, “the Act” means the Labour Act, 2007 (Act No. 11 of 2007).

Portion of basic wage that may be paid in-kind and calculation of the value of in-kind payments

2. (1) The portion of the basic wage that an employer may pay to an employee in kind is an amount which does not exceed the equivalent of one-third of the employee’s basic wage.

(2) The calculation of the cash equivalent of any payment in-kind must be based on the producers’ prices of the commodities comprising the in-kind payment, or in absence of a producers’ price for any commodity, the average price of the commodity at an agriculture cooperative or wholesalers in the nearest city or town.

Written statement of particulars of monetary remuneration

3. The written statement of particulars referred to in section 11 (3) that must accompany payment of monetary remuneration to an employee must contain the matters set out Annexure 1.

Exemption from a wage order

4. (1) An application to the Minister for exemption from a wage order in terms of section 14(1) of the Act must be made on Form LM 1 set out in Annexure 2.

(2) ‘She exemption from a wage order referred to in section 14(3) of the Act must be issued on Form LM 2 set out in Annexure 2, and it must be signed by the Minister.

(3) The fee payable to the Permanent Secretary for a copy of an exemption order is N\$5 per page.

Compassionate leave

5. (1) An application for compassionate leave in terms of section 25(3) of the Act must be made on a form determined by the employer but the form must substantially correspond to Form LS 3 set out in Annexure 2.

(2) The application for compassionate leave must be made either before the applicant takes leave, or if not possible, immediately upon applicant’s return to work.

(3) An application for compassionate leave must be accompanied by a death certificate of the deceased, in case of death, or a medical certificate, in

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case of serious illness or, an affidavit of the employee testifying to the death or serious illness, or, in all cases, such other evidence of death or illness as may be acceptable to the employer.

(4) If the applicant cannot make the application before going on leave, the applicant must make reasonable efforts to notify the employer of his or her absence for compassionate reasons and the intended duration of thereof.

Election of health and safety representatives

6. (1) Whenever it is necessary in terms of section 43 of the Act to conduct an election of a health and safety representative or representatives, the election must be held in the manner prescribed in this regulation.

(2) An election for a health and safety representative must be held at least every two years, or as and when a casual vacancy or vacancies arise.

(3) An election for a health and safety representative must be held in cooperation with the exclusive bargaining agent of the employees, or, if there is none, in cooperation with the employees, and subject to the requirements set out in sub regulations (4) to (8).

(4) A committee consisting of two representatives of the exclusive bargaining agent or, if there is none, two employees, and two representatives of the employer must be established to oversee the conduct of the nominations and the election.

(5) Nominations must take place one week before the voting

(6) An employee may nominate himself or herself or any other employee to stand for election.

(7) The election must be conducted -

(a) at the employer's premises;

(b) during working hours;

(c) with a minimum disruption of the employer's operations; and

(d) by secret ballot.

(8) The ballots must be counted immediately after the voting has been concluded, and the committee must, in writing, make the results known to the employer and employees.

(9) If an employer has recognized a registered trade union as the exclusive bargaining representative of any of its employees, the employer and the trade union may agree on the manner in which the election should be conducted, subject to the requirements set out in sub regulations (4) to (8)

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(10) The trade union must retain records of the ballots cast and the names of the elected representatives for a period of two years from the date of the election.

(11) No later than two months after the election of a health and safety representative, the employer must, through an accredited company or institute, provide training for the health and safety representative in the duties of the position.

Change in constitution of registered trade union or registered employers' organization

7. (1) An application to the Labour Commissioner for a change in the constitution of a registered trade union or registered employer's organisation in terms of section 54(2)(b) of the Act must be made on Form LC 4 set out in Annexure 2 and must be accompanied by two (2) copies of

a resolution containing the wording of the change and a certificate signed by the chairperson stating that the resolution was passed in accordance with the constitution.

(2) If the Labour Commissioner approves a change in a constitution of a registered trade union or registered employers' organisation, the Commissioner must issue a certificate in terms of section 54(4)(b) of the Act on Form LC 5 set out in Annexure 2, and if it is a change of name, a new certificate of registration.

Registration of trade union or employers' association

8. (1) An application to the Labour Commissioner for registration of a trade union or employers' organisation in terms of section 57(1)(a) of the Act must be made on Form LC 6 set out in Annexure 2, and must be accompanied by three certified copies of the constitution of the trade union or employers' organisation.

(2) If the Labour Commissioner decides to register a trade union or employers' organisation in terms of section 57(3)(b) of the Act, the Commissioner must issue a certificate of registration on Form LC 7 set out in Annexure 2.

Register maintained by registered trade unions or registered employers' organization

9. The register to be maintained by registered trade unions and registered employer organisations in terms of section 60(a) of the Act must be on maintained on Form LC 8 set out in

Annual return of registered trade union or employers' organization

10. The annual return to be submitted to the Labour Commissioner in terms of section 60(e) of the Act must be on Form LC 9, and must be accompanied by a statement of income and expenditure for that year, a balance sheet showing its financial position at the end of the year, and its annual audit report prepared by a registered public accountant and auditor or an auditor approved by the Labour Commissioner.

Request for recognition of registered trade union as exclusive bargaining agent

11. (1) A request by a registered trade union for recognition in terms of section 64(3) of the Act must be made on Form LC 10 set out in Annexure 2.

(2) Within 30 days after receiving the trade union request for recognition, the employer must, in terms of section 64(5) of the Act, notify the trade union on Form LC 11 set out in Annexure 2, that it recognises the trade union as the exclusive bargaining agent or that refuses to recognize the trade union.

(3) If the employer fails to respond to the trade union's request within 30 days or fails to recognise the trade union as an exclusive bargaining agent, the trade union may, in terms of section 64(6) of the Act, refer its request to the Labour Commissioner as a dispute on Form LC 12 set out in Annexure 2.

Notification to registered trade union to acquire majority representation

12. Notice which must be given in terms of section 64(11) of the Act by an employer to a trade union recognised as an exclusive bargaining agent, when the employer considers that the trade union no longer represents the majority of the employees in the bargaining unit, must be given on Form LC 13 set out in Annexure 2.

Election of workplace union representatives

13. (1) Where employees who are members of a registered trade union are entitled, in terms of section 67 of the Act, to elect a workplace union representative or representatives, the election must be conducted in the manner set out in this regulation.

(2) On being requested by the registered trade union, the employer must provide facilities that are reasonably necessary for conducting the election.

(3) The registered trade union must assign at least two representatives to supervise the elections.

(4) Nominations of the candidates must take place at least one week before the voting.

(5) The election must be conducted -

- (a) at the employer's premises;
- (b) during working hours;
- (c) with a minimum disruption of the employer's operations;
- (d) by secret ballot; and

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(e) in accordance with the trade union's constitution.

(6) The employer may observe the election process.

(7) The ballots must be counted immediately after the voting has been concluded, and the union must, in writing, make the results known to the employer and employees.

(8) The trade union must retain records of the ballots cast and the names of the elected workplace union representative or representatives for a period of two years from the date of the election.

Request to extend collective agreement to non-parties to the agreement

14. (1) A request to the Minister by a registered employers' organisation and a registered trade union in terms of section 71(2) of the Act that a collective agreement bind nonparties to the agreement must be made on Form LM 14 set out in Annexure 2.

(2) The notice inviting objections to the extension of the collective agreement contemplated in section 71(3)(b) of the Act must be given on Form LM 15 set out in Annexure 2.

(3) A declaration by the Minister extending a collective agreement as contemplated in section 71 (5) of the Act must be made on Form LM 16 set out in Annexure 2.

Application for exemption from extension of collective agreement

15. (1) An application to the Minister for an exemption from an extension of a collective agreement in terms of section 72(1) of the Act must be made on Form LM 17 set out in Annexure 2.

(2) An exemption from a collective agreement contemplated in section 72(2) of the Act must be made on Form LM 18 set out in Annexure 2.

Notice of commencement of strike or lockout

16. (1) A party referring a dispute to the Labour Commissioner pursuant to section 74(1) of the Act must make the reference on Form LC 21 set out in Annexure 2.

(2) Notice of the commencement of strike or lockout in terms of section 74(1)(d) of the Act by a party to a dispute must be given to the Labour Commissioner and to the other parties to the dispute on Form LC 19 set out in Annexure 2.

Appointment of conciliators and arbitrators

17. Where the Minister appoints -

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(a) a conciliator in terms of sections 82(1) or (2) of the Act, he or she must issue to the conciliator a certificate of appointment on Form LM 20 set out in Annexure 2; or

(b) an arbitrator in terms of sections 85(3) or (4) of the Act, he or she must issue to the arbitrator a certificate of appointment on Form LM 20 set out in Annexure 2.

Referral of dispute to conciliation

18. (1) A referral of a dispute to conciliation in terms of section 82(7) of the Act must be made to the Labour Commissioner on Form LC 21, and copies must be served on the other parties to the dispute.

(2) If the Labour Commissioner decides to refer the dispute to conciliation, the Commissioner must, in terms of section 82(3) of the Act, designate a conciliator on Form LC 22 set out in Annexure 2, to try to resolve the dispute and issue a notice of conciliation meeting on Form LC 23 set out in Annexure 2.

(3) If the parties resolve their dispute during the conciliation process, the conciliator must issue a certificate of resolved dispute on Form LC 24 set out in Annexure 2.

(4) If the parties are unable to resolve their dispute through the conciliation process, the conciliator must, in terms of section 82(15) of the Act, issue a certificate of unresolved dispute on Form LC 25 set out in Annexure 2.

Application to reverse decision of a conciliator

19. An application to the Labour Commissioner in terms of section 83(3)(a) of the Act to reverse a decision of a conciliator must be made on Form LC 26 set out in Annexure 2.

Referral of dispute to arbitration

20. (1) A referral of a dispute to arbitration in terms of section 86(1) of the Act must be made to the Labour Commissioner on Form LC 21 set out in Annexure 2.

(2) If the Labour Commissioner decides to refer the dispute to arbitration, the Commissioner must, in terms of section 85(5) of the Act, designate an arbitrator on Form LC 27 set out in Annexure 2, to try to resolve the dispute and issue a notice of hearing on Form LC 28 set out in Annexure 2.

Request for representation at conciliation or arbitration

21. A request for representation at conciliation or arbitration proceedings in terms of section 82(13) or 86(13) of the Act, respectively, must be made on Form LC 29 set out in Annexure 2.

Application to enforce arbitration award

22. An application to a labour inspector to enforce an arbitration award in terms of section 90 of the Act must be made on Form LC 30 set out in Annexure 2.

Order to appear before a labour inspector

23. The order of a labour inspector in terms of section 125(2)(b) of the Act requiring a party to appear at a specified time, date and place for questioning must be on Form LS 31 set out in Annexure 2.

Compliance order

24. (1) A compliance order issued by a labour inspector in terms of section 126(1) of the Act must be on Form LS 32 set out in Annexure 2.

(2) On receipt of the compliance order, the party against whom the order is directed must post a full copy of the order on its premises in a location that is fully visible to the affected employees for a period of one year.

(3) A person who fails to comply with subrule (2) commits an offence and is liable to a fine not exceeding N\$10 000 or to be imprisoned for a period not exceeding two years or to both the fine and imprisonment.

Records and returns

25. (1) The records that must be kept by an employer as contemplated in section 130(1) of the Act must be kept in the form set out in Annexure 3.

(2) Information to be submitted to the Permanent Secretary as contemplated in section 130(2)(b) of the Act is as set out on Form LP 33 set out in Annexure 2.

Application for exemption or variation

26. (1) Application to the Minister, in terms of section 139 of the Act, for exemption or variation from any provision of Chapter 3 must be made on Form LM 34 set out in Annexure 2.

(2) If in terms of section 139(2) of the Act, the Minister decides to grant the application, he or she must issue a notice of exemption or variation on Form LM 35 set out in Annexure 2.

Proof of service of documents

27. Proof of service of documents in respect of conciliation or arbitration proceedings in terms of section 82(8) or 86(3) or any other provision of the Act, must be made in the form of the affidavit of service on Form LG 34 set out in Annexure 2.

Commencement of regulations

28. These regulations come into operation on 1 November 2008.

ANNEXURE 1

**REPUBLIC OF NAMIBIA
LABOUR ACT, 2007
(Section 11(3) Regulation 33)**

**PARTICULARS TO BE INDICATED ON ENVELOPE OR
STATEMENT WHEN REMUNERATION IS PAID TO AN EMPLOYEE**

Note:

“basic wage” means that part of an employee’s remuneration in money including the cash equivalent of payment in-kind, if any, as calculated in terms of section 10 of the Act, paid in respect of work done during the hours ordinarily worked but does not include -

- (i) allowances, including travel and subsistence, housing, motor vehicle, transport, and professional allowances, whether or not based on the employee’s basic wage;
- (ii) pay for overtime, as defined in section 8 (g);
- (iii) additional pay for work on a Sunday or a public holiday;
- (iv) additional pay for night work, as required in terms of section 19(1);
or
- (v) payments in respect of pension, annuity or medical benefits or insurance.

“remuneration” means the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;

The particulars that must be indicated on an envelope or statement that must accompany remuneration paid to an employee are as follows:

- (a) the name and identity number (if any) of employee;
- (b) the name postal and business address of employer;
- (c) ordinary hourly, daily, weekly, fortnightly or monthly basic wage of employee of employee;
- (d) the period in respect of which payment of such basic wage is payable;
- (e) the number of hours worked (by category) and the amount paid to the employee in respect of-

Annex II

- (i) his or her basic wage;
 - (ii) overtime;
 - (iii) night work;
 - (iv) work on Sundays;
 - (v) work on public holidays; and
 - (vi) any other remuneration or allowances;
- (f) amount due for each part of remuneration in addition to basic wage (for example, pension contribution, medical insurance);
- (g) the gross amount of remuneration payable to the employee;
- (h) the particulars and amount of any deductions from the amount referred to in paragraph (g); and
- (i) the nett amount of remuneration payable to the employee.

ANNEXURE 2

FORMS

- | | |
|-------|--|
| LM 1 | Application for exemption from wage order |
| LM 2 | Exemption from wage order |
| LS 3 | Application for compassionate leave |
| LC 4 | Application for change in constitution of trade union or employers' organisation |
| LC 5 | Certificate of approval of changes to constitution |
| LC 6 | Application for registration of trade union or employers' organisation |
| LC 7 | Certificate of registration as trade union or employers' organisation |
| LC 8 | Register of members of trade union or employers' organisation |
| LC 9 | Annual return of registered trade union or employers' organisation |
| LC 10 | Request for recognition as exclusive bargaining unit |
| LC 11 | Notice of recognition or refusal of recognition by employer or employers' organisation |
| LC 12 | Referral of dispute concerning recognition to Labour Commissioner |

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| | |
|-------|--|
| LC 13 | Notice to trade union to acquire majority representation |
| EM 14 | Request for extension of collective agreement |
| LM 15 | Invitation for objections to extension of collective agreement |
| LM 16 | Declaration of extension of collective agreement |
| LM 17 | Application for exemption from extended collective agreement |
| LM 18 | Exemption from extended collective agreement |
| LC 19 | Notice of industrial action |
| LM 20 | Certificate of appointment as conciliator or arbitrator |
| LC 21 | Referral of dispute to conciliation or arbitration |
| LC 22 | Designation of conciliator |
| LC 23 | Notice of conciliation meeting |
| LC 24 | Certificate of resolved dispute |
| LC 25 | Certificate of unresolved dispute |
| LC 26 | Application to reverse conciliator's decision |
| LC 27 | Designation of arbitrator |
| LC 28 | Notice of arbitration hearing |
| LC 29 | Request for representation at conciliation or arbitration in terms of section 82(13) or 86(13) |
| LS 30 | Application to labour inspector to enforce arbitration award |
| LS 31 | Order to appear before labour inspector |
| LS 32 | Compliance order of labour inspector |
| LP 33 | Form in which information is submitted to the Permanent Secretary |
| LM 34 | Application for exemption or variation from Chapter 3 |
| LM 35 | Declaration of exemption or variation from Chapter 3 |
| LG 36 | Proof of service of documents |

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Section 14(1) (Regulation 4(1)))**

APPLICATION FOR EXEMPTION FROM WAGE ORDER

Instructions: Attach hereto the following documents:

- 1. A detailed statement in support of the application, including:
a description of the business and workforce of the Applicant;
the geographical area covered; the applicable wages and
conditions of employment of the employees sought to be
exempted; a comparison of the wages and conditions of
applicant's employees with the wages and conditions of
employment required by the wage order; and the reasons for
requesting the exemption.**
- 2. A copy of the wage order from which exemption is sought.**

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____
5. E-mail: _____
6. Sector/industry: _____
7. Name and date of the wage order from which exemption is sought:

Representative/Applicant (print name and sign)

Position

Date: _____

To: Minister of Labour and Social Welfare
32 Mercedes Street
Private Bag 19005
KHOMASDAL

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 14(3) (Regulation 4(2))

EXEMPTION FROM WAGE ORDER

I, _____, acting in my capacity of Minister of Labour and Social Welfare, hereby exempt (full name of the Applicant(s): _____ located at (physical address _____

from compliance with the wage order in respect of the _____ industry dated _____, as follows:

1. The exemption applies to: (strike one) all the employer's employees/ the employer "(category of employees) _____ employees;

2. The exemption is subject to the following conditions: _____

3. The exemption will be in effect from _____ 20 _____ until _____ 20 _____.

(signed) _____
Minister of Labour and Social Welfare

Date: _____

To: (Name and address of applicant)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 25(3)) (Regulation 5(1))

APPLICATION FOR COMPASSIONATE LEAVE

Instructions:

- 1. An employee is entitled to a maximum of 5 days' compassionate leave each year in the event of a serious illness or death of a spouse, parent, child, brother or sister or mother-in-law or father-law.**
- 2. Employee must submit this application before departing for compassionate leave, or, if this is not possible, must submit this application immediately upon return to work.**
- 3. If the application is not submitted prior to the leave, the employee is expected to inform the employer of the absence as soon as possible.**
- 4. Upon return from leave, the employee must submit a certified copy of the medical certificate as to the serious illness or of the death certificate or other acceptable proof of death or illness.**

1. Name of employee _____ Position _____
2. Address _____
3. Phone _____
4. I hereby apply for compassionate leave on account of
 - a. The serious illness of my _____ (relationship)
 - b. The death of my _____ (relationship)
5. Period of leave _____ 20 ____ to _____ 20 ____
6. Contact details during leave (Address and phone) _____

Print name and sign _____
Date _____

Application approved / not approved (strike one)

Employer" representative (print name and sign)

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 54(2)(b) (Regulation 7(1))

**APPLICATION FOR CHANGE OF CONSTITUTION OF REGISTERED
TRADE UNION AND EMPLOYERS ORGANISATION**

Instructions: **Attach hereto the following documents:**

- 1. 2 certified copies of resolution of Applicant containing the wording of the changes;**
- 2. a certificate signed by the Applicant's chairperson stating that the resolution was passed in accordance with its constitution.**

1. Full name of Trade Union or Employers' Organisation: _____

2. Physical Address: _____
3. Phone: _____ Fax: _____
4. Postal Address: _____
5. E-mail address: _____
6. Section(s) or article(s) proposed to be changed: _____

I certify that the above particulars are true and correct.

Representative of Applicant (print name and sign)

Position

Date: _____

To: Labour Commissioner
 249-582 Richardine Kloppers Street - Khomasdal
 Private Bag 13367
 WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 54(4)(b)) (Regulation 7(2))

CERTIFICATE OF APPROVAL OF CHANGES TO CONSTITUTION

I, _____, in my capacity as the Labour
Commissioner, hereby certify that I have approved the proposed amendment(s) to
the Constitution of _____
(full name of Trade Union or Employers' Organisation) date _____
_____ 20 _____, a copy of which are attached hereto.

(Signature) _____
Labour Commissioner

Date: _____ 20 _____.

To: (Name of trade union) _____

(Full Address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 57(1)(a)) (Regulation 8(1))

**APPLICATION FOR REGISTRATION OF TRADE UNION
OR EMPLOYERS' ORGANISATION**

Instructions: Submit three (3) certified copies of the Applicant's constitution together with this application.

1. Full name of Applicant Trade Union or Employers' Organisation:

2. Sector or industry to be represented: _____

3. Date on which applicant was founded: _____

4. Number of members: _____

5. Physical Address: _____

6. Postal Address: _____

7. Phone: _____ Fax : _____

8. E-mail: _____

9. Office bearers (full names): Position: _____

9.1 _____

9.2 _____

9.3 _____

9.4 _____

9.5 _____

(If additional office-bearers, attach list)

I certify that the above particulars are true and correct.

Representative of Applicant (print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 57(3)(b)) (Regulation 8(2))

**CERTIFICATE OF REGISTRATION AS TRADE UNION OR EMPLOYERS'
ORGANISATION**

This is to certify that

has been registered as a trade union/employers' organisation

IN THE REPUBLIC OF NAMIBIA

with effect from _____

Labour Commissioner

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 60(a)) (Regulation 9)

**REGISTER OF MEMBERS OF REGISTERED TRADE UNION
OR REGISTERED EMPLOYERS' ORGANISATION**

Instruction: Every registered Trade Union and Employers' Organization must maintain the following register:

1. Full name of Trade Union or Employers' Organisation: _____
2. Number of members in good standing as of 1 January of the current _____ year ____ 20: ____.
3. Attached hereto is a list of the present members of the Trade Union or Employers' Organisation as of 1 January 20 ____, containing the following particulars in respect of each employee:
 - 3.1 Full name: _____
 - 3.2 Address: _____
 - 3.3 Place of employment: _____
 - 3.4 Date of initial membership: _____
4. Attached hereto is a list of office-bearers and officials of the Trade Union or Employers' Organisation, containing the following particulars in respect of each office-bearer or employee:
 - 4.1 Full name: _____
 - 4.2 Address: _____
 - 4.3 Place of employment: _____
 - 4.4 Position: _____
 - 4.5 Date of election or appointment: _____

I certify that the above information is true and correct.

Representative of Trade Union/Employers'
Organisation (print and sign)

Position

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 60(e)) (Regulation 10)

**ANNUAL RETURN OF REGISTERED TRADE UNION
OR EMPLOYERS' ORGANISATION**

Instructions: **Attach hereto the original or certified copies of the following documents:**

- 1. the Statement of Income and Expenditure;**
- 2. the Balance Sheet showing the financial position at the end of the Financial Year; and**
- 3. the latest audit report from a certified auditor or auditor approved by the Labour Commissioner.**

1. Full name of Trade Union or Employers' Organisation: _____

2. Physical Address: _____
3. Phone: _____ Fax: _____ E-mail _____
4. Postal Address: _____
5. Financial Year: _____
6. Name of Auditor: _____
7. Physical Address: _____
8. Phone: _____ Fax: _____ E-mail _____
9. Postal Address: _____

Representative of Trade Union/Employers'
Organisation (print name and sign)

Position

Date: _____

To: (name and address of trade union)

Copy to: Labour Commissioner
 249-582 Richardine Kloppers Street - Khomasdal
 Private Bag 13367
 WINDHOEK

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Section 64(3)) (Regulation 11(1))**

REQUEST FOR RECOGNITION AS EXCLUSIVE BARGAINING AGENT

Instructions:

- 1. Attach hereto a copy of trade union registration certificate;**
- 2. Send of proof of service of this request upon the employer or employers' organization to the Labour Commissioner.**

1. Full name of Trade Union seeking recognition: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____
5. E-mail: _____
6. Description of Bargaining Unit for which recognition is sought, specifying whether the unit is company-wide or departmental or covers specified categories of employees: _____

7. Number of employees in the Bargaining Unit: _____
8. A majority of the employees in the above-described bargaining unit desire to be represented by the above-mentioned union as their exclusive bargaining representative.
9. The employer must reply to this request within thirty days of receipt thereof in the form of Form LC 11.

Representative of Trade Union (print name and sign)

Position

Date: _____

To: (name and address of trade union)

Copy to: Labour Commissioner
249-582 Richardine Klopers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 64(5)) (Regulation 11(2))

**NOTICE OF RECOGNITION OR REFUSAL OF RECOGNITION BY
EMPLOYER OR EMPLOYERS' ORGANISATION**

**Instruction: If the Employer/Employers' Organization rejects the Request,
it must provide reasons and attach them to this Notice.**

1. Full name of the Employer/Employers' Organisation: _____

2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____
5. E-mail: _____
6. Date on which the Request was received: _____
7. Description of Bargaining Unit which recognition was sought: _____

8. Recognition granted / rejected (reasons for rejection attached).

Representative of Employer/Employers' Organisation
(print name and sign)

Position

Date: _____

To: (name and address of trade union)

Copy to: Labour Commissioner
249-582 Richardine Klopers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Section 64(6)) (Regulation 11(3))**

**REFERRAL OF DISPUTE CONCERNING RECOGNITION TO LABOUR
COMMISSIONER**

**Instruction: Attach hereto copies of the Trade Union's Request for
Recognition and the Employer's Rejection, if any.**

1. Full name of Trade Union: _____
2. Physical Address: _____
3. Phone: _____ Fax: _____ E-mail: _____
4. Postal Address: _____
5. Full name of Employer / Employers' Organisation: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____
9. Date on which Trade Union requested recognition ____ 20 ____ .
10. Date on which employer rejected recognition (if applicable) ____ 20 ____ .
11. The Employer has not replied to complainant within 30 days of its receipt of complainant's request for recognition. (Check if applicable) _____
12. Description of Dispute: _____

I certify that the above information is true and correct.

Representative of Trade Union
(print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: (other party or parties to the dispute)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 64(11)) (Regulation 12)

**NOTICE TO TRADE UNION TO ACQUIRE MAJORITY
REPRESENTATION**

Instruction: **Send a copy of proof of service of this Notice to the 'Trade Union in the form of Form LG 36 to the Labour Commissioner.**

1. Full name of Employer / Employers' Organisation: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of Trade Union: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E mail: _____
9. I/we am of the opinion that the Trade Union no longer represents the majority of employees in the recognized bargaining unit, for the following reason(s):
10. The Trade Union is hereby notified to acquire a majority in the Bargaining Unit with effect from to 20 _____

Representative of Employer/Employers'
Organisation (print name and sign)

Position

Date: _____

To: (name and address of trade union)

Copy to: Labour Commissioner
249-582 Richardine Klopers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 71(2)) (Regulation 14(1))

REQUEST FOR EXTENSION OF COLLECTIVE AGREEMENT

Instructions:

- 1. Attach hereto a duly signed copy of the collective agreement.**
- 2. This request must be signed by both parties to the collective agreement.**

1. Full address of the Employer/Employers' Organisation: _____

2. Full address of the Trade Union: _____

3. The undersigned parties request the Minister to extend the Collective Agreement to be binding upon all employers and employees in the _____ industry or sector.

Representative of Employer/Employer's
Organisation (print name and sign)

Position

Date: _____

Representative of Trade Union(s)
(print name and sign)

Position

Date: _____

Representative of Trade Union(s)
(print name and sign)

Position

Date: _____

To: Minister of Labour and Social Welfare
32 Mercedes Street
Private Bag 19005
KHOMASDAL

REPUBLIC OF NAMIBIA
Ministry of Labour and Social Welfare

LABOUR ACT, 2007
(Section 71(3)(b)) Regulation 14(2))

INVITATION FOR OBJECTIONS TO EXTENSION OF COLLECTIVE
AGREEMENT:

_____INDUSTRY

- I. This is to inform the public that the (names of parties to the collective agreement) _____ and _____ have applied to the Minister of Labour and Social Welfare in terms of Section 71(2) of the Labour Act 2007 (Act No. 11 of 2007) to extend their collective agreement dated _____ 20_____, which is set out in the Schedule, to apply to all employers and employees in the _____ industry who are not presently parties to the aforesaid agreement.
2. Anyone who wishes to object to the extension of the agreement, in whole or in part, must deliver a written statement setting forth the reasons for the objection to the office of the Minister at the Ministry of Labour and Social Welfare, 32 Mercedes Street, Khomasdal, within 30 days from the date of this notice, or send the written statement by mail to the Minister of Labour and Social Welfare, Private Bag 19005, Khomasdal or by facsimile to the Minister at 210047, in time to reach the Minister within thirty days after the date of this notice.

REPUBLIC OF NAMIBIA
Ministry of Labour and Social Welfare

LABOUR ACT, 2007
(Section 71(5)) (Regulation 14(3))

DECLARATION OF EXTENSION OF COLLECTIVE AGREEMENT:

_____ INDUSTRY

Under Section 71(5) of the Labour Act, 2007 (Act No. 11 of 2007), and at the request of (names of parties to the collective agreement) _____

_____ and

_____, I hereby

declare that the provisions of the collective agreement date _____ 20 _____
and set forth in the Schedule are extended to all employers and employees in the
_____ industry.

Minister

Date _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 72(1)) (Regulation 15(1))

**APPLICATION FOR EXEMPTION FROM EXTENDED COLLECTIVE
AGREEMENT**

Instructions:

- 1. This Application must be accompanied by a detailed statement in support thereof including a description of the business and workforce of the Applicants, the geographical area covered, the applicable wages and conditions of employment; a comparison with the wages and conditions of employment required by the extended agreement, and the reasons for requesting the exemption.**
- 2. Attach additional sheets, if necessary.**

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Sector/Industry : _____
6. Date of the collective agreement from which Exemption is sought: _____
7. Names and addresses of the parties to the collective agreement:
 - 7.1 _____

 - 7.2 _____

Applicant (print name and sign)

Position

Date: _____

To: Minister of Labour and Social Welfare
32 Mercedes street
Private bag 19005
WINDHOEK

Copy to: Each party to the agreement

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 72(2)) (Regulation 15(2))

EXEMPTION FROM EXTENDED COLLECTIVE AGREEMENT

I, _____, acting in my capacity of Minister of Labour and Social Welfare, hereby exempt (full name of the Applicant(s): _____ located at (physical address: _____ from compliance with the collective agreement between _____ and _____ date _____ 20 _____, which the Minister extended to all employers and employees in the industry by Government Notice _____ date _____ 20 _____, as follows:

1. The exemption applies to: (strike one) all the employer's employees/the employer's (state category of categories of employees) _____ employees;
2. The exemption is subject to the following conditions: _____

3. The exemption will be in effect from _____ 20 _____ until 20 _____.

(signed) _____
Minister of Labour and Social Welfare

Date: _____

To: (applicant)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 74(1)(d)) (Regulation 16(2))

NOTICE OF INDUSTRIAL ACTION

Instructions:

- 1. The Notifying trade union or employers' organization must serve this Notice on the Labour Commissioner and on the other Party or Parties to the dispute,**
- 2. A copy of the rules regulating the conduct of strike or lockout, if any, should accompany this notice.**
- 3. If there are additional parties, attach additional sheets.**

1. Full name of the Notifying Party: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of other party or parties to the Dispute: _____
6. Physical address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____
9. Date on which Conciliation started: _____
10. Date on which Conciliation failed: _____
11. The industrial action in the form of: Strike _____ Lockout _____
will commence on _____ 200 _____ at _____ hours.
12. Location (part of establishment) of industrial action: _____

(print name and sign) _____
Representative of the Notifying Party Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

To: (other party to the dispute)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(1) or ((2) and 85(3) or (4) (Regulation 17)

CERTIFICATE OF APPOINTMENT OF CONCILIATOR OR ARBITRATOR

This is to certify that I have appointed

as a conciliator/arbitrator in terms of Section 82(1)/82(2)/ 85(3)/85(4)
of the Labour Act, 2007 (Act No. 11 of 2007).

Minister

Dated: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007

(Section 82(7) and section 86(1) (Regulation 16(1), Regulation 18(1) and Regulation 20(1))

REFERRAL OF DISPUTE TO CONCILIATION OR ARBITRATION

Instructions: A summary of the dispute must be attached hereto stating the subject matter and the facts and circumstances that gave rise to the dispute. It must also contain information on the steps that have been taken to resolve or settle such dispute.

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of the Respondent: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____
9. Nature of Dispute:

| | |
|---|---|
| <ul style="list-style-type: none"> - Unfair Dismissal - Organisational Rights - Unilateral Change of Terms and Conditions - Interpretation/Application of Collective Agreement - Freedom of Association - Unfair Discrimination | <ul style="list-style-type: none"> - Unfair Labour Practice - Dispute of Interest - Severance Package - Disclosure of Information - Refusal to Bargain - Other (specify please) |
|---|---|
10. Date on which the dispute arose: _____ 20 ____.

Representative of the Applicant
(print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: other party or parties to the dispute

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(3) (Regulation 18(2)))

CASE NO: _____

DESIGNATION AS CONCILIATOR

In the matter between:

and

Applicant

Respondent

Date of referral of dispute: _____ 20____ .

TO: _____

PLEASE TAKE NOTICE that you are herewith designated in terms of section 82(3) of the Labour Act, 2007 (Act No. 11 of 2007) to conciliate the abovementioned matter.

PLEASE TAKE FURTHER NOTICE that this matter is set down for a meeting on _____ 20 _____ at (time) _____ at (venue) _____

You are required to attempt to resolve the dispute through conciliation within:

- o 30 days of the date on which the Labour Commissioner received the referral of the dispute;
- or
- o Any longer period agreed in writing by the parties,

You are furthermore required to determine how the conciliation is to be conducted and may require that further meetings be held within the period contemplated in section 82(10).

Date: _____ 20 ____ .

Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(3) (Regulation 18(2))

NOTICE OF CONCILIATION MEETING

In the matter between:

and

Applicant

Respondent

TAKE NOTICE that this matter is set down for a (cross out whichever is inapplicable)
conciliation meeting/arbitration hearing before _____,
conciliator/arbitrator on the _____ day of _____ 20 _____
at _____ o'clock am/pm at _____,
located at _____.

- * If you do not speak English and need an interpreter, kindly inform the Labour Commissioner at least 5 days prior to the date of hearing.
- * You may require the Labour Commissioner to subpoena witnesses and/or to compel the production of relevant 'books, documents or papers by filing a notice on the prescribed form prior to the meeting/hearing
- * Postponements may be granted without the need for the parties to appear if:
 - o all parties agree in writing and notify the conciliator/arbitrator.
 - o a written request for a postponement has been received by the designated conciliator/arbitrator at least ten days before the commencement of the meeting/hearing and the conciliator/arbitrator has granted the request meeting/hearing.
- * A formal request for a postponement may be made at the commencement of the meeting/hearing.

Date: _____ 20____ .

Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

To: (1) (name of applicant) _____
(address) _____
(2) (name of respondent) _____
(address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Regulation 18(3))

CASE NO:

CERTIFICATE OF RESOLVED DISPUTE

In the matter between:

Applicant

and

Respondent

1. Date of referral of dispute: _____ 20 ____.
2. Date on which dispute arose: _____ 20 ____.
3. Dates of conciliation meetings: _____.
4. Nature of the dispute (check applicable category or categories):
 - Unfair Dismissal
 - Organisational Rights
 - Unilateral Change of Terms and Conditions
 - Interpretation/Application of Collective Agreement
 - Freedom of Association
 - Unfair Discrimination
 - Unfair Labour Practice
 - Dispute of Interest
 - Severance Package
 - Disclosure of Information
 - Refusal to Bargain
 - Other (specify please)
5. Representatives of the parties:
 - 5.1 (referring party) _____
 - 5.2 (respondent) _____

The parties herein reached a full and final settlement. A copy of the settlement agreement is attached hereto.

Date: _____ 20 ____.

Place: _____

Conciliator
Office of the Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(15) (Regulation 18(4))

CASE NO:

CERTIFICATE OF UNRESOLVED DISPUTE

In the matter between:

and

Applicant

Respondent

1. Date of referral of dispute _____ 20 ____ .
2. Date on which dispute arose _____ 20 ____ .
3. Dates of meetings: _____
4. Nature of the dispute (check applicable category or categories):
 - Unfair Dismissal
 - Organisational Rights
 - Unilateral Change of Terms and Conditions
 - Interpretation/Application of Collective Agreement
 - Freedom of Association
 - Unfair Discrimination
 - Unfair Labour Practice
 - Dispute of Interest
 - Severance Package
 - Disclosure of information
 - Refusal to Bargain
 - Other (specify please)
5. Representatives of the parties:
 - 5.1 (referring party) _____
 - 5.2 (respondent) _____

The parties herein failed to reach an agreement.

Date: _____ 20 ____ .

Place: _____

Conciliator
Office of the Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 83(3)(a) (Regulation 19))

CASE NO:

APPLICATION TO REVERSE CONCILIATOR'S DECISION

Instruction: **The Applicant must attach a statement providing reasons for Applicant's failure to attend conciliation meeting (attach documentary proof, where applicable).**

1. Full name of the Applicant Party: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of the other party or parties to the dispute: _____

6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____

Representative/Applicant
(print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: other party to the dispute

Annex II

**APPLICATION TO REVERSE CONCILIATOR'S DECISION
PAGE 2**

FOR THE LABOUR COMMISSIONER ONLY:

9. Application is granted for the following reasons:-

10. Application is rejected for the following reasons:

Full Name and Signature

Date:

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 85(5) (Regulation 20(2))

CASE NO: _____

DESIGNATION OF ARBITRATOR

In the matter between:

Applicant

and

Respondent

Date of referral of dispute: _____ 20 ____.

TO: _____

PLEASE TAKE NOTICE that you are herewith designated in terms of section 85(5) of the Labour Act, 2007 (Act No. 11 of 2007) to arbitrate the abovementioned matter.

PLEASE TAKE FURTHER NOTICE that this matter is set down for a hearing on 20 _____ at (time) _____ at (venue) _____

You are required to attempt to resolve the dispute through arbitration within:

- ☐ 30 days of the date on which the Labour Commissioner received the referral of the dispute;
- or
- ☐ Any longer period agreed in writing by the parties.

You are furthermore required to determine how the arbitration is to be conducted and may require that further meetings be held within the period contemplated in section 86(6).

Date: _____ 20 ____ .

Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 86(4) (Regulation 20(2))

NOTICE OF CONCILIATION MEETING OR ARBITRATION HEARING

In the matter between:

Applicant

and

Respondent

TAKE NOTICE that this matter is set down for an arbitration hearing before _____
_____, on the _____ day of _____ 20_____ at
_____ o'clock am/pm at _____
_____, located at _____

- * If you do not speak English and need an interpreter, kindly inform the Labour Commissioner at least 5 days prior to the date of hearing.
- * You may require the Labour Commissioner to subpoena witnesses and/or to compel the production of relevant books, documents or papers by filing a notice on the prescribed form prior to the meeting/hearing
- * Postponements may be granted without the need for the parties to appear if:
 - o all parties agree in writing and notify the arbitrator.
 - o a written request for a postponement has been received by the designated arbitrator at least ten days before the commencement of the hearing and the arbitrator has granted the request.
- * A formal request for a postponement may be made at the commencement of the meeting/hearing.

Date: _____ 20 _____

Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

To: (1) (name of applicant) _____
(address) _____
(2) (name of respondent) _____
(address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(13) and 86(13) (Regulation 21)

**REQUEST FOR REPRESENTATION AT CONCILIATION OR
ARBITRATION IN TERMS OF SECTION 82(13) OR 86(13)**

Instructions: Attach hereto the following documents:

1. (if applicable) the parties' signed agreement to representation of the party or both parties a legal practitioner or other person, including the name, address and other pertinent contact details of the proposed representative;
2. if representation by a legal practitioner is requested, a statement of the reasons that the dispute is of such complexity that it is appropriate for applicant (s) to be represented by a legal practitioner(s) and if the parties have not agreed to legal representation, the reasons that such representation will not prejudice the other party.
3. if representation by another person is requested, a statement as to how the proposed representation will facilitate the effective resolution of the dispute or the attainment of the objects of the Act, and if the parties have not agreed to the representation, the reasons that such representation will not prejudice the other party.

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of the other party to the dispute: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax : _____ E-mail: _____
9. The dispute arose on: _____ 20 _____ at (place) _____
10. The dispute is in the: (sector or industry) _____
11. The nature of dispute: Right ☐ Interest ☐
12. Full particulars of the legal practitioner(s) for whom permission is sought:
Applicant's proposed representative
 - 12.1 Mr/Mrs/Ms _____
 - 12.2 Postal Address: _____
 - 12.3 Phone: _____ Fax: _____ E-mail: _____
 - 12.4 if legal practitioner, date of admission to the High Court of Namibia
_____ 20 _____.
 - 12.5 If representation is sought by a non-legal practitioner, stated position and relationship to applicant, if any _____

Annex II

**REQUEST FOR REPRESENTATION AT CONCILIATION OR ARBITRATION
PAGE 2**

Other party's proposed representative

12.6 Mr/Mrs/Ms: _____

12.7 Postal Address: _____

12.8 Phone: _____ Fax: _____ E-mail: _____

12.9 If legal practitioner, date of admission to the High Court of Namibia
_____ 20 ____ .

12.10 If representation is sought by non-legal practitioner, state position and
relationship to party, if any _____

Representative/Applicant (print name and sign)

Position

Date: _____

To: (Name of conciliator/arbitrator)
Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: other party or parties to the dispute

**REQUEST FOR REPRESENTATION AT CONCILIATION OR
ARBITRATION FOR THE CONCILIATOR/ARBITRATOR:**

13. State the reasons for permitting or refusing the representation: _____

14. Conditions, if any, on which representation is permitted: _____

Conciliator/Arbitrator (print name and sign)

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 90) (Regulation 22)

**APPLICATION TO LABOUR INSPECTOR TO ENFORCE ARBITRATION
AWARD**

Instructions: **Attach hereto the following documents:**

- 1. original or a certified copy of the arbitration award**
- 2. if the arbitrator awarded the payment of money to applicant, copy or copies of employee's payslip(s) showing applicable rate(s) of wages and benefits during the period covered by the arbitration award worksheet showing the applicant's calculations of the monies due.**

1. Full name of applicant party to arbitration (individual/Trade Union/Employer): _____
2. Physical Address: _____
3. Phone: _____ Fax: _____ E-mail: _____
4. Full name of respondent party to arbitration: _____
5. Physical Address: _____
6. Phone: _____ Fax: _____ E-mail: _____
7. Postal Address: _____
8. E-mail: _____
9. Name of arbitrator: _____
10. Date of arbitration award: _____
11. Total amount due to employee (if applicable): _____

I certify that the above particulars are true and correct.

Applicant/Representative Applicant
(print name and sign)

Position

Date: _____

To: Permanent Secretary
Ministry of Labour and Social Welfare
32 Mercedes Street Khomasdal
Private Bag 19005
WINDHOEK

Attention: Director
Labour Services

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 125(2)(b)) (Regulation 23)

ORDER TO APPEAR BEFORE LABOUR INSPECTOR

To: _____

You are hereby ordered to appear before _____, a labour inspector, _____ on _____ 20____ at _____ o'clock at _____ in order to answer questions concerning the complaint of _____ registered with the Ministry of Labour and Social Welfare, which alleges that _____ has violated or is violating Sections _____ of the Labour Act, 2007 (Act No. 11 of 2007) by _____

You are further ordered to bring with you for inspection and copying the following books, documents and/or objects: _____

Please be advised that the failure to comply with this request is an offence for which you may be punished by a fine not exceeding N\$10,000 or imprisonment not exceeding 2 years, or both.

Labour Inspector (print name and sign)

Dated: _____ 20 ____ .

_____ (place)

Received by: _____ (print name) Signature _____

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 126(1)) (Regulation 24)

COMPLIANCE ORDER OF LABOUR INSPECTOR

Instructions:

- 1. The compliance order can be directed against an individual employer, a company or a partnership. The Labour Inspector should direct the compliance order to the employer accordingly. If the employer is a company, the company can be cited. If the employer is a partnership, each partner should be cited.**
- 2. Attach additional sheets if needed.**
- 3. After serving this document upon the employer, the labour inspector must complete an affidavit of service.**

To: (Full name, title and address of party to whom compliance order is directed):

1. Following an inspection conducted by the undersigned, a labour inspector duly appointed in Items of Section 124(1) of the Labour Act, 2007 (Act No. 11 of 2007) on _____ 20 ____
at _____ your premises located at _____
I have reasonable grounds to believe that you/your company have violated the provisions of the Act set forth below.

2. I find that you/your company have violated the following sections of the Act, based upon the facts set out in relation to each violation:

a) Section _____. Relevant facts: _____

b) Section _____. Relevant facts: _____

COMPLIANCE ORDER
PAGE 2

c) Section _____. Relevant facts: _____

d) Section _____. Relevant facts: _____

3. You are hereby ordered to take the following action to remedy each of the above-mentioned violations, within thirty days of receipt of this compliance order:

a) _____

b) _____

c) _____

d) _____

4. You must post a full copy of this order on your premises in a location that is fully visible to the affected employees.

5. Failure to comply with this compliance order constitutes an offence in terms of section 127(1)(d) of the Act, which is punishable by a fine not exceeding N\$10,000 or imprisonment for a period not exceeding two years or both.

6. Should you wish to appeal this order, you may note an appeal to the Labour Court in terms of section 126(3) of the Act.

(print name and sign): _____ Labour Inspector. Date: _____

Address: _____

Phone: _____ Fax: _____ E-mail: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 130(2)(b)) (Regulation 25(2))

FORM IN WHICH INFORMATION IS SUBMITTED TO THE PERMANENT
SECRETARY

Instruction: **The following particulars must be submitted in respect of each employee who is not a Namibian citizen:**

- (a) the name, nationality, date and place of birth of such employee;
- (b) the date of employment of such employee;
- (c) the capacity in which such employee is employed;
- (d) the period of the contract of employment of such employee (if any);
- (e) a full description of academic; technical or professional qualifications and any special expertise of such employee; and
- (f) the number and date of the issuance of any permit in relation to such employee and the date of expiry of such permit.

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Section 139) (Regulation 26(1))**

APPLICATION FOR EXEMPTION OR VARIATION FROM CHAPTER 3

Instructions: **Attach hereto a detailed statement supporting the proposed exemption(s) or variation(s) of one or more of the Basic Conditions of Employment, including:**

- 1. Sections or subsections for which you seek exemption and the reasons therefor;**
- 2. Sections or subsections that you propose to vary, if any, the proposed language for each variation, and the reasons therefor;**
- 3. Specification of employees or categories of employees that would be affected by exemption or variation; and**
- 4. Written submission on behalf of affected employees, or, if not possible, evidence of consultation with employees, reflecting their views of each of the proposed exemptions or variations.**

1. Name of applicant _____
2. Address _____
3. Sections of the Labour Act, 2007, from which exemption or variation is sought.
4. Category or categories of employees that would be affected by exemption or variation.

Representative Applicant (print name and sign)

Position

Date: _____ 20 ____.

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 139(2)) (Regulation 26(2))

DECLARATION OF EXEMPTION OR VARIATION FROM CHAPTER 3

I, _____, acting in my capacity of Minister of Labour and Social Welfare, hereby

1. exempt (full name of the Applicant(s)): _____
located at (physical address: _____) from
compliance with the Sections of Chapter 3, Basic Conditions of Employment,
set forth below in respect of the following categories of employees and
subject to the following conditions, if any:

- 1.1. _____
1.2. _____
1.3. _____
1.4. _____
1.5. _____

2. vary the Sections of Chapter 3, Basic Conditions of Employment as set forth
below, in respect of the following categories of employees and subject to the
following conditions, if any:

- 2.1. _____
2.2. _____
2.3. _____
2.4. _____
2.5. _____

3. This exemption or variation is effective from _____ 20 ____ to _____ 20 ____.

(signed) _____
Minister of Labour and Social Welfare

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 207
(Section 82(8) and 86(3) (Regulation 27))

PROOF OF SERVICE OF DOCUMENTS

Instructions:

1. This document must be sent to the Labour Commissioner, with a copy of the document(s) served attached hereto.
2. A copy of this document must be sent to every other party.

In the matter between:

Applicant

and

Respondent

AFFIDAVIT OF SERVICE

I _____, do hereby certify that
on the _____ day of ____ 20____ at _____ (time) I duly served the
following document(s) _____
_____ (describe the document(s) served) in the
following manner:

(Circle applicable references in (a), (b) (c) or (d) as appropriate).

- (a) By handing a copy to _____ (full name of the person served) the applicant / appellant / respondent / a person apparently not less than 16 years of age and employed at the applicant's / appellant's / respondent's place of business / local / main office and he / she duly signed the attached copy/refused to sign a copy thereof;
- (b) By sending a copy by registered post to _____
_____ (full name of the person served) the applicant / appellant / respondent at _____ (state the postal address) and I annex hereto the certificate of posting;
- (c) By sending a copy by fax to _____ (full name of the person served) the applicant / appellant / respondent at the following number _____ (state telephone number and code) and I annex hereto the transmission confirmation slip;
- (d) By serving the document in accordance with the directions of the Labour Commissioner, as follows: _____

Annex II

**PROOF OF SERVICE
PAGE 2**

Date at _____ this _____ day of _____ 20 ____ .

Signature of deponent _____

Before administering the prescribed oath/affirmation, I put the following questions to the deponent and noted his/her reply in his/her presence:

- (a) Do you know and understand the contents of this affidavit/solemn declaration?
Reply: _____
- (b) Do you have any objection to the taking of the oath?
Reply: _____
- (c) Do you regard the prescribed oath as binding on your conscience?
Reply: _____

This affidavit/solemn declaration was duly sworn to/affirmed before me and the deponent signed it in my presence at _____

on the _____ day of _____ 20 ____ .

Commissioner of Oaths

Full name _____

DATE STAMP

Designation _____

Address _____

To: Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

ANNEXURE 3

LABOUR ACT, 2007
(Section 130(1)) (Regulation 25(1))

RECORDS TO BE KEPT BY EMPLOYERS AT AN ADDRESS IN NAMIBIA

Note:

“basic wage” means that part of an employee’s remuneration in money including the cash equivalent of payment in kind, if any, as calculated in terms of section 10, paid in respect of work done during the hours ordinarily worked but does not include -

- (i) allowances, including travel and subsistence, housing, motor vehicle, transport, and professional allowances, whether or not based on the employee’s basic wage;
- (ii) pay for overtime, as defined in section 8 (g);
- (iii) additional pay for work on a Sunday or a public holiday;
- (iv) additional pay for night work, as required in terms of section 19(1); or
- (v) payments in respect of pension, annuity or medical benefits or insurance.

“remuneration” means the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee;

1. A register must be kept by every employer of every employee in his or her employment containing the following particulars, namely -
 - (a) the name, age identity number (if any), occupation and sex of an employee;
 - (b) the date on which the employee commenced employment;
 - (c) the date of termination of the contract of employment and the reasons for the termination;
 - (d) the ordinary hourly, daily, weekly fortnightly or monthly basic wage and remuneration of an employee;
 - (e) the period in respect of which such basic wage and remuneration is payable;
 - (f) the time (in hours or fractions thereof) per day or per shift worked by the employee during the period referred to in paragraph (c) in respect of -
 - (i) ordinary working hours;
 - (ii) overtime;

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- (iii) night work;
 - (iv) work on Sundays; and
 - (v) work on public holidays;
 - (g) the total number of hours worked by the employee during the period referred to in paragraph (c) in respect of -
 - (i) ordinary working hours;
 - (ii) overtime;
 - (iii) night work;
 - (iv) work on Sundays; and
 - (v) work on public holidays;
 - (h) basic wage or total of basic wage and premium rate for items (ii) to (v) payable to the employee in respect of -
 - (i) ordinary working hours;
 - (ii) overtime;
 - (iii) night work;
 - (iv) work on Sundays; and
 - (v) work on public holidays;
 - (i) amount due for each part of remuneration in addition to basic wage (for example, pension contribution, medical insurance);
 - (j) the gross amount of remuneration payable to the employee;
 - (k) the particulars and amount of any deductions from the amount referred to in paragraph (j); and
 - (l) the nett amount of remuneration payable to employee.
 - (m) a period of absence, including annual leave, sick leave, compassionate leave or maternity leave taken by the employee.
2. A register relating to the granting of leave must be kept by every employer of every employee in his or her employment containing the following particulars, namely -
- (a) the name, occupation and sex of the employee;
 - (b) the date on which the employee commenced his or her employment;
 - (c) the period granted in respect of-
 - (i) annual leave;
 - (ii) sick leave
 - (iii) compassionate leave
 - (iv) maternity leave; and
 - (v) occasional leave
 - (d) the date on which such leave commenced;
 - (e) the date on which such leave ended;

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- (f) the number of days of such leave with full remuneration granted to the employee; and
 - (g) the number of days of such leave without remuneration granted to the employee.
3. A register must be kept by every employer of every employee in his or her employment who is not a Namibian citizen containing the following particulars; namely -
- (g) the name, nationality, date and place of birth of such employee;
 - (h) the date of employment of such employee;
 - (i) the capacity in which such employee is employed;
 - (j) the period of the contract of employment of such employee (if any);
 - (k) a full description of academic; technical or professional qualifications and any special expertise of such employee; and
 - (l) the number and date of the issuance of any permit in relation to such employee and the date of expiry of such permit.

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**RULES RELATING TO THE CONDUCT OF
CONCILIATION AND ARBITRATION BEFORE THE
LABOUR COMMISSIONER: LABOUR ACT, 2007
(ACT NO. 11 OF 2007)**

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SERVING AND FILING DOCUMENTS**

2. Contact details of Offices
3. Office hours
4. Calculation of time periods
5. Signing of documents
6. Service of documents
7. Proof of service of documents
8. Filing of documents with the Labour Commissioner
9. Service by registered post
10. Condonation for late delivery of documents

**PART 3
CONCILIATION OF DISPUTES**

11. Referral of dispute to conciliation
12. Notice of conciliation
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**PART 4
ARBITRATION OF DISPUTES**

14. Referral of dispute to arbitration
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ANNEXURE 1 Offices of the Labour Commissioner

ANNEXURE 2 Forms

ANNEXURE 3 Tariff of costs for unrepresented litigants

PART 1

PRELIMINARY

Definitions and interpretation

1. (1) In these rules, any word or expression to which a meaning has been given in the Act bears that meaning, and unless the context otherwise indicates -

“deliver” means serve on other parties and file with the Labour Commissioner;

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“file” means to lodge with the Labour Commissioner in terms of rule 8;

“Office” means any office of the Labour Commissioner and any labour office contemplated in sections 82(7)(a) and 86(1)(b) of the Act;

“serve” means to serve in accordance with rule 6: and

“the Act” means the Labour Act, 2007 (Act No. 11 of 2007).

(2) All numbered forms referred to in these rules are set out in Annexure 2, but a substantially similar form may be used.

PART 2 SERVING AND FILING DOCUMENTS

Contact details of Offices

2. (1) The addresses, telephones and telefax numbers and email addresses of the Offices are listed in Annexure 1.

(2) Documents may be filed with the Labour Commissioner at any of the addresses or addresses or telefax numbers or email addresses listed in Annexure 1, provided, that the Labour Commissioner may issue instructions from time to time as to the filing of documents in a particular case.

Office hours

3. (1) The Office will be open every day from Monday to Friday, excluding public holidays, between the hours of 08h00 and 17h00, or as determined by the Labour Commissioner.

(2) Documents may be filed with the Labour Commissioner only during the hours referred to in subrule (1).

(3) Despite subrule (2), documents may be faxed to the Labour Commissioner at any time.

Calculation of time periods

4. (1) For the purpose of calculating any period of time in terms of these rules -

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- (a) “day” means any calendar day; and
- (b) when any particular number of days is prescribed for the performance of any act, the same must, subject to subrule (2), be reckoned exclusive of the first and inclusive of the last day.

(2) The last day of any period must be excluded if it falls on a Saturday, Sunday or public holiday.

Signing of documents

5. (1) A document that a party must sign in terms of the Act or these rules may be signed by the party or by a person entitled in terms of the Act or these rules to represent that party in the proceedings.

(2) If proceedings are jointly instituted or opposed by more than one employee, the employees may mandate one of their number to sign documents on their behalf.

(3) A statement authorising the employee referred to in subrule (2) to sign documents must be signed by each employee and attached to the referral document or opposition, together with a legible list of their full names and addresses.

Service of documents

6. (1) Service of documents in terms of the Act or these rules may be effected by the party to the proceedings, a person duly authorised in writing by the party to serve the process, or a messenger of the court appointed in terms of section 14 of the Magistrates Courts Act, 1944 (Act No. 32 of 1944).

(2) Subject to section 129 of the Act, a document may be served on the other parties -

- (a) by handing a copy of the document to -
 - (i) the person concerned;
 - (ii) a representative authorised by the other person to accept service on behalf of that person;
 - (iii) a person who appears to be at least 16 years old and in charge of the person’s place of residence, business or place of employment premises at the time; or
 - (iv) a person identified in subrule (3);

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- (b) by leaving a copy of the document at -
 - (i) an address chosen by the person to receive service;
 - (ii) any premises in accordance with subrule (4);
 - (c) by faxing or emailing a copy of the document to the person's fax number or email address or a fax number or email address chosen by the person to receive service; or
 - (d) by sending a copy of the document by registered post to the last known address of the party or an address chosen by the party to receive service.
- (3) A document may also be served -
- (a) on a company or other body corporate, by handing a copy of the document to a responsible employee of the employee of the company or body at its registered offices, its principal place of business in Namibia or its main place of business within the region in which the dispute first arose;
 - (b) on an employer, by handing a copy of the document to a responsible employee of the employer, at the workplace where the employees involved in the dispute ordinarily work or worked;
 - (c) on a trade union or employers' organisation, by handing a copy of the document to a responsible employee or official at the main office of the union or employers' organization or its office in the place where the dispute arose;
 - (d) on a partnership, firm or association, by handing a copy of the document to a responsible employee or official at the place of business of the partnership, firm or association or, if it has no place of business, by serving a copy of the document on a partner, the owner of the firm or the chairperson or secretary of the managing or other controlling body of the partnership, firm or association, as the case may be;
 - (e) on a local authority, by serving a copy of the document on the town clerk or chief executive officer or any person acting on behalf of that person;

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- (f) on a statutory body, by handing a copy to the secretary or similar officer of that body, or any person acting on behalf of that person; and
 - (g) on the State, a Regional Council, or a Minister, Deputy Minister or other official of the State in his or her official capacity, by handing a copy to a responsible employee at the offices of the Government Attorney, Regional Council, or the relevant Ministry or organ of the State respectively.
- (4) If no person identified in subrule (3) is willing to accept service, service may be effected by affixing a copy of the document to -
- (a) the main door of the premises concerned; or
 - (b) if this is not accessible, a post-box or other place to which the public has access.

(5) The Labour commissioner may order service in a manner other than prescribed in this rule.

Proof of service documents

7. (1) A party must prove to the Labour Commissioner that a document was served in terms of these rules, by providing the Labour Commissioner with an executed Form LG; 36, and -

- (a) with a copy of proof of mailing of the document by registered post to the other party;
- (b) with a copy of the telefax or email transmission report indicating the successful transmission to the other party of the whole document; or
- (c) if a document was served by hand -
 - (i) with a copy of a receipt signed by, or on behalf of, the other party clearly indicating the name and designation of the recipient and the place, time and date of service; or
 - (ii) with a statement confirming service signed by the person who delivered a copy of the document to the other party or left it at any premises.

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(2) If proof of service in accordance with subrule (1) is provided, it is presumed, until is proved, that the party on whom it was served has knowledge of the contents of the document.

(3) The Labour Commissioner may accept proof of service in a manner other than prescribed in this rule, as sufficient.

Filing of documents with the Labour Commissioner

8. (1) A party may file documents with the Labour commissioner only by any one of the following means:

- (a) by handing the document to any of the Offices at the address listed in Annexure I ;
- (b) by sending a copy of the document by registered post to the head office of the Labour Commissioner at the address listed in Annexure 1;
- (c) by faxing the document to the head office of the Labour Commissioner at a number listed in Annexure 1; or
- (d) by emailing the document to the electronic address listed in Annexure 1

(2) A document is filed with the Labour Commissioner when -

- (a) the document is handed to an employee of the Office designated to receive documents;
- (b) a document sent by registered post is received by the Office;
- (c) the transmission of a fax is completed; or
- (d) the transmission of an email is completed.

(3) A party must file the original of a document filed by fax or email, together with a report confirming transmission, if requested to do so by the Labour Commissioner, within five days after the request.

Service by registered post

9. Any document or notice sent by registered post by a party or the Labour Commissioner is presumed, until the contrary is proved, to have been received by the person to whom it was sent within the period contemplated in section 129(3) of the Act, but in any case within seven days after it was posted.

Condonation for late delivery of documents

10. (1) This rule applies to any referral document or application delivered outside of the applicable time period prescribed in the Act or these rules.

(2) An application for condonation for late filing or delivery of documents must be made in the manner prescribed in rule 28.

(3) An application for condonation must be made on Form LC 38 accompanied by a supporting affidavit and must set out the grounds for seeking condonation and include details of the following:

- (a) the extent of lateness;
- (b) the reason for the lateness;
- (c) any prejudice to the other party; and
- (d) any other relevant factors.

(4) A party may oppose an application for condonation by filing its opposition on Form LC 39, together with a supporting affidavit, no later than seven days after the filing of the referral document.

(5) The Labour Commissioner may assist a party to comply with this rule.

**PART 3
CONCILIATION OF DISPUTES**

Referral of dispute to conciliation

11. (1) A party that wishes to refer a dispute to the Labour Commissioner for conciliation must do so by delivering a completed Form LC 21 (“the referral document”).

(2) The referring party must -

- (a) sign the referral document in accordance with rule 5;
- (b) attach to the referral document written proof, in accordance with rule 7, that the referral document was served on the other parties to the dispute; and

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- (c) if the referral document is filed out of time, attach an application of condonation made in accordance with rule 10.

Notice of conciliation

12. The Labour Commissioner must give the parties at least seven days' written notice on Form LC 23, of a conciliation meeting, unless the parties agree to a shorter period.

Confidentiality of conciliation proceedings

13. (1) Conciliation proceedings are private and confidential and are conducted on a "without prejudice" basis.

(2) No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing.

(3) No person, including a conciliator, may be called as a witness during any subsequent proceedings or in any court to give evidence about what transpired during conciliation proceedings, except that disclosure may be ordered by a court -

- (a) in the course of adducing evidence in any criminal proceedings; or
- (b) when it is in the interests of justice that disclosure be made.

PART 4 ARBITRATION OF DISPUTES

Referral of dispute to arbitration

14. (1) A party that wishes to refer a dispute to the Labour Commissioner for arbitration must do so by delivering a completed -

- (a) Form LC 12, in case of a dispute involving non-recognition as an exclusive bargaining agent as contemplated in section 64(6) of the Act; or
 - (b) Form LC 21, in case of any other dispute ("the referral document" in both cases).
- (2) The referring party must -
- (a) sign the referral document in accordance with rule 5;

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- (b) attach to the referral document written proof that the referral document was served on the other parties to the dispute in accordance with rule 7; and
- (c) if the referral document is served out of time, attach an application for condonation made in accordance with rule 10.

Notice of arbitration

15. The Labour Commissioner must give the parties at least 14 days notice of an arbitration hearing on Form LC 28, unless the parties agree to a shorter period.

Consolidation of disputes by the Labour Commissioner or arbitrator

16. The Labour Commissioner, or after the commencement of the arbitration, the arbitrator, may, of his or her own accord or on application, consolidate more than one dispute so that the disputes may be dealt with in the same proceedings.

Referral of class disputes to arbitration

17. (1) One or more members of a class of employers or employees (hereinafter referred to as a “representative party”) may refer a dispute to arbitration (hereinafter referred to as a “class dispute”) on behalf of all members of such a class, and must, in addition to complying with rule 14, file with the Labour Commissioner and serve the respondent with an application for class certification on Form LC 38.

(2) The application for class certification referred to in subrule (1) must describe the class and contain sufficient particulars to establish that -

- (a) the members of the class in question are such a number that joinder of all such members is impracticable;
- (b) there are questions of law or fact common to the class;
- (c) the dispute referred by the representative party or parties is of a similar nature as the disputes to which the other members of the class are parties;
- (d) the representative party or parties will fairly and adequately protect the interests of the other members of the class;

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- (e) the hearing of separate disputes and before different arbitrators will likely create the risk of inconsistent or varying decisions of the arbitrators;
- (f) the respondent or respondents against whom a class dispute has been referred has acted or refused to act on grounds generally applicable to the class; and
- (g) the question of law or fact common to members of the class predominate over any questions affecting only some members, and a class arbitration is superior to other available methods for the fair and efficient resolution of the issues.

(3) On service of the application, the respondent or respondents has 14 days to file opposing affidavits or statements, if any, and the representative party has five days to reply.

(4) The representative party must apply for a hearing date on the application for class certification at the time of filing and must notify the respondent or respondents of the date.

(5) The application must be heard by the arbitrator designated to hear the dispute.

(6) If the arbitrator decides to hear the dispute as a class dispute, the Labour Commissioner must fix a hearing date, not later than 30 days after he or she has decided to hear the dispute, and must give notice thereof on Form LC 37 to such members of that class as is practicable in the circumstances of the case.

(7) The notice referred to in subrule (6) must inform such members that -

- (a) the arbitrator will exclude any member from the class if the member so requests by a date specified in such notice;
- (b) the award of the arbitrator, whether favourable or not, will be binding on all members who do not request exclusion under paragraph (a); and
- (c) any member who does not request exclusion under paragraph (a) may, if the member so desires, appear personally or through a duly authorized representative at the hearing of such a dispute.

(8) The arbitrator may make appropriate orders or rulings determining

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the course of proceedings or prescribing measures to prevent undue repetition or duplication in the presentation of evidence or argument in the hearing of a class dispute.

(9) A class dispute may not be settled without the approval of the arbitrator and notice of the proposed settlement must be given to the members of the class in such manner as the arbitrator may direct, and thereupon such settlement is, for all purposes, deemed to be an award of the arbitrator.

Conduct of arbitration proceedings

18. (1) The arbitrator must conduct the arbitration in a manner contemplated in section 86(7) of the Act and may determine the dispute without applying strictly the rules of evidence.

Effect of complaint lodged with Labour Court upon pending arbitration

19. (1) If, after a labour dispute concerning a violation of Chapter 3 of the Namibian Constitution or any of the fundamental rights and protections in terms of the Act has been referred to the Labour Commissioner for arbitration, any party to the dispute lodges a complaint with the Labour Court in respect of the same dispute, the Labour Commissioner or arbitrator must -

- (a) suspend the arbitration proceedings, if evidence has not yet been led; or
- (b) continue with the arbitration proceeding until its conclusion, including issuing an award, if evidence has already been led.

(2) Nothing in subrule (1) precludes a party from requesting a postponement of an arbitration in order to lodge a complaint with the Labour Court before evidence is presented to the arbitrator.

Arbitrator must attempt to conciliate a dispute

20. (1) Unless a dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.

(2) In such conciliation, the arbitrator must attempt to assist the parties to reach consensus on issues to shorten the proceeding, including -

- (a) facts that are agreed between the parties;

Annex III

- (b) facts that are in dispute;
- (c) the issues that the arbitrator is required to decide;
- (d) the precise relief claimed and if compensation is claimed, the amount of the compensation and how it is calculated;
- (e) the sharing and exchange of relevant documents;
- (f) whether an onsite visit is needed;
- (g) whether evidence on affidavit will be admitted with or without the right of any party to cross-examine the person who made the affidavit;
- (h) which party must present its case first;
- (i) the resolution of any preliminary points that are intended to be taken; and
- (j) any other means by which the proceedings may be shortened.

Arbitration award

21. (1) The arbitrator must, within 30 days of the conclusion of the arbitration proceedings, deliver an award giving concise reasons and he or she must sign and date the award.

(2) The award must specify the date by which the award is to be complied with and the arbitrator must allow such time for such compliance as he or she may deem reasonable in the circumstances of the case.

(3) The award in a class dispute must include and define those members whom the arbitrator finds to be members of the class and must specify those members who have requested exclusion.

(4) Every arbitration award must be sent to the parties with an accompanying notice informing the parties of their right to appeal the award to the Labour Court or to apply to the Labour Court to review the award of the arbitrator.

(5) Any administrative and clerical mistakes in the award may be corrected at any time by the arbitrator on notice to the parties, but without such correction being subject to any appeal.

Enforcement of arbitration award

22. Any party that wishes to request a labour inspector to enforce an arbitration award in terms of section 90 of the Act must make an application on Form LS 30, and the labour inspector must enforce the award as envisaged in that section including instituting execution proceedings on behalf of that party, if necessary, in accordance with the Rules of the Labour Court made under section 119 of the Act.

Appeals to, and reviews by, the Labour Court

23. (1) Any party to an arbitration may, in accordance with subrule (2), note an appeal against any arbitration award to the Labour Court in terms of section 89 of the Act.

(2) An appeal must be noted by delivery, within 30 days of the party's receipt of the arbitrator's award, to the Labour Commissioner of a notice of appeal on Form LC 41, which must set out -

- (a) whether the appeal is from the judgment in whole or in part, and if in part only, which part;
- (b) in the case of appeals from an award concerning fundamental rights and protections under Chapter 2 and initially referred to the Labour Commissioner in terms of section 7(1)(a) of the Act, the point of law or fact appealed against;
- (c) in the case of an award concerning any other dispute, the point of law appealed against; and
- (d) the grounds upon which the appeal is based.

(3) In an appeal noted in terms of this rule, the person to be made respondent is the other party to the arbitration and the person to be served with the notice of appeal is the other party to the arbitration in question.

(4) When an appeal has been noted in terms of this rule, the Labour Commissioner must, within 21 days thereafter, transmit the record of the hearing of the complaint in question to the registrar of the High Court, together with the original arbitrator's award.

(5) A cross-appeal may be noted by the delivery to the Labour Commissioner of a notice of cross-appeal setting out the same information required in the notice of appeal, within seven days after the noting of the appeal.

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(6) A copy of the appeal or cross-appeal must be sent simultaneously with its lodging to all other parties, and proof of service thereof, on Form LG 36, must be filed with the Labour Commissioner and the registrar of the High Court.

(7) An appellant or respondent who wishes to abandon an appeal or cross-appeal may do so -

- (a) by delivery, within 21 after lodging the appeal, of written notice to the Labour Commissioner stating that the appeal is to be abandoned in whole, or if in part, only, specifying which part; or
- (b) by delivery of the notice referred to in paragraph (a) to the registrar of the High Court, if the appeal is to be abandoned at any time after the passage of 21 days after the lodging of the appeal.

(8) Any appeal lodged in terms of this rule must be prosecuted in the Labour Court in accordance with the Labour Court Rules made under section 119 of the Act.

(9) Any review by the Labour Court of any award or decision as contemplated in section 117(1)(b) and (c) of the Act or any other provision of the Act must be instituted and prosecuted in accordance with the Labour Court Rules made under section 119 of the Act.

PART 5

PROVISIONS THAT APPLY TO CONCILIATIONS AND ARBITRATIONS

Venue for conciliation or arbitration

24. (1) A dispute must be conciliated or arbitrated in the region in which the cause of action arose, unless the Labour Commissioner directs otherwise.

(2) The Labour Commissioner determines the venue for conciliation or arbitration proceedings.

Representation of parties

25. (1) During conciliation or arbitration proceedings a party to the dispute has the right to appear in person or be represented by any of the persons listed in sections 82(12) and 86(12) of the Act and may request, in exceptional cases, representation in terms of section 82(13) or 86(13) of the Act.

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(2) A party that wishes to request representation pursuant to section 82(13)(a) or (b) or 86(13)(a) or (b) of the Act must make an application to the conciliator or arbitrator on Form LC 29, at least seven days prior to the conciliation or arbitration.

(3) If a party to the dispute objects to the representation of another party to the dispute or the conciliator or arbitrator suspects that the representative of a party does not qualify in terms of the Act, the conciliator or arbitrator must determine this issue.

Disclosure of documents

26. (1) Either party to conciliation or arbitration proceedings may request the conciliator or arbitrator to make an order as to the disclosure of relevant documents.

(2) The parties may agree on the disclosure of documents.

Failure of party to attend conciliation or arbitration proceedings

27. (1) The consequences of a party failing to attend a conciliation meeting are governed by -

- (a) section 74(3) of the Act, in the case of a conciliation of a dispute of interest; and
- (b) section 83(2) of the Act, in the case of any other dispute referred to conciliation in terms of the Act.

(2) If a party to an arbitration fails to attend a hearing, the arbitrator may -

- (a) postpone the hearing;
- (b) proceed with the hearing in the absence of the party; or
- (c) dismiss the case.

(3) A conciliator or arbitrator must be satisfied that the party has been properly notified of the date, time and venue of the proceedings, and should attempt to contact the absent party telephonically, if possible, before making any decision in terms of this rule.

(4) If a matter is dismissed, the conciliator or arbitrator must send a copy of the ruling to the parties.

**PART 6
APPLICATIONS**

Manner in which applications may be brought

28. (1) This rule applies to -

- (a) an application for postponement, condonation, substitution, variation or rescission;
- (b) an application for class certification; and
- (c) any other application for preliminary or interlocutory relief, such as an application for consolidation or joinder.

(2) An application must be brought on Form LC 38 and on notice to all persons who have an interest in the matter, except in the case of an application for class certification.

(3) The application must state clearly the relief sought and must be supported by an affidavit, or if permitted by the arbitrator, a written and signed statement.

(4) The affidavit or statement referred to in subrule (3) must clearly and concisely set out -

- (a) the names, description and addresses of the parties;
- (b) a statement of the material facts, in chronological order, on which the application is based, in sufficient detail to enable any person opposing the application to reply to the facts;
- (c) the reasons that the applicant has applied for the requested relief;
- (d) provisions of the Act, if any, which support the request for relief;
- (e) any other grounds to support the request for relief;
- (f) if the application is filed outside the relevant time period, grounds for condonation in accordance with rule 10; and
- (g) if the application is brought urgently, the circumstances why the matter is urgent and the reasons why it cannot be dealt with in accordance with the time frames prescribed in these rules.

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(5) Except as otherwise provided in these rules, any party that wishes to oppose the application must serve and file its opposition to the application on Form LC 39, together with an answering affidavit within seven days from the day on which the application was served on that party -

(6) The opposition and answering affidavit must contain, with the changes required by the context, the information required by subrule (4).

(7) The party initiating the proceedings may deliver a replying affidavit within three days from the day on which any opposition and answering affidavit are served on it.

(8) The replying affidavit must address only issues raised in the answering affidavit and may not introduce new issues of fact or law.

(9) In an urgent application, the arbitrator -

(a) may dispense with the requirements of this rule; but

(b) may only grant an order against a party that has been given reasonable notice of the application and an opportunity to be heard.

(10) If the arbitrator considers that a hearing is necessary, the arbitrator must allocate a date for the hearing of the application once a replying affidavit is delivered, or once the time limit for delivering a replying affidavit has lapsed, whichever occurs first, and must notify the parties of the date, time and place of the hearing of the application on Form LC 44.

Postponement of arbitration hearing

29. (1) An arbitration hearing may be postponed -

(a) by agreement between the parties in terms of subrule (2); or

(b) by application and on notice to the other parties in terms of subrule (3).

(2) The arbitrator must postpone an arbitration without the parties appearing if -

(a) all the parties to the dispute agree in writing to the postponement; and

(b) the written agreement for the postponement is received by the arbitrator more than seven days prior to the scheduled date of the arbitration.

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(3) If the conditions of subrule (2) are not met, any party may apply, in terms of rule 28, to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the arbitrator before the scheduled date of the arbitration.

- (4) After considering the written application, the arbitrator may -
- (a) without convening a hearing, postpone the matter;
 - (b) convene a hearing to determine whether to postpone the matter; or
 - (c) deny the application.

Joining of parties to, and dismissal of parties from proceedings

30. (1) The -

- (a) Labour Commissioner may, before the commencement of the arbitration; or
- (b) arbitrator may, after the commencement of the arbitration, join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

(2) An arbitrator may make an order-

- (a) joining any person as a party in the proceedings, after the proceedings have commenced if, in addition to grounds set out in subrule (13), the party to be joined has a substantial interest in the subject matter of the proceedings; or
- (b) dismissing a party from the proceedings where such party has no such interest in the proceedings.

(3) An arbitrator may make an order in terms of subrule (2) -

- (a) of his or her own accord;
- (b) on application by a party; or
- (c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.

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(4) An application in terms of this rule must be made by the service of a completed Form LC 38, and a supporting affidavit on all the relevant parties.

(5) If joinder or dismissal is granted, the arbitrator -

(a) must issue a notice thereof on Form LC 40; and

(b) may give appropriate directions as to the further procedure to be followed in the proceedings;

(6) If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the arbitrator on Form LC 38, for an order substituting that party for an existing party, and an arbitrator may make such order or give appropriate directions as to the further procedure to be followed in the proceedings.

(7) Subject to any order made in terms of subrules (6) and (7), a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

Correction of citation of a party

31. If a party to any proceedings has been incorrectly or defectively cited, the arbitrator may, on application and on notice to the parties concerned, correct the error or defect.

Variation or rescission of arbitration awards or rulings

32. (1) An application for the variation or rescission of an arbitration award or ruling must be made on Form LC 38 within 30 days after service of the award or within 30 days after the applicant became aware of a mistake common to the parties to the proceedings.

(2) A ruling made by an arbitrator which has the effect of a final order, will be regarded as a ruling for the purposes of this rule.

PART 7 GENERAL

Condonation for failure to comply with rules

33. The Labour Commissioner, conciliator or arbitrator may, on good cause shown, condone any failure to comply with the time frames in these rules.

Recording of arbitration proceedings

34. (1) The arbitrator must keep a record of -

- (a) any evidence given in an arbitration hearing;
- (b) any sworn testimony given in any proceedings before the arbitrator;
and
- (c) any arbitration award or ruling made by the arbitrator.

(2) The record may be kept by legible hand-written notes or by means of an electronic recording.

(3) A party may request a copy of the transcript of a record or a portion of a record kept in terms of subrule (2), on payment of the costs of the transcription.

(4) After the person who makes the transcript of the record has certified that it is correct, the record must be returned to any office of the Labour Commissioner.

(5) The transcript of a record certified as correct in terms of subrule (4) is presumed to be correct, unless the Labour Court decides otherwise.

Issuing of summons

35. (1) Any party who requires the Labour Commissioner to summon a person in terms of section 82(18\$(a) or 8618)(a) of the Act or these rules or to produce documentary evidence at the hearing, must file a completed Form LC 42 with the Labour Commissioner.

(2) An application in terms of subrule (1) must be filed with the Labour Commissioner at least seven days before the conciliation or arbitration hearing, or as directed by the Labour Commissioner, conciliator or arbitrator hearing the conciliation or arbitration.

(3) Where a witness is summoned, it must be done on Form LC 43.

(4) The Labour Commissioner may refuse to issue a summons if the party summoned will not have a reasonable period in which to comply with the summons.

(5) A summons must be served on the person to be summoned by the person who has requested the issuing of the summons or by the messenger of

Annex III

court appointed in terms of section 14 of the Magistrates Courts Act, 1944 (Act No. 32 of 1944), at least seven days before the scheduled date of the conciliation or arbitration.

(6) The party who requested the summons must file proof of service of the summons on Form LG 36, executed by the person who served the summons, with the conciliator or arbitrator at the commencement of the conciliation or arbitration, or, if the summons is served after the commencement of the proceeding, as soon as possible after service.

Payment of witness fees

36. (1) A witness summoned in any proceedings must be paid a witness fee in accordance with the tariff of allowances applicable to witnesses subpoenaed to appear in a magistrate's court.

(2) The witness fee must be paid by -

- (a) the party who requested the Labour Commissioner to issue the summons; or
- (b) the Labour Commissioner, if the issuing of the summons was not requested by any party.

(3) Despite subrule (1), the Labour Commissioner may, in appropriate circumstances, order that a witness receive no fee or only part of the witness fee.

(4) Despite subrule (2)(a) the Labour Commissioner may pay the witness fee in his or her discretion.

Costs

37. (1) If the arbitrator decides to make an order for costs pursuant to section 86(16) of the Act, the order of costs should set forth the amount of costs awarded.

(2) In the absence of tariffs in relation to conciliation and arbitration proceedings prescribed by the Minister, the arbitrator must award costs for services rendered in connection with proceedings on Schedule A of the Magistrates Court tariff, prescribed in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

(3) Despite subrule (2), if a party in whose favour an order for costs has been made is not represented by a legal practitioner, that person is entitled to the costs set out in Annexure 3.

Annex III

Repeal of Rules of District Labour Courts and savings

38. (1) Subject to subrule (2), the Rules of District Labour Courts published in Government Notice No. 138 of 19 November 1993 are repealed.

(2) Despite subrule (1) the rules repealed by that subrule do, in respect of any proceedings commenced in the court before the coming into operation of these rules as contemplated in rule 39, continue to apply as if these rules had not been enacted.

Commencement of rules

39. These rules come into operation on 1 November 2008

ANNEXURE 1

ADDRESSES OF THE LABOUR COMMISSIONER

Offices of the Labour Commissioner

HEAD OFFICE

WINDHOEK

Private Bag 13367, Windhoek
249-582 Richardine Kloppers Street
KHOMASDAL
Tel. 061-379100
Fax 061-212334 or 061 -379 129
Email:olc@mol.gov.na

REGIONAL OFFICES

| | |
|--|---|
| OTJIWARONGO P.O. Box 1981 Otjiwarongo Erf BM71/8, Frans Indongo Street Tel: 067-903748 Fax: 067-301053 | GROOTFONTEIN Private Bag 20 6 Grootfontein Courtney Klark Street Tel: 067-242514/243049 Fax: 067-242986 |
| SWAKOPMUND P.O. Box 1143 Swakopmund Tobias Hainyeko Street Tel: 064-403678 Fax: 064-469679 | KEETMANSHOOP P.O. Box 128 Wheeler Street Tel: 063-223580 Fax:063-222465 |
| KATIMA MULILO Private Bag 2330 Ngweze Katima Mulilo Tel: 066-253304 Fax: 066-253328 | MARIENTAL P.O. Box 747 Ernst Stumpfe Street Tel: 063-242368 Fax:063-241177 |
| OPUWO Private Bag 3012 Mbumbijazo Muharukua Street Tel : 065-279853 Fax: 065-273851 | OUTAPI Postal Address Physical Address Tel : Fax: |

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| | |
|--|--|
| OSHAKATI P.O. Box 1529 Oshakati Leo Shoopala Street Tel: 065-220719/224039 Fax: 065-224290 | RUNDU P.O. Box 940 Maria Mwengere Street Tel: 066-255945/946 Fax:066-256331 |
| GOBABIS P.O. Box 2277 Church Street, 57 Erf 98 Tel: 062-562692 Fax:062-562678 | LÜDERITZ P.O. Box 1238 RMI German Hostel Tel: 063-203842 Fax:063-203843 |

ANNEXURE 2 FORMS

- LC 12 Referral of dispute concerning recognition to Labour Commissioner
- LC 21 Referral of dispute to conciliation or arbitration
- LC 23 Notice of conciliation meeting
- LC 28 Notice of arbitration hearing
- LC 29 Request for representation at conciliation or arbitration in terms of section 82(13) or 86(13)
- LS 30 Application to Labour Inspector to enforce arbitration award
- LG 36 Proof of service of documents
- LC 37 Notice of class complaint
- LC 38 Application
- LC 39 Opposition to application
- LC 40 Notice of joinder
- LC 41 Notice of appeal from arbitrator's award
- LC 42 Request to summon witness
- LC 43 Summons
- LC 44 Notice of application hearing

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 64(6)(b))(Rule 14(1)(a))

REFERRAL OF DISPUTE CONCERNING RECOGNITION
TO LABOUR COMMISSIONER

Instruction: **Attach hereto copies of the Trade Union's Request for Recognition and the Employer's Rejection, if any.**

1. Full name of Trade Union: _____
2. Physical Address: _____
3. Phone: _____ Fax: _____ E-mail: _____
4. Postal Address: _____
5. Full name of Employer/Employers Organization: _____

6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____
9. Date on which Trade Union requested recognition: _____ 20 ____
10. Date on which employer rejected recognition
(if applicable): _____ 20 ____ .
11. The Employer has not replied to complainant within 30 days of its receipt of complainant's request for recognition. (Check if applicable): _____
12. Description of Dispute: _____

I certify that the above particulars are true and correct.

Representative of Trade Union
(print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: (other party or parties to the dispute)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Sections 82(7) and 86(1) (Rules 11 and 14)

REFERRAL OF DISPUTE FOR CONCILIATION OR ARBITRATION

Instructions: **A summary of the dispute must be attached hereto stating the subject matter and the facts and circumstances that gave rise to the dispute. It must also contain information on the steps that have been taken to resolve or settle such dispute.**

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of the Respondent: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone : _____ Fax: _____ E-mail: _____
9. Nature of Dispute:

| | |
|--|-----------------------------|
| - Unfair Dismissal | - Unfair Labour Practice |
| - Organizational Rights | - Dispute of Interest |
| - Unilateral Change of Terms and Conditions | - Severance Package |
| - Interpretation/Application of Collective Agreement | - Disclosure of Information |
| - Freedom of Association | - Refusal to Bargain |
| - Unfair Discrimination | - Other (specify please) |
10. Date on which the dispute arose: _____ 20 ____ .

Representative of the Applicant
(print name and sign)

Position

Date: _____

To: Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: other party or parties to the dispute

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 82(3) (Rule 12))

NOTICE OF CONCILIATION MEETING

In the matter between:

and

Applicant

Respondent

TAKE NOTICE that this matter is set down for a conciliation meeting before _____

_____, a conciliator, on the _____ day of _____ 20 ____
at _____ o'clock am/pm at _____
located at _____

- * If you do not speak English and need an interpreter, kindly inform the Labour Commissioner at least 5 days prior to the date of hearing.
- * You may require the Labour Commissioner to subpoena witnesses and/or to compel the production of relevant books, documents or papers by filing a notice on the prescribed form prior to the meeting.
- * Postponements may be granted without the need for the parties to appear if:
 - o all parties agree in writing and notify the conciliator.
 - o a written request for a postponement has been received by the designated conciliator at least five days before the commencement of the meeting and the conciliator has granted the request meeting.
- * A formal request for a postponement may be made at the commencement of the conciliation meeting.

Date: _____ 20 ____

Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

To: (1) (name of applicant) _____
(address) _____
(2) (name of respondent) _____
(address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(section 86(4) (Rule 15))

NOTICE OF ARBITRATION HEARING

In the matter between:

Applicant
and
Respondent

TAKE NOTICE that this matter is set down for an arbitration hearing before _____

_____, an arbitrator, on the _____ day of _____ 20____
at _____ o'clock am/pm at _____
located at _____

- * If you do not speak English and need an interpreter, kindly inform the Labour Commissioner at least 5 days prior to the date of hearing.
- * You may require the Labour Commissioner to subpoena witnesses and/or to compel the production of relevant books, documents or papers by filing a notice on the prescribed form prior to the meeting/hearing.
- * Postponements may be granted without the need for the parties to appear if:
 - o all parties agree in writing and notify the arbitrator.
 - o a written request for a postponement has been received by the designated arbitrator at least ten days before the commencement of the hearing and the arbitrator has granted the request hearing.
- * A formal request for a postponement may be made at the commencement of the meeting/hearing.

Date: _____ 20 _____

Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

To: (1) (name of applicant) _____
(address) _____
(2) (name of respondent) _____
(address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007

(Section 82(13) and 86(13) (Rule 25))

**REQUEST FOR REPRESENTATION AT CONCILIATION OR
ARBITRATION IN TERMS OF SECTION 82(13) OR 86(13)****Instructions: Attach hereto the following documents:**

1. (if applicable) the parties' signed agreement to representation of the party or both parties a legal practitioner or other person, including the name, address and other pertinent contact details of the proposed representative;
2. if representation by a legal practitioner is requested, a statement of the reasons that the dispute is of such complexity that it is appropriate for applicant(s) to be represented by a legal practitioner(s) and if the parties have not agreed to legal representation, the reasons that such representation will not prejudice the other party.
3. if representation by another person is requested, a statement as to how the proposed representation will facilitate the effective resolution of the dispute or the attainment of the objects of the Act, and if the parties have not agreed to the representation, the reasons that such representation will not prejudice the other party.

1. Full name of the Applicant: _____
2. Physical Address: _____
3. Postal Address: _____
4. Phone: _____ Fax: _____ E-mail: _____
5. Full name of the other party to the dispute: _____
6. Physical Address: _____
7. Postal Address: _____
8. Phone: _____ Fax: _____ E-mail: _____
9. The dispute arose on: _____ 20 _____ at (place) _____
10. The dispute is in the: _____ (sector or industry)
11. The nature of dispute: Right ☐ Interest ☐
12. Full particulars of the legal practitioner(s) for whom permission is sought: _____

Applicant's proposed representative

- 12.1 Mr/Mrs/Ms. _____
- 12.2 Postal Address: _____
- 12.3 Phone: _____ Fax: _____ E-mail: _____
- 12.4 If legal practitioner, date of admission to the High Court of Namibia
_____ 20 _____.

Annex III

REQUEST FOR REPRESENTATION AT CONCILIATION OR ARBITRATION
PAGE 2

12.5 If representation is sought by a non-legal practitioner, stated position and relationship to applicant, if any _____

Other party's proposed representative

12.6 Mr/Mrs/Ms. _____

12.7 Postal Address: _____

12.8 Phone: _____ Fax: _____ E-mail: _____

12.9 If legal practitioner, date of admission to the High Court of Namibia _____ 20 ____ .

12.10 If representation is sought by non-legal practitioner, state position and relationship to party, if any _____

Representative of the Applicant
(print name and sign)

Position

Date: _____

To: (Name of conciliator/arbitrator)
Labour Commissioner
249-582 Richardine Kloppers Street - Khomasdal
Private Bag 13367
WINDHOEK

Copy to: other party or parties to the dispute

FOR THE CONCILIATOR/ARBITRATOR:

13. State the reasons for permitting or refusing the representation: _____

14. Conditions, if any, on which representation is permitted: _____

Conciliator/Arbitrator (print name and sign)

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Section 90) (Rule 22)

APPLICATION TO LABOUR INSPECTOR TO ENFORCE ARBITRATION
AWARD

Instructions: **Attach hereto the following documents:**

1. **original or a certified copy of the arbitration award**
2. **if the arbitrator awarded the payment of money to applicant, copy or copies of employee's payslips) showing applicable rate(s) of wages and benefits during the period covered by the arbitration award worksheet showing the applicant's calculations of the monies due.**

- 1 . Full name of applicant party to arbitration (individual/Trade Union/Employer):

2. Physical Address: _____
3. Phone: _____ Fax: _____ E-mail: _____
4. Full name of respondent party to arbitration: _____
5. Physical Address: _____
6. Phone: _____ Fax: _____ E-mail: _____
7. Postal Address: _____
8. E-mail: _____
9. Name of arbitrator: _____
10. Date of arbitration award: _____
11. Total amount due to employee (if applicable): _____

I certify that the above particulars are true and correct.

Representative of the Applicant
(print name and sign)

Position

Date: _____

To: Permanent Secretary
 Ministry of Labour and Social Welfare
 32 Mercedes Street - Khomasdal
 Private Bag 19005
 WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Sections 82(8) and 86(3) Rules 7, 23 and 35)

PROOF OF SERVICE OF DOCUMENTS

Instructions:

1. This document must be sent to the Labour Commissioner, with a copy of the document(s) served attached hereto.
2. A copy of this document must be sent to every other party.

In the matter between:

Applicant
and
Respondent

AFFIDAVIT OF SERVICE

I _____, do hereby certify that on the _____ day of _____ 20-____ at _____ (time) I duly served the following document(s) _____ describe the document(s) served) in the following manner:

(Circle applicable references in (a), (b) (c) or (d) as appropriate).

- (a) By handing a copy to (full name of the _____ person served) the applicant / appellant / respondent / a person apparently not less than 16 years of age and employed at the applicant's / appellant's / respondent's place of business / local / main office and he / she duly signed the attached copy/refused to sign a copy thereof;
- (b) By sending a copy by registered post to _____

(full name of the person served) the applicant / appellant / respondent at _____ (state the postal address) and I annex hereto the certificate of posting;
- (c) By sending a copy by fax to _____
(full name of the person served) the applicant / appellant / respondent at the following number _____
(state telephone number and code) and I annex hereto the transmission confirmation slip;

Annex III

PRO & OF SERVICE OF DOCUMENTS

PAGE 2

- (d) By serving the document in accordance with the directions of the Labour Commissioner, as follows:

Date at _____ this _____ day of _____ 20 ____.

Signature of deponent

Before administering the prescribed oath/affirmation, I put the following questions to the deponent and noted his/her reply in his/her presence:

- (a) Do you know and understand the contents of this affidavit/solemn declaration?

Reply: _____

- (b) Do you have any objection to the taking of the oath?

Reply: _____

- (c) Do you regard the prescribed oath as binding on your conscience?

Reply: _____

This affidavit/solemn declaration was duly sworn to/affirmed before me and the deponent signed it in my presence at _____

on the _____ day of _____ 20 ____.

Commissioner of Oaths

Full name _____

DATE STAMP

Designation _____

Address _____

To: Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Rule 17(6))

NOTICE OF CLASS COMPLAINT

Before the Labour Commissioner

In the matter between: Case No.

and

Applicant

Respondent

TAKE NOTICE that that a complaint has been filed by representative parties on behalf of all members of _____

Particulars of complaint: _____

The complaint will be heard at _____ (place)
on _____ 20 _____ (date) at _____ (time).

Any member of the class will be excluded from the hearing if he or she so requests in writing at any time before the beginning of the hearing.

The decision, whether favourable or not, will be binding on all members of this class who do not request exclusion as indicated above.

Any member who does not request exclusion may appear personally or through a representative at the hearing.

Labour Commissioner

Date: _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Rules 10, 17, 28, 30 and 32)

APPLICATION

Before the Labour Commissioner

In the matter between: Case No.

and

Applicant

Respondent

TAKE NOTICE that the above named Applicant/Respondent intends to apply to the Labour Commissioner/Conciliator/Arbitrator for an order as follows:

- (a) _____
(b) _____
(c) _____
(state the relief sought)

and that the accompanying affidavit of _____ dated ____ 20 ____ will be used in support of the application.

AND FURTHER TAKE NOTICE that if you intend opposing this application you are required to file your opposition to the application with the Labour Commissioner and the respondent or his or her representative, if any, corresponding to form LC 38, within 5 days after service upon you of this notice, not counting the day of service.

DATE AT _____ this _____ day of _____ 20 ____

Applicant/Appellant/Respondent or his or her legal practitioner or other representative (address)

To: (1) _____
APPLICANT/APPELLANT/RESPONDENT

(2) Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

or (conciliator/arbitrator) _____
c/o Labour Commissioner.

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Rule 10)**

OPPOSITION TO APPLICATION

Before the Labour Commissioner

In the matter between:

Applicant

Respondent

and

TAKE NOTICE that _____ (hereinafter called the respondent) (if more than one respondent is cited state whether first, second, etc. respondent [as the case may be]) intends to oppose this application on the following grounds:

AND FURTHER TAKE NOTICE that the respondent has appointed

(state the respondent's address for service) at which he or she will accept notice and service of all documents in these proceedings.

DATE AT _____ this _____ day of _____ 20____

Respondent or his or her legal practitioner or other representative
(address)

To: (1) _____
APPLICANT (address)

(2) Labour Commissioner
249-582 Richardine Klopers Street-Khomasdal
Private Bag 13367
WINDHOEK

or (conciliator/arbitrator) _____
c/o Labour Commissioner.
(address)

LABOUR ACT, 2007
(Rule 30)

Before the Labour Commissioner

In the matter between: Case No.

Applicant

and

Respondent

Take notice that _____
 _____ (name)

residing at _____

have/has been joined as complainant/respondent/has been be dismissed as a complainant or respondent from the proceedings.

Labour Commissioner/arbitrator

Date: _____

(address)

To: (1) (applicant) _____
(address) _____

(2) (respondent) _____
(address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Rule 23(2))

NOTICE OF APPEAL FROM ARBITRATOR'S AWARD

Before the Labour Commissioner

Case No. _____

In the matter between:

Applicant
Respondent

and

Take notice that the Appellant (Complainant*/Respondent* in the above-mentioned arbitration) hereby gives notice of appeal against the entire arbitration award */part of the arbitration award* issued by Arbitrator _____ on ____ 20 ____ .

The questions of fact (only in the case of a dispute involving the Fundamental Rights and Protections) or law appealed against in the arbitrator's award are as follows:

The grounds of appeal are as follows:

(add additional sheets if necessary)

Signed at _____ on this _____ day of _____ 20 ____ .

Appellant or his/her representative
(Address)

To: Labour Commissioner
(Address)

To: Registrar of the High Court
High Court
WINDHOEK

To: (respondent)
(Address) _____

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Rule 35(1))

REQUEST TO SUMMON WITNESSES

Before the Labour Commissioner

Case No.

In the matter between:

Applicant

and

Respondent

- (a) You are hereby requested to summon the following witnesses or persons whose names appear in Annexure "A" hereto, to appear at the above Conciliation/Arbitration before _____, conciliator/arbitrator on the _____ day of _____ 20____ at _____ am/pm to give oral evidence in the above-mentioned matter on behalf of the applicant/respondent;
and

- (b) to produce the following:

(i) Documents: _____

(ii) Records: _____

(iii) Books of account: _____

(iv) Exhibits relevant to this case: _____

(A clear description must be given of all items in b (i) - b (iv) above.)

DATED AT _____ this _____ day of _____ 20____

Applicant/Respondent or his or her legal practitioner or other representative
(address)

To: (1) Labour Commissioner
249-582 Richardine Kloppers Street-Khomasdal
Private Bag 13367
WINDHOEK

OR

(2) (conciliator/arbitrator) _____
(address)

Annex III

**REQUEST TO SUMMON WITNESSES
PAGE 2**

ANNEXURE “A”

Before the Labour Commissioner

Case No.

In the matter between:

and

Applicant

Respondent

LIST OF WITNESSES TO BE SUMMONED (Rule 30)

Note: Proper residential and postal addresses, telephone numbers and facsimile numbers, if any, must be furnished by both parties to the proceedings.

On behalf of the Applicant

On behalf of the Respondent

1.

1.

2.

2.

3.

3.

4.

4.

5.

5.

6.

6.

Signature of Applicant or his/her
representative

Signature of Respondent or his/her
representative

Date:

Date:

REPUBLIC OF NAMIBIA

**LABOUR ACT, 2007
(Rule 35(3))**

SUMMONS

Before the Labour Commissioner

Case No.

In the matter between:

Applicant
and
Respondent

SUMMONS OF WITNESS IN TERMS OF SECTION 82(18)(a)/86(8)(a)

To: The Deputy-Sheriff or _____ (other person designated to make service):
Inform: _____

(State name, sex, occupation, place of residence or business, postal address, telefax of witness). that each of them is hereby called upon to appear in person before Conciliator/Arbitrator at _____ on the _____ day of _____ 20____ at _____ o'clock am/pm and thereafter to remain in attendance until excused, in order to testify on behalf of the above-named applicant*/respondent* in regard to all matters within his or her knowledge relating to the issues of the matter now before the Conciliator/Arbitrator and in the dispute between the parties.

Inform him or her further that it is required from him or her to bring and produce the following items:

(Describe accurately each document, book of accounts, record or other exhibit relevant to the issues of the matter in question)

and

Inform each of the said persons that he or she should on no account neglect to comply with the subpoena as he or she may thereby render himself or herself liable to a fine of N\$10 000,00 or imprisonment for a period not exceeding two years or both.

DATED AT _____ this _____ day of _____ 20____

Labour Commissioner/Arbitrator
(address)

REPUBLIC OF NAMIBIA

LABOUR ACT, 2007
(Rule 28(10))

NOTICE OF APPLICATION HEARING

In the matter between:

Applicant
Respondent

and

TAKE NOTICE that the applicant's/respondent's application for _____ is set down for a hearing before _____, an arbitrator, on the _____ day of _____ 20 ____ at _____ o'clock am/pm at _____

* If you do not speak English and need an interpreter, kindly inform the Labour Commissioner at least 5 days prior to the date of hearing.

Date: _____ 20 ____ .

Labour Commissioner
249-582 Richardine Kloppers Street Khomasdal
Private Bag 13367
WINDHOEK

To: (1) (applicant) _____
(address) _____

(2) (respondent) _____
(address) _____

ANNEXURE 3

**TARIFF OF COSTS (EXCLUDING DISBURSEMENTS)
RECOVERABLE BY UNREPRESENTED LITIGANTS
(Rule 37(3))**

| | |
|---|--------------------|
| First day (preparation and attendance at arbitration) | N\$2000-00 per day |
| Each subsequent day (attendance at arbitration) | N\$600-00 per day |