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 he 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 Minster.
(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 wells 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 Introductorv 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 an 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.

Picket *– >Definitions and Interpretation*

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 loose 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 [secs82&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 or arbitrator
LC 28 Notice or 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 dividedinto seven Parts and are complemented by 15 prescribed forms linked to the rules.

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 calculates 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*