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Termination of Employment *(Chapter 3 Parts F & G)* –

Sections 29 to 38, appearing as entries A. to J. below, deal with termination of employment and diverse related topics.

Discussion: The concept 'termination' as used in the Labour Act, 2007 includes dismissal and resignation. The term 'dismissal' applies to *any* termination of employment of an employee by an employer. The fundamental principle applicable to this Part is that all dismissals must be in accordance with a *fair procedure*, and for a *valid* and *fair reason*, else the dismissal can be legitimately challenged. See also the boxed discussion on "Unfair disciplinary action (sec.48)" under alphabetical entry **"U"** further below.

A. Period of employment *(sec.29)* ***(U)*** – An employee's period of employment includes:

a) The time that the employee has worked for the employer.
b) All leave granted.
c) Any period of suspension.
d) Where reinstatement has occurred, the period from the date of dismissal to the date of reinstatement.
e) Any period of lawful participation in a strike or lockout.

B. Termination of employment on notice *(sec.30)* ***(M)*** – Where a contract of employment may be terminated on notice, the following rules must be observed by the employer and/or the employee, as the case may be:

1. Periods of notice of termination of employment by either an employee or an employer, must be at least –
   - 1 day, if an employee has been employed for 4 weeks or less;
   - 1 week if the employee has been employed for more than 4 weeks but not more than 1 year; and
   - 1 month if the employee has been employed for more than 1 year.
2. The employer and employee may agree to a longer period of notice, provided that it is of equal duration for both parties.

3. Notice must be given in writing with an indication of the reasons (if the termination is by the employer) and the date on which the notice is given.
4. In the case of an employee –
   - working 4 weeks or less, notice may be given on any working day.
   - working for more than 4 weeks but not more than a year, notice must be given on or before the last working day of the week; and
   - working for longer than a year, notice must be given on or before the 1st or the 15th day of the month.
5. An illiterate employee may resign by giving verbal notice.
6. Notice by an employer shall not be given during a period of any type of leave granted in terms of the Act, nor may an employer permit such notice to run concurrently with any kind of leave.
7. An employer has the right to dismiss an employee without notice, or payment in lieu thereof, for any cause recognised by law.
8. A dismissed employee always has the right to dispute the lawfulness or fairness of his/her dismissal.
9. An employer is entitled to waive any right to notice conferred by section 30.

Discussion: Verbal notice of intention to resign by an illiterate employee should preferably be given, or should at least afterwards be confirmed, in the presence of a reliable witness. That is advisable in order to avoid any possible doubt or misunderstanding in this respect and in case of a future dispute regarding the particulars of the resignation.

Dismissal by the employer without notice or payment in lieu thereof, constitutes extreme disciplinary action and is usually reserved only for a very serious offence such as theft, fraud, sabotage, assault, gross insubordination and sexual harassment with aggravating circumstances. Such a dismissal must be preceded by a full and proper disciplinary hearing; with all procedural requirements having been met; sufficient evidence of guilt having been established; and with mitigating circumstances having been taken into due consideration.

Changes: The legal situation regarding notice remains much as before, except that the Act specifically requires the reasons for dismissal to be stated by the employer in all cases. Where only one week notice is required, the notice must be given on or before the last working day of the week – previously such notice had to be given on or before the usual payday.

The previous Act prohibited both the employer and employee from giving notice during an employee's period of absence on annual leave, sick leave or maternity leave, and also prohibited any such leave to run concurrently with a period of notice. The current provision applies only to notice given by an employer.

C. Payment instead of notice *(sec.31)* ***(U)*** – Should an employer for any reason so prefer, the employer may pay an employee in lieu of notice – being the amount the employee would have received had he/she worked during the period of notice. Similarly, an employer has the right to waive notice given by an employee, but must then also pay the employee's remuneration in lieu of the notice. An employee, on the other hand, also has the right not to give the required period of notice but must then pay the employer an amount equivalent to the remuneration which the employer would have paid, if the employee had worked during the period of notice.

D. Automatic terminate ion of contracts of employment *(sec.32)* ***(U)*** – A contract of employment terminates one month after –

- the death or sequestration of the employer, if the employer is an individual;
- the date on which the employer is wound up, if the employer is a juristic person; or
- the date on which a partnership is dissolved.

An executor, administrator, liquidator or partner may give notice to terminate an employee's contract of employment in accordance with the Act, or a collective agreement, at any time during the course of the above mentioned period of a month. An employee whose services are terminated in accordance with this section is a preferent creditor in respect of any remuneration or monies payable.

E. Unfair dismissal *(sec.33)* ***(U)*** – Irrespective of whether or not notice has been given, an employer is prohibited from dismissing an employee without a **valid and fair reason** and without following a **fair procedure**, the latter being subject to any code of good practice issued by the Minister of Labour, or the procedures set out in sec.34 *(>Dismissal arising from collective termination or redundancy)* if the dismissal is in connection with retrenchment. A dismissal is automatically unfair if it happens because an employee –

a) discloses information that the employee is legally entitled or required to disclose;

b) refuses to do anything that an employer must not lawfully permit or require an employee to do;
c) exercises any right conferred by the Act or the terms of a contract of employment or collective agreement;
d) belongs or has belonged to a trade union;
e) takes part in the formation of a trade union;
f) participates in the lawful activities of a trade union outside working hours, or with the consent of the employer, within working hours, or performs the functions of a shop steward as contemplated in section 67 (4).

It is unfair to dismiss an employee because of such employee's sex, race, colour, ethnic origin, religion, creed, social or economic status, political opinion or marital status.

In any proceedings concerning dismissal, once dismissal has been established by a former employee, the *onus (>NLL 1 p.153)* resides with the employer to prove that the dismissal was fair.

Discussion:
The Labour Act, 2007 does not go into any detail regarding what a '*valid and fair reason'* and a *'fair procedure'* entails. It is expected that the Minister will issue a code of good practice on termination of employment, inter alia, also incorporating this aspect, in due course. However, the basic principles of fair disciplinary action and dismissal are well known and have been elaborated upon in numerous court judgements and other authoritative texts.

Valid reason
A reason is valid if it can be proved by resorting to factual evidence. In other words a dismissal will be unfair if the employer is not able to prove the reason for the dismissal. The burden of proof in this regard lies with the employer.

It is sufficient for an employer to prove a reason on the balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. Determining which of the contending versions is the

Fair reason
A fair reason for dismissing an employee depends on the kind of reason and the seriousness of the reason. Such reasons would include –
- employee misconduct related to employment;

- employee incapacity, whether performance or health related;
- employee incompatibility;
- the unsuitability of a probationary employee; and
- the operational requirements of an enterprise.

In addition to the nature of the reason, the reason must also be sufficiently weighty and sufficiently serious to justify dismissal.

Fair procedure
Before an employer can dismiss an employee, the employer must process the dismissal fairly. In general this means that the employer must –
- give the reason for the proposed dismissal to the employee before making the decision to dismiss;
- give the employee an opportunity to respond to those reasons before making a decision to dismiss; and
- permit the employee to be represented in the proceedings

It should be noted also that different reasons for dismissal call for different kinds of procedures. *>Dismissal arising from collective termination or redundancy >Unfair disciplinary action*

Automatically unfair dismissal
Providing for a dismissal to be automatically unfair if it happens for a reason mentioned in a) to f) above, is an indication of the degree of seriousness in which the legislature looks upon such an act by an employer, and the level of protection it wishes to bestow on employees in this regard. However, an allegation of this nature, if denied by the employer, would still have to be determined by due process of arbitration or judicial litigation in which all parties enjoy their normal constitutional, statutory and common law rights.

Negotiated termination
It should be noted that the rules of fair dismissal contemplated above change somewhat when it comes to a negotiated termination of employment, where termination of the employment contract occurs by mutual consent between the employer and the employee. This form of dissolution of the employment contract constitutes neither dismissal nor resignation in the ordinary sense.

Essentially done in terms of *common law (>NLL 1 p.131)* principles, stringent requirements must be observed in order for such a termination agreement to be lawful. These include, but are not limited to, a suitable

representative for the employee, especially if the individual is illiterate or of lower educational background; full understanding and acceptance of the terms of the agreement (usually including a reasonable *quid pro quo,* or settlement amount by the employer); absence of any coercion or deception; and a suitably drafted, signed and witnessed memorandum of agreement.

Again, as with any other category of termination of employment, an aggrieved party has the right to contest the validity of such an agreement through the appropriate channels.

F. Dismissal arising from collective termination or redundancy *(sec.34)* ***(M)*** – This section deals with the reduction of the workforce for reason of reorganisation, or for reason of the transfer, discontinuation, or reduction of a business due to economic or technological considerations. In any such intended dismissal an employer is required to follow the procedure set out hereinafter:

Notification

The employer must notify the Labour Commissioner and the relevant trade union if it has been recognised as an exclusive bargaining agent at least 4 weeks before the time of the intended dismissals. If no recognition agreement exists with a trade union the employer must notify, the workplace representatives (shop stewards) and the employees instead. The notification must also contain the reasons for the reduction in the workforce; the number and categories of employees affected; and the date of the intended dismissal.

The minimum notification period may be shorter if it is not practicable to do so within the period of 4 weeks.

Disclosure of information

All relevant information necessary for the trade union or shop stewards/ employees to engage effectively in the negotiations must be disclosed. However, an employer is not obliged to disclose information that is legally privileged; is prohibited by law or a court order from being disclosed; or is confidential and may cause substantial harm to the employer if disclosed.

Negotiation

The parties must negotiate in good faith on:

- Alternatives to dismissal.
- How to minimise the dismissals.

- The criteria for selecting the employees to be dismissed.
- The conditions on which the dismissals are to take place.
- How to avert the adverse effects of the dismissals.

Depending on the outcome of the negotiations, an employer must select the employees to be dismissed due to redundancy either according to the selection criteria agreed upon, or in the absence of such an agreement according to selection criteria that are fair and objective.

Disputes

Where pursuant to the negotiations no agreement can be reached between the parties, any one of the parties may refer the matter to the Labour Commissioner within one week after expiry of the notice period. The Commissioner must appoint a conciliator to assist the parties to resolve the dispute. The conciliator has up to 4 weeks as from the date of the referral to do so. The employer must continue to negotiate in good faith and may not dismiss employees before the end of the 4 weeks provided for conciliation, unless the dispute has been settled or has been otherwise disposed of.

Disguised transfer

If there is a disguised transfer or continuance of an employer's operation which employs or employed employees who are to be dismissed or were dismissed in terms of this section, the employees or their collective bargaining agent have the right to apply to the Labour Court for appropriate relief. Such relief can include an order directing the restoration of the operation; directing the reinstatement of employees; or awarding lost and future earnings.

"Disguised transfer or continuance" for the purpose of this section includes any practice or situation whereby an employer who runs or operates any business purports to have gone out of business or to have discontinued all or part of its business operations, when in fact those business operations are continued under another name or form or are carried out at another location, without the employer disclosing the full facts to the affected employees or their collective bargaining agent (trade union with whom a recognition agreement exists).

An employee is also entitled to refer a dispute of unfair dismissal or failure to bargain in good faith to the Labour Commissioner in respect of the employee's retrenchment.

Penalties

An employer who contravenes or fails to comply with this section commits an offence and is liable on conviction to a maximum fine of N$10 000.00 and/or up to two years imprisonment.

Discussion: In view of the serious unemployment situation holding sway throughout Namibia, any redundancy exercise (also commonly referred to as retrenchment) needs to be approached cautiously and with the necessary sensitivity. It should genuinely be a route of last resort, and only be considered after all other alternatives have been fully explored by all parties concerned. Management has the prime responsibility in this respect, since as custodian of the enterprise it is usually in the best position to know of possible implementable options combining both organisational efficacy and employment security.

Strategic planning well ahead of time, with blueprints linked to early warning indicators for different economic scenarios, can position an enterprise to deal with a fluctuating socio-economic environment in a pro-active fashion. Controlled downsizing based on the dynamics of natural attrition, or expansion into new markets and new lines of business to make up for a slump in activity elsewhere, can, for example, serve as regulating mechanisms obviating the need for abrupt decisions to retrench staff.

However, should retrenchment, indeed, become unavoidable, the provisions and spirit of this section of the Act, require that a delicate balance be maintained between corporate exigencies on the one hand, and employment security, including humanitarian considerations for affected employees and their dependants, on the other.

The philosophy behind the stipulated timelines applicable to a redundancy exercise, is to send a message to the parties to approach the matter with due responsibility and to emphasise that genuine negotiations are critical otherwise the financial and other consequences can be very serious.

Changes: Section 34 contains a number of provisions which did not apply in the previous dispensation and which need to be noted by employers. The entire process is more interactive and transparent and places greater emphasis on the need for agreement between the parties than before.

The Labour Commissioner as well as affected parties must be informed at least 4 weeks ahead of time – previously there was no time prescription regarding notification of the Labour Commissioner.

The compulsory conciliation provision is a totally novel approach and can result in the entire retrenchment process lasting for up to 9 weeks which could place a considerable additional financial burden on a faltering enterprise. [It is important to note, furthermore, that in the event of conciliation failing and no agreement is reached at the end of the second 4 weeks provided for this purpose and an employer then goes ahead with the dismissals, an aggrieved party (i.e., the relevant union

or the affected employees) could still lodge a claim of unfair dismissal, potentially resulting in the matter being referred to arbitration, further drawing out the process.]

The concept of disguised transfer or continuance of an enterprise and the enormous potential consequences thereof are similarly new and far-reaching.

Other important new additions to the retrenchment procedure are the stipulations on disclosure, alternatives to dismissal, minimisation of dismissals, selection criteria and the requirement for *good faith negotiations* (not merely the requirement to "… *afford* such trade union, workplace union representative or the employees concerned *an opportunity to negotiate* …", as had previously been the case).

Finally, it should be noted that an employer can be penalised in several manners for non-compliance with provisions of this section: Labour Court order; arbitration award; and/or criminal conviction up to a maximum of N$10 000 and/or two years imprisonment.

G. Severance pay *(sec.35)* ***(M)*** – Severance pay consists of an amount equal to at least 1 week's remuneration for each year of continuous service with the employer, calculated on the present level of earnings of an employee. An employee who has completed 12 months of continuous service is entitled to severance pay if:

- The employee is dismissed;
- the employee dies while employed; or
- the employee resigns or retires on reaching the age of 65 years.

An employee <u>does not</u> qualify for any severance pay if:

- The employee is dismissed on grounds of misconduct or poor work performance;
- the employee unreasonably refuses reinstatement;
- the employee resigns or retires before reaching the age of 65 years; or
- the employee unreasonably refuses to accept employment on terms no less favourable than those applicable, immediately before the termination of employment with –
  - the surviving spouse, heir or dependant of a deceased employer within one month of the death of the employer; or
  - one or more of the former partners within one month of the dissolution of the partnership, if the employer was a partnership.

The calculation of the length of an employee's service for the purpose of severance pay is subject to the following rules:

1. If upon the death of an employer the employee is employed by the surviving spouse, heir or dependant, the employee retains service acquired before the employer's death.
2. In a case where a partnership has been dissolved and the employee is employed by a former partner, the employee retains service acquired before the dissolution.
3. Where the employer's business has been transferred to another person and the employee continues in the service of that business after transfer, the employee retains service acquired before the transfer.
4. In the case of a seasonal worker who has worked for the same employer for two or more successive seasons, the service is regarded as continuous provided that the period of service is made up of the periods actually worked.
5. Continuous service includes any period of employment contemplated in sec.29 *(>Period of employment).*

Payment of severance pay in accordance with section 35 does not affect an employee's right to any other benefits that the employer is obliged to pay.

Where employment is terminated by death in the absence of a will, the employee's surviving spouse, or if there is no spouse, the employee's children, must receive the severance pay. If there is no spouse, nor children, the money gets paid into the estate.

Discussion: Some employers have difficulty in interpreting this section. The wisest approach would be to opt for direct, literal interpretation, i.e., to do exactly what the section says and not to attempt to read between the lines. That does of course not prevent an employer and employee to agree on anything which is more beneficial to the employee than provided for in this section. For example, where an employee retires or resigns at 60 and, therefore, before reaching the age of 65 years as provided for in this section, the employer may voluntarily agree to pay severance nonetheless, but is not obliged to do so.

The use of the term 'dismiss' may also be misunderstood. When used in the Labour Act, the term means termination of employment by an employer for any reason whatsoever. Therefore, termination for medical incapability, for example, would also entitle an employee to severance. The only exceptions are dismissal for misconduct or poor work performance as indicated above. When a person has been appointed on a fixed term

contract severance is also not applicable (unless the parties agreed to it) since the contract terminates through the elapse of time and not though dismissal or resignation.

The section refers to severance pay being calculated on remuneration. Employers, therefore, must base their calculations on the total value of all payments in money or in kind relating to the employee's present earnings, including any monthly allowances or other regular payments made or owing to an employee. Put another way, severance pay is basically the equivalent of 4.333 of an employee's current monthly gross earnings for each completed year.

Changes: The severance pay provision is essentially unchanged in substance, except for the exclusion of recognition for contributions by the employer to a pension fund, or any other type of savings on behalf of the employee by an employer, which become payable to the employee upon termination of service. Formerly, if such contribution equalled or exceeded the calculated amount for severance, severance pay was not obligatory.

Another slight change is that severance pay is not applicable in a case of a fair dismissal on grounds of misconduct and poor *work performance.* Previously it had not been applicable in cases of misconduct and *incapability.* In this regard it should be noted that one of the main purposes of severance pay is to cushion the effects of employer initiated termination where the employee has no culpability. Therefore, as with retrenchments it would be grossly unfair for an employee to lose benefits because of chronic illness, for example, while at the same time facing a dark future of unemployment through no fault of his/her own.

H. Transportation on termination of employment (sec.36) (M)

– If the services of an employee are terminated during the first 12 months of employment at a place other than where the employee was recruited, the employer must transport the employee to the place of recruitment or pay him/her an amount equal to the costs of such transport.

The benefit does not apply when an employee unreasonably refuses reinstatement.

Change: This provision did previously not apply in a situation where an employee has been fairly dismissed on grounds of misconduct or incapability.

I. Payment on termination and certificates of employment *(sec.37)* ***(M)*** – An employee whose services have been terminated is entitled to payment by the employer –

- for any work done prior to termination;
- >*notice*;
- >*annual leave* entitlements;
- paid time off for >*Sunday work* or >*public holiday(s)* work performed (if applicable);
- >*severance pay* (if applicable); and
- >*transport allowance* (if applicable)

Leave for an incomplete annual leave cycle is calculated on a pro rata basis. The employee does not qualify for such pro rata accrued leave of an uncompleted leave cycle if no notice or payment in lieu of notice has been given by that employee to the employer.

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

Payment on termination of employment must be done in the usual >*payment of remuneration* manner (including payslip, etc.) on the day of termination.

The termination must be accompanied by a *certificate of service* containing the following information:

a) Full name of the employee;
b) name and address of the employer;
c) description of the industry/sector in which the employer is engaged;
d) date of commencement and date of termination of employment;
e) employee's job description/title;
f) remuneration amount at date of termination; and
g) reason for termination: *only if the employee so requests.*

The employer is at liberty to, but not obliged, to additionally provide an employee a testimonial or other certificate of good character.

Changes: The provisions in this section are largely unchanged. A slight but significant modification exists in the stipulation that an employer is not required to pay pro-rata leave for an uncompleted leave cycle if an employee has not given proper notice.

***J. Disputes concerning this Chapter** (sec.38) **(N)** (Chapter 3): Conditions of employment and termination]* – Disputes involving the application, interpretation or alleged non-compliance or contravention of basic conditions of employment, including any matter related to the termination of employment, may be referred to the Labour Commissioner in writing by any of the affected parties. A copy of the referral must be served on the other parties.

The Labour Commissioner will then make arrangements for the appointment of an arbitrator to resolve the dispute in accordance with Part C of Chapter 8 of the Labour Act, 2007 *(>Arbitration of disputes).*

Trade union – *>Definitions and Interpretation*

Trade Unions and Employers' Organisations (Chapter 6 Part A)

– Sections 52 to 56, appearing as entries A. to E. below, deal with establishment and winding up of trade unions and employers' organisations.

Discussion: A *trade union (>NLL 1 pp.118 to 122)* is an organised association of workers formed for the protection and promotion of their common interests. The concept is defined more specifically in the Labour Act, 2007 as *" …an association of employees whose principal purpose is to regulate relations between employees and their employers"* (section1).

An *employers' organisation (>NLL 1 pp.79 & 80)* is an association consisting of employers in a given economic sector whose principal purpose is the regulation of relations between employers, employees, trade unions and the State with a view to enhance the productivity and welfare of all. The concept is defined in the Act as *"… any number of employers associated together for the purpose, of regulating relations between those employers and their employees or the employees' trade unions"* (section1).

A. Definitions relating to Chapter 6 (Trade Unions and Employers' Organisations)** (sec. 52) **(N) – Definitions provided in section 52 have, for the most part, been incorporated in the discussion of the relevant provision to which they refer. However, for ease of reference, they are repeated verbatim below as appearing in the Labour Act, 2007.

Authorised representative – means any person authorised to represent a registered trade union or any office-bearer or official;

Employer's premises – means any premises under the control of the employer where work is done or the employees are accommodated;

Fee – means an entry fee, a periodic membership fee, a levy, or any other monetary amount owed by a member of a trade union to that union in terms of its constitution;

Registered trade union – includes one or more trade unions acting jointly, or a federation of trade unions, for the purposes of Parts A and B of Chapter 6;

Workplace – means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, each of those operations constitutes a separate workplace.

B. Constitutions of trade unions or employers' organisations

(sec.53) ***(U)*** – A trade union or employers' organisation that intends to register under the Labour Act, 2007 must adopt a constitution that meets the statutory requirements set out below.

The relevant constitution must:

a) State the name of the association;
b) state its objects;
c) describe the industry or industries it represents;
d) prescribe the qualifications for admission to membership;
e) provide for membership fees and the method for determining them and other payments by members;
f) establish the circumstances and procedure for the termination of membership which must include an opportunity for the member to be heard and a right of appeal;
g) prescribe that –
    - a member in good standing is a member who is not more than 3 months in arrears with the payment of any fees due in terms of the constitution;
    - only a member in good standing may nominate candidates for any office or vote or be voted for in an election of an office-bearer or official; and

- no person who has been convicted of an offence of which dishonesty is an element and for which that person has been sentenced to imprisonment without an option of a fine, may stand for election as an office-bearer;

h) state the –
   - functions of its officials and office bearers;
   - procedures for the appointment or election of officials and office-bearers;
   - terms of appointment of its officials and office bearers; and
   - circumstances and manner in which officials and office-bearers may be removed from office;

i) prescribe the procedure for nomination and election of workplace representatives and health and safety representatives;

j) prescribe that –
   - there must be at least one general meeting of members every three years;
   - general meetings of members must be open to all members; and
   - the procedure for convening and conducting meetings of members and meetings of office bearers, including the quorum for meetings and the manner in which minutes are to be kept;

k) establish the manner in which ballots are to be conducted;

l) provide for the banking and investing of funds;

m) establish the purpose for which funds may be used;

n) provide that no payment may be made to an official or employee without the prior approval of its governing body granted under the hand of its chairperson, except for their salaries and the expenses incurred by them in the course of their duties;

o) provide for the acquisition and control of property;

p) determine the date for the end of its financial year;

q) prescribe a procedure for affiliation, or amalgamation, with other trade unions or employers' organisations, as the case may be;

r) prescribe a procedure for changing the constitution; and

s) prescribe a procedure by which it may be wound up.

In meeting the above requirements, the constitution of a trade union or employers' organisation must, furthermore:

- Not be in conflict with the Namibian Constitution or any other law;
- Not hinder or the attainment of the objects of any law; and
- Not evade any obligation imposed by any law.

The Labour Commissioner is authorised to notify any such association that he has reason to believe that is constitution does not comply with the

statutory requirements, and to call on the body to make representations in that regard or to redraft its constitution in order to meet requirements. After considering such representations or redrafted constitution the Commissioner may inform the party that the constitution meets requirements, or inform the party that it does not meet the prescribed requirements.

C. Changing the constitution of a registered trade union or registered employers' organisations *(sec.54)* ***(U)*** – If a registered trade union or employers' organisation intends to change any aspect of its constitution the Labour Commissioner should be formally approached for approval in that regard. This would entail submission of the relevant prescribed form, 3 copies of the resolution containing the wording of the amendment and a certificate by the chairperson certifying that the resolution was passed in accordance with the constitution.

The Labour Commissioner, who may require further information in support of the application, must consider the application. If the Commissioner is satisfied that the amendments meet all requirements, they are approved by the issuing of an appropriate certificate to the trade union or employers' organisation. If the Commissioner refuses approval, that must be done by written notice in which the reasons for refusal are provide.

[See Regulation 7: *Change in constitution of registered trade union or registered employers' organisation]*

D. Winding up of trade unions or employers' organisations *(sec.55)* ***(U)*** – This section provides for the closing down, or dissolving, of a registered trade union or employers' organisation by order of the Labour Court. The association itself, a member, the Labour Commissioner or a person (in the case of insolvency) may apply to the Court for such winding up upon good cause shown. In the case of eventual insolvency, the Insolvency Act, 1943 (Act No. 16 of 1943) is applicable, although any reference in that Act to "the court" shall be interpreted as a reference to the Labour Court.

E. Appeals from decision of Labour Commissioner *(sec.56)* ***(N)*** – Any person dissatisfied with a decision of the Labour Commissioner made with regard to Part A of Chapter 6 of the Labour Act (Trade Unions and Employers' Organisations) may appeal to the Labour Court against the decision.

Transitional Provisions – The Schedule to the Labour Act, referred to in section 142 *(>Repeal of laws, transition and consequential amendments)* governs the transition from the administration of the Labour

Act, 1992 and the Labour Act, 2004 to the administration of those matters under the Labour Act, 2007. Items 1. to 17., appearing below, deal with the applicable transitional provisions.

Discussion: Transitional provisions in an Act allow for the smooth transition, or passage, from the previous statutory regime to a new dispensation put in place by a new law. It is often not practically possible, or in some instances desirable, to have the changeover occur immediately, or virtually automatically. For instance, there is usually a need to first orientate and educate those affected by the new law and to put in place the necessary administrative structures.

With the Labour Act, 2007 that was catered for by the fact that in terms of section 143 *(Short title and commencement)* the Act, and different provisions thereof, come into operation after promulgation on dates determined by the Minister. It was, therefore, possible to allow for a certain elapse of time between the publishing of the Act and its coming into operation.

However, in addition to an orientation interval it was also necessary to put in place practical measures to allow for the completion or rounding off of matters such as applications, conciliation boards, litigation, etc, initiated under the previous Act.

Equally, provision had to be made for the continuation without interruption of certain powers, offices, measures, authorisations, entitlements, rights and obligations from the old system to the new. These and related aspects are suitably provided for in the 18 'items' (not to be confused with 'sections' as in the Act proper) appearing in the Schedule of Transitional Provisions appended to the Labour Act, 2007. Although the items do not form part of the Act itself, they are invested with equal legal authority.

1. Definitions *(item 1)* – In the Schedule 'effective date' means the date on which the Act, or any section of it, came into operation as determined by the Minister in terms of section 143. Any reference in the Schedule to 'previous Act' means the Labour Act, 1992 reference to '2004 Act' means the Labour Act, 2004 and reference to 'this Act' means the Labour Act, 2007.

2. General preservation of rights, duties, regulations, notices and other instruments *(item 2)* – In terms of item 2 of the Schedule the following rights, duties, regulations, notices and other instruments emanating from the previous Act must be dealt with as set out hereinafter:

- Any right or entitlement enjoyed by any person, or obligation imposed on any person, in terms of a provision of the previous Act that has not been fulfilled immediately before the effective date *must be considered to be a right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of the new Act*, as from the date that the right, entitlement or obligation first arose.

- Any regulation promulgated in terms of the previous Act *remains in force* as if it had been promulgated under the new Act as from the effective date. [For example, the Regulations Relating to the Health and Safety of Employees at Work promulgated in *Government Gazette* No. 1617 of 1 August 1997 remain applicable to all employers and employees in Namibia.]

- Any official form prescribed for use in terms of the previous Act *can be used for a similar purpose* under the new Act until a new form has been provided.

- A notice given by a person to another person in accordance with the previous Act *is to be considered as notice given* in terms of any comparable provision of the new Act, as from the date that the notice was given under the previous Act.

- An agreement between an employee and employer, a request or an authorisation given by an employee to an employer, in terms of the previous Act, and in effect immediately before the effective date, *remains in force*, as if it had been made in terms of the new Act.

- Permission given by a person to another person in terms of the previous Act, and in effect immediately before the effective date, *remains in force*, as if it had been made in terms of the new Act.

- An assignment by the President in terms of sec.102(1) of the previous Act [assignment of the administration of provisions or regulations to different Ministers], *remains in force*.

- A document, that before the effective date, had been served in accordance with sec.113 of the previous Act (service of documents by an official of the Ministry of Labour on another person), *must be regarded as having been served* for the purpose of the new Act.

- An order of the Labour Court, a district labour court, or a labour inspector and in effect immediately before the effective date, *remains in force*.

- An exemption granted by the Minister in terms of sec.114 of the previous Act [exemption to employer regarding certain basic conditions of employment] is deemed to have been granted in terms of the corresponding provision of the new Act, and *remains in force*.

- A delegation of authority made in terms of sec.115 of the previous Act [delegation of power to an official of the Ministry of Labour], and in effect immediately before the effective date *remains in force until it is withdrawn*.

3. Continuation of time *(item 3)* – When it is necessary for the purpose of the Act to refer to a period of time, or to calculate a period of time, the calculation can legitimately extend to a date before the effective date where so required by the relevant circumstances. [For example, when calculating the amount of severance pay to which an employee is entitled who has been employed since 1995, severance must be counted as from that year until the date of termination].

4. Applications and notices concerning continuous work and overtime hours *(item 4)* – A notice by the Minister in the *Government Gazette* concerning continuous work and in operation immediately before the effective date remains in force until its expiry date.

An application made to the Permanent Secretary with regard to extended overtime, and pending at the effective date, must be proceeded with as if an application under the new Act. A notice by the Permanent Secretary increasing maximum overtime remains in force until its expiry date.

5. Applications and notices concerning Sunday or public holiday work *(item 5)* – An application made to the Permanent Secretary concerning Sunday work which is still pending at the effective date must be proceeded with as if is an application under the new Act.

A notice concerning work on Sundays or public holidays issued by the Permanent Secretary and in effect immediately before the effective date, remains in force until its expiry date.

6. Remuneration deposited with Permanent Secretary *(item 6)* – Despite the repeal of the previous Act, sections 44(2)(b) and (c) relating to monies paid to the Permanent Secretary by an employer for payment to an employee by court order, or otherwise, shall remain in force for 6 months and 3 years, respectively, as from the effective date.

7. Health and safety representatives *(item 7)* – A health and safety representative holding office, and a health and safety committee in operation,

immediately before the effective date remain in place after the coming into effect of the new Act. Any rules made by the committee continue to remain in force.

8. Registration of trade unions and employers' organisations *(item 8)* – Matters related to the registration of trade unions and employers' organisations are dealt with as indicated below:

- An application by a trade union or employers' organisation for registration, or for the amendment of its constitution that was pending immediately before the effective date, *must be proceeded with* in terms of the new Act.
- A trade union or employers' organisation that was registered in terms of the previous Act, immediately before the effective date, *continues to be registered* in terms of the new Act.
- A certificate of registration issued to a trade union or employers' organisation and valid immediately before the effective date *continues to be valid* as if it had been issued in terms of the new Act, subject to the new Act and any conditions attached to it at the time it was issued.
- An application to be recognised as an exclusive bargaining agent and pending immediately before the effective date *must be proceeded with* under the provisions of the new Act.
- A registered trade union that was recognised as an exclusive bargaining agent immediately before the effective date *continues to be an exclusive bargaining* agent after the effective date.
- A workplace union representative holding office immediately before the effective date *continues to hold office*, and the term of the representative ends at the expiry of 2 years, measured as from the date on which the representative was most recently elected to office.

9. Collective bargaining *(item 9)* – Matters related to collective bargaining are be dealt with as indicated below:

- The provisions appearing under >*Collective Agreements* (Part D of Chapter 6) apply *equally to a collective agreement* whether entered into before or after the effective date.
- An exemption from a collective agreement granted by the Minister that was in effect immediately before the effective date, *continues to be in force*.

- The extension of a collective agreement by the Minister that was in effect immediately before the effective date *continues to be in force*.
- An exemption from an extension of a collective agreement granted by the Minister *continues to be in force.*
- A request to the Minister for an exemption from the provisions of a collective agreement in terms of sec. 69(3) of the previous Act, that has not been granted immediately before the effective date *lapses and is a nullity* in terms of the new Act.
- A request to the Minister for an extension of a collective agreement, that has not been granted immediately before the effective date *must be proceeded with*.
- A request to the Minister for an exemption from the extension of a collective agreement in terms of sec. 70(5) of the previous Act that has not been granted immediately before the effective date *must be proceeded with*.
- A dispute that was pending before the Labour Commissioner or before a conciliation board immediately before the effective date, *must be proceeded with* in terms of the provisions of the new Act, subject to any directions given by the Labour Commissioner as to the fair and reasonable transition from the previous Act to the new Act.

10. Strikes, lock-outs and essential services *(item 10)* – A strike or lockout that was underway or for which notice had been given in terms of the previous Act, immediately before the effective date, continues to be governed by the relevant provisions of the previous Act, unless the parties agreed that the strike or lockout must be governed by the provisions of the new Act.

An essential service designated in terms of the previous Act, remains an essential service subject to the authority of the Essential Services Committee to recommend the variation or cancellation of that designation.

11. Wages Commission, Wage orders and exemptions *(item 11)* – Matters related to a Wages Commission, wage orders, and exemptions there from, immediately before the effective date remain in effect as if done under the new Act.

An appeal to the Labour Court from the granting of an exemption pending before the court at the effective date, must be concluded as if the previous Act had not been repealed.

12. Labour Commissioner and Labour Inspectors *(item 12)* – The person who immediately before the effective date was appointed as Labour Commissioner continues to be the Labour Commissioner subject to the new Act and any conditions attached to his/her appointment in terms of the previous Act.

An individual who immediately before the effective date was appointed as labour inspector continues to be a labour inspector subject to the new Act and any conditions attached to his/her appointment in terms of the previous Act. Such a person's certificate of appointment by the Permanent Secretary also continues to remain valid.

13. Labour Advisory Council *(item 13)* – Matters related to the Labour Advisory Council (LAC) are dealt with as indicated below:

- The person who immediately before the effective date was the chairperson of the LAC, remains the chairperson for 3 years measured as from the date on which that individual was most recently designated by the Minister to hold that office.
- Other serving members immediately before the effective date, remain in office for 3 years measured as from the dates on which they were most recently appointed.
- Rules made by the LAC and in effect immediately before the effective date remain in force.
- Statutory committees of the LAC in effect immediately before the effective date remain in operation.
- The person formally appointed and serving as Secretary of the LAC immediately before the effective date, continues to be the Secretary of the Council.

14. Labour Court *(item 14)* – Matters related to the Labour Court are dealt with as indicated below:

- A judge of the High Court, who at the effective date, is seized of a matter arising under the previous Act, remains seized of that matter until it is concluded.
- Section 16 of the previous Act (Constitution of the Labour Court) continues to apply in respect of any matter coming before the Labour Court in terms of the new Act, until such time as the Judge-President first appoints members of the Court.

- A person who was a member of the Labour Courts' Rules Board immediately before the effective date ceases to be a member as from that date.
- Rules made by the Labour Courts' Rules Board and in effect immediately before the effective date remain in force in so far as they are applicable to proceedings in terms of the new Act, subject to repeal, amendment or replacement by the new Labour Court Rules Board.

15. Pending disputes *(item 15)* – *'Pending* disputes' for the purpose of this item refer to matters that have been filed with the registrar of the district labour court, or the Labour Court, and have been issued a case number. Such disputes are to be dealt with as indicated below:

- A dispute that was pending immediately before the effective date *must be concluded* by the relevant court in terms of the old Act.
- A dispute that arose under circumstances that occurred before the effective date but was not pending before a district labour court, or the Labour Court, as the case may be, on the effective date, *must be dealt with in terms of the new Act*.
- An alleged unfair dismissal dispute that occurred before the effective date but was not pending, the cause of action of which occurred more than 6 months but less than 12 before the effective date, *must be dealt with in terms of sec.24 of the previous Act*, to determine when the dispute is barred due to the passage of time. [Section 24 of the previous Act stipulates that no proceedings shall be instituted after the expiration of a period of 12 months as from the date on which the cause of action has arisen, or the contravention or failure in question has taken place, or from the date on which the party instituting such proceedings has become or could reasonably have become aware of such cause of action or contravention or failure, as the case may be, except with approval of the court on good cause shown]
- An appeal or review allowed from a matter that was pending *must be proceeded with* in terms of the provisions of the previous Act.

16. References in other laws *(item 16)* – As from the effective date any reference in any law to a provision of the previous Act, must as far as possible, be read as if it were a reference to the corresponding provision in the new Act

Similarly, as from the effective date any reference in any law to a district labour court must be read as if it were a reference to the Labour Commissioner

if it concerns a matter in respect of which the new Act provides for a referral to the Labour Commissioner, or to the Labour Court, in any other case.

Any reference in any law to the Labour Court, Labour Advisory Council, or Wages Commission must be read as a reference to each such body respectively, as constituted under the new Act.

17. Resolution of other transitional matters *(item 17)* – The final item of the Schedule provides for dealing with areas of uncertainty arising from the implementation of the Labour Act, 2007. In a situation of this nature a party may apply to the Labour Court for a *declaratory order (>NLL 1 p.135)* and the Court may make any order that is just and reasonable, including an order applying a provision of the previous Act, despite its repeal.

A party making such an application must serve notice thereof on the Permanent Secretary, the Labour Commissioner and on any other persons with an interest in the order sought. All these officials and persons will then each have the rights of a party in the matter before the Court.

Transport allowance – >Termination of employment

Transportation on termination of employment *(sec.35)* – *>Termination of employment*

U

Unfair dismissal – *>Termination of employment*

Unfair Labour Practices *(Chapter 5)* – Sections 48 to 51, appearing as entries A. to E. below, deal with unfair labour practices.

Discussion: The concept of an unfair practice generally refers to any employment-related act or omission, perpetrated by an employer, employers' organisation, employee or by a trade union which is detrimental to healthy labour relations, employee welfare and legitimate employer objectives.

A. Unfair disciplinary action *(sec.48)* ***(U)*** – This section simply stipulates that disciplinary action taken against an employee in contravention of section 33 *(>Unfair dismissal)* constitutes an unfair labour practice.

Discussion: Whereas section 33 is directed at *dismissal in general* (any kind of termination of employment by an employer), section 48 is concerned with *discipline* (>NLL 1 p.73) which *can* lead to dismissal but not necessarily so. Before disciplinary action can be viewed equitable in the eyes of the law, three basic conditions have to be complied with. As in the case of fair dismissal, there must be a *valid* and *fair reason* for such disciplinary measures taken; and the action itself must be in compliance with a *fair procedure*.

Valid reason
The *validity consideration* refers to the factual circumstance surrounding purported misconduct. In other words, it points to the requirement that sufficient objective evidence must be available to substantiate the occurrence of an alleged offence on a convincing balance of probabilities. Subjective hunches and suspicions are insufficient to declare an employee guilty of wrongdoing. In other words the reason for disciplinary action must be lawful in terms of the Labour Act; the employer's disciplinary code; and/or in terms of the common law.

Fair reason
Fair reason essentially has regard to the requirement that whatever the disciplinary steps decided upon after establishment of proof of guilt, they must be appropriate and fair under the circumstances and be consistently applied. That is to say, disciplinary measures should match the seriousness of an offence and should not be applied haphazardly.

Discipline concerned with rules
A chairperson of a disciplinary hearing, as well as an arbitrator or a court of law must essentially consider six aspects to determine whether discipline meets the requirement of a *valid and fair reason*. It must be established whether:

a) A rule regulating conduct in, or of relevance to, the workplace was involved; if so,
b) whether the rule was reasonable;
c) whether the rule was known to the accused employee, or whether he/she ought reasonably to have had knowledge of it;
d) whether the rule was consistently applied in the past;
e) whether in the specific case being investigated the rule was infringed; and

f) whether the disciplinary measure decided upon is the appropriate sanction for the contravention of the rule under the specific circumstances applicable to the case.

Remedial focus

In this respect it must again be emphasized that disciplinary action should in the first place be of remedial nature. It is not a question of punishing an employee in the sense of applying retribution for an infraction. It is rather a matter of attempting to remedy and to positively influence improper workplace conduct. After all, a lot of time and expense has usually been invested in recruiting, training, motivating etc., of the employee concerned – quite apart from the fact that an employee has an inherent right to be treated fairly. Thus in many cases suitable counselling is all that is lacking in order to ensure normalization of performance patterns.

Should unacceptable behaviour persist despite recourse to remedial efforts on the part of management, sterner measures would have to be considered. Certain types of shop-floor offences, on the other hand, such as those involving distinct dishonesty, violence, or gross insubordination, are so prejudicial to the employment relationship that they commonly necessitate summary dismissal at a first occurrence. In such cases counselling and warnings would usually be insufficient to restore impaired trust and confidence.

Fair procedure

Fair disciplinary action is based on the principles of *natural justice (>NLL 1 p.152).*

Natural justice is a fundamental legal concept underlying fair enquiry of alleged transgression made against an individual(s). It is based on universal natural moral law (what is right and wrong). In Roman Law (aspects of which form part of our common law) this is expressed by two main tenets: *Audi alteram partem* “hear the other side”; and *nemo iudex in propria causa* “no one may judge his own cause”

The principles comprise or imply certain main elements which must be observed in the fair adjudication of a case. The elements include –

- being informed of nature of accusation;
- opportunity for the accused to prepare for defence;
- right of representation;
- hearing of the accusation by an impartial adjudicator*;*
- opportunity to defend, put questions and state own case; and
- being given a reasoned judgment.

The level of formality of the procedure is determined by the seriousness of the alleged misconduct. Thus where the possibility exists that an employee may be given a final written warning or even be dismissed a full disciplinary hearing needs to be held. Conversely, where the enquiry would result in a verbal warning or first written warning less formality would normally be required, as long as the employee is still afforded opportunity to state his/her case before a disciplinary measure, or the withholding thereof, is decided upon.

B. Employee and trade union unfair labour practices (sec.49) (M) –

Employee unfair labour practices

It is an unfair labour practice for an employee to engage in any conduct that subverts (undermines) orderly collective bargaining or which constitutes intimidation of any person.

Trade union unfair labour practices

It is an unfair labour practice for a registered trade union to –

a) refuse to bargain collectively in a situation where the Labour Act or a collective agreement require the union to do so;
b) bargain in bad faith;
c) engage in conduct that subverts orderly collective bargaining;
d) engage in conduct that intimidates any person; or
e) not fairly represent an employee in any bargaining unit in respect of which the trade union is recognised as the exclusive bargaining agent.

These prohibitions must not be construed as preventing any person from participating in a lawful strike, picket or lockout that is in compliance with provisions of the Act.

Changes: Use of the expression 'unfair labour practice' in conjunction with certain forms of prohibited conduct pertaining to employees and trade unions is an innovation in the Act, as well as the specific proscription of bad faith bargaining. For the rest the contents of this section do not differ substantially from the previous Act.

C. Employer and employers' organisation unfair labour practices (sec.50) (M) –

Employer and employers' organisation unfair labour practice

It is an unfair labour practice for an employer or for a registered employers' organisation to –

a) refuse to bargain collectively in a situation where the Labour Act or a collective agreement require the employer or organisation to do so;
b) bargain in bad faith;
c) fail to disclose relevant information that is reasonably required by workplace union representatives to perform their functions;
d) fail to disclose relevant information that is reasonably required by a recognised trade union to consult or bargain collectively in respect of any labour matter;
e) unilaterally alter any term or condition of employment
f) seek to control any trade union or federation of trade unions;
g) engage in conduct that subverts orderly collective bargaining; or
h) engage in conduct that intimidates any person.

Disclosure

An employer is not required to disclose information if it is –

- legally privileged;
- prohibited by any law or court order from being disclosed;
- confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
- if it is private personal information relating to an employee, unless the employee consents to the disclosure of the information.

Disputes about disclosure

A dispute regarding disclosure may be referred to arbitration for determination. It must then first be established whether or not the information is relevant. If it is relevant but legally privileged or prohibited by law or a court order from being disclosed, then it may not be divulged.

If the arbitrator decides that the information is relevant but is confidential or constitutes private personal information relating to an employee, the arbitrator must balance, or weigh up, the harm that disclosure is likely to cause against the harm that the failure to disclose is likely to cause. If the arbitrator decides that the balance of harm favours disclosure, the latter may order disclosure subject to conditions designed to limit the harm likely to be caused to the employee or employer.

When making an order, the arbitrator must take into account any previous breach of confidentiality in respect of information disclosed to the workplace union representative or trade union, and may refuse to order the disclosure

of the information for a period of time. In a dispute about alleged breach of confidentiality, the arbitrator may also order the withdrawal of the right of disclosure for a period.

Changes: Use of the expression 'unfair labour practice' in conjunction with certain forms of prohibited conduct pertaining to employers and employers' organisations is an innovation in the Act, as well as the specific proscription of bad faith bargaining. Furthermore, the portion dealing with disclosure introduces a new concept to Namibian statutory collective relations with the intention to promote transparent negotiations in which there is optimal sharing of relevant information to enable rational, realistic decision making.

E. Disputes concerning this Chapter *(sec.51)* ***(N)*** – Disputes involving the application, interpretation or alleged non-compliance or contravention of any matter related to unfair labour practices as set out in Chapter 5, may be referred to the Labour Commissioner in writing by any of the affected parties. A copy of the referral must be served on the other parties.

The Labour Commissioner will then make arrangements for the designation of an arbitrator to resolve the dispute in accordance with Part C of Chapter 8 of the Labour Act, 2007 *(>Arbitration of disputes).*

If a dispute concerning an alleged unilateral alteration of a term or condition of employment is referred to the Labour Commissioner within 30 days following the alteration, the employer must restore such term or condition of employment as of the date of the alteration or refrain from effecting such alteration until the dispute is resolved or settled in terms of this Part or is otherwise disposed of.

An employer who contravenes or fails to comply with the foregoing provision relating to alleged unilateral alterations commits an offence and is liable on conviction to a maximum fine of N$10 000.00 and/or up to two years imprisonment.

Urgent interdicts – *>Strikes and Lockouts*

Urgent work – *>Definitions relating to Basic Conditions of Employment*

V

Variation and rescission of awards – *>Arbitration of disputes*

W

***Wages Commission** (Chapter 9 Part C)* – Sections 105 to 114, appearing as entries A. to J. below, deal with the *Wages Commission*. Sections 13 and 14 dealing with *wage orders*, appear as entries K. to L.

A. Continuation of Wages Commission** (sec.105) **(U) – In terms of sec.105 of the Labour Act, 2007, the Wages Commission established by section 84 of the Labour Act, 1992 remains in place subject to the provisions Chapter 9 Part C.

The Wages Commission may be constituted by the Minister of Labour whenever the latter may decide to do so or at the request of a trade union or employers' organisation.

B. Functions of Commission** (sec.106) **(U) – The functions of the Wages Commission are to investigate terms and conditions of employment, including remuneration, and to report back to the Minister for the purpose of making a *>wage order.*

C. Composition of Commission** (sec.107) **(M) –The Wages Commission consists of at least three but not more than five members appointed by the Minister. In addition to the chairperson, there must be at least one member nominated by a registered trade union and one member nominated by a registered employer's organisation.

Changes: The only change is the potential enlargement of the Wages Commission from three members to five members.

D. Terms of office of members of Commission** (sec.108) **(U) – The Minister is empowered to remove a member of the Wages Commission from office on various counts, including in a situation where the Minister has cause to believe that the member is no longer fit or able to discharge the functions of his/her office. A new appointment must then be made in the prescribed manner to fill the vacancy for the unexpired term of office.

E. Meetings of Commission** (sec. 109) **(U) – The chairperson of the Wages Commission decides the date, time and venue of meetings of the Commission. A majority of members of the Commission constitutes a quorum and decisions are taken by majority vote of members present at a meeting.

F. Administration of Commission *(sec.110)* ***(U)*** – The Permanent Secretary is responsible for providing staff of the Ministry to perform administrative and clerical work for the Wages Commission and may also designate an official to serve as secretary. In addition the Commission may engage persons to assist it in the performance of its functions after consultation with the Permanent Secretary.

G. Terms of reference of Commission *(sec.111)* ***(U)*** – The Minister determines the terms of reference of the Wages Commission including the *industry or area* to be investigated; the *categories of employees;* and the matters to be investigated relating to terms and conditions of employment.

The terms of reference are published by notice in the *Government Gazette* inviting written representations from interested parties. In addition to the notice the Minister is required to publish the information through other available means to ensure that stakeholders are well aware of the investigation.

H. Powers of Commission *(sec.112)* ***(U)*** – The Commissions Act, 1947 (Act No.8 of 1947), read with any changes required by the context, applies to the Wages Commission in the performance of its functions**.** Its members, or a person formally authorised by it, may exercise the same powers conferred on a labour inspector in the performance of its functions.

I. Matters to be considered in investigation *(sec.113)* ***(U)*** – In performing its work, the Wages Commission is obliged to take cognizance of Article 95 of the Namibian Constitution (Promotion of the Welfare of the People) in as far as it relates to labour matters.

The Commission must, furthermore, consider all representations submitted to it by interested parties as well as all relevant matters including the –

- ability of employers to carry on business on a profitable basis if any specific recommendation is made in a wage order;
- cost of living in Namibia or any part of it;
- minimum subsistence level in any area of the country;
- value of board, lodging or other benefits provided by employers to employees; and
- any other mater determined by the Minister.

J. Reports of Commission (sec.114) (U) –

Findings and recommendations

Upon completion of an investigation the Wages Commission prepares a report to the Minister which consists of its findings and recommendations, subject to its terms of reference. The recommendations must cover:

- Minimum *remuneration;*
- the *amount* of any increase or reduction in remuneration;
- the *basis* upon which remuneration is to be determined;
- the prohibition of payment of *remuneration in kind*;
- the *deduction* to be made, permitted or prohibited from remuneration;
- *where, when* and *how* remuneration is paid;
- what *employment records* an employer is required to keep, for how long and in what form;
- the prohibition of, or regulation and remuneration of, certain kinds of work, whether on the employer's premises or off it, including *outwork, task-work, contract work or piecework;* and
- *any other matter* connected or incidental to any matter contemplated in the above.

Minority report

A dissenting member who does not agree with the Wages Commission's report, or any part of it, may submit a minority report to the Minister, and the fact of minority disagreement must also be recorded in the main report.

Publishing of Report

The Minister may publish the Commission's report, or information contained in it, but may not include information relating to financial statements or trade practices of an employer in such a publication.

***K. Wage order** (sec.13) **(M)** – After considering a report and recommendations of the Wages Commission, the Minister may, in terms of this section, make a wage order fixing wages and other conditions of employment for employees in a given industry and/or area in accordance with the Commission's recommendations. The order must be published by notice in the *Government Gazette*, and becomes effective as from a date specified in the *Gazette.*

The wage order is binding on all employers and employees described in the notice. It remains binding until suspended or cancelled by the Minister; amended or replaced by a new or amende d wage order; or is superseded by a collective agreement.

In addition to the notice the Minister is required to publish the information through other available means to ensure that stakeholders are informed of the wage order.

The Minister is not obliged to make a wage order that has been recommended by the Wages Commission, and should he decide against it, any person who maybe aggrieved by such a decision may apply to the Labour Court for a review of the decision.

Changes: The Labour Act, 1992 stipulated that if the Minister deems it expedient to make a wage order, it "… shall be in accordance with …" the recommendations of the Wages Commission. The new Act permits the Minister to modify the recommendations.

Previously, if the Minister decided not to make a wage order recommended by the Wages Commission, he was required to submit the report of the Commission to the National Assembly together with the reasons for his decision. This reporting mechanism has been removed in the new Act.

L. Exemptions from wage order *(sec.14)* ***(M)*** – The Minister may, upon application, exempt any person from the provisions of a wage order if satisfied that the conditions of employment of the employees concerned are not substantially less favourable than those contained in the wage order; or if the Minister is satisfied that special circumstances exist that justify the exemption in the interest of the affected employees.

An exemption by the Minister must be in the prescribed manner and may include any conditions under which it is granted.

The Permanent Secretary must inform all affected persons of the exemptions. The Minister may amend or withdraw an exemption.

[See Regulation 4: Exemption from wage order]

Change: The previous Act mentioned that a person aggrieved by the granting of an exemption had the right to note an appeal to the Labour Court. No such recourse is mentioned under this section.

Week *– >Definitions relating to Basic Conditions of Employment*

Weekly rest period *– >Daily spread-over and weekly rest period*

Work of equal value *– >Prohibition of discrimination in employment*

Work on Sundays *(sec.21)* ***(U)*** – An employer is not allowed to require or permit an employee to work on a Sunday except for the purpose of

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

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

1. An employee who works on a Sunday is entitled to double that employee's basic hourly wage for each hour worked on that day.
2. Alternatively, the parties can agree that the employee be paid one-and one-half the employee's basic hourly wage for each hour worked on that day and be granted equal paid time off from work during the next working week.
3. In the case of an employee who ordinarily works on a Sunday, the employer must pay the employee's daily remuneration plus the hourly basic wage for each hour worked.
4. Where the majority of hours worked on a shift fall on a Sunday, all the hours are deemed to have been worked on the Sunday – where the majority of hours fall on an ordinary working day the majority of hours are deemed to fall on the ordinary working day.

Discussion: In the past there has been uncertainty as to whether the time off referred to in paragraph 2. above, must be paid time or not. The argument being, that if so, it would mean that such an employee would effectively be remunerated 2½ times for the work performed on a Sunday (1½ times for the hours worked on that day plus another 1 times for the hours off in the following week for having worked the previous Sunday. However, the reference in section 37(1)(b) *(>Payment on termination)* of the new Act to "… any *paid time off* that the employee is entitled to in terms of sections 21(6) or (6) or 22(5) …" refers to paid time off if choosing 1½ pay rate for work on a Sunday or public holiday. The two sections (21 and 37) read together, thus remove any ambiguity in this regard and confirm that this payment option indeed amounts to a compensation rate of 2½ times ordinary pay.

It is important to note under this section the distinction made between remuneration and basic hourly wage. The latter does not include any additional monetary items such as allowances or pension contributions or medical aid benefits. The former, on the other hand, represents the entire monthly package to which an employee is entitled. Only employees who normally work on a Sunday as part of their ordinary weekly hours, receive one portion of their Sunday pay in the form of remuneration. All other Sunday pay is calculated on basic wage only.

The specific reference to "... hotel, boarding house or hostel ..." in subsection 21.(2)(b) is problematical as many other types of establishments and operations in the hospitality and tourism industries which also need to render services on Sundays are thus excluded. The situation requires an exemption or variation for such employers to be able to operate legally on Sundays and public holidays.

X

Y

Yearly leave – *>Annual leave*

Young workers – *>Child Labour*

Youth employment – *>Child Labour*

Z