

BOTSWANA

NATIONAL INDUSTRIAL RELATIONS CODE OF GOOD PRACTICE

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Approved: 23/08/02

NATIONAL INDUSTRIAL RELATIONS CODE OF GOOD PRACTICE

PART A: INTRODUCTION

1. PURPOSE AND PRINCIPLES

- 1.1 The purpose of this National Industrial Code of Industrial Relations Practice is to provide practical guidance on the day to day implementation of fair labour practices and the promotion of good human and industrial relations at the workplace.
- 1.2 It has been prepared in consultation with the Labour Advisory Board and published in terms of Section 49 of the Trade Disputes Act and Section 68 of the Trade Unions' and Employers' Organisations Act.
- 1.3 The Code provides guidance by summarising some of the provisions of the law and providing guidelines on good practice. If there is any conflict between the provisions of the Acts and this Code, the provisions of the Acts prevail.
- 1.4 The Code is intentionally general because every situation is unique and departures from the standards in this Code may be justified in appropriate circumstances. Anyone who departs from them must demonstrate reasons for doing so.
- 1.5 To the extent that this Code advances an interpretation of the law, that interpretation is the policy of the Minister and should be applied unless that interpretation is reversed by a decision of the Court.
- 1.6 The Code intends to assist-
 - 1.6.1 employees and their trade unions;
 - 1.6.2 employers and their employer organisations; and
 - 1.6.3 mediators, arbitrators and judges.
- 1.7 The principles underlying the Code are as follows:-
 - 1.7.1 good industrial relations can only be built on mutual trust, confidence and respect for the different interests of employees and employers and the broader interests represented by Government.

- 1.7.2 employers and employees must accommodate different cultural, religious and social attitudes, values and beliefs at the workplace.
 - 1.7.3 employers and employees must promote efficiency and productivity at the workplace.
 - 1.7.4 collective bargaining is the preferred means of building relationships and preventing and resolving disputes.
 - 1.7.5 sound procedures which settle disputes and grievances promptly and equitably, minimise conflict.
 - 1.7.6 fair employment standards and fair labour practices constitute the foundation of sound labour relations and an efficient and productive workplace.
 - 1.7.7 a workplace must be free of discrimination, particularly gender discrimination, and promote employment opportunities for disadvantaged groups.
 - 1.7.8 the independence and neutrality of Government is important in the prevention and resolution of disputes.
- 1.8 In any undertaking, management needs to use its resources efficiently in order to achieve profitability, while employees look for continuity of employment, security of earnings and satisfaction in their work. Both have a common interest in the undertaking's success because without it their aims cannot be achieved. Some conflicts of interest are bound to arise, but, with good industrial relations, they can be resolved in a constructive way.
- 1.9 Good industrial relations are a joint responsibility. It needs the continuing co-operation of all concerned – management, employees, trade unions, employers' organisations and Government. One of the objects of this Code is to encourage, promote and assist in the development of that co-operation.

2. APPLICATION AND USE

- 2.1 Anyone interpreting or applying the Employment Act, the Trade Disputes Act or the Trade Unions and Employers' Organisations Act must take into account the Code.
- 2.2 In terms of Section 18(5) of the Trade Disputes Act, the Industrial Court must in the exercise of its powers, take into consideration any code of practice agreed between Government, employers' organisations and trade unions.

2.3 In addition to providing guidance to the Court in determining appropriate decisions in the case of any dispute or grievance referred to the Court, the Code also provides guidance for employers and trade unions in the promotion of collective bargaining, consultation and the development of sound industrial relations.

2.4 Industrial relations are not static. As relations at the work place develop, the provisions of the Code will be periodically reviewed by the Minister, taking into account decisions of the Courts. This review will take place after consultation with representative organisations of employers and employees, in accordance with the policy of tri-partite consultation.

PART B: ROLES OF SOCIAL PARTNERS

3. ROLE OF MANAGEMENT

3.1 The principal aim of management is to conduct the activities of the business undertaking successfully and profitably. To achieve this aim it is necessary to promote good working relations between management and employees and managers should ensure that they deal with employees fairly and respect the dignity of their employees in an atmosphere of mutual trust and respect.

3.2 Although the primary responsibility of management is to conduct the business of the undertaking efficiently and effectively to ensure success, management should also recognise that each employee has needs and aspirations at work and these should be taken into consideration in the daily conduct of business. Management, therefore, should refrain from taking decisions affecting employees that-

3.2.1 are arbitrary; or

3.2.2 are taken without prior consultation.

3.3 Good industrial relations at the workplace are the joint responsibility of employers, employees and their organisations. However, primary responsibility for the promotion of good working relations rests with management, who should take the initiative and pay as much attention to industrial relations as it does in respect of finance, production, marketing or administration.

- 3.4 If a trade union has been recognised for negotiation and joint consultative purposes, management must, jointly with the union-
- 3.4.1 establish and maintain effective arrangements and procedures for:
 - (a) negotiation, consultation and communication regarding terms and conditions of employment; and
 - (b) the speedy and equitable settlement of grievances and disputes.
 - 3.4.2 ensure that all managers and supervisors are aware of the arrangements and procedures, and that they comply with the provisions of any recognition or collective agreement.
 - 3.4.3 advise employees of their rights of membership, participation in, and representation by, a trade union.
- 3.5 If no trade union is recognised for the purpose of negotiation, consultation and communication, management should-
- 3.5.1 establish effective means for:
 - (a) consultation and communication with employees regarding terms and conditions of employment; and
 - (b) the speedy and equitable settlement of grievances and disputes.
 - 3.5.2 ensure that all managers and supervisors are aware of those procedures and comply with and observe their provisions.
- 3.6 Effective management is dependent upon the systematic organisation of work, and management should ensure that-
- 3.6.1 the responsibilities of each employee or group of employees are clearly defined within the organisational structure of the employer;
 - 3.6.2 managers understand their responsibilities and have the authority to carry out their responsibilities;
 - 3.6.3 there are clear lines of accountability, and that employees are informed of what their tasks, objectives and priorities are and are kept informed of progress in meeting them.

3.7 All managers and supervisors should receive training in supervisory techniques and the promotion of good industrial relations. Management should ensure that managers and supervisors-

3.7.1 are properly selected and trained;

3.7.2 understand their responsibilities and authority;

3.7.3 are fully conversant with management policies and objectives;

3.7.4 understand the arrangements and procedures for the settlement of any disputes and grievances, the implementation of a disciplinary procedure, and the general provisions of employment legislation;

3.7.5 recognise their role as the link in the exchange of information and views between management and employees.

4. THE INDIVIDUAL EMPLOYEE

4.1 The employee has obligations to the employer, and if a member, to the trade union.

4.2 The relationship between an employee and the employer is a contract in which the employee, in exchange for remuneration and benefits, agrees to work to the best of the employee's ability under the instructions and directions of the employer.

4.3 The terms of a contract of employment may be fixed by law, by a collective agreement or by mutual consent, subject always to employment legislation and collective agreements.

4.4 Each employee shares responsibility for the state of industrial relations at the workplace and to promote the establishment of good working relations. Each employee should-

4.4.1 be familiar with, and understand, the terms and conditions of employment and abide by them at all times;

4.4.2 be aware of any code of conduct governing behaviour at the work place, and the arrangements and procedures for disciplinary action, and the settlement of disputes and grievances;

4.4.3 respect the right of management to manage, and carry out lawful and reasonable instructions of management to the best of the employee's ability;

4.5 Employees who are members of a profession, or who work in an essential service, should be aware of any special obligations arising out of membership of such profession, or employment in such industry; and should refrain from any action which may be contrary to the code of ethics of such profession, or harm the well-being of any individual or community.

5. TRADE UNIONS

5.1 The principal aim of trade unions is to protect and promote the interests of employees. This can only be achieved if the businesses in which their members are employed operate efficiently and profitably.

5.2 It is, therefore, in the interests of trade unions to share with management the responsibility for the promotion of harmonious human and industrial relations at the workplace.

5.3 Trade unions should-

5.3.1 join with management in the establishment and maintenance of effective arrangements and procedures for-

- (a) negotiation, consultation and communication regarding terms and conditions of employment; and
- (b) the speedy and equitable settlement of grievances and disputes;

5.3.2 ensure that their members, representatives and officials are aware of, and understand those arrangements and procedures and follow and abide by them at all times;

5.3.3 take steps to ensure officials and representatives understand their role, duties, obligations and powers at the workplace in relation to those of management;

5.3.4 maintain effective communication between their members and management and foster open discussion and consultation to the mutual benefit of the employer and employees;

5.3.5 encourage members to participate in the activities of the trade union, to attend meetings and to comply with the rules and procedures of the union.

5.3.6 represent the interests of employees in consultation and negotiation with Government and employers on industrial relations and matters affecting employment.

6. EMPLOYEE REPRESENTATIVES

6.1 An employer is obliged to recognise a trade union representative appointed from amongst its employees by a recognised trade union. An employer may set reasonable limits on the number of trade union representatives in a workplace. These representatives are entitled to represent members in respect of grievances, discipline or termination of employment. Elections of union representatives may take place during working hours subject to reasonable limitations imposed by the employer. See Section 50(C) of the Trade Unions and Employers' Organisations Act and clause 8 of the Code of Good Practice: Collective Bargaining.

6.2 If there is no recognised trade union in the workplace, an employer may recognise representatives elected from amongst its employees for the purpose of representing those employees in their dealings with the employer. An employer should not encourage this form of representation in order to pre-empt the recognition of a trade union at the workplace.

6.3 If a recognised trade union has elected representatives at the workplace, they have responsibilities towards members and their union, and, in their capacity as employees, to their employer.

7. EMPLOYERS' ORGANISATIONS

7.1 The primary aim of employers' organisations in the context of this Code is to promote the interests of their members through negotiation, consultation and communication with trade unions and Government.

7.2 In order to achieve this aim and to encourage the development of good industrial relations, employers' organisations should-

7.2.1 establish and maintain procedures and arrangements with trade unions to-

(a) settle disputes and grievances amicably;

- (b) negotiate terms and conditions of employment at the appropriate level, whether at the workplace or at the industry level;
- (c) consult on matters of mutual concern to employees; employers and their organisations.

7.2.2 in the absence of trade unions, encourage their members to establish and maintain procedures and arrangements to-

- (a) settle disputes and grievances amicably;
- (b) consult on matters of mutual concern;

7.2.3 encourage their members to adopt fair conditions of employment;

7.2.4 provide an advisory service to members on all aspects of industrial relations and employment;

7.2.5 represent the interests of the employers-

- (a) in negotiation and consultation with trade unions;
- (b) in preventing or settling disputes; and
- (c) in consulting with the Government on labour matters;

PART C: EMPLOYMENT RELATIONSHIP

8. RECRUITMENT AND APPOINTMENTS

8.1 An employer may not discriminate against any applicant for employment on a basis which will include but not be limited to race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed. See Code of Good Practice: Employment Discrimination.

8.2 It is not discrimination to amongst others,-

8.2.1 take appropriate affirmative action measures. For example, the policy of localisation as set out in the Employment of Non Citizens Act; or

8.2.2 appoint a person on the basis of the inherent requirements of the job. For example, the appointment of a female customs official to conduct searches of women.

8.3 In addition, wherever practicable in filling vacancies, management should-

- 8.3.1 give priority to serving employees for promotional positions in order to provide career development opportunities;
- 8.3.2 encourage open competition for promotion. In order to avoid de-motivating employees, the practice of premature selection of particular individual employees for promotion should be avoided wherever possible;
- 8.3.3 ensure that reference enquiries about applicants are restricted to obtaining information directly relevant to the particular position for which the applicant has applied;
- 8.3.4 establish clear job qualification requirements and ensure that the qualifications required for a position are not over-inflated to target applications from a particular group; and
- 8.3.5 provide employment opportunities for disabled persons, and, wherever practical, structure the working environment to facilitate the employment of disabled persons. See Code of Good Practice: Employees with Disabilities.

9. CONTRACTS OF EMPLOYMENT

- 9.1 An employment contract may be specifically agreed between an employer and an employee, either in writing or verbally. An employment contract may also be established through the conduct of those parties, even if the terms of the contract are not expressly agreed. For example, an employee commences working for an employer and is in due course paid weekly, even though the terms may not have been discussed. Contracts of employment may also be amended in the same ways.
- 9.2 To avoid misunderstandings and disputes, employers should enter into written contracts of employment with employees and amend employment contracts in writing.
- 9.3 Contracts of employment (see the model contract of employment published in terms of Section 49 of the Trade Disputes Act) should contain the following particulars:

- 9.3.1 the full name and address of the employer;
 - 9.3.2 the name and occupation of the employee, or a brief description of the work for which the employee is employed;
 - 9.3.3 the place of work, and, where the employee is required or permitted to work at various places, an indication of this;
 - 9.3.4 the date on which the employment begins;
 - 9.3.5 the employee's ordinary hours of work and days of work;
 - 9.3.6 the employee's wage or the rate and method of calculating wages;
 - 9.3.7 the rate of pay for overtime work;
 - 9.3.8 any other cash payments that the employee is entitled to;
 - 9.3.9 any payment in kind that the employee is entitled to and the value of the payment in kind, for example, accommodation;
 - 9.3.10 when remuneration will be paid;
 - 9.3.11 any deductions to be made from the employee's remuneration;
 - 9.3.12 the annual leave to which the employee is entitled and when that leave is to be taken;
 - 9.3.13 the sick leave, maternity benefits and leave (see Code of Good Practice : Maternity Benefits and Family Responsibility) or other leave to which an employee is entitled;
 - 9.3.14 the period of notice required to terminate employment, or if employment is for a specified period, the date or eventuality when employment is to terminate;
 - 9.3.15 the payment for working on recognised public holidays;
 - 9.3.16 a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.
- 9.4 The employee should be supplied with a copy of the current employment contract, and any amendments to that contract.
- 9.5 Employers should keep copies of all employment contracts concluded with employees for at least three years after the termination of those contracts.

10. REMUNERATION AND PAYMENT SYSTEMS

- 10.1 The rate of remuneration may be determined by collective agreements, a Regulation of Wages Order, or by consent, subject to the minimum wages provided for in a collective agreement or Wage Order.
- 10.2 Detailed regulations on the payment of wages are set out in Part vii of the Employment Act.
- 10.3 Payment systems vary according to the nature and organisation of work, statutory provisions, local labour market forces and other factors. However, in adopting payment systems, management should-
- 10.3.1 establish regular and fixed pay periods, and employees should be made aware of their pay periods and pay days.
 - 10.3.2 provide sufficient information to enable every employee to know how their pay has been calculated, details of any overtime payments, allowances and deductions. Payment systems should be kept as simple as possible to ensure employees understand them.
 - 10.3.3 develop payment systems which, wherever practical, link payment with performance. Nothing in the labour legislation governing the payment of minimum wages inhibits the use of payment-by-results schemes. Employers using these schemes, however, should establish a rate at a level at which a reasonably competent employee, without undue exertion, can earn not less than the minimum wage for that amount of time at work.
 - 10.3.4 be aware of the potential conflict which can arise as a result of disparities in wages and salaries, particularly if the disparities are not work related.
 - 10.3.5 advise employees whether it is the employer's policy to give annual service increments and merit increments. Employees should also be informed whether their pay will be subject to regular reviews and cost of living increases.

11. WORKING CONDITIONS

- 11.1 Detailed provisions governing the protection of health and safety at work are contained in the Factories Act, its regulations, the Mines, Works, Quarries and Machineries Act, and other legislation affecting employment conditions. In observing the provisions of this legislation, special attention is drawn to the following:
- 11.1.1 The need to actively promote health and safety at work. Conditions of employment must be designed to eliminate as far as possible anything that may expose an employee to danger, health hazards, or unpleasant working conditions.
 - 11.1.2 If hazardous or unpleasant working conditions, because of the nature of the work, cannot be avoided, employers must provide appropriate protective clothing and equipment, and should consider compensation for unpleasant working conditions.
 - 11.1.3 The advisability, where practical, to adopt a procedure of pre and post employment medical examinations, and, if employees may be exposed to potentially hazardous substances, regular in-service medical examinations.
 - 11.1.4 The desirability, wherever possible, to establish joint management and employee health and safety committees.
- 11.2 If an employer is not subject to the above legislation, the employer is nevertheless obliged under the common law to provide safe and healthy working conditions. The standards contained in health and safety legislation, taking into account the different circumstances of each employer, may constitute the standards against which an employer's conduct will be measured.

12. HIV/AIDS AT THE WORK PLACE

- 12.1 In recognition of the potential danger of the spread of HIV/AIDS, and other contagious and infectious diseases, all employers should conform to the provisions of the National Policy on HIV/AIDS and Employment.
- 12.2 Employers, employees and their organisations should have regard to and comply with the Code of Good Practice: HIV/Aids and Employment.

13. DISCIPLINE

- 13.1 The maintenance of discipline at the workplace is a joint responsibility of management, individual employees, and trade unions. Employers, employees and their organisations should have regard to and comply with the Code of Good Practice: Termination of Employment. See also the Model Disciplinary and Incapacity Policy and Procedures published in terms of section 49 of the Trades Disputes Act.
- 13.2 In the event of a breach of discipline, management has the right and responsibility to take appropriate action. The objective of disciplinary action, is to bring about a change in undesirable behaviour, and should not be used in a vindictive manner.
- 13.3 Section 26 of the Employment Act provides a guide to serious misconduct for which the ultimate disciplinary penalty of termination of employment can be imposed. However, this section is by no means exhaustive, and employers are encouraged to supplement this guide with their own codes of conduct, disciplinary measures, and disciplinary procedures appropriate to their particular circumstances, industries and needs.
- 13.4 If the employer recognizes a trade union, the code of conduct, disciplinary measures and disciplinary procedures should be subject to negotiation and agreement.
- 13.5 To minimise disputes arising out of the application of discipline at the work place, codes of conduct, disciplinary measures and disciplinary procedures, should provide for-
- 13.5.1 progressive disciplinary penalties;
 - 13.5.2 prompt disciplinary action;
 - 13.5.3 establishment of written warnings as part of the procedure;
 - 13.5.4 the right of appeal against any disciplinary action;
 - 13.5.5 the right of representation in disciplinary cases.
- 13.6 Managers, supervisors, individual employees, and trade unions should be familiar with and trained in the application of any disciplinary procedure, and management must ensure strict adherence to these procedures.

13.7 Except in the case of small undertakings, a code of conduct, disciplinary measures and disciplinary procedures should be formalised in writing, and must-

13.7.1 list the types of unacceptable behaviour which may incur disciplinary action;

13.7.2 specify by position who has authority to take various forms of disciplinary action and ensure supervisors do not have the power to dismiss without reference to more senior management;

13.7.3 provide employees with the opportunity to state their case, call any witnesses in their defence, and be accompanied by a trade union representative or fellow employee;

13.7.4 provide for the right of appeal to a level of management not previously been involved in the disciplinary hearing;

13.7.5 provide for independent conciliation and arbitration if the parties to the procedure so wish.

13.8 If misconduct has taken place, appropriate disciplinary action will depend upon the circumstances of the case, and the seriousness of the misconduct. Normally, however, the procedure should operate as follows:

13.8.1 The first step should be a verbal warning, or in the case of more serious misconduct, a written warning;

13.8.2 No employee should normally be dismissed for the first breach of discipline except in the case of serious misconduct as defined by Section 26 of the Employment Act (note that this list is not exhaustive)

13.8.3 A written record should be maintained of all disciplinary action, including verbal warnings and the employee given a copy of this record;

13.8.4 Employees, and, if they so wish, their representatives, should have access to any written record of disciplinary action taken against them;

13.8.5 No disciplinary action should be taken against an employee representative until the trade union has been notified, although the representative may be suspended pending disciplinary action.

14. TERMINATION OF EMPLOYMENT

14.1 Security of employment is one of the primary concerns of employees and no contract of employment may be terminated -

14.1.1 arbitrarily;

14.1.2 without due process;

14.1.3 without just cause;

14.2 Employers, employees and their organisations should have regard to and comply with the Code of Good Practice: Termination of Employment. See also sections 17 to 28 of the Employment Act which deal with termination of employment during probationary periods, terminations with notice, terminations without notice, certificates of employment, redundancy, severance pay and the right to protest against the termination of the contract under the Trade Disputes Act.

PART D: COLLECTIVE BARGAINING

15. RECOGNITION OF TRADE UNIONS

15.1 Section 30 and 30B of the Trade Disputes Act and Section 50 and 50A of the Trade Unions and Employers' Organisations Act provide for the recognition of a registered trade union once the union has recruited into membership a minimum of 25 % of eligible employees within a workplace or industry. Employers and employees and their organisations should have regard to and comply with the Code of Good Practice : Collective Bargaining and the Model Recognition Agreement and the Model Constitution of a Joint Industrial Council published in terms of Section 49 of the Trade Disputes Act.

15.2 In order to ensure that the policy of encouraging independent trade unions is not undermined through the proliferation of unregistered employee groups, or inhibited by employer established employee structures, management should-

15.2.1 discourage the establishment of ad hoc employee committees outside any established recognition procedure;

15.2.2 clearly define the role of any workers' committees, their membership and function in the absence of a recognised trade union, and ensure their independence.

16. COLLECTIVE BARGAINING

- 16.1 The determination of terms and conditions of employment and the settlement of grievances and disputes through a process of free collective bargaining is recognised as the preferred mechanism for promoting good industrial relations at the level of the workplace, the industry and at national level. Employers, employees and their organisations must have regard to and comply with the Code of Good Practice : Collective Bargaining.
- 16.2 In the process of collective bargaining, the representatives of employers and employees must respect the differing interests of employers and employees, and take into account the interests of the community at large.
- 16.3 Collective bargaining may be carried out at various levels – at the work place, regionally, at industry level and nationally- and may relate to all employees within an establishment or industry, or specifically defined groups of employees.
- 16.4 Wherever possible, collective bargaining should cover as wide a group as practicable within the same establishment or industry. The establishment of too many small bargaining units complicates the bargaining process, and makes it difficult to ensure that related groups of workers are treated consistently. Care, however, should be taken to ensure that the distinct interests of groups of employees are taken into consideration and are represented in negotiations.
- 16.5 For collective bargaining to be successful, employers must share information with employee organisations. Management should make available information necessary to facilitate collective bargaining in good faith, provided that no employer may be required to divulge confidential information. See clause 9 of the Code of Good Practice : Collective Bargaining.

17. COLLECTIVE AGREEMENTS

- 17.1 Employer and employee representatives, in concluding collective agreements, must have regard to Part v of the Trade Disputes Act.
- 17.2 A collective agreement should be in writing and should include provisions for future amendments, interpretation, and termination of the agreement, and should provide for the mediation and arbitration of disputes arising from the interpretation or implementation of the agreement.

17.3 A collective agreement determining terms and conditions of employment should clearly state the period and the employees covered, and include -

17.3.1 wages and salaries, including overtime rates, bonuses, piece rates, payment systems etc.;

17.3.2 hours of work, provisions for shift working, overtime, annual leave, sick leave, maternity leave, compassionate leave and other forms of approved absence;

17.3.3 job evaluation techniques and the measurement of performance and measurement of work;

17.3.4 pension, provident fund and gratuity schemes;

17.3.5 service awards;

17.3.6 disciplinary codes of conduct, disciplinary measures, disciplinary and grievance procedures;

17.3.7 procedures for handling redundancies and temporary lay-offs;

17.3.8 training and localisation programmes.

17.4 Employer and employee representatives should conclude procedural agreements covering-

17.4.1 details of the parties to the agreement and the categories of employees falling within the scope of the agreement

17.4.2 matters subject to collective bargaining and the level at which this bargaining will take place;

17.4.3 procedural arrangements for negotiating terms and conditions of employment, and the conditions under which terms can be re-negotiated;

17.4.4 facilitates for trade unions and the establishment, status, appointment and functions of shop stewards;

17.4.5 procedures for the settlement of collective disputes and for disputes arising out of matters of interpretation;

17.4.6 procedures to be followed in the event of any industrial action by either party to the agreement and the protection of essential services within an industry or individual company;

17.4.7 ban on victimisation on the grounds of trade union membership, or non-membership, or trade union activity;

17.4.8 the establishment and scope of any consultative committees;

18. STRIKES AND LOCKOUTS

- 18.1 The Trade Disputes Act promotes collective bargaining as the primary mechanism for employers and employees to resolve matters of mutual interest themselves without outside interference. An exception to this is in respect of essential services. In these services compulsory adjudication by the Industrial Court or arbitration resolves disputes after negotiations and mediation have failed.¹
- 18.2 Although a measure of last resort, strikes and lockouts are forms of lawfully sanctioned economic pressure in order to resolve disputes of interest between employers and their employees. Protected strikes and lockouts are those permissible in law. A strike and lockout are temporary applications of pressure in the collective bargaining process and their purpose should not be to unnecessarily damage the employer's business.
- 18.3 The object of a strike or lockout is to settle a trade dispute. Accordingly a strike or a lockout comes to an end if the dispute that gives rise to it is settled. It may be settled by an agreed compromise or a return to work. If an employer withdraws a lockout without the employees agreeing to the demands that gave rise to the lockout, employees return to work on the terms that existed prior to the lockout being implemented. If employees abandon the strike or the strike is called off by the trade union, the employees also return to work on the terms that existed prior to the strike being implemented unless the employer has instituted a lockout.

¹ See sections 7(1)(b), 9 and 43 and the schedule on essential services. Need to reconcile these sections.

- 18.4 Employer, employees and their organisations should have regard to and comply with the Code of Good Practice: Picketing and the Code of Good Practice: Strikes and Lockouts.

19. GRIEVANCE PROCEDURES

- 19.1 All employees have a right to seek redress for any perceived grievance and the right to query the application of their agreed terms and conditions of employment, without fear of victimization. Employers, employees and their organisations should have regard to and comply with the model Grievance Procedure published in terms of Section 49 of the Trade Disputes Act.
- 19.2 Management, jointly with management trade union representatives should establish arrangements and procedures under which employees can raise grievances and have them fairly and promptly settled.
- 19.3 If there is no recognised trade union, the employer should establish arrangements and procedures under which employees can raise grievances
- 19.4 The objective of grievance procedures should be to promote the settlement of any grievance as close to the level of origin of the grievance as possible.
- 19.5 Management, therefore, should ensure that supervisors are vested with necessary authority to promote the early settlement of grievances.
- 19.6 If an employee remains aggrieved by a decision at this level, grievance procedures should provide for the right of appeal to a higher authority.

20. COMMUNICATION AND CONSULTATION

- 20.1 The objective of good communications and consultation is to share information of mutual concern, and thereby promote an environment of mutual trust and respect.
- 20.2 In order to promote good human and industrial relations at the work place arrangements must be established to ensure effective consultation and communications between management and employees.
- 20.3 Management should take the initiative in establishing channels of communication and consultation to ensure the flow of

information from management to employees, and from employees to management.

- 20.4 If the employer recognises a trade union, care should be taken that channels of communication with employees complement, rather than supplement or compete with, any consultative or communication procedures agreed with the trade union.
- 20.5 The most important method of communication is direct contact between the manager or supervisor, and the immediate work group or individual employee, and between the manager or supervisor and employee representative.
- 20.6 Management should ensure that all managers and supervisors regard consultation and communication with employees and their trade union representatives, as one of their principal duties. As representatives of management they should ensure that employees under their supervision are aware of management's policies, objectives and intentions, and the necessary information to perform their duties effectively.
- 20.7 To facilitate the development of good communications between management and employees, consideration should be given to-
 - 20.7.1 the establishment of regular works and departmental staff meetings and other suitable opportunities of employees to express their opinion on matters of mutual concern;
 - 20.7.2 the publication and distribution of company newsletters and journals to which employees should be encouraged to contribute;
 - 20.7.3 the use of company notice boards to disseminate information;
 - 20.7.4 the establishment of suggestion boxes and suggestion schemes;
 - 20.7.5 the development of social, welfare and sporting activities and facilities which promote interaction between management and employees.
- 20.8 In particular, management should ensure that it provides employees with information (subject to any confidentiality requirements) on the performance of the business and any organisational, financial or management changes which may affect employees.

20.9 If formal mechanisms exist for consultation and communication between management and trade union representatives, management and the representatives share a joint responsibility for effective arrangements for reporting back to employees.

20.10 If joint consultative committees are established, management and employee representatives should agree on –

20.10.1 the composition, objectives and functions of the committees and of any sectional or functional sub-committees;

20.10.2 the arrangements for the election or nomination of representatives;

20.10.3 the rules or procedures;

20.10.4 the scope of consultation and subjects to be discussed.

21. LOCALISATION

21.1 Employers are required in terms of the Employment of Non Citizens Act to develop plans, programmes and policies aimed at developing the skills, knowledge and potential of suitably qualified citizens to facilitate the policy of localisation. Employers should ensure that their employees or any recognised trade unions are consulted in the development and implementation of these plans, programmes and policies, which should be in writing and made available to all employees and recognised trade unions.

21.2 In addition, employers of non-citizen employees should ensure that those employees are orientated on Botswana's traditions and culture in the context of the working environment and are familiar with Botswana's employment legislation and policies, including their obligation to impart skills and knowledge to citizen employees.

22. TRAINING

22.1 Management and any recognised trade union should ensure that new employees are properly inducted into the company.

22.2 The induction should include information concerning the employee's job and direct supervisor, rates of pay and other terms and conditions of employment, the company's rules and regulations, channels for communication, and, if appropriate, information about any trade union recognised by the company.

- 22.3 Special attention should be paid to the induction of new entrants to the labour market, so that school leavers entering the labour market for the first time develop a positive attitude towards work.
- 22.4 If an employee may be exposed to potentially dangerous plant and equipment, or other hazardous working conditions, special training should be given in the use of safety equipment, safety procedures, and the wearing of protective clothing. Employees should be trained in occupational health and safety practices at work.
- 22.5 Management should recognise the need for career development of employees and wherever practical should establish appropriate training programmes to enable employees to develop additional skills and knowledge and thereby fulfil their full potential.
- 22.6 In service training, therefore, should be viewed as an essential component in the development of the potential for their employees and wherever practical and appropriate, employees undergoing training should be given time off with pay.
- 22.7 Before appointment to supervisory and or management positions, employers should ensure employees undergo appropriate training prior to taking up these positions.
- 22.8 Employers should take advantage of existing educational, training and apprenticeship schemes in the country.
- 22.9 Fair and objective criteria should in all cases be applied in selecting employees for training. These may include, but not necessarily be limited to the following:-
- 22.9.1 the inherent requirements of a job or the organisation;
 - 22.9.2 employees' skill levels and/or performance;
 - 22.9.3 the mentoring and training of employees with regard to promotional opportunities;
 - 22.9.4 the retraining of employees with new skills in anticipation of retrenchments;
 - 22.9.5 the application of appropriate affirmative action criteria;

23. CODES OF GOOD PRACTICE AND MODEL PROCEDURES AND AGREEMENTS

- 23.1 The Codes of Good Practice and Model Procedures and Agreements attached to this Code are published in terms of Section 49 of the Trade Disputes Act and Section 68 of the Trade Unions and Employers' Organisations Act.

Approved: 23/08/02

CODE OF GOOD PRACTICE: EMPLOYMENT DISCRIMINATION²

1. Introduction

1.1. The objective of this Code is to eliminate discrimination at the workplace and promote equality of opportunity and treatment in employment.

2. Elimination of Discrimination

Every employer must take steps to eliminate discrimination in any employment policy or practice and must promote equal opportunity at the workplace.

3. Prohibition of Discrimination

3.1. No employee or employer may discriminate, directly or indirectly, against any employee in any employment policy or practice.

3.2. Discrimination may include, but not be limited to, discrimination on the basis of race, tribe, place of origin, national extraction, social origin, marital status, political opinions, sex, colour or creed.³

3.3. Harassment of an employee, whether of a sexual nature or otherwise, constitutes a form of discrimination.

3.4. Not every differentiation based on one of the listed grounds in clause 3.2 constitutes discrimination. It is not discriminatory to –

3.4.1. take appropriate affirmative action measures. For example, giving effect to the policy of localisation in the Employment of Non Citizens Act; or

3.4.2. distinguish, exclude or prefer any person on the basis of an inherent requirement of the job. For example, to exclude female applicants for a male role in a film.

² This code has been developed on the assumption that there is a legal remedy beyond the provisions of section 23 relating to dismissals for discrimination in employment.

³ This list is drawn from section 23(d) of the Employment Act. There may be other grounds such as pregnancy, family responsibility, trade union membership, sexual orientation, age, disability, religion, HIV status, conscience, belief, culture, language and birth.

4. Formulation and Application of Policy

- 4.1. Every employer must formulate a policy for the prevention of discrimination and promotion of equal opportunity in employment.
- 4.2. If there is a recognised trade union in the workplace, the employer must consult the union in developing the policy and, if possible, incorporate the policy in a collective labour agreement.
- 4.3. If there is no recognised trade union in the workplace, the employer must invite representatives of the employees to participate in the formulation of the policy.
- 4.4. The policy must take into account that all employees are entitled to equal opportunity and equal treatment subject to an assessment of their abilities in relation to the employer's organisational needs.
- 4.5. The policy must address each of the following labour practices:
 - 4.5.1. access to vocational guidance, appointments and promotions;
 - 4.5.2. access to training and employment opportunities;
 - 4.5.3. advancement in accordance with their experience, ability and potential;
 - 4.5.4. security of employment;
 - 4.5.5. remuneration for work of equal value;
- 4.6. Collective agreements must not contain provisions which discriminate against employees in respect of any of the labour practices listed in clause 4.5.
- 4.7. Employers' organisations and trade unions may not discriminate in the admission or retention of membership or in the conducting their affairs.
- 4.8. If appropriate, the employer must establish a committee, or task an existing committee, to promote the application of the employment discrimination policy in the workplace including-
 - 4.8.1. taking all practical measures to foster and communicate understanding and acceptance of the principle of non-discrimination and to promote equality among employees;
 - 4.8.2. investigating complaints that the policy is not being observed and, if necessary, making recommendations or decisions about the manner in which discriminatory practices may be corrected.
- 4.9. Application of the policy must not adversely affect special measures designed to meet the particular requirements of employees who, for reasons such as age, sex, race, disability or marital status, require special protection or assistance.

5. Direct and Indirect Discrimination

- 5.1. This Code aims to eliminate both direct and indirect discrimination.
- 5.2. Direct discrimination occurs if an employee is treated prejudicially on the listed grounds referred to in clause 3.2. For example a woman with the same experience and qualifications is paid less than a man doing the same job.
- 5.3. Indirect discrimination occurs if a requirement or condition, which, on the face of it, appears to be neutral, has the effect of discriminating against a person or category or persons on the grounds listed in clause 3.2. For example, if an employer stipulates knowledge of English as a requirement for the job when it is not an inherent requirement, that requirement, while appearing neutral may discriminate against applicants on the grounds of race or social origin.

6. Employer Responsibilities

- 6.1. It is primarily the employer's responsibility to ensure that there is equal opportunity in the work place. The employer must adopt, communicate, implement, monitor and review policies to eliminate discrimination, and the following guidelines are provided on specific issues.
- 6.2. *Advertising*
 - 6.2.1. An employer must not unfairly limit advertisements for employment to areas or publications which may exclude or disproportionately reduce the numbers of applicants on the grounds referred to in clause 3.2.
 - 6.2.2. An employer must as far as possible avoid being too prescriptive in the advertised requirements for a job, unless the prescriptions are genuinely required for the position.
 - 6.2.3. An employer using recruitment agencies must take all reasonable steps to ensure that those agencies subscribe to this Code.
- 6.3. *Selection*
 - 6.3.1. Selection criteria and tests must be analysed from time to time to ensure that they genuinely relate to the job requirements and do not directly or indirectly discriminate against candidates.
 - 6.3.2. If reasonably possible, the short-listing and interviewing of applicants must not be done by only one person, and must ultimately be checked by someone at a more senior level.
 - 6.3.3. Persons responsible for short-listing, interviewing and selecting candidates must be given guidance or trained on the proper

application of the principle of equal opportunity in selection and the dangers of indirect discrimination.

6.4. *Training*

6.4.1. Every employer must ensure that criteria for selecting employees for training, whether for induction, promotion or skill training are not discriminatory.

6.4.2. Every employer must examine its policies periodically to avoid indirect discrimination.

6.5. *Performance reviews*

6.5.1. Every employer must ensure that the assessment criteria do not discriminate indirectly.

6.5.2. Every employer must ensure those responsible for conducting performance reviews evaluations do not discriminate.

7. Employee Responsibilities

7.1. Employees, in carrying out their employment functions, must not discriminate and must take measures to prevent discrimination in the workplace.

7.2. In order to provide a non-discriminatory work environment, employees must –

7.2.1. comply with the policies and measures to avoid discrimination;

7.2.2. implement the policies and measures;

7.2.3. notify the employer or the recognised trade union of any suspected discriminatory conduct.

7.2.4. refrain from harassing or victimising employees.

8. Trade Union Responsibilities

8.1. Trade union officials and representatives play important roles on behalf of their members in preventing discrimination and in promoting equal opportunity and good employment relations.

8.2. Trade unions must not discriminate by unfairly refusing membership or offering less favorable terms of membership on the grounds referred to in clause 3.2.

8.3. Trade unions must accept that discriminatory conduct by their members must be treated as a disciplinary offence by employers.

8.4. Trade unions must provide training and information for officials and representatives on their responsibilities for equal opportunity, and must co-operate in the development, introduction, implementation and monitoring of policies to promote equality.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: EMPLOYEES WITH DISABILITIES⁴

1. Introduction

- 1.1. Equal opportunity and the fair treatment of employees is a fundamental principle of Botswana labour law. The law provides for specific protections of certain categories of employee – particularly employees with infirmities and physical handicaps.
- 1.2. The purpose of this Code is to guide employers, employees and their organisations in promoting equal opportunities and fair treatment of employees with disabilities in the workplace. It is also a guide to mediators, arbitrators and the courts.
- 1.3. The Code is intentionally general because every person and situation is unique and departures from the standards in this Code may be justified in appropriate circumstances. Anyone who departs from them must demonstrate reasons for doing so. The following kinds of reasons may justify a departure from the guidelines. Note that this list is not exhaustive.
 - 1.3.1. the size of the employer may justify a departure. For example, an employer with a very small number of employees may not have to make the kinds of accommodations a large employer should;
 - 1.3.2. the nature or location of the employer's premises may justify special rules in respect of organizational rights. For example, there may workplaces in which it is too dangerous for disabled employees to work.
- 1.4. This Code must be read in conjunction with the Code of Good Practice: Unfair Discrimination.
- 1.5. Employers, employees and their organisations should use this Code to develop, implement and refine disability policies and programmes to suit the needs of their own workplaces.

2. Who is a disabled person?

- 2.1. Not every disabled person requires protection. Protection is afforded to those employees who have a disability which impacts on their ability to be employed and remain in employment. It normally includes disabilities that-
 - 2.1.1. are long-term or recurring;

⁴ Some of the provisions of this Code need to be first published as regulations under section 125 of the Employment Act in order to provide the authority to make rules regulating the employment of disabled persons in the workplace.

- 2.1.2. involve a physical handicap or mental impairment;
- 2.1.3. substantially limit a disabled employee's employment opportunities.

2.2. *Long-term or recurring disabilities*

2.2.1. Long-term disability means the impairment has lasted or is likely to persist for a significant period eg a number of years. A short-term or temporary illness or injury is not regarded as an impairment which gives rise to a disability.

2.2.2. A recurring impairment is one that is likely to happen again and to be substantially limiting - see Clause 2.4 below. It includes a constant underlying condition, even if its effects fluctuate. For example epilepsy.

2.2.3. Progressive conditions are those that are likely to develop, change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. For example the onset of AIDS.

2.3. *Physical or mental impairment*

2.3.1. Physical impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as hearing or visual impairments.

2.3.2. Mental impairment means a clinically recognised condition or illness that affects a person's thought processes, judgement or emotions.

2.4. *Substantially limiting employment opportunities*

2.4.1 An impairment is substantially limiting if, in the absence of reasonable accommodation by the employer, a person may be perceived to be either totally unable to do a job or would be significantly limited in doing it.

2.4.2 Some impairments are not substantially limiting. For example a person who is visually impaired may easily overcome the impairment by wearing spectacles or contact lenses.

3. **Reasonable accommodation for people with disabilities**

3.1. Every employer must take reasonable steps to accommodate the needs of employees with disabilities. The aim of the accommodation is to reduce the impact of the impairment on the person's capacity to fulfil the essential functions of a job.

3.2. An employer may adopt the most cost-effective means of effectively removing the barrier to a person being able to perform the job and to enjoy equal access to the benefits and opportunities of employment.

3.3. The duty to reasonably accommodate a disabled person applies to both disabled applicants for employment and to disabled employees-

3.3.1. during the recruitment and selection process;

- 3.3.2. in the working environment;
 - 3.3.3. in the way work is usually done, evaluated and rewarded; and
 - 3.3.4. in any employment benefits or privileges.
- 3.4. The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability or if the disability is reasonably self-evident to the employer.
- 3.5. The employer must consult the employee and, if practical, technical experts, to establish appropriate mechanisms to accommodate an employee's disability. The particular accommodation will depend on the individual, the impairment and its effect on the employee, as well as on the job, the working environment and the cost.
- 3.6. Examples of reasonable accommodation include the following:
- 3.6.1. adapting existing facilities to make them accessible. For example a ramp for disabled employees in wheelchairs;
 - 3.6.2. adapting existing equipment or acquiring new equipment, including computer hardware and software;
 - 3.6.3. re-organising work stations;
 - 3.6.4. changing training and assessment materials and systems;
 - 3.6.5. restructuring jobs so that non-essential functions are re-assigned;
 - 3.6.6. adjusting working time and leave in order to accommodate employees who need regular treatment;
 - 3.6.7. providing readers or sign language interpreters, and
 - 3.6.8. providing specialised supervision, training and support.
- 3.7. An employer may evaluate work performance against the same standards as other employees but the nature of the disability may require an employer to adapt the way performance is measured.
- 3.8. The employer is not obliged to accommodate an employee with a disability if this would impose an unjustifiable hardship on the business of the employer. Unjustifiable hardship will result from policies and steps that require significant or considerable difficulty or expense. This involves considering the effectiveness of the accommodation contemplated and the extent to which it may seriously disrupt the operation of the business.

4. Recruitment and selection

- 4.1. When employers recruit they must-
- 4.1.1. identify the inherent requirements of the vacant job;
 - 4.1.2. describe clearly the necessary skills and capabilities for the job;
 - 4.1.3. set reasonable criteria for selection, preferably in writing, for vacant jobs.

- 4.2. Advertisements should be accessible to persons with disabilities and, where practical, circulated to organisations that represent the interests of people with disabilities.
- 4.3. Advertisements or notices should include sufficient detail about the essential functions and duties of the job so that potential applicants with disabilities can make an informed decision as to whether they meet the inherent requirements of the job.
- 4.4. Employers must be careful to exclude functions that are not essential to performing the inherent requirements of the job because selection based on non-essential functions may unfairly exclude people with disabilities.
- 4.5. Employers should apply the same criteria to test the ability of people with disabilities as are applied to other applicants, but employers should accommodate applicants who have disabilities.
- 4.6. The purpose of the selection process is to assess whether or not an applicant is suitably qualified. This may require a two-stage process, if an applicant has a disability, namely determining whether-
 - 4.6.1. an applicant is suitably qualified;
 - 4.6.2. a 'suitably qualified applicant' needs to be accommodated in order to perform the inherent requirements of the job.
- 4.7. Employers should monitor their criteria for selection. If they tend to exclude people with disabilities, they should be reviewed to ensure that inappropriate barriers to persons with disabilities are removed.
- 4.8. Selection interviews should be conducted in a sensitive, objective and unbiased manner. Interviewers should avoid stereotypical assumptions about people with disabilities.
- 4.9. If an applicant has disclosed a disability or has a self-evident disability, the employer should focus on the applicant's qualifications for the job rather than the disability, and should enquire and assess if the applicant would, but for the disability, be suitably qualified.
- 4.10. Interviewers should ask applicants with disabilities to indicate how they would accomplish the inherent requirements of the job and perform its essential functions, and what accommodation may be required.
- 4.11. An employer may reasonably require an applicant with a disability to undergo appropriate medical or functional testing to determine an applicant's actual or potential ability to perform the inherent requirements of the job. The testing must-
 - 4.11.1. comply with the requirements of clause 5 below and any statutory requirements; and
 - 4.11.2. measure whether the applicant is able to perform the inherent requirements of the job with or without reasonable accommodation.

- 4.12. Subject to section 144 of the Employment Act, an employer may not employ people with disabilities on less favourable terms and conditions for reasons connected with the disability.

5. Medical and psychometric testing

- 5.1. Medical and psychometric tests should be relevant and appropriate to the kind of work and the necessary criteria for the job. An employer who requires a person to undergo a test must bear the costs of the test.
- 5.2. Employers should ensure that tests do not unfairly exclude employees with disabilities and are not biased in how they are applied, assessed or interpreted.
- 5.3. If an employee has been ill or injured and it appears that the employee is no longer able to perform the job, the employer may require the employee to undergo a test. The object of the test must be to assess if the employee can safely perform the job or to identify what steps should be taken in order to make a reasonable accommodation for the employee.

6. Training and career advancement

- 6.1. Employees with disabilities should be consulted about developing specific career advancement programmes responsive to their needs and circumstances.
- 6.2. Training, work organisation and recreational benefits should be accessible to employees with disabilities. Examples include training facilities and venues, as well as canteen facilities, parking, crèche and social or sporting activities.
- 6.3. Systems and practices to evaluate work performance should clearly identify and fairly measure and reward performance of the inherent requirements or essential functions of the job. Work that falls outside the inherent requirements or essential functions of the job should not be evaluated.

7. Retaining people with disabilities

- 7.1. Employees who become disabled during employment should, if practical, be re-integrated into work.
- 7.2. If an employee is incapacitated as a result of a disability, the employer should keep in touch with the employee and where practical, encourage an early return to work. This may require vocational rehabilitation, transitional work programmes and, if appropriate, the arrangement of temporary or permanent flexible working time.
- 7.3. If an employee is frequently absent from work for reasons of illness or injury, the employer may consult the employee to assess if the cause of the illness or injury is a disability that requires reasonable accommodation.
- 7.4. If practical, employers must offer alternative work, reduced work or flexible work, so that employees are not compelled or encouraged to

terminate their services if they can, with reasonable accommodation, continue in employment.

8. Termination of employment

- 8.1. If an employee becomes disabled, the employer must consult the employee to assess if the disability can be reasonably accommodated. If not, the employer must consult the employee to explore the possibility of alternative employment appropriate to the employee's different capacity.
- 8.2. If the employee is unable to be accommodated, or there is no appropriate alternative employment, the employer may terminate the employment relationship in accordance with the Code of Good Practice: Dismissals relating to incapacity.
- 8.3. When employees with disabilities are dismissed for operational requirements, the employer should ensure that any selection criteria do not directly or indirectly discriminate unfairly against people with disabilities.

9. Confidentiality and disclosure of disability

- 9.1. Employers, including health and medical services personnel, may only gather personal details relating to employees if it is necessary to achieve a legitimate purpose.
- 9.2. Employers should protect the confidentiality of the information that has been disclosed, and should take care to keep records of private information relating to the disability of employees confidential and separate from general personnel records.
- 9.3. When an employer no longer requires the information it should be returned to the employee, destroyed or rendered anonymous.
- 9.4. Employers may not disclose any information relating to a person's disability without the written consent of the person concerned.

10. Employee disclosure

- 10.1. People with disabilities are entitled to keep their disability status confidential, but should in no way misrepresent their ability to fulfil the inherent requirements of a job. If the employer is not aware of a disability or the need to accommodate it, the employer is not obliged to provide such accommodation.
- 10.2. If the disability is not self-evident, the employer may require the employee to disclose sufficient information to confirm the disability.
- 10.3. If the employer disputes that the employee is disabled or that the employee requires accommodation, the employer is entitled to request the employee to be tested to determine the employee's ability or disability, at the expense of the employer. As information about disability may be technical, employers should ensure that a competent person interprets the information.
- 10.4. If accommodating the employee requires the co-operation of other employees, it may be necessary to reveal the person's disability to

other employees, for example, the employee's supervisor or manager. The employer may, after consulting the disabled employee, advise relevant staff that the employee requires accommodation, without disclosing the nature of the disability, unless this is required for the health or safety of the disabled employee or other persons.

11. Employee benefits

11.1. An employer who provides or arranges for occupational insurance or other benefit plans directly or through a separate benefit scheme or fund, must ensure that they do not unfairly discriminate, either directly or indirectly, against employees with disabilities.

11.2. An employer must assist a disabled employee in obtaining benefits or compensation in terms of applicable labour legislation. For example, sick leave benefits or workmen's compensation claims.

12. Promoting the employment of people with disabilities

12.1. Employers should develop policies and strategies to give preference to the employment of disabled persons in order to ensure that they are equitably represented in the employers' workforce.

12.2. The implementation of the policies and strategies in terms of this clause does not constitute discrimination.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: SEXUAL HARASSMENT IN THE WORKPLACE

1. Introduction

- 1.1. This Code is published in terms of section 49 of the Trade Disputes Act. (Chapter 48:02)
- 1.2. The objective of this Code is to eliminate sexual harassment in the workplace.
- 1.3. This Code promotes the development and implementation of policies and procedures that should lead to the creation of a workplace-
 - 1.3.1. that is free of sexual harassment;
 - 1.3.2. in which the employer respects the employee's right to dignity, privacy and equity; and
 - 1.3.3. in which employees respect one another's right to dignity, privacy, and equity.
- 1.4. Sexual harassment constitutes a breach of contract and a delictual wrong. This means-
 - 1.4.1. that an employee who is harassed may-
 - (a) resign and claim compensation for constructive dismissal;
 - (b) sue for damages for breach of contract or an invasion of privacy;
 - (c) interdict the harasser or the employer;
 - 1.4.2. that an employer may lawfully discipline or dismiss an employee who is found to have been guilty of sexual harassment.
- 1.5. Sexual harassment constitutes a trade dispute in that it may concern a grievance or dispute over-
 - 1.5.1. the application of the common law relating to employment;
 - 1.5.2. the conditions of employment under which an employee may be required to work because of the common law duty to provide safe working conditions;
 - 1.5.3. dismissal. If an employee who is harassed resigns because it is intolerable to continue working for that employer, that resignation may constitute a constructive dismissal that is wrongful.

1.6 This Code provides guidance by summarising some of the provisions of the law and providing guidelines on good practice. If there is any conflict between the provisions of any legislation and this Code, the provisions of the legislation must prevail.

1.7 The guidelines should be followed and may be departed from only if there is good reason to do so. Anyone who departs from them should demonstrate reasons for doing so.

2. Application of the Code

2.1. Although this Code is intended to guide employers and employees, it also applies to perpetrators and victims of sexual harassment who may extend beyond the workplace such as-

2.1.1. job applicants;

2.1.2. clients (including patients, students etc);

2.1.3. suppliers;

2.1.4. contractors;

2.1.5. other people dealing with the organisation

2.2. Clause 2.1 does not confer authority on an employer to take disciplinary action against persons who are not employees. The employer should however take steps to prevent employees from being harassed and should consider steps against the employer of a perpetrator.

2.3. Sexual harassment constitutes serious misconduct that may entitle an employer to dismiss the employee without notice in terms section 26(1) of the Employment Act.

2.4. The employer must ensure that legitimate channels or procedures exist for victims of harassment to lodge grievances and that they may do so without victimisation.

2.5. This Code is not intended to replace any collective agreement that prohibits sexual harassment in the workplace. It should, however, be taken into account in the negotiation of any collective agreement and in its interpretation by an arbitrator or the Industrial Court.

3. Definition of sexual harassment

3.1. Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of the conduct distinguishes it from consensual behaviour.

3.2. Sexual attention becomes sexual harassment if-

3.2.1. the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment;

3.2.2. the recipient has made it clear that the behaviour is not wanted;
or

3.2.3. the perpetrator should have known that the behaviour is regarded as unacceptable.

4. Forms of sexual harassment

4.1. Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, and is not limited to the examples listed below:

4.1.1. Physical conduct constituting sexual harassment includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex;

4.1.2. Verbal forms of sexual harassment include the following types of statements made in the presence of a person or directed toward that person:

- (a) unwelcome innuendoes, suggestions and hints;
- (b) sexual advances, sex related jokes or comments with sexual overtones;
- (c) insults or unwelcome graphic comments about a person's body or sexual orientation;
- (d) inappropriate enquiries about a person's sex life or sexual orientation.

4.1.3. Non-verbal forms of sexual harassment include the following unwelcome conduct:

- (a) whistling;
- (b) sexual gestures;
- (c) indecent exposure; and
- (d) the display of sexually explicit pictures and objects.

4.1.4. Sexual harassment in the form of "quid pro quo harassment" occurs when an owner, a person of authority or a co-employee attempts to influence any employment related decision affecting an employee in exchange for a sexual favour. Those decisions include a decision to employ, promote, train, discipline, improve terms and conditions of employment or benefits, transfer or dismiss an employee or job applicant.

4.2. Sexual harassment in the form of sexual favouritism exists if a person who is in a position of authority rewards only those who respond to that person's sexual advances, or other deserving employees who do not submit themselves to any sexual advances, are denied those rewards. These rewards may be in the form of access to employment opportunities, promotions, merit rating, salary increases etc.

4.3 Sexual harassment warranting disciplinary action includes harassment by an employee of another employee outside of working hours or off work premises, if it impacts on the employment relationship. In these cases, it will be no defence to the disciplinary charges for the alleged perpetrator to claim that the conduct occurred outside working hours or off work premises.

5. Guiding principles

5.1. An employer should create and maintain a working environment in which the dignity of each employee is respected. A climate in the workplace should also be created and maintained in which victims of sexual harassment will not fear reprisals or feel that their grievances are ignored or trivialised. Implementing and publicising the following guidelines at the workplace may assist in achieving these ends:

5.1.1. All employees are required to refrain from committing acts of sexual harassment;

5.1.2. All employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others;

5.1.3. The employer should take steps to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business, are not subjected to sexual harassment by any of its employees;

5.1.4. The employer must take appropriate action in accordance with this code if sexual harassment occurs in the workplace.

6. Policy statement

6.1. In the absence of a collective agreement, every employer should, as a first step in expressing concern and commitment to prevent sexual harassment in the workplace, issue a policy statement which should endorse the provisions of this Code.

6.2. The policy statement should be communicated to all employees and displayed in a way that it can be seen by employees and non-employees who visit the workplace.

6.3. The policy statement should provide that-

6.3.1. all employees, job applicants and other persons who have dealings with the organisation, have the right to be treated with dignity;

6.3.2. sexual harassment in the workplace will not be permitted or condoned; and

6.3.3. persons who have been subjected to sexual harassment in the workplace have the right to raise a grievance about it and have appropriate action taken against the harasser by the employer.

6.4. The employer should identify a senior employee responsible for implementing the policy and should place that employee under a positive duty to implement the policy and ensure that fair and consistent disciplinary action is taken against employees who do not comply with the policy.

6.5. The policy statement should also explain the procedure which should be followed by employees who are victims of sexual harassment, including:

6.5.1. allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially; and

6.5.2. employees will be protected against victimisation, retaliation for lodging grievances and from false accusations.

7. Procedures

7.1. Every employer should develop a clear procedure to deal with sexual harassment. The procedure may be incorporated into an existing grievance or disciplinary procedure.

7.2. The procedure should take the provisions of this clause into account.

7.3. *Advice and Assistance*

7.3.1. Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. If possible, employers should designate a person outside of line management whom victims may approach for confidential advice. Such a person-

- (a) could include persons employed by the organisation to perform, among others, such a function, a trade union representative or co-employee, a member of the human resources department or an outside professional;
- (b) should have the appropriate counselling and labour relations skills and experience, and be given adequate resources;
- (c) should be able to provide support and advice on a confidential basis.

7.4. *Options to resolve a problem*

7.4.1. Employees should be advised of two broad options to resolve a problem relating to sexual harassment, namely in an informal way or in terms of a formal procedure. The employee should be under no duress to accept one or other option.

7.4.2. In more serious cases it may not be appropriate to try and resolve the problem informally, such as cases involving sexual assault, rape, a strip search and quid pro quo harassment.

7.5. *Informal procedure*

7.5.1. It may be sufficient for the employee concerned to have the opportunity to explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it is offensive or makes the employee feel uncomfortable, and that it interferes with work. The person against whom the grievance is lodged should then be given an opportunity to apologise for the conduct and to provide a commitment that it will not happen again.

7.5.2. If the informal approach has not provided a satisfactory outcome or if the conduct continues, it may be appropriate to embark upon a formal procedure.

7.6. *Formal procedure*

7.6.1. A formal procedure for resolving a grievance should be available and should-

- (a) specify to whom the employee should lodge the grievance;
- (b) make reference to time-frames to allow the grievance to be dealt with expeditiously;
- (c) notify the victim that if the dispute is not resolved satisfactorily, the dispute may be referred in terms of the Trade Disputes Act for resolution.

7.7. *Investigation and disciplinary action*

7.7.1. Disciplinary action taken against an alleged harasser should follow an established procedure or the procedures set out in the Code on Termination of Employment.

7.7.2. The range of disciplinary sanctions to which employees will be liable should be clearly stated in any policy or procedure, and it must also be made clear that it is a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

7.7.3. The Code on Termination of Employment provides that an employee may be dismissed for serious misconduct or repeated offences. A serious incident of sexual harassment or continued harassment after warnings may justify dismissal.

7.8. *Criminal charges and civil claims*

7.8.1. A victim of sexual assault may have the right to press separate criminal charges or to institute civil legal proceedings against an alleged perpetrator, and the legal rights of the victim are in no way limited by this Code.

7.8.2. The fact that an employee has laid a charge or instituted civil legal proceedings does not affect the employer's duty to take appropriate action as soon as possible, including disciplinary

action against an employee who has been accused of sexual harassment in the workplace.

7.8.3. An employee who is subject to criminal proceedings for sexual harassment, may exercise the right to remain silent in any disciplinary proceedings. If the employee remains silent, the employer is entitled to take disciplinary action, including dismissal, based on any other evidence led in the disciplinary proceedings.

7.9. *Referral to adjudication*

7.9.1. If a complaint of alleged sexual harassment is not resolved to the satisfaction of the complainant, the complainant may refer the matter as a trade dispute to the Office of the Labour Commissioner for mediation in accordance with the provisions of the Trade Disputes Act. Should the dispute remain unresolved after mediation, the Labour Commissioner must refer the matter to the Industrial Court in terms of the Act.

7.9.2. Any employee dismissed on grounds of sexual harassment has the right to challenge the fairness of that dismissal in terms of the Act.

8. Confidentiality

8.1. Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that keeps confidential the identities of the persons involved.

8.2. In cases of sexual harassment, the employer, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary enquiry. Only appropriate members of management as well as the aggrieved person, representatives of the parties, the alleged perpetrator, witnesses and an interpreter if required, may be present in the disciplinary enquiry.

8.3. Employers are required to disclose to any party or to their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this Code.

9. Information and education

9.1. The Office of the Commissioner of Labour should ensure that copies of this Code are accessible and available.

9.2. Employers and employer organisations should include the issue of sexual harassment in their orientation, education and training programmes of employees.

9.3. Trade unions should include the issue of sexual harassment in their education and training programmes of shop stewards and employees.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: HIV/AIDS AND EMPLOYMENT

1. Introduction

- 1.1. The Code recognises that the Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems which have socio-economic, employment and human rights implications.
- 1.2. It is recognised that the HIV/AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.
- 1.3. HIV/AIDS knows no social, gender, age or racial boundaries, but it is accepted that socio-economic circumstances do influence disease patterns. HIV thrives in an environment of poverty, rapid urbanisation, violence and destabilisation. Transmission is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Women are more vulnerable to infection particularly in cultures and economic circumstances in which they have little control over their lives.
- 1.4. Furthermore HIV/AIDS is still a disease surrounded by ignorance, prejudice, discrimination and stigma. In the workplace, discrimination against people living with HIV and AIDS has been perpetuated through practices such as pre-employment HIV testing, dismissals for being HIV positive and the denial of employee benefits.
- 1.5. One of the most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through the implementation of an HIV/AIDS policy and programme. Addressing aspects of HIV/AIDS in the workplace will enable employers, trade unions and government to actively contribute towards local, national and international efforts to prevent and control HIV/AIDS. In light of this, the Code has been developed as a guide to employers, trade unions and employees.
- 1.6. Furthermore the Code seeks to assist with the attainment of the broader goals of:
 - 1.6.1. eliminating discrimination in the workplace based on HIV/AIDS status;
 - 1.6.2. promoting a non-discriminatory workplace in which people living with HIV/AIDS are able to be open about their status without fear of stigma or rejection;

- 1.6.3. promoting appropriate and effective ways of managing HIV/AIDS in the workplace;
- 1.6.4. creating a balance between the rights and responsibilities of all parties; and
- 1.6.5. giving effect to the regional obligations of the country as a member of the Southern African Development Community.

2. Objectives

2.1. The Code's primary objective is to set out guidelines for employers, employees and trade unions to implement so as to ensure that individuals with HIV/Aids are not discriminated against in the workplace. This includes provisions regarding:

- 2.1.1. creating a non-discriminatory work environment;
- 2.1.2. dealing with HIV/AIDS testing, confidentiality and disclosure;
- 2.1.3. providing equitable employee benefits; and
- 2.1.4. dealing with dismissals.

2.2. The Code's secondary objective is to provide guidelines for employers, employees and trade unions on how to manage HIV/AIDS within the workplace. Since the HIV/AIDS epidemic impacts upon the workplace and individuals at a number of different levels, it requires a holistic response, which takes all of these factors into account. The Code therefore includes the following principles:

- 2.2.1. creating a safe working environment for all employers and employees;
- 2.2.2. developing procedures to manage occupational incidents and claims for compensation;
- 2.2.3. introducing measures to prevent the spread of HIV/AIDS;
- 2.2.4. developing strategies to assess and reduce the impact of the epidemic upon the workplace; and
- 2.2.5. supporting those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible.

2.3. In addition, the Code promotes the establishment of mechanisms to foster co-operation at the following levels:

- 2.3.1. between employers, employees and trade unions in the workplace; and
- 2.3.2. between the workplace and other stakeholders.

3. Application And Scope

- 3.1. All employers and employees, and their respective organisations are encouraged to use this Code to develop, implement and refine their HIV/AIDS policies and programmes to suit the needs of their workplaces.
- 3.2. For the purposes of this Code, the term "workplace" should be interpreted broadly to include the working environment of, amongst others, persons not necessarily in an employer-employee relationship, those working in the informal sector and the self-employed.
- 3.3. This Code does not impose any legal obligation in addition to any existing legislation. Failure to observe it does not, by itself, render an employer liable in any proceedings, except where the Code refers to obligations set out in law.
- 3.4. The Code should be read in conjunction with other codes of good practice that may be issued by the Commissioner of Labour e.g Code of Good Practice: Employment Discrimination.

4. Promoting A Non-Discriminatory Work Environment

- 4.1. No person with HIV/AIDS may be discriminated against in any employment policy or practice, including-
 - 4.1.1. recruitment procedures, advertising and selection criteria;
 - 4.1.2. appointments and the appointment process;
 - 4.1.3. job classification or grading;
 - 4.1.4. remuneration, employment benefits and terms and conditions of employment;
 - 4.1.5. employee assistance programmes;
 - 4.1.6. job assignments;
 - 4.1.7. training and development;
 - 4.1.8. performance evaluation systems;
 - 4.1.9. promotion, transfer and demotion;
 - 4.1.10. disciplinary measures other than dismissal
 - 4.1.11. termination of services.

4.2. To promote a non-discriminatory work environment based on the principle of equality, employers and trade unions should adopt positive measures such as:

4.2.1. preventing discrimination and stigmatisation of people living with HIV/AIDS through the development of policies and programmes for the workplace;

4.2.2. awareness programmes, education and training on the rights of all persons with regard to HIV/AIDS;

4.2.3. mechanisms to promote acceptance of HIV/AIDS in the workplace;

4.2.4. providing support for all employees infected or affected by HIV/AIDS; and

4.2.5. grievance procedures and disciplinary measures to deal with HIV-related complaints in the workplace.

5. HIV Testing

5.1. No employer should require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status.

5.2. An employer may, as part of a health care service provided in the workplace, provide testing to an employee who has agreed to a test, subject to the following:

5.2.1. pre- and post test counselling should be provided; and

5.2.2. strict procedures relating to confidentiality of an employee's HIV status as described in clause 6.2 of this Code should be implemented.

5.3. The agreement referred to in clause 5.2 must be based on informed consent. This means that the employee must be provided with all the necessary information, including what the test is, why it is necessary, the benefits, risks, alternatives and any social implications of the outcome of the test, and must understand this.

5.4. Anonymous HIV testing in the workplace may occur with the employee's consent, provided the information obtained may not be used to discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.

6. Confidentiality And Disclosure

6.1. All persons with HIV/AIDS have the legal right to privacy. An employee is therefore not legally required to disclose the employee's HIV/AIDS status to the employer or to other employees.

6.2. If an employee chooses to voluntarily disclose the employee's status to the employer or to other employees, this information may not be disclosed to others without that employee's written consent. Where written consent is not possible, steps should be taken to confirm that the employee wishes to make the disclosure.

6.3. Mechanisms should be created to encourage acceptance and support for those employers and employees who voluntarily disclose their status within the workplace, including:

6.3.1. encouraging persons with HIV/AIDS to conduct or participate in education, prevention and awareness programmes;

6.3.2. encouraging the development of support groups for employees with HIV/AIDS; and

6.3.3. ensuring that persons who are open about their HIV/AIDS status are not discriminated against or stigmatised.

7. Promoting A Safe Workplace And Safe Society

7.1. An employer is obliged to provide and maintain, as far as is reasonably practical, a workplace that is safe and without risk to the health of its employees.

7.2. Employers, employees and trade unions, as part of their commitment to reducing HIV/AIDS in society generally, should support education and training aimed at reducing the risk of HIV/AIDS outside the workplace. This should include the risks resulting from unprotected sex, sex with more than one partner, and information about the most common ways in which HIV/AIDS is transmitted.

7.3. The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace should ensure that it has policies dealing with, amongst others:

7.3.1. the risk, if any, of occupational transmission within the particular workplace;

- 7.3.2. appropriate training and education on the use of infection control measures so as to reduce the risk of HIV transmission outside or in the workplace;
- 7.3.3. providing appropriate equipment and materials to protect employees from the risk of exposure to HIV at the workplace;
- 7.3.4. the steps that should be taken following an occupational accident at the workplace;
- 7.3.5. the procedures to be followed in applying for compensation for occupational infection;
- 7.3.6. the reporting of all occupational accidents; and
- 7.3.7. adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

8. Employee Benefits

- 8.1. Employees with HIV/AIDS may not be discriminated against in the allocation of employee benefits.
- 8.2. Employees who become ill with AIDS should be treated like any other employee with a comparable life threatening illness with regard to access to employee benefits.
- 8.3. Information from benefit schemes on the medical status of an employee must be kept confidential and should not be used to discriminate.
- 8.4. If an employer offers a medical scheme as part of the employee benefit package it should ensure that this scheme does not discriminate, directly or indirectly, against any person on the basis of HIV status.

9. Dismissal

- 9.1. Employees with HIV/AIDS may not be wrongfully dismissed solely on the basis of their HIV/AIDS status.
- 9.2. If an employee becomes too ill to perform the employee's work, an employer should follow accepted guidelines regarding dismissal for incapacity before terminating an employee's services, as set out in the Code of Good Practice: Dismissal.

- 9.3. The employer must ensure that as far as possible, the employee's right to confidentiality regarding the employee's HIV status is maintained during any incapacity proceedings.

10. Assessing The Impact Of HIV/Aids On The Workplace

- 10.1. Employers and trade unions should develop appropriate strategies to understand and respond to the impact of HIV/AIDS in their particular workplace and sector. This should be done in co-operation with initiatives by government, civil society and non-governmental organisations.
- 10.2. Broadly, impact assessments should include risk profiles and assessments of the direct and indirect costs of HIV/AIDS.
- 10.3. Risk profiles may include an assessment of the following:
- 10.3.1. the vulnerability of individual employees or categories of employees to infection;
 - 10.3.2. the nature of the organisation's operations and how this may increase susceptibility to HIV infection. For example the reliance on migrant labour, long distance transport etc;
 - 10.3.3. a profile of the communities from which the organisation draws its employees;
 - 10.3.4. a profile of the communities surrounding the organisation's place of operation; and
 - 10.3.5. an assessment of the impact of HIV/AIDS upon their target markets and client base.
- 10.4. The assessments should also consider the impact that the HIV/AIDS epidemic may have on:
- 10.4.1. direct costs to employee benefits, medical costs and increased costs related to staff turnover, retraining and recruitment costs and the costs of implementing an HIV/AIDS programme;
 - 10.4.2. indirect costs incurred as a result of increased absenteeism, employee mortality, loss of productivity, a general decline in workplace morale and possible workplace disruption;
 - 10.4.3. the cost effectiveness of any HIV/AIDS interventions should also be measured as part of an impact assessment.

11.A Workplace HIV/Aids Policy

11.1. Every workplace should develop an HIV/AIDS policy in order to ensure that employees affected by HIV/AIDS are not discriminated against in employment policies and practices. This policy should cover:

- 11.1.1. an outline of the organisation's HIV/AIDS programme;
- 11.1.2. details on employment policies such that impact on HIV/AIDS such as medical testing, employee benefits, performance management and procedures to be followed to determine medical incapacity and dismissal;
- 11.1.3. standards of behaviour expected of employers and employees in their dealings with employees with HIV/AIDS.
- 11.1.4. measures to deal with deviations from these standards;
- 11.1.5. means of communication within the organisation on HIV/AIDS issues;
- 11.1.6. details of employee assistance available to persons affected by HIV/AIDS; and
- 11.1.7. monitoring and evaluating those mechanisms.

11.2. All policies must be developed in consultation with key stakeholders within the workplace including trade unions, employee representatives, occupational health staff and the human resources department.

11.3. The policy should reflect the nature and needs of the particular workplace.

11.4. Policy development and implementation is a dynamic process, so the workplace policy should be-

- 11.4.1. communicated to all concerned;
- 11.4.2. routinely reviewed in light of changing circumstances and new scientific information; and
- 11.4.3. monitored for its successful implementation and evaluated for its effectiveness.

12.Workplace HIV/Aids Support Programmes

12.1. Every workplace should implement a workplace HIV/AIDS support programme aimed at preventing new infections, providing care and support for employees who are infected or affected, and managing the impact of the epidemic in the organisation.

12.2. The nature and extent of a workplace support programme should be guided by the needs and capacity of each individual workplace. Every workplace programme should however attempt to promote the following:

- 12.2.1. regular HIV/AIDS awareness programmes;
- 12.2.2. voluntary testing;
- 12.2.3. education and training;
- 12.2.4. condom distribution and use;
- 12.2.5. risk minimising social and sexual practices;
- 12.2.6. the use of infection control measures;
- 12.2.7. creating an environment that is conducive to openness, disclosure and acceptance amongst all staff;
- 12.2.8. access to counselling and other forms of social support for people affected by HIV/AIDS;
- 12.2.9. maximising the performance of affected employees through reasonable accommodation, such as investigations into alternative sick leave allocation;
- 12.2.10. developing strategies to address direct and indirect costs associated with HIV/AIDS in the workplace;
- 12.2.11. regular evaluation and review of the programme.

12.3. Employers should take all reasonable steps to assist employees with referrals to appropriate health, welfare and other support facilities within the community, if such services are not provided at the workplace

13. Information And Education

- 13.1. The Office of the Commissioner should ensure that copies of this Code are available and accessible.
- 13.2. Employers and employer organisations should include the Code in their orientation, education and training programmes of employees.
- 13.3. Trade unions should include the Code in their education and training programmes of shop stewards and employees.

14. HIV/Aids Free Status As An Inherent Job Requirement

- 14.1. Notwithstanding the contents of this Code, it is recognised that there may be a very limited number of occupations in which HIV/AIDS free status is an inherent job requirement. For example, surgeons with HIV/AIDS who may transmit the virus to patients or emergency care nurses with HIV/AIDS who may place themselves at risk as result of increased likelihood of exposure to infection flowing from that job.

14.2. In such instances, it is recognised that:

14.2.1. it would be fair to regard HIV/AIDS status as a barrier to recruitment or continued employment in that position;

14.2.2. an employer is legitimately entitled to require pre-employment testing and regular employment testing, as a pre-condition of employment;

14.2.3. in the event that an existing employee in such position contracts HIV/AIDS, the employer should consider all reasonable alternatives, for example a transfers, restructuring of tasks etc, prior to considering the dismissal of the employee concerned for incapacity.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: MATERNITY BENEFITS AND FAMILY RESPONSIBILITY

1. Introduction

- 1.1. The purpose of this Code is to guide employers, employees and their organisations in dealing with maternity benefits and family responsibility at the workplace. It is also a guide to mediators, arbitrators and the courts.
- 1.2. For the purposes of this Code, confinement means the date or the estimated date of delivery.

2. Absence From Work In Connection With Confinement

- 2.1. In terms of section 117 of the Employment Act, a pregnant employee must give her employer a certificate signed by a medical officer or a registered nurse and midwife estimating the employee's confinement. The certificate must be issued within 6 weeks of confinement.
- 2.2. On receipt of the certificate, the employer must immediately permit the employee to go on maternity leave until confinement and for a further period of up to six weeks after her confinement. This means that a pregnant employee is entitled to up to twelve weeks' leave depending on the date that the certificate is handed in.
- 2.3. Within 21 days of the confinement, the employee must give her employer a certificate of the actual date of confinement signed by a medical officer or a registered nurse and midwife.
- 2.4. An employer may not permit or require an employee to work before the expiry of –
 - 2.4.1. the six week period after confinement; or
 - 2.4.2. an eight week period after confinement if the period is extended by an additional two weeks because she suffers from an illness arising out of her confinement and is consequently unfit to return to work.
- 2.5. An employee's maternity leave may be further extended by an additional 6 weeks if she suffers from an illness arising out of her confinement and is consequently unfit to return to work.

3. Payment Of Maternity Allowance

- 3.1. In terms of section 117 (5) of the Employment Act, an employer must pay an employee whilst she is on maternity leave, a maternity allowance of not less than 25% of her basic pay or 50t for each day of

absence, whichever amount is the greater. Note that the maternity allowance includes payment for rest days and paid public holidays that occur during maternity leave.

3.2. The employer must pay the required maternity allowance in three instalments as follows:

3.2.1. the *first*, for the period of absence up to and including the day of confinement, shall be paid within 48 hours of the employee giving the employer the certificate contemplated in clause 2.3 above;

3.2.2. the *second*, for the six weeks immediately after confinement, must be paid on the employee's return to work. If the period has been extended in terms of clause 2.4, the employer must pay the second instalment on the day she would otherwise have returned to work; and

3.2.3. the *third*, if there has been an extension of maternity leave in accordance with clause 3.4, must be paid in respect of the extended period, within forty eight hours after the employee gives the employer the certificate referred to in that clause.

3.3. An employee is only entitled to an allowance for the extended period of two weeks after the expiry of six weeks following confinement if she gives her employer a certificate to that effect signed by a medical officer or registered nurse and midwife.

3.4. The employee may nominate, in writing, a person to whom her maternity allowance must be paid.

4. Effect Of Confinement On Continued Employment

4.1. Maternity leave does not interrupt an employee's period of service. Accordingly, service benefits continue to accrue to the employee during her maternity leave.

4.2. In terms of section 120 of the Employment Act, no notice of intention to terminate the employment of a pregnant employee without good cause within three months of her confinement, shall affect her right to receive her maternity allowance. Good cause in this context should be limited to serious misconduct as defined in section 26(4) of the Employment Act.

4.3. If a dispute arises as to whether a notice of intention to terminate an employment contract was given for good cause, either the employer or the employee concerned may refer the question to the Commissioner for a ruling in this regard. This ruling shall be binding, although either party may appeal against the Commissioner's ruling to the Minister, by delivering a written appeal to the Minister within thirty days after the date of being informed of the ruling.

4.4. An employer may not give an employee notice of termination of employment while she is on maternity leave. Any notice of termination, which is due to expire during maternity leave, is null and void.

5. Effect Of Death During Confinement Period

- 5.1. In terms of section 118 (2) of the Employment Act, if an employee on maternity leave dies before or on the day of her confinement, the employer must pay the maternity allowance due up to the date of her death subject to a maximum of 42 days' pay.
- 5.2. If an employee on maternity leave dies after confinement, the employer must pay, in addition to the amount referred to in clause 5.1, a maternity allowance due up to the date of her death.
- 5.3. The maximum amount of maternity allowance for the period after confinement is 42 days' pay, unless the six week period has been extended in terms of clause 3.3, in which case the maximum amount is 56 days' pay.

6. Nursing Of Infants

- 6.1. Section 123 of the Act provides that a female employee may suckle or otherwise feed her child for half an hour twice a day during working hours for six months after returning to work following her confinement.
- 6.2. The employer is obliged to pay the employee her basic pay in respect of time utilised in terms of clause 6.1, as if it were ordinary working time.

7. Medical Expenses

Nothing in the Employment Act places an obligation on an employer to be liable for the medical expenses incurred by a female employee during or attributable to her pregnancy or confinement.

8. Health And Safety

- 8.1. An employer may not require or permit pregnant or breast-feeding employees to perform work that is hazardous to their health or that of their children.
- 8.2. Employers and employees should be aware of how pregnancy and confinement may impact upon the work of the employee. While the following list is not exhaustive, it serves as an example of the kinds of factors which may need to be considered by the employer-
 - 8.2.1. morning sickness may temporarily interfere with an employee's ability to do her work or perform shift work. Exposure to nauseating smells may also aggravate this condition.
 - 8.2.2. backache and varicose veins may result from work involving manual labour or prolonged standing or sitting.
 - 8.2.3. a greater frequency of visits to the toilet may occur and the effect that this may have on the employee leaving her workplace unattended.

- 8.2.4. the employee's increasing size and discomfort may require changes of protective clothing and physical changes to her work environment. It must also be recognised that her increasing size may impair her dexterity, co-ordination and other similar factors. If an employee's balance is affected, it may result in difficulties whilst working on slippery or wet surfaces.
- 8.2.5. tiredness associated with pregnancy may affect the employee's ability to work overtime or to perform evening work. Additional rest periods may also be required.
- 8.3. Certain physical conditions at work may pose a threat to the health and safety of a pregnant employee or her child. These conditions may include the following:
 - 8.3.1. exposure to noise, vibration, radiation, electro magnetic fields etc.
 - 8.3.2. working in extreme conditions. For example, excessive heat or cold; and
 - 8.3.3. exposure to harmful chemical substances.

9. Family Responsibility

- 9.1. Employees have commitments to their families, which may from time to time impact on their work. This must be recognised by employers who should be sensitive to the personal needs and circumstances of their employees.
- 9.2. Employers should consider granting employees paid leave in addition to their normal annual leave entitlement, in circumstances such as the following:
 - 9.2.1. in the case of fathers, when a child is born;
 - 9.2.2. when an employee's child is seriously ill; and
 - 9.2.3. in the event of the death of an employee's spouse or life-partner, or parent, grandparent, child, grandchild or sibling.
- 9.3. An employer may consider granting employees a maximum entitlement of compassionate leave per year (for example, three days' paid leave) which may be utilised for these purposes. An employer is entitled to reasonable proof of the event giving rise to the need for leave.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: TERMINATION OF EMPLOYMENT

1. Introduction

- 1.1. This Code of Good Practice deals with some of the key aspects of termination of employment. It aims to summarise some of the provisions of the law and provide guidelines on applying the law.
- 1.2. This Code intends to assist-
 - 1.2.1. employees and their trade unions;
 - 1.2.2. employers and their employer organizations; and
 - 1.2.3. mediators, arbitrators and judges.
- 1.3. The guidelines in this Code may be departed from if there is good reason to do so. Anyone who departs from them must prove the reasons for doing so. The following kinds of reasons may justify a departure from the provisions of the Code. Note that this list is not exhaustive.
 - 1.3.1. the size of the employer may justify a departure. For example, an employer with a small number of employees may not be required to comply with all the procedural requirements of this Code, but that employer must, nevertheless, give an employee a fair opportunity to respond to any allegations before taking a decision affecting that employee's rights.
 - 1.3.2. the nature of the employer's business may require stricter adherence to rules that may normally be the case. For example a single breach of health and safety rules in a dangerous working environment may justify more serious disciplinary action than may otherwise be the case.
 - 1.3.3. collective misconduct may justify a departure from the ordinary procedural rules provided that the employees are given an opportunity to answer any charges against them.
- 1.4. To the extent that this Code advances an interpretation of the law, that interpretation is the policy of the Minister and should be applied by mediators and arbitrators unless that interpretation is reversed by a decision of the Industrial Court.
- 1.5. The provisions of this Code may be varied by a collective agreement provided that no collective agreement may remove a statutory right.
- 1.6. A key principle in this Code is that employers and employees should treat one another with mutual respect, bearing in mind the objectives of both employment justice and the efficient operation of

business. While employees should be protected from arbitrary or other unfair action, employers are entitled to satisfactory conduct and work performance from their employees.

2. Duration of Employment

2.1. The rules that regulate the termination of a contract of employment may depend on the duration of the contract. See Section 17 of the Employment Act. There are two kinds of agreed duration:

2.1.1. an agreement to work for a specified period of time. A fixed term may be for a specified period (for example 6 months) or may be determined by a specified event (for example, the completion of a building, a bridge or a road). A fixed term contract normally terminates automatically on the expiry of the period. Seasonal workers may be employed on a fixed term contract for a season, which normally terminates at the end of the season. The failure to renew a fixed-term contract in circumstances when the employee reasonably expected continuity of employment may constitute a dismissal. For example, if an agricultural worker has been employed each year on a fixed term contract for a harvesting season, and this has continued for several years, that employee may have a reasonable expectation of ongoing employment in the next season. In these circumstances, the employer's failure to renew the employee's contract may constitute a dismissal.

2.1.2. an agreement to work for an unspecified period of time (normally up and until retirement). This kind of contract continues until it is lawfully terminated. This means that it must be terminated for just cause and on proper notice by either of the parties or for other reasons e.g. by agreement, death of the employee etc.

3. Grounds for Termination of Employment

3.1. *Agreement to terminate*

If an employer and an employee agree to terminate the contract, the contract terminates in accordance with that agreement. For example, a redundant employee may agree to voluntary retrenchment on an agreed package from a specified date.

3.2. *Death or sequestration*

A contract of employment normally terminates after the death or sequestration of the employer or upon the death of the employee.

3.3. *Retirement*

3.3.1. Unless the contract of employment provides otherwise, a contract of employment normally terminates automatically when the employee reaches the agreed or normal age of retirement. In

other words, it is an implied term of a contract that the contract terminates on retirement.

3.3.2. If no retirement date is agreed, the normal retirement age will be implied from the employer's practice in the past and the practice in the industry. In most industries, the normal retirement age is between 60 and 65 years of age.

3.3.3. If the employee continues to work after reaching retirement age, the contract is extended and the normal rules of termination of employment apply, unless the employee and the employer agree to something different.

3.4. *Resignation*

3.4.1. If an employee has agreed to a fixed term contract, that employee may only resign if the employer materially breaches the contract. If there is no breach by the employer, the only way that the employee may terminate the contract lawfully is by getting the employer to agree to an early termination.

3.4.2. A material breach means a serious breach that goes to the core of the contract. The refusal to pay wages, verbal or physical abuse, sexual harassment and discrimination are examples of conduct that amount to a material breach by the employer of the employment contract.

3.4.3. If an employee has agreed to work for an unspecified period of time, the employee may resign by giving notice of termination in accordance with the contract or the provisions of section 18 of the Employment Act, or without notice if the employer has materially breached the contract. See the examples referred to in clause 3.4.2.

3.4.4. If the employee is required to give notice but does not work the period of notice, the employee must pay the employer the remuneration that the employer would have paid if the employee had worked the notice.

3.5. *Forced resignation or constructive dismissal*

3.5.1. If an employer makes continued employment intolerable, it may lead to the resignation of the employee. That resignation may amount to a dismissal. Resignation in these circumstances is often referred to as constructive dismissal.

3.5.2. A constructive dismissal will be judged as a dismissal, and a dismissal in these circumstances will normally be wrongful. An employee may however not lightly resign and claim constructive dismissal. Even if an employee has been unfairly dealt with at work, the employee should normally utilise available mechanisms to deal with grievances. It is only if continued employment is intolerable, that an employee will be entitled to resign and legitimately claim constructive dismissal.

3.6. *Dismissals*

3.6.1. If an employee is on a fixed term contract, the employer may only dismiss the employee before the expiry of the contract period if the employee materially breaches the contract. See clauses 6, 8 and 9 for examples of material breach. If there is no breach by the employee, the only way that the employer may terminate the contract is by getting the employee to agree to the early termination.

3.6.2. In a contract for an unspecified period, a dismissal is not wrongful if it is effected for a fair reason and in accordance with a fair procedure, in addition to complying with any notice period required in a contract of employment or by legislation.

3.6.3. There are normally only 3 recognised grounds of dismissal for a fair reason, namely-

- (a) misconduct;
- (b) incapacity, including poor work performance or ill health or injury; and
- (c) operational requirements.

3.6.4. This Code lays down guidelines for a fair procedure.

3.6.5. The onus of proving the fairness of a dismissal lies with the employer. This must be established on a balance of probabilities. This means that if there are two opposing versions, the one that is the more probable constitutes proof. If the employer is unable to decide which is the more probable, the employee must be given the benefit of that doubt.

4. Probationary employees

4.1. Subject to what is stated in a collective agreement, an employee may be required to serve a period of probation to enable the employer to make an informed assessment of whether the employee is competent to do the job and is suitable for employment.

4.2. The period of probation should be of reasonable length having regard to how long it takes to determine the employee's competence and suitability for employment, in relation to factors such as the nature and complexity of the job, the standards required, etc. The period may be extended by agreement, or if the employer reasonably requires a further period to assess the employee's competence or suitability. The maximum period is three months for unskilled employees and twelve months for skilled employees - see section 20(1) of the Employment Act.

4.3. Section 20(3) of the Employment Act requires a prospective employer to inform a prospective employee in writing of the length of the probationary period, before entering into an employment contract providing for probation.

- 4.4. During the period of probation, the employer should meet with the employee at regular intervals for the purposes of monitoring and evaluating the employee's performance and suitability, and to provide guidance in this regard. This may entail instruction, training and counseling to the employee during probation.
- 4.5. If during probation the employer has grounds to be concerned that an employee is not performing to standard or may not be suitable for the position, the employer must notify the employee of the concerns and give the employee an opportunity to respond to those concerns.
- 4.6. An employer or an employee may terminate a contract of employment during probation on not less than 14 days' notice, and that termination is deemed to be a termination for just cause. Neither the employer nor the employee need give reasons for the termination. (see section 20(2) of the Employment Act). Nevertheless, an employer should convene a hearing prior to the dismissal of an employee on probation.

5. Managing Discipline

- 5.1. All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to the employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.
- 5.2. Discipline should be corrective. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counseling and warnings.
- 5.3. Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor infractions of work rules and discipline. Repeated misconduct will justify warnings, which may themselves be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

6. Dismissals for Misconduct

6.1. Any person who is determining whether a dismissal for misconduct is wrongful should consider-

6.1.1. whether the employee contravened a rule or standard regulating conduct relating to employment;

6.1.2. if a rule or standard was contravened, whether-

- (a) the rule is a valid or reasonable rule or standard;
- (b) the rule is clear and unambiguous
- (c) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (d) the rule or standard has been consistently applied by the employer; and
- (e) whether dismissal is an appropriate sanction for the contravention of the rule or standard.

6.2. Although it is generally not appropriate to dismiss an employee for a first offence, dismissal may be justified if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Without being exhaustive, the kind of conduct described in section 26(4) of the Employment Act is considered to be sufficiently serious to justify dismissal. This conduct includes willful disobedience of reasonable orders, theft, violence, gross negligence, persistent absence from work without permission, gross dishonesty; willful damage to property or willfully endangering the safety of others. Every case must be assessed on its own merits.

6.3. In determining whether or not dismissal is the appropriate sanction, the employer should consider-

6.3.1. the gravity of the misconduct in the light of past infringements, the strictness of the rule, the nature of the job, health and safety, and the likelihood of repetition;

6.3.2. the circumstances of the employee such as the employee's employment record (including length of service, previous disciplinary record) and personal circumstances.

6.4. The employer should apply the sanction of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who in similar circumstances participate in the misconduct under consideration.

6.5. The procedure to be followed by an employer in processing a dismissal for misconduct is set out in clause 11 below.

7. Managing Performance Standards

7.1. An employer should stipulate the required standards of work. Some standards are self-evident or can be inferred from custom and

practice. Others need to be stated in the contracts of employment or in applicable work schedules and brought to the specific attention of the employees.

- 7.2. The employer must give appropriate guidance, instruction or training, if necessary, to an employee before dismissing the employee for poor work performance. What is appropriate will depend on the circumstances of each case, and the employer is not normally obliged to retrain the employee in all the skills required to perform the job. In section 26(4)(j) of the Employment Act, consistent poor work performance below average despite at least two written warnings may constitute serious misconduct. This does not however mean that two warnings will have to be given in all cases or that two warnings are always sufficient.
- 7.3. There should be an investigation to establish the reasons for the unsatisfactory performance. If investigation reveals that all or part of the reason for the employee's poor performance is not the fault of the employee, that would have a bearing on the fairness of any action taken against the employee.
- 7.4. The employee must be given a reasonable time to improve. What is reasonable will depend on the nature of the job, the extent of the poor performance, status of the employee, length of service, the employee's past performance record, etc.
- 7.5. If the employee continues to perform unsatisfactorily, the employer must warn the employee that he or she may be dismissed if there is no improvement within a stipulated time.
- 7.6. An opportunity to improve may be dispensed with if-
 - 7.6.1. the employee is a manager or senior employee whose knowledge and experience qualify the employee to judge whether the standards set by the employer are being met;
 - 7.6.2. the degree of skill required is sufficiently high that the potential consequences of a small departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify dismissal.

8. Dismissals for Incapacity: Poor Work Performance

- 8.1. Any person who is determining whether poor work performance justifies dismissal must consider-
 - 8.1.1. whether the employee failed to meet a performance standard;
 - 8.1.2. whether the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - 8.1.3. whether the performance standard is reasonable;

- 8.1.4. the reasons why the employee failed to meet the performance standard;
- 8.1.5. whether the employee was afforded a fair opportunity to meet the performance standard;
- 8.1.6. whether dismissal is the appropriate sanction for not meeting the performance standard.
- 8.2. Although the employer has the managerial prerogative to set performance standards, the standards may not be unreasonable.
- 8.3. Proof of poor performance is a question of fact to be determined on a balance of probabilities. This can be difficult if the employee's tasks are not capable of precise measurement or evaluation. The burden of proof lies with the employer and that is why it is important for the employer to engage in a process of assessment and appraisal with the employee.
- 8.4. The procedure to be followed by an employer in processing a dismissal for poor work performance is set out in clause 11.

9. Dismissals for Incapacity: Ill-health or injury

- 9.1. Incapacity on the grounds of ill health or injury may be temporary or permanent.
- 9.2. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee.
- 9.3. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- 9.4. The degree and cause of incapacity is relevant to the fairness of any dismissal. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
- 9.5. Particular consideration should be given to employees who are injured at work or who are incapacitated by work related illness. The duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.
- 9.6. Any person determining whether a dismissal arising from ill health or injury is unfair must consider:

9.6.1. whether the employee is able to perform the work; and

9.6.2. if the employer is not capable-

- (a) the extent to which the employee is able to perform the work;
 - (b) the extent to which the employee's work circumstances might be adapted to accommodate disability, or if this is not possible, the extent to which the employee's duties might be adapted; and
 - (c) the availability of any suitable alternative work.
- 9.7. The procedure to be followed by an employer in processing a dismissal for ill health or injury is set out in clause 11.

10. Incompatibility

10.1. Incompatibility results from the unsuitability of an employee for work, and may be caused by the employee relating poorly with co-employees, clients or other persons who are important to the organisation.

10.2. Incompatibility is a special kind of incapacity: poor work performance and may constitute a fair reason for termination. The steps required in clauses 7.2 to 7.6, read with changes required by the context, apply. In particular the employer must-

10.2.1. record the incidents of incompatibility that gave rise to concrete problems or disruption;

10.2.2. warn and counsel the employee before dismissal. This must include advising the employee of any acceptable conduct, who has been adversely affected by that conduct and what remedial action is proposed;

10.3. Before dismissing an employee for incompatibility, the employer should give the employee a fair opportunity to -

10.3.1. consider and reply to the allegations of incompatibility;

10.3.2. remove the cause for disharmony; and

10.3.3. propose alternatives to dismissal.

10.4. The procedure to be followed by an employer in processing a dismissal for incompatibility is set out in clause 11.

11. Fair procedure

11.1. This procedure applies if an employer is processing a dismissal for misconduct or incapacity: provided that it may be varied in appropriate circumstances. It would for example be appropriate to dispense with a hearing if the action to be taken is implemented with the consent of the employee concerned.

- 11.2. An investigation should be conducted by the employer to ascertain whether there are grounds for a hearing to be held.
- 11.3. If an enquiry is to be held, the employer must notify the employee of the allegations using a form and language that the employee can reasonably understand.
- 11.4. The employee is entitled to a reasonable time to prepare for the hearing and to be assisted at the hearing by a fellow employee who may be a trade union representative.
- 11.5. The hearing must be held and finalised within a reasonable time, and chaired by a sufficiently senior and impartial representative from management.
- 11.6. The employee must be given a proper opportunity at the hearing to respond to the allegations, question any witnesses called by the employer and to lead witnesses if necessary.
- 11.7. If an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.
- 11.8. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.
- 11.9. A trade union official is entitled to represent a trade union representative or an employee who is an office-bearer or official of a trade union at a hearing held under this clause.
- 11.10. If the employee is dismissed, the employee must be given the reason for dismissal and notified of the right to refer a dispute concerning the wrongfulness of the dismissal to the Office of the Labour Commissioner.
- 11.11. In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures.
- 11.12. Employers should keep records for each employee specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for the actions.
- 11.13. In cases of collective misconduct, it may be fair to hold a collective hearing.

12. Unprotected strikes

- 12.1. Participation in a strike that does *not* comply with the provisions of the Act is serious misconduct that may justify dismissal. The fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –
 - 12.1.1. the seriousness of the contravention of the Act and attempts made to comply with it;

- 12.1.2. whether the strike was in response to unjustified conduct by the employer, and whether the strike was the only reasonable option available to the employees concerned;
 - 12.1.3. whether the parties have made genuine attempts to negotiate the resolution of the dispute giving rise to the strike;
 - 12.1.4. the manner in which the employees have conducted themselves during the strike, and, in particular, whether the strike was conducted in a peaceful manner or accompanied by violent behaviour; and
 - 12.1.5. the impact of the strike on the employer's business.
- 12.2. Prior to dismissal the employer must, at the earliest opportunity, make reasonable attempts to contact a trade union official to discuss the course of action it intends to adopt.
- 12.3. If dismissals are contemplated, the employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.
- 12.4. If the employer cannot reasonably be expected to extend these steps to the employees in question the employer may dispense with them.
- 12.5. The employer may not discriminate between striking employees by dismissing or reinstating only some of them without good reason. If however the reason for the difference in treatment is based on grounds of participation in strike related misconduct such as picket violence or malicious damage to property, or other justifiable reasons, the different treatment may be fair.

13. Retrenchments

- 13.1. A retrenchment means a dismissal arising from a redundancy caused by the re-organisation of the business or the discontinuance or reduction of the business for economic, structural, technological or similar reasons.
- 13.2. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for these reasons. As a general rule-
- 13.2.1. the re-organisation of the business arises from the restructuring of the business as a result of a number of possible business related causes -such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business;
 - 13.2.2. economic reasons are those that relate to the financial management of the enterprise;

- 13.2.3. technological reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to new technology;
- 13.3. Because retrenchment is essentially a "no fault" dismissal and because of the adverse effects on the employees affected by it, there are particular obligations on an employer, which are directed toward ensuring that all reasonable alternatives to dismissal are canvassed and that the employees are treated fairly.
- 13.4. An employer who intends to retrench must give written notice of that intention to the Labour Commissioner and every employee likely to be affected by any proposed retrenchment.
- 13.5. The employer should consult the employees to be affected and their trade union, with a genuine attempt to achieve consensus on the following:
 - 13.5.1. alternatives to dismissals such as transfer to other jobs, lay-off etc;
 - 13.5.2. criteria for selecting the employees for dismissal such as last-in-first-out (LIFO), subject to special skills and affirmative action;
 - 13.5.3. steps to minimize the dismissals such as voluntary retrenchment packages, early retirement etc;
 - 13.5.4. conditions under which dismissals take place, such as the timing, severance pay etc;
 - 13.5.5. steps to avoid the adverse effects of the dismissals such as time off to seek work, etc
- 13.6. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce through retrenchment is contemplated by the employer so that possible alternatives can be explored. The consultation process should allow the employee representatives to-
 - 13.6.1. meet and report back to employees;
 - 13.6.2. engage meaningfully with the employer; and
 - 13.6.3. request, receive and consider all relevant information which must be disclosed by the employer.
- 13.7. The more urgent the need of the business to respond to the factors giving rise to any contemplated retrenchment, the more truncated the consultation process may be. Urgency should not, however, be induced by the failure by the employer to initiate the consultation process as soon as a reduction of the workforce was contemplated. The parties who are required to consult must meet as soon and as frequently as may be practical during the process.
- 13.8. Selection criteria for retrenchment should be agreed with the employee representatives, failing which the criteria used by the employer must be fair and objective. Section 25 of the Employment

Act provides that the principle, commonly known as 'first in last out' should be applied in respect of each category of employee if practical, provided that the employer must take into account-

- 13.8:1. the need for the efficient operation of the undertaking;
 - 13.8:2. the ability, experience, skill and occupational qualifications of each employee affected by the redundancy.
- 13.9. Retrenched employees should be given preference if the employer again hires employees with comparable qualifications, subject to -
- 13.9.1. the employees having expressed a desire to be re-hired; and
 - 13.9.2. the re-hiring taking place within 6 months of the retrenchment.

14. Severance benefit

- 14.1 In terms of section 28 of the Employment Act, when an employment contract terminates for any reason, the employer must pay the employee a severance benefit at the prescribed rate if the employee has been continuously employed by the employer for 60 months or more.
- 14.2 The employer's obligation to pay severance pay in respect of a period of continuous employment as outlined in clause 14.1 above falls away, if the employee or the employee's dependant or beneficiary is or will become entitled to a gratuity or pension in respect of that period of employment.
- 14.3 An employee can elect to receive the severance pay either at the conclusion of each period of 60 months' continuous service or on the termination of employment .
- 14.4 If there is a dispute over the amount of severance pay , either the employer or the employee may in the prescribed manner refer the dispute to the nearest labour officer to determine the amount payable .
- 14.5 If the employer or the employee is dissatisfied with the labour officer's determination, that party may appeal against the determination in the prescribed manner to the Commissioner . The Commissioner must then determine the matter, and this determination is conclusive proof of the amount of severance pay payable.

Approved: 23/08/02

**TRADE DISPUTES ACT
&
TRADE UNIONS AND EMPLOYERS' ORGANISATIONS ACT
CODE OF GOOD PRACTICE: COLLECTIVE BARGAINING**

1. Introduction

- 1.1. Collective bargaining is one of the fundamental policies promoted by the Trade Disputes Act and the Trade Unions and Employers' Organisations Act. It is through the collective regulation of employment related matters and the prevention and resolution of labour disputes that the fundamental aims of the Acts are realised.
- 1.2. The purpose of this Code is to guide employers and trade unions to bargain collectively in an effective manner. It is also a guide to mediators, arbitrators and the courts.
- 1.3. The guidelines should be followed and may be departed from only if there is good reason to do so. Anyone who departs from them must demonstrate reasons for doing so. The following kinds of reasons may justify a departure:
 - 1.3.1. *the size of the employer* For example, an employer with less than 10 employees would not be expected to enter into a recognition agreement.
 - 1.3.2. *the nature or location of the employer's premises* may justify special rules in respect of organizational rights. For example, there may have to be special rules regulating trade union access where the employees reside on the premises.
 - 1.3.3. *the nature of the employer's business*. For example, there may have to be special rules regulating trade union access to high security premises such as a diamond mine.
[Note that this list is not exhaustive].
- 1.4. Collective bargaining may take place at workplace or industry level. This Code covers collective bargaining at both those levels.

2. Recognition generally

- 2.1. Recognition means that an employer or employers' organisation recognises a trade union as the collective bargaining agent of all or some of its employees.
- 2.2. A recognised collective bargaining agent engages with the employer or employers' organisation with the following objectives:
 - 2.2.1. to represent employees in their dealings with their employer;

- 2.2.2. to negotiate and conclude collective labour agreements; and
- 2.2.3. to prevent and resolve labour disputes.
- 2.3. A collective bargaining agent represents the employees in the constituency in respect of which it is recognised. This recognised constituency is called the bargaining unit. A bargaining unit may be restricted to the trade union's members or it may be for specific categories of employee.
- 2.4. A trade union must be recognised if it represents more than 25% of the employees of the employer or of the industry. See sections 30(4) and 30A of the Trade Disputes Act and sections 50 (1) and 50A(d) of the Trade Unions and Employers' Organisation Act. Nothing in these Acts prevents an employer from recognising a trade union that represents less than 25 % of the employees or recognising more than one union in a workplace or in an industry.
- 2.5. An employer is not obliged to recognise a trade union in respect of employees who are members of senior management ie managers who are responsible for determining policy and who represent the employer in negotiations.
- 2.6. If a trade union is recognised-
 - 2.6.1. the trade union is entitled to organisational rights and to the disclosure of information; and
 - 2.6.2. both the trade union and the employer (or employers' organisation) are obliged to bargain in good faith with each other.

3. Process of applying for recognition at the workplace

- 3.1. A trade union may, in terms of section 30 of the Trade Disputes Act and section 50 of the Trade Unions and Employers' Organisations Act, request an employer to recognise it as a collective bargaining agent. To do this, it must fill in the prescribed form and serve the completed form on the employer and a copy on the Commissioner.
- 3.2. In its application, the union should-
 - 3.2.1. describe the bargaining unit taking into account the factors referred in clause 5; and
 - 3.2.2. provide documentary proof that it is representative. This may be done by the submission of signed authorisations to deduct trade union dues, documentary proof of membership or by a petition signed by employees.
- 3.3. The employer must respond within 30 days of receipt of the request by notifying the trade union in the prescribed form if it is prepared to recognise the union. The employer may only refuse to recognise the union on one or more of the following grounds:
 - 3.3.1. the union does not represent at least one quarter of its employees;

- 3.3.2. the Industrial Court has authorised the withdrawal of recognition and the period contemplated in the order has not expired;
- 3.3.3. the employees that the union seeks to represent are members of senior management.
- 3.4. If the employer fails to agree to recognise the union within 30 days, the union may refer a dispute to the Commissioner by completing the prescribed form and serving a copy on the employer. The Commissioner must refer the dispute to mediation.
- 3.5. If the dispute remains unresolved after 30 days of the referral, any party may refer the dispute to the Industrial Court for determination. If the dispute concerns the representativeness of the union, the Industrial Court may direct the mediator to conduct a ballot. The Industrial Court may, in its determination, order the employer concerned to recognise the union.

4. Process of applying for recognition at industry level.

- 4.1. For the purposes of this clause, a trade union includes two or more unions acting jointly. See section 30B(1) of the Trade Disputes Act.
- 4.2. A trade union may apply for the establishment of a joint industrial council under section 30B of the Trade Disputes Act if it represents at least one quarter of the employees in the industry. The application must be in accordance with the prescribed form and served on the Commissioner.
- 4.3. On receipt of the application, the Commissioner must call for representations by notice in the Government Gazette. After considering the representations, the Commissioner must call a meeting of all interested organisations and attempt to facilitate the establishment of a joint industrial council.
- 4.4. If a council is established, the parties must take the provisions of section 30D(4) of the Trade Disputes Act and the model joint industrial council constitution into consideration.
- 4.5. If the interested organisations do not agree to establish a council, the Commissioner must determine whether the union represents at least one quarter of the employees in the industry. In order to do this, the Commissioner may -
 - 4.5.1. scrutinise signed authorisations to deduct membership dues, the union's membership records or other documentation; or
 - 4.5.2. conduct a ballot, in part of or the whole of the industry.
- 4.6. If a council is not established and if the Commissioner is satisfied that the union represents at least one quarter of the employees concerned, the Commissioner must issue a certificate certifying that the union is a recognised trade union in the industry.

4.7. If a trade union is recognised in an industry-

4.7.1. the trade union and the employer organisation in that industry must bargain in good faith with each other; and

4.7.2. any employer in the industry not belonging to the employers' organisation and the trade union must bargain in good faith with each other.

5. Determination of a bargaining unit

5.1. When recognising a trade union as a collective bargaining agent in the workplace or at industry level, the issue of which employees the union is to represent in collective bargaining inevitably arises. Different considerations arise in recognition at the level of the workplace and at industry level.

5.2. If an employer has to recognise two or more trade unions in a workplace, which it may have to do given the statutory threshold of 25% of the employees, the following options are open to the parties:

5.2.1. the trade unions may, by agreement, be recognised jointly in respect of the same appropriate bargaining unit;

5.2.2. if the trade unions represent different interests within the workplace, they may be recognised in respect of different bargaining units; or

5.2.3. each trade union may be recognised in respect of its members only.

5.3 It is possible for an employer to have more than one bargaining unit within the same workplace, although this is not common. For example, there may be separate bargaining units for professional and non-professional employees. For example there may be two bargaining units in an academic institution, one for teachers and another for support staff.

5.4 A bargaining unit may not include all employees. Senior managers who are responsible for determining policy and representing the employer in negotiations with a union are excluded from a bargaining unit. See sections 30(5) and 30B(11) of the Trade Disputes Act. The reason for this is to avoid conflicts of interests and to ensure that there are employees to represent management's interests in the workplace and deal with the trade union.

5.5 The following factors are identified to assist unions, employers, mediators, arbitrators and the courts in determining an appropriate bargaining unit. These factors are not exhaustive and include the following:

5.5.1 *the wishes of the parties;*

5.5.2 *the bargaining history of the parties.*

5.5.3 *the extent of union organisation at the employer and in industry generally;*

5.5.4 *employee similarity of interest.* If the employees in the bargaining unit share the same interests, for example similar terms of employment or similar conditions of work, that points to a single bargaining unit;

5.5.5 *the geographic location of the employer.* For example, if an employer has several separate places of work close together, that points to a single unit. But if the places of work are far away from each other or in different towns, that points to separate bargaining units;

5.5.6 *the nature of the employer's business and its organisational and decision-making structure.* For example, if there are separate workplaces and the terms and conditions are left to the discretion of the managers of those workplaces, that points to separate bargaining units. If, however, the decisions are made at head office, that points to a single unit; and

5.5.7 *the different functions or processes of the employer and the degree of their integration.*

5.6 A single factor is seldom definitive. A factor points to a certain conclusion rather than determining it. For example, a retail employer may have shops in different towns. The fact that they are in different towns points to separate units but the fact that the employees share similar terms and conditions of employment and the fact that the decisions concerning pay and conditions is made at head office may point more strongly in the other direction.

5.7 If a joint industrial council is established or a trade union is recognised in an industry, the parties must agree on an appropriate bargaining unit for the industry, failing which the courts must determine the bargaining unit. The following kinds of factors should be taken into account:-

5.7.1 the wishes of the parties;

5.7.2 the extent of union organisation in the industry;

5.7.3 employee similarity of interest.

6. Bargaining matters

6.1. Sections 50(2) and 50A(6) of the Trade Unions and Employers' Organisations Act require recognised trade unions and employers or employer organisations to bargain in good faith on various matters. These sections describe the scope of compulsory collective bargaining. They are-

6.1.1. remuneration and other terms and conditions of employment;

- 6.1.2. employment benefits;
 - 6.1.3. employment policies concerning the recruitment, appointment, training, transfer, promotion, suspension, discipline and dismissal of employees; and
 - 6.1.4. the collective bargaining relationship including –
 - (a) organisational rights;
 - (b) negotiation and dispute procedures;
 - (c) grievance, disciplinary and termination of employment procedures; and
 - 6.1.5. any other agreed matter.
- 6.2. Terms and conditions of employment include-
- 6.2.1. the terms normally stated or implied in a contract of employment such as hours of work, leave, duration, notice periods etc;
 - 6.2.2. the conditions normally associated with employment such as rules regulating behaviour in the workplace, canteen facilities, health and safety etc.
- 6.3. It should be noted that scope of collective bargaining is dynamic. Trade unions engage on a much wider range of issues than in the past. Modern collective labour agreements contain a much wider range of issues than their predecessors. The fact that certain issues have historically not been the subject of collective bargaining does not mean that they should on that ground alone be excluded from collective bargaining in the future. The concepts of remuneration, terms and conditions of employment, employment benefits and collective bargaining relationships are not tied to a specific content.
- 6.4. It should however also be noted that the greater involvement of the trade union in employer decisions that affect employees carries with it the additional responsibilities of co-operation and confidentiality.
- 6.5. There are some operational and managerial decision-making powers of the employer that do not fall within the scope of collective bargaining. For example specific decisions such as the introduction of a new product or service, the investment decisions, distributions to share holders, the closing down of a product line or service or the introduction of new technology. A collective agreement, however, dealing with the procedure for the introduction of new technology or an agreement on retrenchment flowing from a closure or new technology falls within the scope of collective bargaining.

7. Duty to bargain in good faith

- 7.1. Bargaining in good faith requires the parties to explore issues with an open mind and with the intention to reach an agreement.
- 7.2. The following conduct is consistent with bargaining in good faith:

- 7.2.1. respect for the representatives of the parties;
 - 7.2.2. preparing for negotiations in advance, which entails developing proposals and securing mandates for those proposals;
 - 7.2.3. retaining consistent representation during the negotiation process, unless there are good reasons for not doing so;
 - 7.2.4. attending meetings timeously;
 - 7.2.5. motivating any proposals made;
 - 7.2.6. considering proposals made by the other party and, if not accepted, motivating why they are not accepted.
- 7.3. While parties cannot be compelled to reach agreement, conduct which leads to an inference that the party concerned has no genuine desire to reach agreement may constitute bargaining in bad faith. Bargaining in bad faith may be inferred from the following conduct:
- 7.3.1. making grossly unreasonable demands;
 - 7.3.2. refusing, without good reason, to make concessions;
 - 7.3.3. refusing to disclose relevant information that is reasonably required for collective bargaining;
 - 7.3.4. being insulting, derogatory or abusive in negotiations;
 - 7.3.5. delaying negotiations unnecessarily;
 - 7.3.6. imposing unreasonable conditions for negotiations to proceed;
 - 7.3.7. by-passing the representatives of the parties in the collective bargaining process (for example, if management makes offers directly to employees during the collective bargaining process and prior to the process being exhausted);
 - 7.3.8. engaging in unilateral action such as the unilateral alteration of terms and conditions or industrial action before negotiations have been exhausted.
- 7.4. The duty to bargain in good faith ends at deadlock. Deadlock is reached once negotiations are exhausted. Negotiations are exhausted if both parties agree or one party declares deadlock after-
- 7.4.1. that party has genuinely sought to reach agreement but failed to do so after a reasonable period;
 - 7.4.2. the other party conducts itself in a manner from which it may be inferred that it no longer wishes to bargain. For example if a party walks out of negotiations;
 - 7.4.3. the other party bargains in bad faith.
- 7.5. A party that bargains in bad faith may not rely on its own conduct to terminate the bargaining process and declare deadlock. In other words if the innocent party does not declare a deadlock, the defaulting party may not implement its proposals or engage in industrial action.

- 7.6. Any party in the bargaining process may refer a dispute concerning a failure to bargain in good faith to the Commissioner in accordance with section 5 of the Trade Disputes Act. The Commissioner must then refer the dispute to mediation.
- 7.7. If the dispute is not settled through mediation, the dispute may be referred to the Industrial Court for determination.

8. Organisational rights of recognised trade unions

- 8.1. An employer is required, in terms of section 50C of the Trade Unions and Employers' Organisations Act, to grant a recognised trade union, whether recognised at the level of the workplace or industry, the following organisational rights:
- 8.1.1. access to its premises for an authorised union representative to recruit members, hold meetings and represent members;
- 8.1.2. deduct union dues and levies on the written authorisation of an employee; and
- 8.1.3. recognise union representatives appointed by the union from amongst its employees in respect of grievances, discipline and termination of employment.
- 8.2. A recognised trade union and employer should first attempt to conclude a collective labour agreement to regulate the manner in which the organisational rights referred are to be exercised.
- 8.3. An employer may impose reasonable limits on the frequency, time and place of access by authorised union representatives to its business, and may impose reasonable limits on the number of union representatives to be appointed from its employees to represent union members. An employer may also impose a levy of up to 5 % of the union subscriptions, for giving effect to the deductions.
- 8.4. The election of union representatives by employees may take place during working hours, but the employer may place reasonable limitations on the place and time for these elections.
- 8.5. If a dispute arises over organisational rights, either party may refer the dispute to the Commissioner in terms of section 5 of the Trade Disputes Act. The Commissioner must refer the dispute for mediation. If the dispute is not settled, any party may refer the dispute to the Industrial Court for determination.
- 8.6 The trade union should ensure-
- 8.6.1 that shop stewards, officials or other representatives are duly authorised to act on behalf of the trade union and their powers, duties and authority are clearly defined;
- 8.6.2 management is notified of the union's duly authorised shop stewards, officials or representatives and their authority and power, and any changes in appointments;

- 8.6.3 that shop stewards, officials or other representatives are issued with written credentials setting out their period of office, the work group represented, and a brief statement of their powers and functions within the union, including any authority to call for industrial action;
 - 8.6.4 that shop stewards, officials or other representatives are properly trained and fully understand their role and function;
 - 8.6.5 establish procedures for the election and appointment of shop stewards, officials or representatives to ensure the varied interests of members are taken into consideration.
- 8.7 Management should allow shop stewards access to facilities to enable them to carry out their functions. These facilities may include-
- 8.7.1 access to their members subject to the permission of the appropriate managers or supervisors which should not be unreasonably withheld;
 - 8.7.2 the maintenance of full pay while carrying out their functions as employee representatives;
 - 8.7.3 lists of newly engaged employees;
 - 8.7.4 reasonable access to an office, telephone, the use of company notice boards and other facilities on terms and conditions as may be negotiated.
- 8.8 It is in the interests of both management and unions that shop stewards, officials and other employee representatives are properly trained.
- 8.9 Management and unions therefore should-
- 8.9.1 review the type of training required, to ensure appropriate training;
 - 8.9.2 agree on arrangements for time off for training with, or without pay;
 - 8.9.3 jointly train them in procedures for consultation, communication and the handling of grievances and disputes.

9. Disclosure of Information

- 9.1. An employer is required, subject to Section 50 D of the Trade Unions and Employers' Organisations Act to disclose to a recognised trade union all the relevant information that is reasonably required to allow the union to represent its members in consultations and collective bargaining with the employer.
- 9.2. An employer is not required to disclose information that –
- 9.2.1. is legally privileged. For example, the correspondence between the employer and its lawyers (attorney/client privilege).
 - 9.2.2. the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of court;
 - 9.2.3. is confidential and, if disclosed, may cause material harm to an employee or the employer; or
 - 9.2.4. is an employee's personal information, unless the employee consents to the disclosure of that information.
- 9.3. The purpose of disclosure is to make the negotiation or consultation process as rational as possible, to ensure good faith during bargaining and to develop trust between the bargaining parties. Parties should have the information to formulate reasonable demands or responses, and to arrive at a realistic settlement.
- 9.4. As a general rule, the employer is obliged only to disclose information that is relevant. Information is generally relevant if it is likely to influence a party's views on a matter being discussed. For example, if during wage negotiations the employer states that it can afford the increase proposed by the union but will not agree to the demand, the disclosure of the employer's financial affairs may not be relevant. If however the employer claims that it cannot afford the proposed increase, the employer's financial records become relevant.
- 9.5. It is not possible to list all the items that should be disclosed in all circumstances. The following items are examples of the kind of information that may be relevant in negotiations:
- 9.5.1. *remuneration and benefits issues*: reward policies and systems; job evaluation systems and grading criteria; earnings according to grade, department, workplace, sex, race, casual workers etc, giving if appropriate the distributions and make-up of remuneration showing any additions to the basic rate; the total wage bill; details of fringe benefits and total labour costs.
 - 9.5.2. *conditions of service issues*: policies on recruitment, redeployment, redundancy, training, affirmative action, and promotion; appraisal systems; health, welfare and safety matters;
 - 9.5.3. *performance issues*: productivity and efficiency records; savings from increased productivity and output; return on capital invested; sales and state of order book;

- 9.5.4. *labour force issues*: numbers employed analysed according to grade, department, location, age, sex, race or any other appropriate criterion; labour turnover; absenteeism; overtime; short-time; lay-offs; planned changes in work methods, materials, equipment or organisation; available manpower plans; investment plans.
- 9.5.5. *ability to pay issues*: cost structures; gross and net profits; sources of earnings; assets; liabilities; allocation of profits; details of government financial assistance; transfer prices; loans to parent or subsidiary companies and interest charged.
- 9.6. These examples are not intended to represent a checklist of information that must be provided in all negotiations. Nor are they meant to be an exhaustive list of types of information that may be disclosed - other items may be relevant in particular negotiations.
- 9.7. Confidential information is information that the employer regards as confidential in order to protect its interests or the interests of those associated with its business such as its employees, customers, suppliers, investors etc. But the information must not just be confidential. It must also be information, if disclosed, that may cause *material harm* to an employee or the employer. Material harm may occur if the disclosure of confidential information may lead to, for example-
- 9.7.1. the employer losing customers to competitors;
 - 9.7.2. suppliers refusing to supply necessary materials or services;
 - 9.7.3. banks refusing to grant loans; or
 - 9.7.4. the employer not being able to raise funds to finance the business.
- 9.8. Private personal information may include information found in an employee's employment file. This information may include information concerning the employee's financial circumstances, marital circumstances, criminal record or health (HIV/AIDS or alcoholism). This kind of information is private and personal. The employer may not disclose it unless the employee consents or an arbitrator or court requires it to do so.
- 9.9. Trade unions should identify and request information in advance of negotiations, if practical. In order to avoid misunderstandings and cause unnecessary delays, trade unions should-
- 9.9.1. frame their requests for information in writing and as precisely as possible.
 - 9.9.2. include motivation for the information taking into account the matters raised in this Code;
 - 9.9.3. give the employer sufficient time to prepare and submit the information requested taking into account whether or not there is likely to be a dispute over disclosure.

- 9.10. Any dispute over the disclosure of information should be referred to the Commissioner under section 5 of the Trade Disputes Act. The Commissioner must refer that dispute for mediation. If the dispute is not settled, any party may refer the dispute to the Industrial Court for determination.

10. Duties of fair representation

- 10.1. The duty to bargain in good faith places a responsibility on a recognised trade union to represent employees within the recognised bargaining unit fairly.
- 10.2. The duty of fair representation imposes the following duties on a recognised trade union in respect of employees within the bargaining unit who are not members of the union:
- 10.2.1. the union cannot refuse to represent non-union members;
 - 10.2.2. the union may not discriminate against non-union members; and
 - 10.2.3. the union may not enter into collective labour agreements that favour its members at the expense of non-union members.
- 10.3. As a consequence of a duty of fair representation imposed on a recognised trade union, the union and the employer may agree to implement an agency shop agreement within a recognised bargaining unit, in terms of which employees within that unit who are not members of the union may be obliged in terms of their contracts of employment to pay an agency fee. This agency fee must-
- 10.3.1 be not more than the union membership fees payable;
 - 10.3.2 only be applicable in respect of employees within the bargaining unit who are eligible for union membership but who elect not to be union members;
 - 10.3.3 be paid into a separate bank account, administered as agreed between the trade union and the employer, and used only for socio-economic interests of employees (e.g. training)

11. Withdrawal of recognition at the workplace or at Industry Level

- 11.1. An employer or an employer's organisation may apply to the Industrial Court for an order authorising the withdrawal of recognition of a trade union at workplace and/or industry level, on the following grounds:
- 11.1.1. the union no longer represents one quarter of the employees concerned;
 - 11.1.2. the union refuses to negotiate in good faith with the employer;

- 11.1.3. the union refuses or fails to comply with an arbitration award or an order of the Industrial Court;
 - 11.1.4. the union has materially breached a collective labour agreement concluded with an employer or employer's organisation.
- 11.2. The representivity of a trade union may be challenged at industry level only-
- 11.2.1. one year after the Commissioner certified the union as a recognised union in the industry in terms of section 30B(6) of the Trade Disputes Act; or
 - 11.2.2. one year after any previous application in terms of section 30C of that Act to withdraw the union's recognition of grounds of representivity.
- 11.3. An employer or employer's organisation seeking to withdraw the recognition of a trade union must serve a copy of the application in the prescribed form on the Commissioner for mediation after having served it on the union concerned. The application must also be served on the Labour Advisory Board.
- 11.4. If the dispute remains unresolved after mediation, the employer or employer's organisation may refer the dispute to the Industrial Court for determination.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: STRIKES AND LOCKOUTS

1. Introduction

- 1.1 The Code is intended to provide practical guidance on strikes and lockouts. The guidelines should be followed. They may be departed from only if there is good reason for doing so.

2. Matters in respect of which a strike or lockout is permissible

- 2.1 The subject matter of a protected strike or lockout is limited to interest disputes only. Note that it is not permissible to strike or lockout in respect of disputes of interest in an essential service. Those disputes must be referred to compulsory arbitration.

- 2.2 An interest dispute is defined in the Act. It means a trade dispute between an employer or an employers' organisation on the one hand and employees or a trade union on the other but excludes disputes that the Act requires to be resolved by adjudication, which are commonly known as 'disputes of right'.

- 2.3 A dispute of right may be described as a dispute arising from the breach or contravention of a law, contract of employment or collective agreement. A dispute of interest on the other hand is a dispute which cannot be resolved through enforcing legal rights. The distinction can be demonstrated by an example. If an employer pays an employee less than the agreed rate, a dispute over that underpayment is a dispute of right that may be referred to adjudication. If an employer refuses to increase the agreed rate, a dispute over that refusal is a dispute of interest and may be resolved through industrial action. There are exceptions to this approach to interest disputes - e.g. disputes of interest that are referred to arbitration in essential services or by agreement.

- 2.4 The following may be examples of a dispute of interest.

2.4.1 a dispute over what next year's wages are going to be;

2.4.2 a dispute over a new collective agreement or the renewal of an expired agreement;

2.4.3 a dispute over shorter working hours or higher overtime rates;

2.4.4 a dispute over a new retrenchment procedure or recruitment policy;

2.5 Strikes and lockouts are prohibited if :-

2.5.1 the strike or lockout is in breach of the provisions of the Act or any agreed procedure; or

2.5.2 in breach of a peace clause in a collective agreement; or

2.5.3 the employees are engaged in an essential service; or

2.5.4 the subject matter of the strike is not a trade dispute, is regulated by a collective agreement or is required to be referred to arbitration or the Industrial Court in terms of this Act; or

2.5.5 the parties to the dispute have agreed to refer that dispute to arbitration.

3. Procedural requirements for a protected strike or lockout

3.1 The dispute must concern an interest dispute and be referred to the Office of the Commissioner of Labour.

3.2 The Commissioner must appoint a mediator and determine the date, time and place for the first mediation meeting.

3.3 The mediator must attempt to resolve at one or more meetings within 30 days from the date of referral of the dispute and -:

3.3.1 if successful, the mediator must assist the parties to record the settlement in a written agreement;

3.3.2 if there are no prospects of settlement, the mediator must seek to reach agreement on the rules to regulate the strike or lockout;

3.3.3 if the parties do not agree on rules to regulate the strike or lockout, the mediator must determine them in accordance with this Code;

3.4 A 30 day mediation period is set aside for the dispute to be resolved. A mediator, however, may certify that the dispute is unresolved within that period, if satisfied that there are no

prospects of settlement. The period may also be lengthened by 30 days if the party referring the dispute fails to attend a mediation meeting. The period may also be shortened to the date of a mediation meeting if the other party fails to attend.

- 3.5 At least 48 hours notice of the commencement of the strike or lockout must be given in the prescribed form to the Commissioner and the other parties to the dispute. The notice must state the date and time of the industrial action. The purpose of the notice is to enable the other party to prepare for the proposed industrial action and in the case of a strike, to ensure that the employer has the opportunity to shut down the business without unnecessary harm being done to it.
- 3.6 The strike or lockout must commence within a reasonable period after the stated time and date. If the industrial action does not commence at the stated time and date, a fresh notice must be given. If the intended strike or lockout is to be intermittent, the notice must include the dates and times of each stoppage. Substantial compliance with the requirements of this clause will be sufficient, in deciding whether the industrial action commenced at the time and date specified in the notice.
- 3.7 If a strike or lockout is suspended and the employees return to work, a fresh notice must be given if the strike or lockout is resumed. That notice must state the date and time of the resumption of the industrial action.
- 3.8 The notice may be given before the mediation period has expired, provided that the strike or lockout commences after the expiry of that period.
- 3.9 Once the abovementioned procedural requirements have been complied with, either party to the dispute may commence industrial action. In other words a trade union may strike in respect of a dispute referred by the employer and an employer may lockout in respect of a dispute referred by the employees, provided the party initiating industrial action has given the required notice to the other party.
- 3.10 Notwithstanding having certified that a dispute has not been resolved, a mediator retains jurisdiction over the dispute until the dispute is settled and must continue if possible to try and settle the dispute by mediation.
- 3.11 It is possible to have a strike and a lockout at the same time. If the employees engage in a partial stoppage, the employer may institute a total lockout in response after giving the required notice.

4. Consequences of a protected strike

- 4.1 A person does not commit a delict or a breach of contract by taking part in a protected strike or lockout, and no civil legal proceedings may be instituted as a result. This does not however include any unlawful or wrongful conduct in furtherance of a protected strike or lockout.
- 4.2 An employee who takes part in a protected strike may not be dismissed for doing so. An employee who is subject to a lockout may not be dismissed for not giving in to the lockout. This does not preclude the employer from dismissing an employee during a strike or lockout for serious misconduct such as picket violence.
- 4.3 An employer is not obliged to remunerate an employee for services that an employee does not render during a strike or protected lockout.
- 4.4 an employee, member or official of a trade union may participate in a picket in accordance with the Act and any Code of Good Practice governing picketing.

5. Rules regulating the conduct of strikes and lockouts

- 5.1 The mediator appointed to resolve the interest dispute, must try and reach agreement on rules to regulate the conduct of strikes and lockouts if the dispute is not resolved through mediation. If no agreement is reached on the rules, the mediator must determine these rules. A strike or lockout in breach of those rules renders it unprotected industrial action.
- 5.2 These rules must address the following:
- 5.2.1 the conduct of any strike ballot required;
 - 5.2.2 the actual notice of the commencement of the strike or lockout;
 - 5.2.3 the use of replacement labour during the strike or lockout;
 - 5.2.4 picketing;
 - 5.2.5 places, times and conditions for strikers or locked out employees to assemble on the premises during the strike or lockout;

- 5.2.6 an expedited procedure for dealing with disputes arising from the conduct of the parties during the strike or lockout;
 - 5.2.7 appointment of representatives responsible for ensuring compliance with rules;
 - 5.2.8 security of the employer's premises during the strike or lockout;
 - 5.2.9 commitment to take steps to ensure compliance with the provisions of the Act and the rules;
 - 5.2.10 the mediation process during the strike or lockout.
- 5.3 If no agreement is reached on the rules, the mediator must determine the rules but may not in doing so-
- 5.3.1 restrict the rights and protections given in the Act. For example, the mediator may not prescribe the form that a strike may take (ie a go slow) but may require notice of any change in form (from a go slow to a total stoppage);
 - 5.3.2 deviate from what the parties themselves have agreed during the mediation or in a collective agreement.
- 5.4 An employer may not employ replacement labour in a protected strike or lockout and a trade union may not picket the premises of the employer during a protected strike or lockout-
- 5.4.1 if the parties have concluded an agreement on the provision of a minimum service during the strike or lockout; or
 - 5.4.2 if no minimum service agreement is concluded, for 14 days after the commencement of the strike or lockout;

6. Dismissal of strikers

- 6.1 It is wrongful to dismiss a striker engaged in a protected strike. This protection against dismissal does not extend to strike related misconduct such as picket line violence, malicious damage to property etc. The ordinary rules relating to dismissal for misconduct will apply to an employee charged with this kind of misconduct.
- 6.2 It may be fair to dismiss a striker engaged in an unprotected strike. The fairness of the dismissal depends on a number of factors. Those are specifically dealt with in the Code of Good Practice: Termination of employment.

Approved: 23/08/02

TRADE DISPUTES ACT

CODE OF GOOD PRACTICE: PICKETING

1. Introduction

1.1 This Code provides guidance by summarizing some of the provisions of the law and providing guidelines on good practice. If there is any conflict between the provisions of any legislation and this Code, the provisions of the legislation must prevail.

1.2 Section 13(1) of the Constitution recognises the right of assembly. This right is given effect to by section 54 (1) of the Trade Unions and Employers' Organisations Act and section 36 (4) of the Trade Disputes Act.

1.3 This Code of Good Practice is intended to provide practical guidance on picketing in support of a protected strike. The Code seeks to guide the exercise of this right and to assist employers, employees and their organizations agree picketing rules and to assist mediators in determining them.

2. Summary of the Law

2.1. Section 36 (4) of the Trade Disputes Act provides for the right of any employee, member or officer of a trade union to picket in furtherance of a protected strike for the purpose of peacefully communicating information and persuading any person not to work for, or to contract with, the employer party to the dispute.

2.2. There are limitations to the exercise of this right. A picket may not be attended by such numbers or conducted in a manner likely to intimidate any person, obstruct the entrance or exits of any premises, or lead to a breach of the peace. It is a crime to conduct a picket in this way.

2.3. Section 55 of the Trade Unions and Employers' Organisations Act specifically describes the kind of conduct that constitutes intimidation. This conduct includes-

2.3.1. the use of violence against any person, spouse or child;

2.3.2. the damage to property;

2.3.3. the persistent following of a person;

2.3.4. the hiding of any tools, clothes or any other property or hindering the use of those tools, clothes or property;

2.3.5. the watching or besetting of any place where a person resides, works or carries on business or happens to be; or

2.3.6. the following of a person in a disorderly manner.

2.4. The ordinary laws regulating the right of assembly do not apply to a picket in furtherance of a trade dispute. A picket for purposes other than to demonstrate in furtherance of a trade dispute is not protected by the Act, and the lawfulness of that picket or demonstration will depend on compliance with other laws, including the common law, municipal by-laws and any applicable statutes regulating the right of assembly.

2.5. Section 35(4) of the Trade Disputes Act limits the right to picket in furtherance of a protected strike or lock-out if-

2.5.1. the parties have concluded an agreement on the provision of a minimum service during the strike or lockout; or

2.5.2. if no agreement is concluded, for 14 days after the commencement of the strike or lockout.

3. Picketing rules

3.1. If the mediator assigned to mediate a dispute of interest in terms of section 5(5) of the Trade Disputes Act fails to settle the dispute, the mediator must try and assist the parties to reach agreement on rules to regulate the conduct of the strike or lockout including picketing rules.

3.2. If the mediator fails to secure an agreement on picketing rules, the mediator must determine those rules in accordance with these guidelines.

3.3. The following matters should be addressed in any agreed or determined picketing rules:

3.3.1. trade union authorisation of the picket;

3.3.2. the notice of the commencement of the picket and the place, time and the extent of the picket;

3.3.3. the nature of the conduct in the picket (ie a commitment not to engage in violence);

3.3.4. the number of picketers and their location;

3.3.5. the modes of communication between marshals and employers and any other relevant parties;

3.3.6. access to the employer's premises for purposes other than picketing e.g. access to toilets, the use of telephones, etc.

3.4. The following specific factors should apply in the determining the locality of the picket and whether it should take place at or near the employer's premises:

- 3.4.1. the nature of the workplace eg. a shop, a factory, a mine etc;
- 3.4.2. the particular situation of the workplace eg. distance from place to which public has access, living accommodation situated on employer premises, etc.
- 3.4.3. the number of employees taking part in the picket inside the employer's premises;
- 3.4.4. the areas designated for the picket;
- 3.4.5. time and duration of the picket;
- 3.4.6. the proposed movement of persons participating in the picket;
- 3.4.7. the proposals by the trade union to exercise control over the picket; and
- 3.4.8. the anticipated conduct of the picketers.

4. Conduct during the picket

- 4.1. The registered trade union should appoint a convenor to oversee the picket. The convenor should be a member or an official of the trade union. The union should notify the employer of the name and contact details of the convenor. That person should have, at all times, a copy of the Trade Disputes Act and the Trade Unions and Employers' Organisations Act, a copy of this Code, any collective agreement or rules regulating pickets and a copy of the union authorisation of the picket. These documents are important for the purposes of persuading the persons participating in the picket to comply with the law. These documents may also be important to establish the lawfulness and the protected nature of the picket to the employer, the public and the police.
- 4.2. The employer should, on receipt of the notification, provide the convenor with the name, address and telephone number of the person appointed by the employer to represent it in any dealings arising from the picket.
- 4.3. The registered trade union should appoint picket marshals to monitor the picket. They should have the telephone numbers of the convenor, the trade union office and any persons appointed to oversee the picket, in the absence of the convenor. The marshals should be readily identifiable as marshals. The trade union should instruct the marshals on the law, any agreed picketing rules or where no agreed rules exist, any picketing rules that have been stipulated by a mediator, this Code and the steps to be taken to ensure that the picket is conducted peacefully.

- 4.4. Although the picket may be held in a public place, the picket may not interfere with the constitutional rights of other persons.
- 4.5. The picketers should conduct themselves in a peaceful, unarmed and lawful manner. Subject to any agreement or rules, they may-
 - 4.5.1. carry placards;
 - 4.5.2. chant slogans; and
 - 4.5.3. sing and dance.
- 4.6. Picketers may not -
 - 4.6.1. physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises;
 - 4.6.2. commit any action which may lead to a breach of the peace or be unlawful, including but not limited to any action which is, or may be perceived to be violent or intimidating.

5. Role of the police

- 5.1. As a general rule, the police should not be seen in an area where a picket is held. Police should only become visible if there is a reasonable apprehension of a breach of the peace or law, and particularly if there is violence anticipated.
- 5.2. It is not the function of the police to take any view of the merits of the dispute giving rise to a strike or a lock-out. They have a general duty to uphold the law and may take reasonable measures to keep the peace whether on the picket line or elsewhere.
- 5.3. The police have no responsibility for enforcing labour legislation. For example, an employer should not require the police to help in identifying picketers against whom it wishes to seek an order from the Industrial Court.
- 5.4. The police have the responsibility to enforce the criminal law. They may arrest picketers for participation in violent conduct or attending a picket armed with dangerous weapons. They may take steps to protect the public if they are of the view that the picket is not peaceful and is likely to lead to violence.

6. Role of private security personnel

- 6.1. Private security personnel may be employed by the employer to protect its property and to ensure the safety of people on the employer's premises.
- 6.2. Private security personnel have no responsibility for enforcing labour legislation or any order of the Industrial Court. Enforcement of an order on the application of an employer is a matter for the Court and its officers

7. General rights, obligations and immunity

- 7.1. A person who takes part in a lawful picket in accordance with the Act does not commit a delict or a breach of contract. This means that the employer may not sue a person or a union for damages caused by a lawful picket.
- 7.2. The employer may not take disciplinary action against an employee for participating in a lawful picket. Where the employee's conduct during a picket constitutes misconduct, the employer may take appropriate disciplinary action.

8. Information and education

- 8.1. The Commissioner of Labour should ensure that copies of this Code are accessible and available.
- 8.2. Employers and employer organisations should include the issue of industrial action (including picketing) in their orientation, education and training programmes of employees.
- 8.3. Trade unions should include the issue of industrial action (including picketing) in their education and training programmes of shop stewards and employees.

Approved: 23/08/02

MODEL CONTRACT OF EMPLOYMENT

This model contract is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. This contract should be regarded as a suggested working document to assist parties in concluding their own agreements, and may be departed from with good cause. They should be adapted to cater for the specific circumstances of the parties. It is important to note that-

- the contract must comply with the provisions of the Employment Act; and
- the provisions of the Employment Act must be applied even if not specifically stated in a contract.

Entered into between: _____
("the employer")

Physical and postal Address of Employer:	
--	--

and _____
("the employee")

Physical and postal Address of Employee:	
--	--

1. COMMENCEMENT

This contract will begin on _____ and continue until terminated in terms of Clause 10.

2. PLACE OF WORK

3. JOB DESCRIPTION

Job title: _____

Duties:

4. SALARY/WAGE

- 4.1 The employee's basic pay is _____;
- 4.2 The employee is entitled to the following allowances/payments in kind/bonuses: _____;
- 4.3 The total value of the remuneration resulting from Clauses 4.1 and 4.2 is _____;
- 4.4 The wage period is weekly/monthly and wages are paid on the last day of each wage period;
- 4.5 The employee agrees to the following deductions in terms of the Employment Act:

5. HOURS OF WORK

- 5.1 The ordinary daily working period is from _____ a.m. to _____ p.m. on Mondays to Fridays and from _____ a.m. to _____ p.m. on Saturdays. The ordinary working days are Monday to Friday / and Saturday / and Sunday.
- 5.2 Overtime is worked if and when agreed, subject to Section 96(2) of the Employment Act;
- 5.3 The employee is paid for overtime at the following rate:-

6. WORK DURING REST PERIODS

- 6.1 Work during a rest period must be agreed.
- 6.2 If the employee works during a rest period, the employee must be paid double the wages for the period worked.

7. PUBLIC HOLIDAYS

7.1 The employee is entitled to basic pay for each paid public holiday.

7.2 Work on a paid public holiday must be agreed.

7.3 If the employee works on a paid public holiday, the employee must be paid double the basic wages for that day.

8. ANNUAL LEAVE

8.1 The employee is entitled to a minimum of 15 days' paid leave each year.

8.2 The employee's leave is to be taken from _____ to _____ or at other times determined by the employer.

9. SICK LEAVE

9.1 The employee is entitled to 14 days' paid sick leave in any one year of continuous employment, on the recommendation of a medical officer on each occasion when sick leave is taken.

9.2 The employee must notify the employer as soon as possible if the employee is absent from work through illness.

10. TERMINATION OF EMPLOYMENT

10.1 This contract may be terminated by either party giving the other _____ weeks/months notice.

10.2 Notice must be given in writing. If the employee is illiterate, notice may be given verbally.

10.3 On termination of the contract of employment, the employer must furnish the employee with a written certificate of service.

11. OTHER CONDITIONS OF EMPLOYMENT OR BENEFITS

12. APPLICATION OF THE EMPLOYMENT ACT

12.1 This Agreement must be interpreted and applied in accordance with the provisions of the Employment Act.

12.2 If there is any conflict between this Agreement and the Employment Act, the provisions of the Employment Act applies as if a term of this Agreement.

SIGNED AT _____ ON THIS _____ DAY OF _____

EMPLOYER

EMPLOYEE

Approved: 23/08/02

MODEL GRIEVANCE PROCEDURE

This model procedure is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. This procedure should be regarded as a suggested working document to assist parties in concluding their own agreement, and may be departed from with good cause. It should be adapted to cater for the specific circumstances of the parties.

1. INTRODUCTION

- 1.1 The purpose of this Procedure is to provide a structured process for resolving employee grievances. A grievance can be described as a strong feeling of injustice or dissatisfaction affecting an employee, arising out of the employee's work situation.
- 1.2 Grievances should be resolved as near to their point of origin as possible, and as soon as possible. An employee shall normally only be entitled to use this Procedure within a reasonable period of the cause of the grievance having occurred.
- 1.3 Management and employees, at all levels within an organisation, must give careful consideration to grievances raised and should use their conflict resolution skills in making genuine attempts to resolve grievances. They should recognise that a working environment often entails working under stressful conditions and in pressurised circumstances.
- 1.4 Employees and managers should treat one another with appropriate sensitivity and respect, and contribute towards a constructive working environment within an organisation.
- 1.5 The lodging of a grievance must not prejudice an employee's employment in any way.
- 1.6 An employee is entitled to be assisted by a fellow employee in processing a grievance at all stages in terms of this Procedure. This fellow employee may be a trade union representative.

2. STAGES IN THE PROCEDURE

STAGE ONE

- 2.1 An aggrieved employee should normally always first raise the grievance verbally with the employee's immediate manager. Provided however, this shall not be required if it would be unreasonable to expect the employee to do so (e.g. sexual harassment charges against the immediate manager), and in that event the employee may proceed directly to Stage Two of this Procedure.
- 2.2 If the manager cannot resolve the grievance to the employee's satisfaction within 5 working days or any other period agreed between them, the aggrieved employee should complete a formal grievance form and refer the matter to Stage Two, to be dealt with by a more senior manager.
- 2.3 In terms of this form, the employee must outline the grievance and propose a possible remedy. The manager who dealt with the grievance in Stage One must also enter on the grievance form steps taken to resolve the grievance, any comments, and a proposed remedy.
- 2.4 If the employee's immediate manager is the manager who normally deals with grievances at Stage Two of this Procedure, the employee should still discuss the grievance verbally with that person in terms of Clause 2.1 before completing a formal grievance form. Stage Two of this Procedure must then be dealt with by a more senior manager.

STAGE TWO

- 2.5 As soon as possible after receipt of a formal grievance form, the manager dealing with the grievance in Stage Two should meet with the aggrieved employee, and they should use their best endeavors to attempt to resolve the grievance within 10 working days or any other period agreed between them
- 2.6 The manager processing the grievance in Stage Two must decide on the procedure to be followed in each case. This may involve calling a meeting of affected parties, facilitation, mediation, arbitration, a commission of enquiry, or any other procedure which may be appropriate in the circumstances.
- 2.7 Should the employee still feel aggrieved, notwithstanding efforts to resolve the dispute in terms of Clause 2.6, the employee may use whatever means are available in law for the protection of the employee's rights.

MODEL GRIEVANCE FORM

(TO BE COMPLETED BY THE EMPLOYEE LODGING THE GRIEVANCE)

NAME OF EMPLOYEE :

CAUSE OF THE GRIEVANCE :

SOLUTION REQUESTED :

SIGNATURE OF EMPLOYEE : DATE.....

**TO BE COMPLETED BY THE MANAGER WHO DEALT WITH THE GRIEVANCE
IN STAGE ONE OF THE PROCEDURE (UNLESS NOT APPLICABLE IN TERMS
OF CLAUSE 2.1 OF THE GRIEVANCE PROCEDURE)**

DATE RECEIVED :

NAME OF MANAGER :

STEPS TAKEN TO RESOLVE GRIEVANCE :

COMMENTS ABOUT THE GRIEVANCE :

REMEDY PROPOSED BY MANAGER DEALING WITH THE GRIEVANCE

OUTCOME :

MANAGER'S SIGNATURE :

DATE.....

**(TO BE COMPLETED BY MANAGER DEALING WITH THE GRIEVANCE IN
TERMS OF STAGE TWO OF THE PROCEDURE)**

DATE RECEIVED :

MANAGER'S COMMENTS :

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MANAGER'S PROPOSALS :

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OUTCOME :

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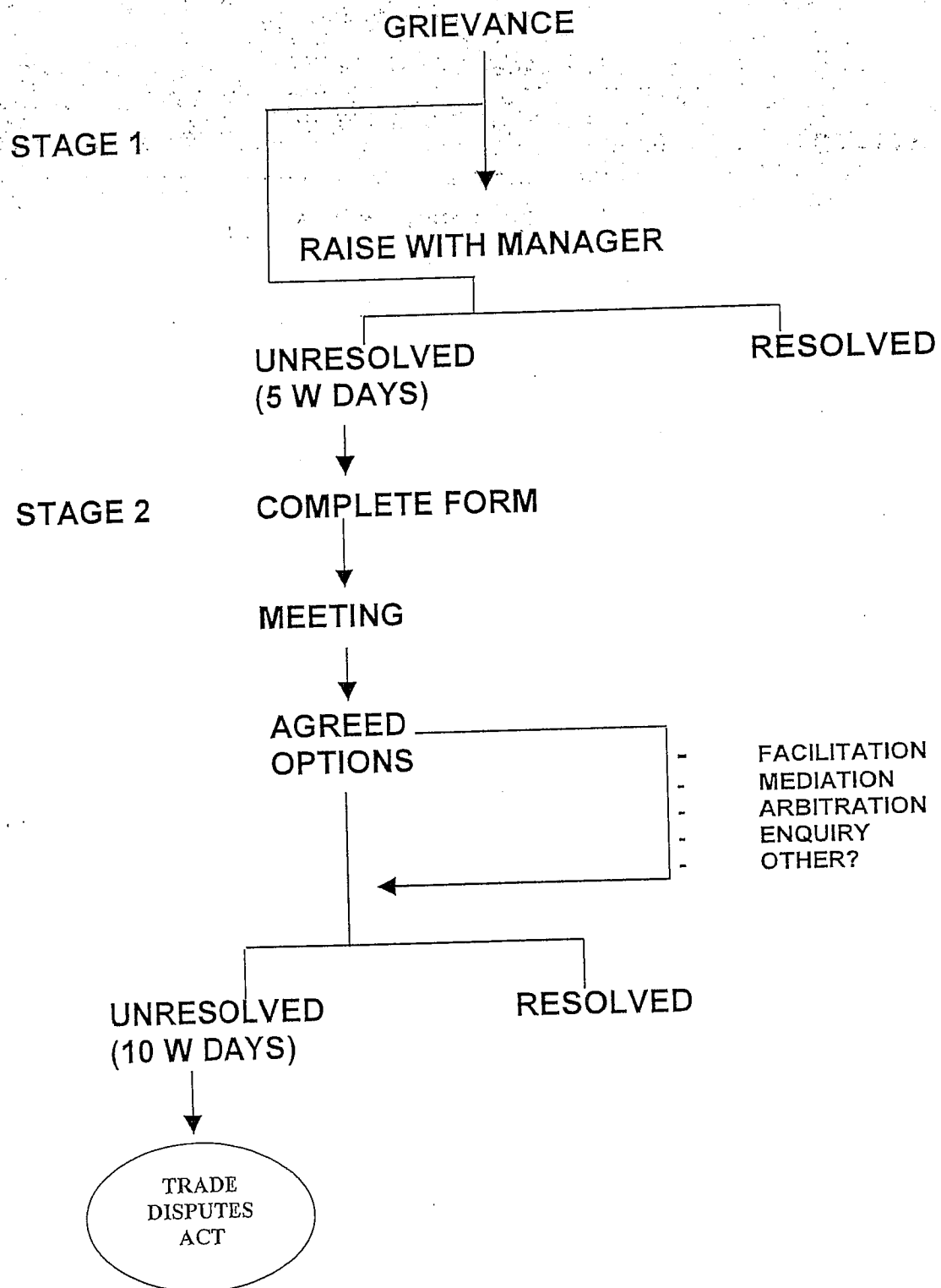
MANAGER'S SIGNATURE :

DATE.....

EMPLOYEE'S SIGNATURE :

DATE

MODEL GRIEVANCE PROCEDURE OUTLINE



Approved: 23/08/02

MODEL DISCIPLINARY AND INCAPACITY POLICY AND PROCEDURES

These model procedures are published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. These procedures should be regarded as suggested working documents to assist parties in concluding their own agreements, and may be departed from with good cause. They should be adapted to cater for the specific circumstances of the parties.

1. INTRODUCTION

- 1.1 The purpose of this document is to provide for a fair procedure to be applied when the conduct of an employee is unacceptable, or when an employee is incapable of rendering satisfactory service due to ill health/injury or poor work performance. This document also aims to ensure that fair decisions are taken in respect of the conduct or capacity of employees.
- 1.2 Employees are expected to carry out their duties in an effective manner and conduct themselves in a reasonable manner. Their actions must at all time be in accordance with the policies and rules existing within an organisation.
- 1.3 An employer should apply discipline where possible in a corrective manner, with the aim of attempting to ensure that employees comply with the rules and policies governing their employment.
- 1.4 This procedure serves as a guide, and should be implemented in a flexible manner. Management may deviate from it in appropriate circumstances. It is also not possible to cover every offence in the attached Code, and management may take appropriate action even if a specific offence is not provided for in the Code.
- 1.5 This document does not provide for procedures to be followed in the event of industrial action. Industrial action must be dealt with in accordance with applicable legislation and the Code of Good Practice: Strikes and lockouts.

2. COUNSELLING AND VERBAL WARNINGS

- 2.1 The primary aim of discipline is to correct employees' behaviour, in order to ensure that they conduct themselves in an acceptable manner. The primary means of achieving this objective should be the counselling of employees by supervisors or managers, who should explain to employees what is expected of them. If this does not achieve the desired objectives, stronger action may be required.
- 2.2 If an employee commits minor misconduct or performs poorly, the action taken should be a verbal reprimand coupled with an instruction from the employee's manager to correct the behaviour. These reprimands constitute informal corrective action and are not reflected on the employee's personal file.

3. WRITTEN WARNINGS

- 3.1 A written warning may be issued by a sufficiently senior manager, if the work performance or conduct of an employee has not improved following counselling or verbal warnings, or if the misconduct or work performance requires that stronger action than a verbal warning be taken.
- 3.2 The manager must inform the employee of the reasons for concern, and give the employee an opportunity to make representations. During this process, the employee may have present a representative appointed in terms of Clause 4.4. This process should not however normally be constituted as a formal hearing.
- 3.3 After having considered any representations made, the manager must decide whether or not to give the employee a written warning. Any warning should be issued to an employee personally and in accordance with the attached form, and a copy of the completed form should be given to the employee.
- 3.4 If an employee feels aggrieved by having been given a written warning, the employee may complete the appropriate appeal section of the employee copy of the warning form within five working days of having received it, and hand it to the manager who issued the warning.
- 3.5 The appeal must be referred to the next level of management above the level of the manager who issued the warning.

- 3.6 The manager considering the appeal must consider the written representations contained on the form and may speak to the persons concerned to obtain additional information, but no formal hearing should normally take place.
- 3.7 The manager considering the appeal should personally advise the employee of the outcome of the appeal within five working days of having received it. The manager must record the outcome on the appropriate section of the original warning form and the employee's copy of this, and return this copy to the employee.

4. HEARINGS

- 4.1 A sufficiently senior manager should be appointed as chairperson to convene a hearing, if there is -
- 4.1.1 further misconduct following a written warning or warnings; or
 - 4.1.2 repeated written warnings for different offences; or
 - 4.1.3 allegations of serious misconduct such as those referred to in Section 26(4) of the Employment Act, and which could on their own justify a final written warning or dismissal; or
 - 4.1.4 clauses 6.4 or 7.3 of this Procedure being invoked.
- 4.2 The chairperson of the hearing must be impartial and should not, if possible have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may be used as chairperson.
- 4.3 The employee must be advised in writing of the allegations against the employee and the time and date of the proposed hearing, giving the employee a reasonable opportunity to prepare for the hearing.
- 4.4 The employee must be informed of the right to choose another employee to be present as a representative at the hearing, to provide assistance. This employee providing assistance may be a trade union representative.

- 4.5 Subject to clause 8.3 the employee and the representative are entitled to be present at all times during the hearing, and must be informed of all the facts of the case being brought against the employee. An interpreter must be made available if required.
- 4.6 A management representative should present the case in support of the allegations against the employee, and the employee must be given an opportunity to present a case at the hearing. Both parties may call witnesses and question any witnesses called by the other party.
- 4.7 After having heard all the evidence, the chairperson must make a decision, based on a balance of probabilities, as to whether the employee is guilty of the allegations. If the chairperson is undecided, the employee must get the benefit of the doubt.
- 4.8 The question of guilt and the penalty to be imposed must be considered separately, and the employee or the representative is entitled to make representations in regard to an appropriate sanction. The chairperson must consider any applicable disciplinary code in deciding on the sanction. Mitigating and aggravating factors to be considered should include-
- (a) the seriousness of the offence;
 - (b) the employee's circumstances (including personal circumstances);
 - (c) the nature of the employee's job; and
 - (d) the circumstances of the infringement itself.
- 4.9 The chairperson must advise the employee of the outcome of the hearing as soon as possible. The chairperson must sign the disciplinary form and give a copy to the employee.
- 4.10 If the employee is given a final written warning, it should be made clear that any further misconduct of a similar nature whilst the final written warning is operative, may result in dismissal. In appropriate circumstances, the chairperson may issue a comprehensive final written warning, which specifies that any further misconduct of whatever nature whilst the final warning is operative, may result in dismissal.
- 4.11 When considering whether a dismissal for misconduct is fair, the chairperson should consider the following :-
- (a) Whether the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace.

- (b) If such a rule or standard was contravened, whether it was-
- (i) valid or reasonable;
 - (ii) known, or ought to have been known, by employees;
 - (iii) consistently applied; and
 - (iv) sufficiently serious to justify dismissal.

- 4.12 An employee may appeal against the outcome of a hearing, by completing the appropriate section of the copy of the disciplinary form and giving it to the chairperson within five working days of being disciplined, together with any written representations the employee may wish to make. The chairperson must within five working days refer the matter to the next more senior level of management, with a written report summarising reasons for the disciplinary action imposed. The employee appealing must be given a copy of this report.
- 4.13 The manager considering the appeal must take into consideration the documentation provided. An appeal should not normally constitute a re-hearing of the entire case, and it should normally focus specifically on the grounds for appeal and be decided on the basis of the written submissions provided. The manager considering the appeal may however arrange a further hearing to consider evidence and argument relating to the appeal, in which event the employee may be assisted by a representative in terms of clause 4.4 above.
- 4.14 The manager considering the appeal must record the outcome of the appeal in the appropriate section of the original disciplinary form and the employee's copy of this, and return this copy to the employee.
- 4.15 If an employee wishes to challenge the outcome of the appeal, the employee may utilise whatever dispute mechanisms are contained in the Trade Disputes Act. The time period within which to exercise these rights shall commence from the date the employee is advised of the outcome of the appeal.

5. SUSPENSION

5.1 In circumstances in which serious misconduct or incapacity appears to have occurred, a sufficiently senior manager may suspend the employee from work pending an enquiry. An employee may also be so suspended if the employee's presence would obstruct the investigation into the alleged offence or if the employee's presence could create difficulties at the workplace. An employee who is suspended by management under these circumstances must be paid normal basic earnings for the period of suspension.

5.2 Management may in appropriate circumstances and only with the consent of the employee, suspend an employee without pay for up to a maximum period of 30 days, as a form of disciplinary action. This suspension should normally be accompanied by a final written warning, which runs from the time the employee recommences employment. Suspension without pay should be used for offences which justify a more serious sanction than a final written warning, but where the employment relationship has not irretrievably broken down.

6. INCAPACITY: POOR WORK PERFORMANCE

6.1 In cases of alleged poor work performance by an employee, a manager must consult the employee with a view to identifying and analysing the problem. The employee must be given an opportunity to account for the poor performance, and may be assisted in this process by a representative appointed in terms of Clause 4.4

6.2 If the manager believes that it is a matter which constitutes possible misconduct, it must be dealt with in terms of the procedures outlined above in Clauses 2 to 5 of this document.

6.3 If the manager believes it is a matter that constitutes possible incapacity on behalf of the employee concerned, a process of consultation and counselling between management and the employee must take place in an attempt to rectify the problem. This process may include appropriate evaluation, training, instruction, guidance or counselling, and should normally provide for a reasonable period of time for improvement.

6.4 If counselling is not successful or if the problem is not capable of being rectified, the manager must convene a hearing for the purposes of considering the matter, and if appropriate, to consider

alternative ways of resolving the matter or possible termination of employment. This hearing must be convened in accordance with Clause 4 above, subject to any changes required by the context.

6.5 When considering whether a dismissal for incapacity in respect of poor work performance is fair, the manager chairing the enquiry should consider the following :-

- (a) whether or not the employee failed to meet a performance standard;
- (b) if the employee did fail to meet the required standard, whether or not-
 - (i) the employee was aware, or ought to have been aware, of the standard;
 - (ii) the employee was given a fair opportunity to meet the standard; and
 - (iii) dismissal was the appropriate sanction;

7. INCAPACITY : ILL HEALTH AND INJURY

7.1 In cases of alleged incapacity of an employee due to ill health or injury, a manager must consult the employee with a view to identifying and analysing the problem. The employee may be assisted in this process by a representative appointed in terms of Clause 4.4.

7.2 The parties should use their best endeavors during this process to agree solutions to the problem. Consideration should be given to the extent of the incapacity and whether it is temporary or permanent, and all possible alternatives to dismissal should be considered.

7.3 If counselling does not successfully resolve the problem, the manager must convene a hearing in terms of Clause 4 above (subject to any changes required by the context), for the purpose of considering the matter.

7.4 When considering whether a dismissal arising from ill health or injury is fair, the manager chairing the enquiry should consider the following :-

- (a) whether the employee is capable of performing the work, and

- (b) if the employee is not capable-
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances or duties may be adapted to accommodate the problem, and
 - (iii) the availability of any suitable alternative work.

8. GENERAL

- 8.1 Disciplinary action should be recorded on the prescribed forms attached to this Procedure. An employee's signature on any form is not an admission of guilt and is merely an acknowledgement that the employee has received the form.
- 8.2 Written warnings and final written warnings should be kept on an employee's personal file and should remain operative for an appropriate period. This may vary depending on the nature of the offence and other relevant circumstances. As a guide, written warnings and final written warnings may remain operative for a period of up to six and twelve months respectively from their date of issue, and should then cease to apply. This may however not always be the case and it is possible that some warnings may apply indefinitely (e.g. a final warning for assault or sexual harassment). The manager issuing the warning must in each case decide on its period of application.
- 8.3 If an employee or a representative unreasonably frustrates or delays the implementation of the processes outlined in this Procedure, management is entitled to proceed in their absence.
- 8.4 The levels of responsibility for managing discipline as indicated in this Procedure may have to be varied in cases where senior managers are being disciplined. Appropriate senior managers should be used for these purposes, and consideration may also be given in certain circumstances to bringing in outside persons to fulfil functions such as chairing enquiries involving senior managers

Approved: 23/08/02

MODEL DISCIPLINARY CODE

GUIDE TO DISCIPLINARY ACTION

This Code applies to all employees and is a guide for appropriate disciplinary sanction. As such, it does not detract from management's right to depart from this Code depending on the circumstances of each case. The Code aims to achieve the required blend of flexibility and consistency, and to ensure fairness in the application of discipline.

This list of offences is also not exhaustive, and an employer may discipline any employee for good cause even though the specific offence may not be stated in this Code.

The penalties recommended relate to the commission of the offence in isolation. The existence of any previous warnings and other material factors, should be taken into account in deciding on the appropriate disciplinary action.

EXAMPLES OF FIRST OFFENCES FOR WHICH WARNINGS MAY BE GIVEN⁵

ABSENCE

1. Late for work, leaving work place without permission, or general time keeping offences.
2. Absence from work without permission or without acceptable reason (for up to 3 working days).

INSTRUCTIONS

3. Failing to carry out the reasonable instructions of a superior.

WORK PERFORMANCE

4. Poor Performance without acceptable reason.
5. Doing unauthorised private work.

⁵ A final warning may be given if the offence is serious enough to justify this action being taken.

PROPERTY

6. Causing damage to or loss of the employer's property, or other property (e.g. belonging to other employees, customers, clients or members of the public), either through negligence or failure to carry out instructions.
7. Misuse or neglect of the employer's property.

BEHAVIOUR

8. Unacceptable behaviour towards customers, clients, fellow employees or members of the public.

GENERAL

9. General offences and breaches of organisational rules or policy.

FIRST OFFENCES WHICH MAY CONSTITUTE SERIOUS MISCONDUCT IN TERMS OF SECTION 26 (4) OF THE EMPLOYMENT ACT AND FOR WHICH AN EMPLOYEE MAY BE DISMISSED⁶.

ABSENCE

10. Absence from work without permission or without acceptable reason (for 3 working days or more).

INSTRUCTIONS

11. Refusal to carry out the reasonable instructions of a superior.

WORK PERFORMANCE

12. Habitual or wilful negligence in the performance of work.
13. Totally unacceptable work performance or behaviour, or consistent work performance below average despite at least 2 written warnings.
14. Dishonesty or any other major breach of trust.

⁶ The sanction may be reduced to suspension without pay with the employee's consent, and/or a final written warning in appropriate circumstances.

PROPERTY

15. Causing serious damage (real or potential) to or loss of the employer's property or other property (e.g. belonging to other employees, customers, clients or members of public), either through gross negligence or wilful damage.
16. Theft or unauthorised possession of the employer's property or other property (e.g. belonging to other employees, customers, clients or members of the public).
17. Misappropriation of organisational funds.

BEHAVIOUR

18. Abusive behaviour, assaults, threatened assaults or other totally unacceptable conduct towards other employees, customers, clients, or members of the public.
19. Being under the influence of alcohol or drugs whilst at work, or consuming alcohol or drugs whilst on duty.

GENERAL

20. Other serious breaches of organisational rules or policy, which have the effect of causing an irretrievable breakdown in the employment relationship.
21. Criminal convictions relating to an offence which impacts, directly or indirectly, on the employment relationship.

MODEL WRITTEN WARNING FORM

(TO BE COMPLETED BY THE MANAGER ISSUING THE WARNING)

NAME OF EMPLOYEE :

REASON FOR WRITTEN WARNING :

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.....
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.....
.....

DESCRIPTION OF WRITTEN WARNING :

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.....

DATE OF ISSUE :

MANAGER'S SIGNATURE : DATE :
.....

EMPLOYEE'S SIGNATURE : DATE :
.....

EMPLOYEE REP SIGNATURE : DATE

**(TO BE COMPLETED WITHIN FIVE DAYS OF RECEIVING A WARNING,
BY AN EMPLOYEE WHO WISHES TO APPEAL)**

I WISH TO APPEAL AGAINST THIS WRITTEN WARNING FOR THE
FOLLOWING REASONS :

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SIGNATURE OF EMPLOYEE : DATE ;

RECEIVED BY MANAGER :

SIGNATURE : DATE

(TO BE COMPLETED BY THE MANAGER CONSIDERING THE APPEAL)

DATE RECEIVED:

OUTCOME OF APPEAL :

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SIGNATURE OF MANAGER : DATE

SIGNATURE OF EMPLOYEE: DATE

MODEL ENQUIRY FORM

(TO BE COMPLETED BY THE MANAGER CONDUCTING THE ENQUIRY)

- 1. NAME OF EMPLOYEE :
- 2. NAME OF CHAIRPERSON
- 3. SUMMARY OF ALLEGATIONS AGAINST EMPLOYEE :
.....
.....
- 4. DATE AND TIME EMPLOYEE ADVISED OF ENQUIRY TO BE HELD :
.....
- 5. DATE AND TIME OF ENQUIRY:
- 6. PERSONS PRESENT AT ENQUIRY (EXCLUDING WITNESSES)
AND THEIR DESIGNATION
.....
.....
.....
.....
.....
- 7. (a) EMPLOYEE DOES/DOES NOT WISH TO HAVE A REPRESENTATIVE PRESENT (DELETE WHICHEVER DOES NOT APPLY). NAME OF REPRESENTATIVE TO BE INSERTED IN 6 ABOVE.
- 7 (b) EMPLOYEE DOES/DOES NOT WISH TO HAVE AN INTERPRETER (DELETE WHICHEVER DOES NOT APPLY). NAME OF INTERPRETER TO BE INSERTED IN 6 ABOVE.
- 8. BRIEF SUMMARY OF EMPLOYEE'S RESPONSE TO ALLEGATIONS AGAINST HIM/HER :
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10. MANAGER'S FINDINGS, BASED ON THE EVIDENCE PRESENTED :

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11. RELEVANT FACTORS TO BE TAKEN INTO ACCOUNT IN DECIDING ON THE APPROPRIATE SANCTION :

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12. OUTCOME OF ENQUIRY :

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13. MANAGER'S SIGNATURE : DATE:

14. EMPLOYEE'S SIGNATURE: DATE :

(TO BE COMPLETED WITHIN 5 WORKING DAYS OF ACTION HAVING BEEN TAKEN, BY AN EMPLOYEE WHO WISHES TO APPEAL)

I WISH TO APPEAL AGAINST THE OUTCOME OF THE ENQUIRY FOR THE FOLLOWING REASONS :

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IN TERMS OF THIS APPEAL, I ASK THAT THE FOLLOWING ACTION BE TAKEN

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EMPLOYEE'S SIGNATURE : DATE :

RECEIVED BY MANAGER:

SIGNATURE : DATE :

(TO BE COMPLETED BY THE MANAGER HEARING THE APPEAL)

DATE RECEIVED :

FINDINGS CONCERNING THE APPEAL:

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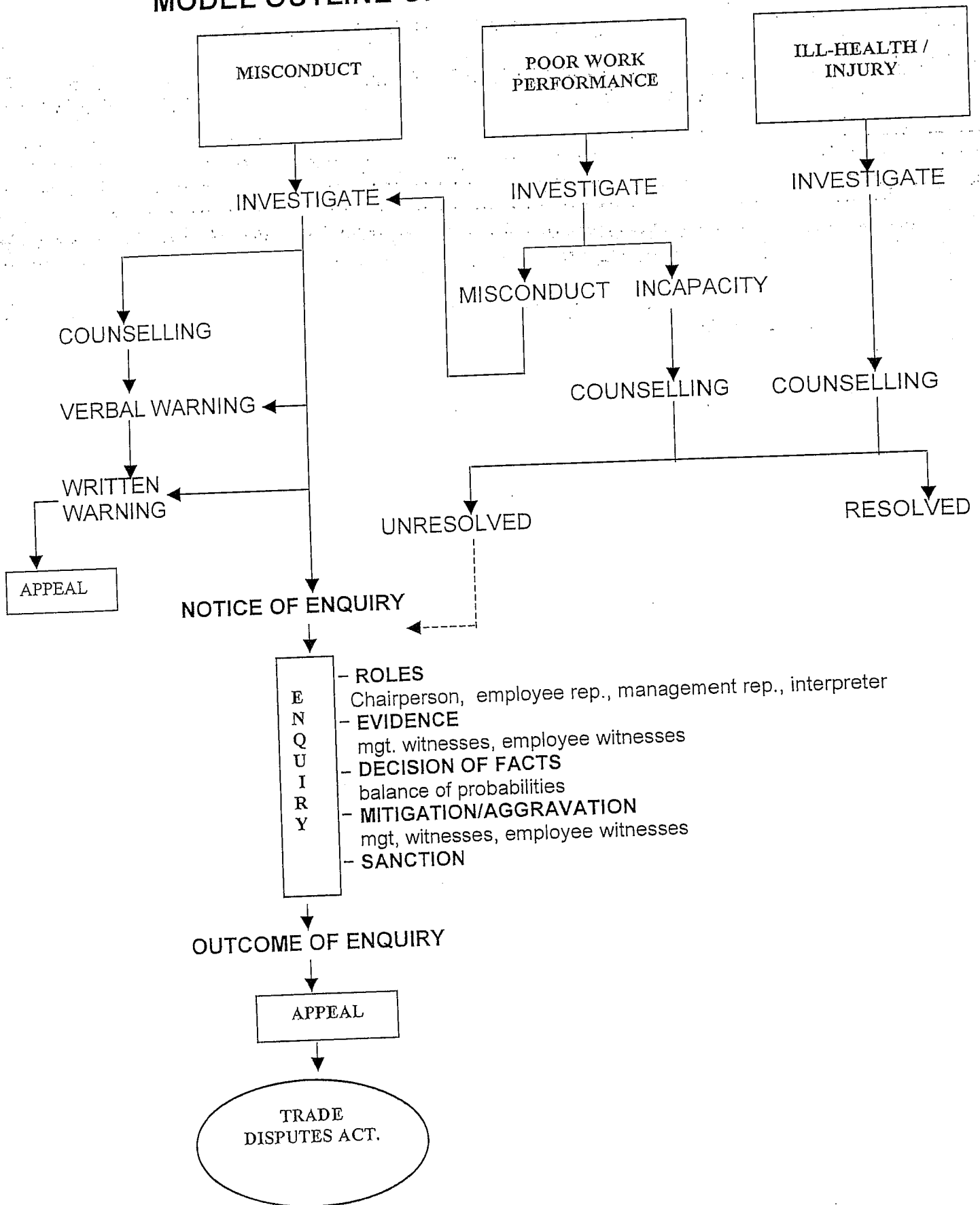
OUTCOME OF APPEAL :

.....
.....

MANAGER'S SIGNATURE : DATE.....

EMPLOYEE'S SIGNATURE : DATE.....

MODEL OUTLINE OF DISCIPLINARY PROCESS



Approved: 23/08/02

MODEL RETRENCHMENT PROCEDURE

This procedure is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. This procedure should be regarded as a suggested working document to assist parties in concluding their own agreement, and may be departed from with good cause. It should be adapted to cater for the specific circumstances of the parties.

1. INTRODUCTION

- 1.1 This Procedure applies when an employer contemplates terminating the employment of employees on the basis of operational requirements.
- 1.2 "Operational Requirements" can be described as the economic, technological, structural or similar needs of an employer. A dismissal based on operational requirements is commonly known as "retrenchment".
- 1.3 Retrenchment is a traumatic process, and an employer should attempt to implement this Procedure in a manner that is sensitive to the needs and interests of employees.

2. CONSULTATION

- 2.1 If an employer contemplates terminating the employment of employees for operational requirements, management must notify the employees likely to be affected and any trade union representing at least 25% of the employees.
- 2.2 The employer must also notify the Commissioner in writing of its intention to retrench, in accordance with Section 25(2) of the Employment Act

2.3 An employer must consult with a recognised trade union or a trade union representing more than 25% of the employees. During the consultation process, the employer should attempt to reach agreement with employees or their representatives detailed in Clause 2.1 on the following:-

- (a) appropriate measures to:
 - (i) avoid the dismissals;
 - (ii) minimise the number of dismissals;
 - (iii) change the timing of the dismissals; and
 - (iv) mitigate the adverse effects of the dismissals
- (b) the method for selecting the employees to be retrenched :
and
- (c) severance pay to be paid to retrenched employees.

2.4 Management must allow the consulting parties referred to in Clause 2.1, an opportunity to make representations on matters about which the parties are consulting.

2.5 Management must consider and respond to any representations made, and if management does not agree with them, state reasons for so disagreeing. Management must respond in writing, to any representations made in writing.

3. DISCLOSURE OF INFORMATION

3.1 Management must disclose to the consulting parties referred to in Clause 2.1 above all relevant information, including the following :-

- (a) the reasons for the proposed retrenchments;
- (b) the alternatives that management considered before proposing the retrenchments and the reasons for rejecting each of the alternatives;
- (c) the number of employees likely to be affected and the job categories in which they are employed;

- (d) the proposed method for selecting which employees to retrench;
- (e) the time when, or the period during which, the retrenchments are likely to take effect;
- (f) the proposed retrenchment package if any;
- (g) any possible assistance that the employer proposes to offer to the employees to be retrenched; and
- (h) the possibility of the future re-employment of the employees who are retrenched;

3.2 Notwithstanding clause 3.1, management shall not be required to disclose confidential an/or privileged information.

4. SELECTION CRITERIA

- 4.1 Employees to be retrenched must be selected in respect of each category of employee, wherever reasonably practicable, in accordance with the principle commonly known as first-in last-out.
- 4.2 In doing so, the employer must take into account the following:
- (a) the need for the efficient operation of the organisation; and
 - (b) the ability, experience, skill and occupational qualifications of each employee.

5. SEVERANCE BENEFIT

5.1 In terms of Section 28 of the Employment Act, an employer must pay an employee to be retrenched a severance benefit at least at the prescribed rate, if the employee has been continuously employed by the employer for 60 months or more. An employer is not obliged to pay a severance benefit to employees with lesser service, but may agree to do so.

5.2 The employer's obligation to pay severance pay in respect of a period of continuous employment as outlined in Clause 5.1, falls away if the employee or the employee's dependant or beneficiary is or will become entitled to a gratuity or pension in respect of that period of employment.

5.3 An employee may elect to receive severance pay either at the conclusion of each period of 60 months' continuous service or on the termination of employment.

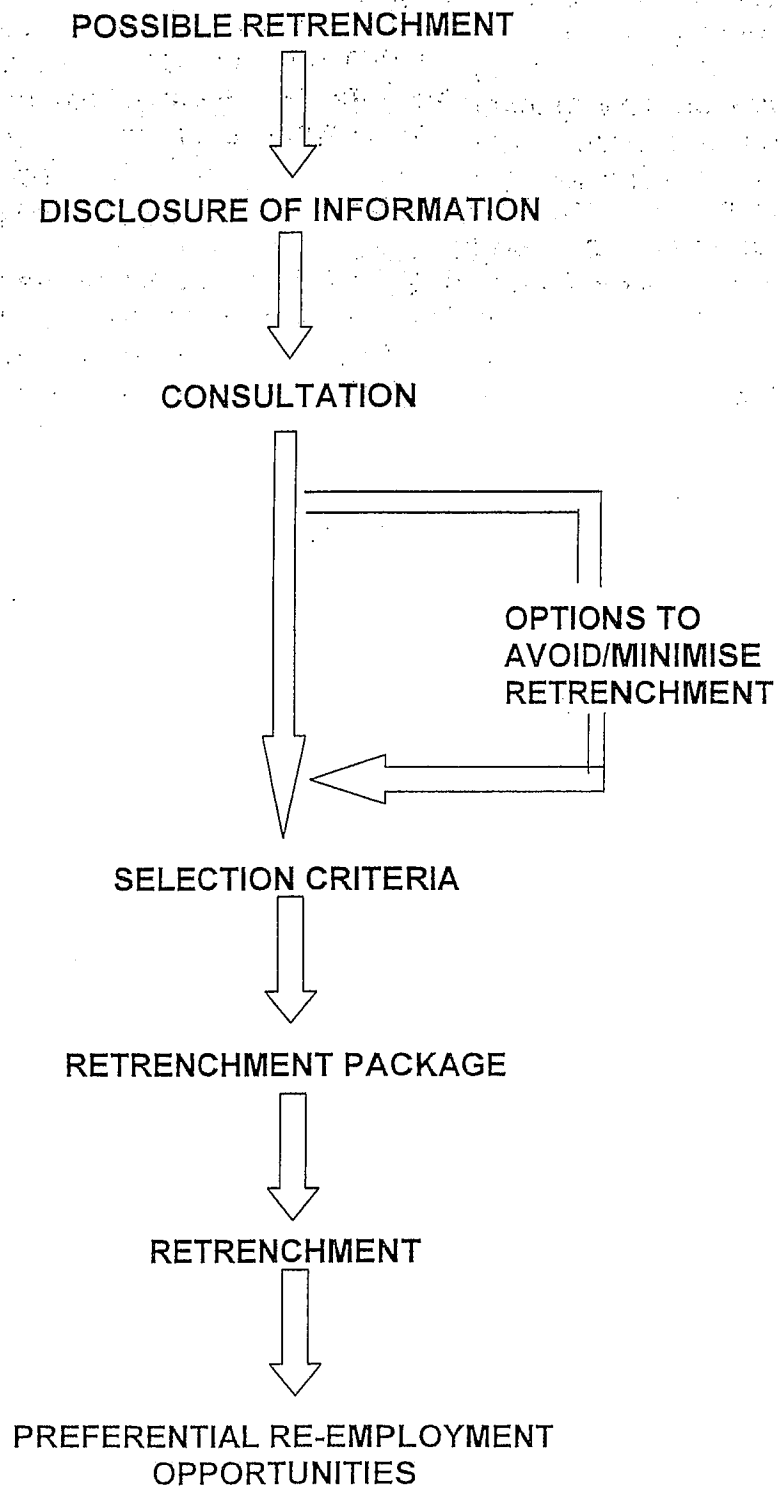
6. PREFERENTIAL RE-EMPLOYMENT OPPORTUNITIES

Retrenched employees must be given preference in re-employment to the extent that is reasonably practical, if the employer within six months of retrenchment again seeks to recruit employees in comparable occupations.

7. CONCLUSION

This Procedure provides guidelines to ensure fairness and consistency in implementing retrenchments. These procedures should not be applied in an inflexible manner and management is entitled to deviate from these guidelines in appropriate circumstances. Management must however at all times act fairly and having considered the interests of employees to be retrenched.

MODEL RETRENCHMENT PROCEDURE OUTLINE



Approved: 23/08/02

MODEL RECOGNITION AGREEMENT

This model agreement is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. This agreement should be regarded as a suggested working document to assist parties in concluding their own agreement, and may be departed from with good cause. It should be adapted to cater for the specific circumstances of the parties.

CONCLUDED BY AND BETWEEN

("The Employer")

AND

("The Union")

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1. GENERAL PRINCIPLES

- 1.1 The Employer and the Union agree that fair labour relations are essential for the effective functioning of the organisation, to the benefit of the Employer and all its employees.
- 1.2 The parties agree that, whilst their interests may differ, they will use their best endeavours through discussion, consultation and negotiation to resolve any differences or disputes which may occur. They agree to deal with each other in good faith in accordance with this Agreement, in seeking mutually acceptable solutions to differences or disputes which occur.
- 1.3 The parties endorse the principle of freedom of association and recognise the right of employees to belong to the union of their choice. No action on the part of either party shall be taken to interfere with these rights.
- 1.4 The Employer recognises the right of the Union to run its own affairs in accordance with its constitution, and to work for improved conditions of employment for its members. In doing so, the Union will comply with the terms of this Agreement, and any other agreement between the parties, as well as any obligations imposed by law.
- 1.5 The Union recognises the Employer's rights to manage its business. In doing so the Employer will comply with the provisions of this Agreement and any other agreement between the parties, as well as any obligations imposed by law.
- 1.6 The parties undertake not to unfairly discriminate on any arbitrary grounds, including race, sex, creed, religion, or union membership.
- 1.7 The parties recognise that it is their common objective to ensure the efficient running and growth of the organisation from which all parties shall benefit.
- 1.8 The Employer's management and the Union leadership including Union representatives, undertake to encourage their constituencies to act in the following ways:-

- 1.8.1 to treat one another with respect and courtesy;
 - 1.8.2 to act in ways which develop trust;
 - 1.8.3 to be participative and proactive in responding to challenges;
 - 1.8.4 to work as partners to develop outcomes which benefit all;
- 1.9 For the purposes of this Agreement "days" shall be taken to mean all days excluding Saturdays, Sundays and statutory public holidays.
- 1.10 For the purpose of this Agreement, "employees" shall be taken to exclude any member of senior management responsible for determining policy and representing the employer in negotiations with the Union.

2. RECOGNITION AND REPRESENTATION

- 2.1 For the purposes of this Agreement, the "bargaining unit" shall mean those employees, other than fixed term contract and casual employees, employed in the following grades/categories – **(insert / amend wording if appropriate)**.
- 2.2 The Employer recognizes the Union as the collective bargaining representative of **(insert correct description: e.g. Union members within the bargaining unit)**, provided that the Union shall maintain a minimum membership in excess of 25 % of employees within the bargaining unit.
- 2.3 The parties agree that the number of valid stop orders being processed by the Employer on the Union's behalf at any one time, shall be the sole measure of the Union's membership for the purposes of this Agreement.
- 2.4 Whilst the Union's right to bargain collectively on matters referred to in Section 50(2) of the Trade Unions and Employers' Organisations Act is governed by its level of membership referred to in clause 2.2 of this Agreement, this shall not limit the Union's right to represent any employees who are Union members on an individual basis on issues affecting their employment.

- 2.5 In the event of any other union being granted collective bargaining rights by the Employer in respect of the bargaining unit, the Union and the Employer shall together with that other union, discuss the formation of a joint collective bargaining forum in which all parties are represented.

3. TRADE UNION DUES

- 3.1 A Union member may authorise the Employer in writing to deduct Union subscriptions from his/her salary in terms of a valid Union stop order form.
- 3.2 If the Employer receives these authorisations, it must pay the Union on or before the 7th day of each ensuing month, the aggregate amounts deducted.
- 3.3 The subscriptions collected by the Employer shall be forwarded to the Union, together with a monthly schedule reflecting:-
- 3.3.1 a list of names of all members from whose salary the Employer has made deductions;
 - 3.3.2 details of the amounts deducted, the employees' place of work and period to which the deduction relates; and
 - 3.3.3 a list of any employees who have ceased to be contributors since the previous schedule provided, specifying the reasons why contributions have ceased e.g. resignation (from the Employer or from the Union), dismissal, retrenchment, maternity leave etc.
- 3.4 If the Union increases its subscriptions or if it wishes to collect additional levies from its members, the Employer agrees to implement this provided the Union gives one calendar month's notice in writing to the Employer and to its members, which shall expire prior to the month in which the increase or the levy is to become effective.

- 3.5 The Employer shall not be responsible for the collection of any arrear subscriptions for whatever reason, unless the arrears are the Employer's fault.
- 3.6 A Union member may cancel the authorisation referred to in Clause 3.1, by addressing a written instruction to the Employer, subject to one calendar month's notice. The Employer shall forward to the Union with the next monthly schedule referred to in Clause 3.3, a copy of any cancellation instructions received
- 3.7 The Employer may, subject to one calendar month's written notice to the Union, impose a levy of up to 5 % of the total Union subscriptions it deducts from its employees.

4. ACCESS

- 4.1 Union officials shall, subject to any conditions regarding time and place that are reasonable and necessary to prevent undue disruption of work, have access to the Employer's premises to meet with employees in order to recruit members, communicate with members, or serve members' interests.
- 4.2 The Union will give 4 days' written notice of these visits to the Employer who shall, if any conditions referred to in Clause 4.1. are to be imposed, advise the Union in writing of those conditions within 2 days of receipt of the Union's notice.
- 4.3 Union officials shall, upon arrival at the Employer's premises, notify (**insert – name/designation**) of their presence.
- 4.4 The Employer agrees in principle to make reasonable facilities available to the Union for the conduct of its business. The detail of these arrangements shall be discussed between the parties, and any agreements shall be recorded in writing. A notice board shall be provided at the employee entrance to the Employer's premises, for the Union's use.

5. TRADE UNION REPRESENTATIVES

5.1 RECOGNITION

5.1.1 The Employer acknowledges the right of Union representatives elected in terms of the Union's constitution and in accordance with clause 5.2 of this Agreement, to represent the interests of Union members.

5.1.2 All Union representatives shall act in a manner that attempts to promote the objectives of this Agreement.

5.1.3 A Union representative must in advance obtain the consent of a manager, if duties as a Union representative will take the representative away from normal work duties. This consent shall not be unreasonably withheld.

5.1.4 Subject to the provisions of this Agreement, a Union representative shall at all times comply with terms and conditions of employment, and shall be subject to the same standards of discipline and performance that are applicable to other employees.

5.2 ELECTION

5.2.1 Two Union representatives shall be elected to represent up to 50 Union members at the Employer's premises, and one additional Union representative shall be elected for every 50 additional Union members, subject to a maximum of 7 Union representatives (**note – this is a suggested formula**). The Union constitution shall govern the nomination, election, and term of office of the Union representatives, provided that Union representatives elected must be employed within the bargaining unit.

5.2.2 Elections shall be held during working hours by secret ballot on the Employer's premises. The arrangements for the conducting of elections shall be agreed between the Union and management prior to elections.

5.2.3 Management undertakes not to interfere in the election of Union representatives. Elections may be conducted by a Union official or any other Union office bearer as defined in its constitution.

5.2.4 Management is entitled to observe ballot proceedings.

5.3 VACATION OF OFFICE

5.3.1 A Union representative, shall vacate that office in any one of the following circumstances;

5.3.1.1 when the period for which the Union representative was elected expires;

5.3.1.2 on the date of resignation as a Union representative;

5.3.1.3 on the date on which the Union representative's employment terminates;

5.3.1.4 should a petition be signed by more than 50 % of Union members within the bargaining unit in support of a vote of no confidence, on the date when the petition is presented to management;

5.3.1.5 on the date on which the Union representative is promoted to a position outside of the bargaining unit;

5.3.1.6 on the date on which the Union representative ceases to be a Union member.

5.4 BY-ELECTIONS

5.4.1 Whenever a Union representative vacates this position during a term of office, a by-election shall be held. The Union representative elected to take that person's place will hold office for the unexpired term of office.

- 5.4.2 The provisions of Clause 5.2 of this Agreement shall apply in respect of any by-election held.

5.5 RIGHTS

- 5.5.1 Union representatives shall have the right to represent Union members during working hours in terms of this Agreement, without loss of pay or fear of victimisation.

- 5.5.2 Union representatives shall be entitled to hold a meeting with Union members on the Employer's premises during working hours once a month, which meeting shall not last longer than one hour. Union representatives shall be entitled to meet for one hour during business hours during the week preceding the meeting, to prepare.

- 5.5.3 The Employer shall provide Union representatives with the use of an office to perform their duties of office in terms of this Agreement.

- 5.5.4 A Union representative shall not be subjected to a disciplinary enquiry, unless 5 days' prior notice has been given to the Union.

5.6 TIME OFF

- 5.6.1 Each Union representative shall be entitled to take paid time off for Union business including training, conventions and conferences, for a maximum of days (**insert**) per annum, provided the Union's written confirmation of the reason for the leave is provided and management's consent has been granted in terms of Clause 5.6.2. Additional leave may be granted, paid or unpaid, by agreement between the parties.

- 5.6.2 Union representatives must obtain written consent from management if they wish to take time off in terms of Clause 5.6.1, at least 5 days prior to the date on which leave is required, and this permission shall not be unreasonably withheld.

5.7 JOINT LABOUR RELATIONS TRAINING

- 5.7.1. The Employer and the Union agree in principle to joint labour relations training for managers and Union representatives, and shall meet to discuss this training. They shall attempt to agree on the content of joint labour relations courses and the facilitators to be used.

6. INFORMATION DISCLOSURE

- 6.1. The Employer must disclose to the Union all relevant information that will allow the Union to engage effectively in consultation and/or negotiation and to perform its functions in terms of this Agreement.
- 6.2 Any request for information by the Union must be made in writing.
- 6.3 The Employer is not required to disclose information that-
- 6.3.1 is legally privileged;
 - 6.3.2 the Employer cannot disclose without contravening a prohibition imposed on it by any law or order of court;
 - 6.3.3 is confidential and, if disclosed, may cause substantial harm to an employee or to the Employer;
 - 6.3.4 is private personal information relating to an employee, unless that employee consents in writing to the disclosure of that information;

7. NEGOTIATION AND CONSULTATION

- 7.1 A meeting between the Union representatives and management shall normally be held once a month, provided that this may be varied by agreement between the parties.

- 7.1.1 The purpose of these meetings is to enable the parties to communicate, consult and negotiate on issues affecting the employment of the Union's members.
- 7.1.2 The parties shall provide written notification to each other at least 5 days before the date of a meeting (unless otherwise agreed between them), of the issues they wish to raise, thereby enabling both parties to adequately prepare for the meeting. At the beginning of each meeting, the parties shall discuss and attempt to reach agreement on the agenda for that meeting.
- 7.1.3 Meetings shall take place on the Employer's premises and shall commence during normal working hours. Management shall record the minutes of the meetings and distribute them within 5 days' after the meeting, and these minutes shall be approved at the next meeting.
- 7.1.4 A maximum of two Union officials shall be entitled to attend these meetings, provided that at least 2 days' prior written notice has been given to management.
- 7.2 Negotiations shall take place once a year between the Union (represented by its officials and representatives) and the Employer, unless otherwise agreed between the parties, for the purposes of negotiating on wages and other substantive conditions of employment.
- 7.2.1 The parties agree to commence wage negotiations at least 2 calendar months before the normal annual wage review date.
- 7.2.2 The parties shall, at least 10 days before the date of the first negotiating meeting (unless otherwise agreed between them), provide written notification to each other of issues they wish to raise, thereby enabling them to adequately prepare for the negotiations.
- 7.2.3 Annual wage negotiations shall take place at the Employer's premises and shall commence during normal working hours. Management shall record the minutes of each meeting and distribute them within 5 days after the meeting, and these minutes shall be approved at the next meeting.

7.3 In both the monthly meetings (Clause 7.1 above) and the annual wage negotiations (Clause 7.2 above), the parties shall meet as often as they agree to be necessary to resolve issues. The parties agree to work together to ensure the efficient conduct of these meetings. Any agreements concluded shall be reduced to writing and signed by the representatives of the parties, and shall be binding for the period stipulated in the agreement.

7.4 Union representatives shall provide feedback to Union members on negotiations and any agreements concluded, in terms of Clause 5.5.2 of this Agreement. Additional feedback meetings on Company premises may be agreed between the parties. A copy of any agreements reached between the parties shall be displayed on the notice board referred to in Clause 4.4 of this Agreement, unless otherwise agreed between the parties.

7.5 The parties shall use their best endeavours to resolve negotiations as quickly and as effectively as possible. If a matter has not been resolved after a minimum of two meetings, either party may declare a dispute in terms of Clause 8 below; provided that the parties may agree to continue to meet without declaring a dispute, notwithstanding two or more meetings having being held.

8. DISPUTE PROCEDURE

8.1 The Employer and the Union shall negotiate in good faith and use their best endeavours to reach mutually acceptable solutions to all disputes which arise between them, and they shall consult each other when they anticipate that disputes may arise. They agree to adopt the procedure set out below in an attempt to resolve all disputes which have arisen through negotiations in terms of Clause 7.

8.2 Either party may declare a dispute in writing to the other party, setting out the nature of the dispute and a proposed settlement.

8.3 The party receiving a declaration of dispute in terms of Clause 8.2, shall within 5 days respond in writing, setting out its understanding of the nature of the dispute and its proposed settlement.

- 8.4 Within 10 days of the declaration of the dispute or on a mutually agreed date, a meeting shall be held between the parties in an attempt to resolve the dispute. Further meetings may be held by mutual agreement between them, and the parties shall use their best endeavours to resolve the dispute.
- 8.5 The parties recognise their commitment in terms of Clause 9 to minimise the possibility of industrial action, and undertake to consider referring unresolved disputes to mediation, arbitration (whether of a binding or advisory nature), or any other constructive method for resolving a dispute.
- 8.6 Notwithstanding anything else contained in this Agreement, either party may use the dispute machinery in the Trade Disputes Act (hereinafter referred to as "the Act") if-
- 8.6.1 negotiations are deadlocked and both parties agree to use the Act's dispute procedures; or
 - 8.6.2 since the dispute was declared, the parties have met on at least two occasions or 15 days have elapsed, and agreement still has not been reached; or
 - 8.6.3 the other party is in breach of its obligations in terms of this Agreement or in law.
- 8.7 The parties shall use their best endeavours to resolve disputes between themselves without having to resort to the Act. Even if the dispute machinery in the Act has been invoked, the parties may continue to meet in an attempt to resolve the dispute.

9. STRIKES AND LOCKOUTS

- 9.1 The Employer and the Union agree that they shall not cause, take part in or support any industrial action, without first exhausting the negotiation and dispute procedures in this Agreement and thereafter having complied with the requirements of the Act. For the purposes of this Agreement, "industrial action" shall be taken to mean a strike or lockout as defined in the Act.

- 9.2 The Union undertakes to take all reasonable steps to ensure that its officials and members do not breach the provisions of this Agreement, and the Employer similarly undertakes to take all reasonable steps to ensure that its management does not breach the provisions of this Agreement. Both parties agree to take all reasonable steps to remedy any breach that may occur.
- 9.3 Either party shall be entitled to exercise its rights to deal with misconduct or criminal conduct or serious breaches of this Agreement during industrial action.
- 9.4 If the Union engages in a strike in accordance with Section 35 of the Act, it shall-
- 9.4.1 give the Employer at least 48 hours' prior written notice of the date and time of the commencement of industrial action;
 - 9.4.2 not interfere with the Employer's right to hire replacement labour, once the provisions of Section 35(3) of the Act have been complied with;
 - 9.4.3 allow non-striking employees to continue working without unlawful interference;
 - 9.4.4 allow the Employer to continue with its ordinary business, including access to and exit from the Employer's premises by staff, customers, suppliers and any other third parties, subject to its lawful right to picket;
 - 9.4.5 not, either on or off the Employer's premises, intimidate, threaten or harass any non-striking employees or any other persons;
 - 9.4.6 not, either on or off the Employer's premises engage in any form of violence or damage to property;
 - 9.4.7 ensure that the Employer's safety and security provisions are complied with at all times;

- 9.5 The Union and/or its members shall, during a strike or lock-out, leave the Employer's premises immediately if requested to do so by the Employer. The Union and/or its members shall not unlawfully occupy the Employer's premises.
- 9.6 The Union and its members shall be entitled to picket outside the Company's premises during any strike or lock-out, provided that:
- 9.6.1 the picket is peaceful and orderly, and is conducted in accordance with the provisions of the Act and picketing rules or guidelines published in terms of the Act;
- 9.6.2 the picket is for the purposes of peacefully demonstrating in support of a lawful strike or in opposition to a lock-out.
- 9.7 The parties agree that it is imperative that contact be maintained between the Employer and the Union during any industrial action. For this purpose, the Employer and the Union shall, within 24 hours of any notification of industrial action having been given in terms of Section 34(1)(c) of the Act, advise each other of the name and telephone contact details of the duly authorised representative(s) who will be contactable at all times during any industrial action.
- 9.8 If Union members participate in industrial action in contravention of this Agreement or the Act, then the following shall apply :-
- 9.8.1 The Employer shall as soon as possible advise the Union, and shall afford the Union an opportunity to remedy the breach;
- 9.8.2 The Employer may issue an ultimatum in clear and unambiguous terms, stating what is required of the employees concerned and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it. The Employer may however dispense with these requirements, if it cannot reasonably be expected in the circumstances, to extend these steps to the employees involved.

9.9 If repeated or intermittent industrial action occurs, the Employer shall not be required to comply with the requirements set out in Clause 9.8.

9.10 If either party causes, participates in or supports industrial action which is unlawful or in breach of this Agreement, the other party shall have the right to :

9.10.1 use any lawful means to protect its interests;

9.10.2 summarily terminate this Agreement in writing to the defaulting party, subject to 5 days' written notice to rectify the breach having been given to the defaulting party

10. DURATION OF AGREEMENT

10.1 This Agreement shall come into operation on the date it is signed.

10.2 This Agreement may be terminated as follows;

10.2.1 after the expiry of 3 calendar months of either party giving the other written notice of termination of the Agreement; or

10.2.2 in the circumstances contemplated in Clause 9.10; or

10.2.3 if a party (the defaulting party) fails to fulfil any of its obligations in terms of this Agreement and subsequently fails to remedy the breach within 10 days of receiving written notice of the breach from the other party (the aggrieved party), the aggrieved party shall be entitled to summarily terminate the Agreement by notice in writing to the defaulting party at the end of the 10 days; or

- 10.2.4 if the Employer gives written notice to the Union that its representation may have fallen below 25 % of the bargaining unit, and the Union fails to substantiate its membership as being in excess of 25 %, within one calendar month, the Employer shall be entitled to summarily terminate this Agreement by notice in writing to the Union.

11. ADDRESSES AND NOTICES

- 11.1 For the purposes of this Agreement, including requests for meetings, the giving of notices and the serving of legal processes, the parties choose the following physical localities at which documents may be served:

EMPLOYER:

UNION:

- 11.2 The parties may at any time change their stated address by notice in writing, provided that it always includes a physical locality at which documents can be served.
- 11.3 Any document served in connection with this Agreement shall be delivered by hand, sent by prepaid registered post, or sent by fax. If sent by registered post, it shall be deemed to have been received on the 5th day after posting.

12. GENERAL

- 12.1 No relaxation or indulgence which the Employer or the Union may grant to the other party shall constitute a waiver by the former of any of its rights under this Agreement.

12.2 This Agreement constitutes the entire agreement between the parties and no amendments shall be binding unless the amendment is reduced to writing and signed by both parties.

DATED AT _____ ON THIS _____ DAY OF _____

AS WITNESSES:

1. _____

FOR AND ON BEHALF OF
THE UNION

2. _____

AS WITNESSES:

1. _____

FOR AND ON BEHALF OF
THE EMPLOYER

2. _____

Approved: 23/08/02

MODEL OUTSOURCING AND NEW TECHNOLOGY PROCEDURE

This procedure is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. This procedure should be regarded as a suggested working document to assist parties in concluding their own agreement, and may be departed from with good cause. It should be adapted to cater for the specific circumstances of the parties.

1. INTRODUCTION

- 1.1 This Procedure applies if an employer contemplates outsourcing any service or part of its business or introducing new technology, and if that outsourcing or new technology may lead to the retrenchment of its employees.
- 1.2 The purpose of this Procedure is to provide for a fair procedure to be applied in the circumstances contemplated in Clause 1.1, and to ensure that fair decisions are taken if these circumstances arise.

2. THE NEED FOR THIS PROCEDURE

- 2.1 Decisions taken by an employer with regard to outsourcing or the introduction of new technology may have significant consequences for employees. These decisions may lead to jobs subsequently becoming redundant and the retrenchment of employees.
- 2.2 In the circumstances contemplated in Clause 2.1, consultation at the time that the retrenchment is contemplated may be of very little value. The reason for this may be that the decisions which effectively gave rise to the need to retrench were taken at a much earlier stage, namely in regard to the outsourcing or the purchase of new technology.

6.3 This Procedure aims to address these concerns, and ensure that all consequences for employees are taken into consideration at the time outsourcing or new technology decisions are taken.

3. NOTICE

3.1 If an employer contemplates outsourcing any service or part(s) of the organisation's activities or introducing new technology, and these decisions may at any future stage have redundancy implications for employees, the employer should give written notice of its contemplated action to any trade union it has recognised in terms of the Trade Disputes Act as representing any of the employees who may at some future stage be affected by these decisions. In the absence of any recognised union, that notice should be addressed to all those employees, proposing that they put forward representatives with whom management will be able to consult on their behalf.

3.2 The notice referred to in Clause 3.1 should disclose all relevant information, including but not limited to the following :-

3.2.1 the reasons for the proposed action;

3.2.2 any alternatives that management has considered;

3.2.3 the possibility of any redundancies resulting from these decisions, and if so -

(a) the number of employees likely to be effected and the job categories in which they are employed;

(b) the time when or the period during which the retrenchments are likely to take effect;

4. CONSULTATION

4.1 An employer should meet with the representatives referred to in Clause 3.1 as soon as reasonably possible after giving the notice referred to in that Clause.

4.2 The consultation process may take place during a number of meetings between the parties, and the parties should attempt to reach agreement on the following :

4.2.1 the need for the outsourcing or new technology contemplated;

4.2.2 the consequences for employees of any decisions taken in relation to outsourcing or new technology;

- 4.2.3 ways in which any redundancy of employees resulting from these decisions may be avoided or minimised;
- 4.2.4 the time when retrenchment consultations in accordance with the Trade Disputes Act or any applicable retrenchment procedures must commence.

5. IMPLEMENTATION OF DECISIONS

- 5.1 An employer should not implement any decisions to outsource or purchase new technology prior to the exhaustion of the consultation process. The process comes to an end either by agreement between the parties, or when a party informs the other in writing after-
 - 5.1.1 it has genuinely sought to reach agreement but has failed to do so after a reasonable period; or
 - 5.1.2 the other party has conducted itself in a manner from which it may be inferred that it no longer wishes to continue to consult. For example if a party walks out of the consultation process; or
 - 5.1.3 the other party has consulted in bad faith.
- 5.2 After the consultation process has been exhausted, management may implement its decision to outsource or purchase new technology. If employees or the recognized trade union object, they may refer the matter as a trade dispute to the Commissioner in terms of the Trade Disputes Act.

6. THE NEED TO COMPLY WITH RETRENCHMENT OBLIGATIONS

- 6.1 Nothing in this Procedure detracts from an employer's obligation to comply with its redundancy obligations in accordance with labour legislation or any applicable retrenchment procedures. These obligations would have to be complied with if the outsourcing or new technology decisions contemplated in this Procedure result in the redundancy of any employees.

Approved: 23/08/02

MODEL CONSTITUTION OF A JOINT INDUSTRIAL COUNCIL

This constitution is published by the Minister in terms of Section 49 of the Trade Disputes Act (Chapter 48:02) to guide employers, employees and their respective organisations. The purpose of this model constitution is to assist trade unions and employers to prepare a constitution of a joint industrial council that meets the requirements of Section 30D of the Trade Disputes Act. The parties to the council are free to draft their own constitution or to adapt this model to suit their own requirements provided that the constitution complies with section 30D of the Trade Disputes Act.

1. Name

The name of this joint industrial council is

2. Scope

This council covers the _____ industry
and the following classes of employee:

3. Powers and functions

- (1) The powers and functions of the council are –
- (a) to conclude collective labour agreements;
 - (b) to prevent and resolve labour disputes;
 - (c) to promote and establish training and education schemes;

- (d) to establish and administer pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the council or their members;
 - (e) to develop proposals for submission to any appropriate forum on policy and legislation that may affect the sector or area;
 - (f) **(insert other agreed matters)**
- (2) The council may only exercise these powers and perform these functions within its scope.

4. Parties

- (1) The founding parties to the council are –
 - (a) the following employers' organisations –
 - (i) **[insert names]**
 - (ii)
 - (iii)
 - (b) the following trade union(s) –
 - (i) **[insert names]**
 - (ii)
 - (iii)
- (2) Any trade union or employers' organisation that has members that fall within the scope of the council may apply in writing to the council for admission as a party. The council must ensure that a copy of any application has been served on the Commissioner.
- (3) The application must be accompanied by –
 - (a) a certified copy of the applicant's constitution;
 - (b) a certified copy of the applicant's certificate of registration;
 - (c) details of the applicant's membership including:-
 - (i) in the case of an employers' organisation, the number of employees that its members employ within the council's scope; or
 - (ii) in the case of a trade union proof of its members that fall within the scope of the council.
 - (d) a statement of the reasons why the applicant ought to be admitted as a party to the council; and

- (e) any other information on which the applicant relies in support of its application.
- (4) Within 90 days of receiving an application for admission, the council must decide whether to grant or refuse the application and must advise the applicant of its decision in writing.
- (5) If the council admits an applicant-
 - (a) the secretary must make the appropriate amendments to Clause 4(1) of this constitution within 14 days of the decision; and
 - (b) the applicant immediately enjoys the benefits and privileges of being a party to the council and incurs the obligations arising out of being a party to the council in terms of this constitution.
- (6) If the council refuses to admit an applicant it must advise the applicant of its reasons for that decision.
- (7) Any party to the council may withdraw from the council by notifying the council in writing of its decision. This notice must also specify the date of the withdrawal, which must be at least three months after the date of the notice. The council shall ensure that a copy of this notice has been served on the Commissioner.

5. Appointment of representatives

- (1) The council consists of representatives of employers' organisation(s) and trade union(s).
- (2) The number of persons representing either the employers' organisation(s) or trade union(s) must-
 - (a) be equal to the number of persons representing the other; and

(b) be determined by the council, and specified below:-

(i) Employers' organisation(s)	no of representatives
_____	_____
_____	_____
_____	_____
(ii) trade union(s)	no of representatives
_____	_____
_____	_____
_____	_____

(3) Subject to sub-clause (2) and its own constitution, each party to the council may appoint –

- (a) its representatives to the council; and
- (b) an alternate for each of its representatives.

(4) A representative or an alternate-

- (a) holds office for twelve months and will be eligible for re-appointment at the end of that term;
- (b) whose term of office has expired and who is not re-appointed, may nevertheless continue to act as a representative until that representative's successor assumes office.

(5) Despite sub-clause (4) –

- (a) a party may withdraw any of its representatives or alternates after having given at least 21 days' notice in writing to the secretary;
- (b) a representative who, without good cause, is absent from three consecutive meetings of the council, is disqualified from continuing in that office.

(6) If the office of any representative or alternate becomes vacant, the party that appointed the representative or alternate may appoint another representative or alternate for the unexpired portion of the predecessor's term of office.

6. Council meetings

- (1) The council must hold –
 - (a) an annual general meeting in the month of
 - (b) an ordinary meeting at least once every month(s).
- (2) A special meeting of the council–
 - (a) may be called at any time by the chairperson with a view to disposing of urgent business; and
 - (b) must be called by the chairperson within 14 days of –
 - (i) receiving a request for a special meeting that states the purpose of the special meeting and signed by not less than representatives; or
 - (ii) the adoption of a resolution by the council calling for a special meeting.
- (3) At the annual general meeting, the council must –
 - (a) elect the additional members of the executive committee;
 - (b) elect the chairperson and the deputy chairperson of the council;
 - (c) consider the annual financial statements of the council and the auditor's report on those statements; and
 - (d) consider and approve, with or without any amendments, the budget of the council for the next financial year as prepared in terms of clause 12(10).
- (4) The secretary must prepare a written notice of every council meeting stating the date, time and venue of the meeting and the business to be transacted, and must send the notice to each representative by registered post at least days before the date of the meeting. However, the chairperson may authorise shorter notice for a special meeting. (Note: There is no restriction as to the kind of service. The constitution can stipulate any form of service by hand, faxed transmission or electronic mail).
- (5) At least half of the total number of employer representatives and half of the total number of employee representatives form a quorum and must be present before a meeting may begin or continue.

- (6) If there is no quorum present at the time fixed for a meeting to begin or continue and for 30 minutes after that time, the meeting must be adjourned to the same place at the same time on the corresponding day in the following week unless that day is a public holiday, in which case the meeting must be adjourned to the day immediately after that public holiday.
- (7) A meeting that was adjourned in terms of sub-clause (6) may proceed on the date to which it has been adjourned with the representatives present at the time called for the meeting, regardless of whether or not notice has been given in terms of sub-clause (4) and whether or not a quorum is present.
- (8) The secretary must cause minutes to be kept of the proceedings at council meetings.
- (9) At every meeting of the council –
 - (a) the secretary must read the minutes of the previous meeting unless they were previously circulated; and
 - (b) after the minutes have been confirmed, with or without any amendments, the chairperson must sign the minutes.
- (10) A motion proposed at a meeting may not be considered unless it has been seconded. The chairperson may require a motion to be submitted in writing, in which case the chairperson must read the motion to the meeting.
- (11) Unless this constitution provides otherwise, all motions must be decided by a majority of votes of those present and entitled to vote and voting must be by show of hands. (Note: The constitution could stipulate that certain matters must be decided by ballot.)
- (12) Each representative has one vote on any matter before the council for its decision. However, if at the meeting the employer representatives and employee representatives are not equal in number, the side that is in the majority must withdraw so many of its representatives from voting at that meeting as may be necessary to ensure that the two sides are of equal numerical strength at the time of voting.
- (13) If any question which the executive committee considers to be extremely urgent arises between meetings of the council, and it is possible to answer that question by a simple "yes" or "no", the executive committee may direct the secretary to cause a vote of the representatives on the council to be taken by post or by fax. A proposal subjected to a postal or fax vote may be adopted only if it is supported by at least two-thirds of the total number of representatives who are entitled to vote.

- (14) The executive committee may adopt general rules of procedure for its meetings and for the meetings of the council and of its other committees. However, in the event of any conflict between those rules and the provisions of this constitution, the provisions of this constitution will prevail.

7. Executive committee

- (1) The council must have an executive committee that consists of the chairperson and the deputy chairperson of the council, who are members by virtue of their respective offices, and additional members elected in accordance with sub-clause (3).
- (2) Subject to the directions and control of the council, the executive committee may exercise and perform the powers, functions and duties of the council relating to the supervision and control of the everyday management and administration of the council. In addition, the executive committee may –
- (a) investigate and report to the council on any matter connected with the sector in respect of which the council is registered;
 - (b) do anything necessary to give effect to decisions of the council;
 - (c) monitor and enforce collective agreements concluded in the council; and
 - (d) exercise and perform any power, function and duty that is conferred or imposed on the executive committee by or in terms of this constitution or that is delegated by the council to the executive committee. However, the council may not delegate to the executive committee the powers, functions, and duties contemplated in clauses 4(4), 6(3), 13 and 14, and sub-clauses (3) and (6) of this clause, and the power of the council to delegate.
- (3) At the annual general meeting, the council must elect the additional members of the executive committee and an alternate for each of them. The additional members and their alternates must be representatives in the council, and half of the additional members, as well as their alternates, must be appointed by the employer representatives in the council, whilst the other half of the additional members, as well as their alternates must be appointed by the employee representatives in the council.
- (4) (a) An additional member of the executive committee holds office for twelve months and is eligible for re-election at the end of that term.
 - (b) An additional member of the executive committee whose term of office has expired and who is not re-elected, may

nevertheless continue to act as a member of the executive committee until that member's successor assumes office.

- (5) An additional member of the executive committee –
 - (a) may resign from the committee at any time after having given at least 21 days' notice in writing to the secretary;
 - (b) must vacate the office immediately –
 - (i) in the case of resignation, when the resignation takes effect; or
 - (ii) upon ceasing to be a representative of the council.
- (6) If the seat of an additional member of the executive committee becomes vacant:-
 - (a) the council must fill the vacancy from the number of candidates nominated for that purpose by –
 - (i) the employer representatives in the council, if that seat had been held by an additional member representing the employers; or
 - (ii) the employee representatives in the council, if that seat had been held by an additional member representing employees.
 - (b) a member appointed to fill a vacant seat holds that seat for the unexpired portion of the predecessor's term of office.
- (7) The executive committee must hold an ordinary meeting at least once every months;
- (8) A special meeting of the executive committee –
 - (a) may be called at any time by the chairperson with a view to disposing of urgent business; and
 - (b) must be called by the chairperson within days of receiving a request for a special meeting that states the purpose of the special meeting and signed by not less than members of the executive committee.
- (9) The secretary must prepare a written notice of every executive committee meeting showing the date, time and venue of the meeting and the business to be transacted, and must send the notice to each member of the committee by registered post at least days before the date of the meeting. However, the chairperson may authorise shorter notice for a special meeting. (Note: There is no restriction as to the kind of service. The constitution can stipulate any form of service eg service by hand, faxed transmission or electronic mail).

- (10) At least half of the members of the executive committee representing employers and half of the members of that committee representing employees form a quorum and must be present before a meeting may begin or continue.
- (11) Each member of the executive committee has one vote on any matter before the committee for its decision. However, if at the meeting the members representing employers and those representing employees are not equal in number, the side that is in the majority must withdraw so many of its members from voting as may be necessary to ensure that the two sides are of equal numerical strength at the time of voting.
- (12) In relation to any matter before the executive committee for its decision, the decision of a majority of those members of the executive committee who are present at the meeting and entitled to vote will be the decision of the committee.

8. Other committees

- (1) The council may establish other committees to perform any of its functions, including investigating and reporting to the council on any matter but excluding the functions referred to in clause 7(2)(d).
- (2) Half of the members of any committee so appointed must be nominated by the employer representatives, and the other half by the employee representatives. Committee members must also be –
 - (a) employers or employees within the registered scope of the council; or
 - (b) office bearers or officials of the parties to the council.
- (3) A majority of the total number of the members of a committee forms a quorum and must be present before the meeting may begin or continue.
- (4) The provisions of clause 7 relating to the calling and conduct of executive committee meetings, read with the changes required by context, apply to meetings of any committee contemplated in this clause.

9. Chairperson and deputy chairperson

- (1) At the annual general meeting the council must elect a chairperson and a deputy chairperson. Subject to sub-clauses (3) and (6)(a), the serving chairperson of the council at the time of the annual general meeting will be the chairperson of the meeting and preside over the election of the next chairperson.

- (2) The chairperson of the meeting must call for nominations for the office of chairperson. A person is nominated if proposed by one and seconded by another representative in the council.
- (3) If the serving chairperson is nominated for another term, the council by a show of hands must elect a representative in the council to act as chairperson of the meeting during the election of the next chairperson.
- (4) If only one candidate is nominated, the candidate will be deemed to have been elected the new chairperson unopposed, and must be declared by the chairperson of the meeting to have been so elected. If two or more candidates are nominated, the chairperson of the meeting must conduct a vote by ballot, and must declare the candidate in whose favour the majority of the votes have been cast, to have been elected the new chairperson.
- (5) If an equal number of votes are cast for two or more candidates, and no other candidate has drawn a higher number of votes than those candidates, the chairperson of the meeting will cause to be determined by lot which one of those candidates is to become the new chairperson.
- (6)
 - (a) Upon having been declared elected, the new chairperson must preside over the meeting and must call for nominations for the office of deputy chairperson.
 - (b) If the newly elected chairperson is an employer representative, only employee representatives may be nominated for deputy chairperson, and vice-versa.
 - (c) The provisions of sub-clauses (2), (4) and (5), read with the changes required by context, apply to the election of the deputy chairperson.
- (7)
 - (a) The chairperson and the deputy chairperson hold their respective offices until the next election of the chairperson or deputy chairperson (as the case may be) takes place, or, if the chairperson or deputy chairperson ceases to be a representative in the council on any date before that election, until that date. Each of them will be eligible for re-election if still a representative when their respective terms as chairperson and deputy chairperson expires.
 - (b) If the office of the chairperson or deputy chairperson becomes vacant before the next election of the chairperson or deputy chairperson (as the case may be), the executive committee must elect a person as a chairperson or deputy chairperson (as the case may be) to hold office until the next election.

- (c) An election contemplated in paragraph (b) must be held in accordance with sub-clauses (2), (4), (5) and (6), read with the changes required by the context.
- (8) The chairperson must preside over all meetings of the council, and must –
- (a) sign the minutes of council meetings after those minutes have been confirmed;
 - (b) sign cheques drawn on the council's bank account; and
 - (c) perform any other functions and duties entrusted to the chairperson by this constitution as well as those that are generally associated with the office of chairperson.
- (9) The deputy chairperson must preside over meetings of the council and perform the duties and functions of the chairperson whenever the chairperson is absent or for any reason unable to act or to perform those functions and duties.
- (10) If both the chairperson and the deputy chairperson are absent or unable to act or to perform the functions and duties of the chairperson, the council, by show of hands, must elect from the representatives a person to act as chairperson and to perform those functions and duties.
- (11) A chairperson or a deputy chairperson who has not been elected from amongst the representatives in the council is not entitled to vote on any matter before the council or the executive committee.
- (12) A chairperson or a deputy chairperson may be removed from office by the council for serious neglect of duty, serious misconduct or due to incapacity.

10. Officials and employees

- (1) The council must appoint a secretary who will be responsible for the administrative and secretarial work arising from the functioning of the council and for performing the duties imposed on the secretary by or in terms of the Trade Disputes Act and this constitution. These include –
- (a) to keep and maintain the books and records of account that the council may direct in order to fully reflect the financial transactions and state of affairs of the council;
 - (b) to attend all meetings of the council and the executive committee, and record the minutes of the proceedings at those meetings;
 - (c) to conduct the correspondence of the council, keeping originals of letters received and copies of letters sent;

- (d) at each meeting of the council, to read significant correspondence that has taken place since the previous meeting;
 - (e) to bank all moneys received on behalf of the council within three days of receipt;
 - (f) whenever required by the council, but at least once in every quarter of the financial year, to submit to the council statements of its financial affairs and position;
 - (g) to prepare, for submission at the annual general meeting of the council, the budget for the next financial year and an annual report summarizing the key activities of the council; and
 - (h) to countersign cheques drawn on the council's bank account
- (2) The secretary must –
- (a) retain a copy of the confirmed and signed minutes of every meeting of the council, the executive committee and any other committee of the council in safe custody in the office of the council for a period of at least three years from the date those minutes were confirmed;
 - (b) retain every financial statement referred to in sub-clause (1)(f), and all vouchers and records relating to statements of that nature, for at least three years from the date of the statement; and
 - (c) sign the certificates of appointment to be issued to the persons appointed as employees or officials of the council.
- (3) The council may appoint any additional officials and any number of employees that may be necessary to assist the secretary in performing the functions and duties of that office.
- (4) Where there are two or more suitable candidates for appointment to the position of secretary, the council must elect the secretary by conducting a ballot of the representatives present at the meeting at which an appointment is to be made, with the candidate receiving the highest number of votes being appointed.
- (5) The secretary, officials and employees of the council must not be biased in favour of or prejudiced against any party in the performance of their respective functions.

11. Procedure for the negotiation of collective agreements

- (1) Any party to the council may introduce proposals for the conclusion of a collective agreement in the council.

- (2) The proposals must be submitted to the secretary in writing and must identify the other parties to the proposed agreement.
- (3) Within seven days of submission of the proposals, the secretary must serve copies of the proposals on the other parties to the council.
- (4) Within 21 days of submission of the proposals, the chairperson must call a special meeting of the executive committee to consider the proposals and to decide on a process for negotiating the proposals, including –
 - (a) the introduction of counter-proposals;
 - (b) whether the negotiations should be conducted by the council, the executive committee or any other committee of the council; and
 - (c) the timetable for the negotiations.
- (5) If no negotiation process is agreed –
 - (a) the executive committee may agree to appoint a facilitator to facilitate negotiations and the conclusion of a collective agreement; and
 - (b) the council must meet at least twice within 30 days of the meeting of the executive committee referred to in sub clause (4), to negotiate on the proposals and any counter proposals, unless a collective agreement has been concluded;
- (6) If a collective agreement is concluded:-
 - (a) the secretary must as soon as possible distribute by hand or by registered post a copy of the agreement to every party to the council;
 - (b) every party to the council to which the agreement relates must as soon as possible publish a copy of the agreement on a generally accessible notice board at its premises; and
 - (c) the secretary shall within 28 days of the conclusion of the agreement lodge a copy of the agreement with the Commissioner in terms of Section 33(1) of the Trade Disputes Act.
- (7) If no collective agreement is concluded the parties to the council may –
 - (a) agree to refer the dispute to arbitration by an agreed arbitrator, or to any other dispute resolving mechanism agreed between them; or
 - (b) utilise the dispute procedures contained in the Act.

- (8) During any strike or lock-out the parties to the dispute must attend every meeting convened by a mediator appointed by the Commissioner to resolve the dispute. If any party to the dispute fails to attend a meeting without good cause, the members of that party—
- (a) if they participate in a strike, will forfeit the protection they and their strike would have enjoyed in terms of the Act;
 - (b) if they engage in a lock-out, will forfeit the protection they or their lock-out would have enjoyed in terms of the Act.

12. Finances

- (1) The council may raise funds by charging a levy on employers who are members of the council and members of trade unions that are members of that council.
- (2) The council must open and maintain an account in its name at a bank of its choice that is registered in Botswana, and —
 - (a) deposit all moneys it receives in that account within three days of receipt; and
 - (b) pay the expenses of and make all payments on behalf of the council by cheques drawn on that account.
- (3) The council may invest any surplus funds not immediately required for current expenses or contingencies, in —
 - (a) savings accounts, permanent shares or fixed deposits in any registered bank or financial institution;
 - (b) a registered unit trust;
 - (c) any other manner approved by the Commissioner.
- (4) All payments from the council's funds must be —
 - (a) approved by the council; and
 - (b) made by cheque drawn on the council's bank account and signed by the chairperson or deputy-chairperson and counter-signed by the secretary. However, the council, by special resolution, may authorise any representative in the council, official or employee of the council to sign or counter-sign cheques drawn on the council's bank account in the event of both the chairperson and the deputy chairperson or the secretary not being readily available for that purpose.
- (5)
 - (a) Despite sub-clause (4), the council may maintain a petty cash account, out of which the secretary may make cash payments not exceeding on any one occasion.
 - (b) Funds required for the petty cash account may be transferred to that account only by drawing a cheque issued and signed in the manner required by sub-clause (4).

- (c) Except with the approval of the council, cheques drawn to transfer funds to petty cash may not exceed per month in aggregate.
 - (d) The council must determine the form of records to be kept for the petty cash account.
- (6) At the end of each quarter of the financial year, the secretary must prepare a statement showing the income and expenditure of the council for that quarter, and another reflecting the assets, liabilities and financial position as at the end of that period.
- (7) The financial year of the council begins on 1 in each year and ends on of the following year, except for the first financial year, which begins on the day that the council is registered and ends on the
- (8) No later than after the end of the financial year, the secretary must prepare a statement of the council's financial activity in respect of that financial year showing –
- (a) all moneys received by the council –
 - (i) in terms of any collective agreement registered in terms of the Trade Disputes Act; and
 - (ii) from any other sources;
 - (b) expenditures incurred on behalf of the council under the following heads –
 - (i) remuneration and allowances of their officials and employees;
 - (ii) amounts paid to representatives and alternates in respect of attendance at meetings, the travelling and subsistence expenses incurred by them, and in lieu of the salary or wage deducted or not received by them due to their absence from work by reason of their involvement with the council;
 - (iii) remuneration and allowances paid to any mediators or arbitrators;
 - (iv) office accommodation;
 - (v) printing and stationery requirements; and
 - (vi) miscellaneous operating expenditure;
 - (c) the council's assets, liabilities and financial position as at the end of that financial year.
- (9) (a) The annual financial statements must be signed by the secretary and counter-signed by the chairperson, and submitted to an auditor for auditing and preparing a report to the council.
- (b) True copies of the audited statements and the auditor's reports must be made available for inspection at the office of the council to members and representatives of the parties, who are entitled to make copies of those statements and the auditor's report.

- (c) The secretary must send certified copies of the audited financial statements and the auditor's report to the Commissioner within 30 days of receipt thereof.
- (10) Every year the secretary must prepare, for submission at the annual general meeting of the council, a budget for the council for the next financial year.
- (11) At the annual general meeting the council must appoint an auditor to perform the audit of the council for the next year.

13. Winding up

- (1) At a special meeting called for that purpose, the council, may decide to wind itself up if a resolution adopted by a majority of the total number of representatives in the council, so decides.
- (2) Upon adoption of a resolution to wind up, the secretary must take the necessary steps to ensure that—
 - (a) application is immediately made to the Commissioner for an order giving effect to the resolution; and
 - (b) the council's books and records of account and an inventory of its assets, including funds and investments, are delivered to the appointed liquidator, and that whatever may be necessary is done to place the assets, funds and investments of the council at the disposal and under the control of the liquidator.
- (3) Each party to the council remains liable for any unpaid liabilities to the council as at the adoption of a resolution to wind-up the council.
- (4) If all the liabilities of the council have been discharged, the council must transfer any remaining assets to —
 - (a) an industrial council within the same or similar sector; that has been agreed upon at the special meeting referred to in sub-clause (1); or
 - (b) the office of the Commissioner if —
 - (i) there is no council within the same or similar sector; or
 - (ii) the parties to the council fail to agree on another council that is to receive the remaining assets.

14. Changing the constitution

- (1) The council may change this constitution at any time—
 - (a) by a resolution adopted by unanimous vote of all the representatives in the council on a motion to amend tabled without prior notice; or
 - (b) by a resolution adopted by at least two thirds of all the representatives in the council after at least one month's notice of that motion to amend has been given to the secretary and all the other representatives.
- (2) Any amendment to this constitution becomes effective after the resolution effecting that amendment has been certified by the Commissioner.

15. Necessary first steps

- (1) With a view to making the council operative and functional without delay, the provisions contained in the Annexure to this constitution will apply and must be read as one with the constitution until the requirements and procedures contemplated in those provisions have been complied with.
- (2) Any act performed in compliance with the provisions contained in the Annexure will be deemed to have been performed in terms of and in accordance with this constitution.

16. Definitions

In this constitution, any expression that is defined in the Act has that meaning and unless the context otherwise indicates –

“Act” means the Trade Disputes Act;

“chairperson” means the chairperson of the council who, by virtue of that office, is also the chairperson of the executive committee;

“Commissioner” means the Commissioner of Labour and includes the office of the Commissioner;

“deputy chairperson” means the deputy chairperson of the council who, by virtue of that office, is also the deputy chairperson of the executive committee;

“executive committee” means the executive committee contemplated in clause 7; and

“secretary” means the secretary of the council.

ANNEXURE

Necessary first steps to be followed by the council

(1) At the first meeting of the council, which will be held

- (a) the council, by show of hands, must select a suitable person to act as chairperson of that meeting, subject to paragraph (c), as well as another to keep the minutes of the meeting;
- (b) the council must elect the chairperson and deputy chairperson and the additional members of the executive committee in the manner set out in clauses 7 and 9 respectively, read with the changes required by the context;
- (c) the newly-elected chairperson of the council must take over the chair at the meeting; and
- (d) the council must appoint an auditor to perform the audit of the council in respect of its first financial year.

(2) The secretary, in the manner contemplated in clause 10(1)(g), must as soon as possible prepare, for submission at the next ordinary meeting of the council, a budget for the council for its first financial year.

NOTE: According to the above model constitution, the council's certificate of registration is, upon receipt, to be attached to its constitution (see Clause 2). If not so attached, the constitution of a council following the model will be incomplete.