INDUSTRIAL RELATIONS MANUAL

Part 1 of 2

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IR MANUAL INDEX

Part 1 of 2

Part 2 of 2

1. INTRODUCTION

Managing employees is an integral part of running a business and it is unfortunate that some employers find out the hard way that sloppy handling of labour relations in the workplace can be costly and embarrassing. **Costly**, because if managers do not follow fair procedures, they may have to reinstate or compensate an employee who was treated unfairly. **Embarrassing,** because the manager will have difficulty defending a weak case during arbitration or in the Labour Court and will have displayed his or her ignorance and incompetence to everyone involved. In addition, the employer will have lost control over the situation – usually to a trade union.

Don't learn the hard way!

The cost, the embarrassment, and the traps in labour relations can usually be avoided if a manager acts professionally and follows a few relatively simple guidelines. The aim of this Manual is to assist RMI members in the management of employees – effectively and fairly.

Keep proper records!

A good place to start is with proper record keeping for each and every employee. In this way, you can keep track of a worker's history in your business, beginning with the application for employment and the interview, through to termination of employment. In the field of labour relations, written records of disciplinary enquiries, counselling, warnings and dismissals are important.

Avoid the traps!

We have attempted to make this Manual as comprehensive as possible, to guide you in the right direction, and to warn you of the traps. But we do not believe that it would be helpful to swamp you with things which are not relevant or significant to small business employers. You will note that not all the annexures can be used as they stand. For example, there is not a single letter of appointment, which can be used for all grades of employees in all businesses. Equally, you might not agree with the specimen disciplinary code, simply because standards of work performance and personal conduct will vary from employer to employer.

You are free to design your own documentation, and if you would like our assistance, please give us a call.

Use RMI's services!

Perhaps the best advice which we can give, is that you make use of the labour relations' services available from the RMI office in your area. A telephone call – before you take action against an employee – can only be to your advantage.

Region	IR Specialist	Email Address	Contact Details
Johannesburg	Itumeleng Mathibe Thenjiwe Hugo	Itumeleng.Mathibe@rmi.org.za thenjiwe.hugo@rmi.org.za	Office : (011) 886-6300 Cell : (071) 418-5600 Cell : (073) 426-5324
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2. BARGAINING COUNCIL SYSTEM

2.1 WHAT IS THE BARGAINING COUNCIL?

It is a statutory body established between employer organisations on the one hand and trade unions on the other, in order to regulate employer/employee relations in an industry. It is not a Government Department, but is vested with certain legal powers in terms of labour legislation.

The Motor Industry Bargaining Council (MIBCO) is made up of two groups of representatives – employers are represented by the RMI and FRA and employees are represented by two trade unions, i.e. NUMSA and MISA. Thus, members of the RMI have direct representation on the body which regulates key issues in the motor industry.

The Bargaining Council's national office is situated in Randburg with Regional Offices throughout the country:

Johannesburg Regional Office	(011) 886-6300
KwaZulu-Natal Regional Office	(031) 266-7031
Free State/Northern Cape Regional Office	(051) 430-3294
Eastern Cape Regional Office	(041) 364-0070
Western Cape Regional Office	(021) 939-9440

2.2 PARTIES TO THE COUNCIL (MIBCO)

RMI Retail Motor Industry Organisation (mandated by members of the Organisation but acts on behalf of all employers in the motor industry with majority seats at MIBCO).

FRA Represents the interest of fuel retailers together with SAPRA, which forms part of the RMI.

MISA Motor Industry Staff Association (represents office, stores, sales and clerical employees, Apprentices and Grades 7 and 8 employees).

NUMSA National Union of Metalworkers of South Africa (representing all categories of employees).

Each of these bodies have both a national office and a regional office located at various centres around the country.

2.3 PURPOSE, POWERS AND FUNCTIONS

The Labour Relations Act (hereinafter referred to as "the Act") stipulates that the purpose of the Bargaining Council is to provide a framework within which employees and their trade unions, employers and employers' organisations may:

- Collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest, formulate industrial policy;
- Promote –
  - Orderly collective bargaining;
  - Collective bargaining at sectoral level;
  - Employee participation in decision making in the workplace (workplace forums); and
  - The effective resolution of labour disputes.

Bargaining Councils have the following powers and functions:

- Conclude and enforce collective agreements;
- Prevent and resolve labour disputes;
- Promote and establish training and educational schemes;
- Establish and administer social security funds such as pension, provident, medical aid, sick pay, holiday pay, unemployment and training schemes;
- Make submissions on policy and legislation that may affect the industry;
- Determine by collective agreement those matters that may not lead to a lawful strike or lock-out at the workplace; and
- Confer additional matters for consultation at workplace forums.

Dispute Resolution

In terms of the Act, 1995, the Bargaining Council is vested with jurisdiction to conciliate and/or arbitrate the following types of disputes:

- Issues which could lead to strikes;
- Issues over essential services;
- Alleged Unfair dismissals;
- Severance pay; and
- Alleged unfair labour practices.

The Council's **Dispute Resolution Centre** (**DRC)** must attempt to resolve the disputes firstly by conciliation, and if unsuccessful, by arbitration. In this regard the DRC has similar jurisdiction as would the Commission for Conciliation Mediation and Arbitration (CCMA). Other types of disputes

are referred to and dealt with by the CCMA and/or the Labour Court of South Africa.

2.4 THE COUNCIL'S COLLECTIVE AGREEMENTS

Employers and employees in the Motor Industry are governed by a number of agreements, several of which related to retirement funds and a fund for sickness, accident and maternity benefits. They are not relevant to our discussion on industrial relations, and it is sufficient to mention that these agreements are all administered by the Bargaining Council. Queries concerning these funds should be raised with the Council in the different regions.

The **Main Agreement for the Motor Industry** as well as the **Administrative Agreements** need special mention here.

<u>The Main and Administrative Agreements</u>

These two Agreements are somewhat similar to a national "contract of employment" which apply to all employers and employees in the motor industry. They set out the basic terms and conditions of employment. The more relevant provisions deal with:

- Job descriptions – every category of employee has a defined set of duties;
- Minimum wages, actual/guaranteed increases (where applicable) payment of earnings, deductions, piece-work, commission work, travelling and subsistence allowances, stand- by and call-out allowances, retrenchment pay, etc;
- Hours of work, shift work, overtime, short time and Sunday work;
- Annual leave, public holidays, accrued leave pay and additional holiday pay;
- Sick leave and maternity leave;
- Supply of overalls; Specified prescribed tools and equipment; and
- Ratios, i.e. artisans and operative grades of employees.

Because there are a number of specialist activities within the motor industry, the Main Agreement is divided into several sections:

- **Division A:** Definitions and provisions, which apply to all employers and employees in the industry.

- **Division B:** Provisions which apply to office, stores, sales and clerical employees (administrative personnel).

- **Division C:** Provisions, which apply to all workshop and forecourt staff within:

- **Chapter I:** All establishments other than those registered in terms of Chapter II to V
- **Chapter II:** Vehicle Body Builders
- **Chapter III:** Manufacturers
- **Chapter IV:** Automotive Engineers
- **Chapter V:** Reconditioners (e.g. brakes and clutches).

- **Division D:** Conditions applying to different sectors of the industry and especially wage dispensations which are over and above minimum wages.

Each employer is required to be in possession of a current copy of the Main Agreement, accessible by employees. It is available from:

JUTA's CUSTOMER SERVICES
1ST FLOOR, SUNCLARE BUILDING,
21 DREYER STREET, CLAREMONT
CAPE TOWN, 8000

(**Note:** From time to time, JUTA's printed version is unavailable – Please liaise with JUTA directly in this regard.)

The MIBCO Main Agreement is also accessible on the RMI website i.e. www.rmi.org.za or on the MIBCO website which is www.mibco.org.za.

3. THE EMPLOYMENT PROCESS

Recruiting and selecting new employees should be done with care, so as to attract suitable employees to your business, sift out unsuitable applicants, and thereafter select suitable candidates. Following a few simple procedures may go a long way in making your employment practices so much more professional.

The Employment Equity Act defines "employment policy or practice" to include recruiting, advertising, selecting, and the appointment process. The Act covers applicants for employment, prohibits unfair discrimination and requires employers to eliminate discrimination from employment policies and practices.

Therefore it is important to handle the entire employment process (labour planning, recruitment and selection) cautiously and professionally.

3.1 JOB ANALYSIS

The first step is to determine the job content and location within the organisation. Guidance should be taken from the job descriptions for the various job categories in the Main Agreement. Thereafter, it becomes relatively easy to establish the tasks that are involved in the job. An example of a simple job analysis is shown in the table below:

FUNCTION	TASKS
1. Control of the stocks and stores	❑ Ordering stock ❑ Placing stock into inventory ❑ Issuing stock upon receipt of a stock requisition from the workshops ❑ Issuing stock to the counter salesperson upon receipt of a sales requisition ❑ Daily stock taking ❑ Balancing of stock ❑ Stores security as per stores security orders
2. Attending to customers	❑ Attend to customers when counter salesperson is unavailable or when work pressure at the counter warrants your attention
3. Assembling orders	❑ Picking stock and putting together goods required to fulfil orders, using an order/requisition form or an invoice
4. Dispatching	❑ Sending goods, by hand or by other appropriate means, to other departments for transit

3.2 JOB SPECIFICATION

Upon completion of the job analysis, a job specification should be compiled. A job specification is a tool to determine what expertise and experience is required for the efficient performance of the job. The job specification should contain the following:

- The job title, qualifications, skills, knowledge and experience required;
- A schedule of tasks to be performed (derived from job evaluation and the Main Agreement for the Motor Industry); The " job related" behaviour required; and
- A list of the disqualifying selection criteria e.g. no drivers licence for the position of driver.

This job specification may be used at a later stage if the employee is, for example, performing below the required standard, or becomes medically unfit to perform the work for which the employee has been appointed. The absence of a job specification makes the management of performance (e.g. performance appraisal) virtually impossible.

3.3 ADVERTISING THE VACANCY

Upon completion of the job analysis and compilation of a job specification, the vacancy can then be advertised. Advertisements may be verbal or written.

It is suggested that vacancies should first be advertised internally. If no suitable responses are forthcoming, then advertise as widely as possible.

NOTE:

The Employment Equity Act requires employers to eliminate direct and indirect unfair discrimination in employment policies and practices, so one should for instance avoid advertising a position, for example, in a newspaper read only by a certain segment of the community. The employer may later face claims of unfair discrimination. If the employer is going to advertise in the print media, use a newspaper/magazine, which is generally read by the community as a whole.

After the closing date for applications, list the applicants in terms of their qualifications. **The applicants who clearly fail to qualify should be advised accordingly as soon as possible.** The employer need not give reasons to unsuccessful applicants in the first instance. Only upon written request by the applicant must reasons be disclosed. Applicants who qualify for the position should be scheduled for a job interview.

NOTE:

The Employment Equity Act (1998) defines an employee to include an applicant for employment. The impact of this is that discrimination, which is unfair or arbitrary in recruiting and selecting, is prohibited.

3.4 THE INTERVIEW

3.4.1 PREPARING FOR THE INTERVIEW

Privacy is important, and arrangements should preferably be made to avoid interruptions by telephone or people walking in and out of the office so as to ensure unrestrained responses from the applicant.

Enough time should be set aside to fairly assess the applicants. This could mean a time period of 30 to 45 minutes per candidate for unskilled and semi-skilled positions. For higher- level jobs such as technical, managerial and sales, where specific skills, abilities, personality and motivation are critically important, a longer period may be required.

Immediately prior to the actual interview, the interviewer should acquaint himself again with all the available details of the applicant/s. This should include the Employment Application Form (see **Annexure A — Employment Application Form**), all supportive documentation, certificates and employment history. Certain facts may thus stand out and need further investigation/clarification during the interview.

It is recommended that a list of relevant questions be prepared to ensure that all applicants are equally evaluated and that all issues related to the vacancy are addressed.

3.4.2 CONDUCTING AN INTERVIEW

The manner in which the interview is conducted must allow free and open discussion. Applicants are more likely to speak freely and honestly if they perceive that the interviewer understands them and accepts what they have to say. Interviewers must show understanding for the applicant's point of view.

Because a prime objective is to learn as much about the candidates as is necessary to make a reliable assessment, the interviewer must make skilful use of questions, which are structured accordingly. It is preferable to ask open ended questions e.g. "Tell me about the duties, responsibilities and relationship of your last job", rather than closed e.g. "Did you have to write reports?" or "How did you co-ordinate with other departments?" Ensure that the discussion is relevant and to the point.

Immediately when the interview is concluded, the interviewer should record impressions to prevent confusion and loss of information. It is generally unwise to engage in extensive note taking during the course of the interview. Occasional note taking of objective data is acceptable.

Common Pitfalls in Screening and Interviewing

- Appearance may be misleading. Thus, if a person is neat, clean-cut, and alert, the interviewer may assume that the person is also intelligent, ambitious, and dependable.
- Do not jump to conclusions. Certain mannerisms or expressions of the applicant may evoke strong emotional overtones for the interviewer. The key question is whether these may have any material bearing on future job performance.
- **NB** - Failure to listen. A talkative interviewer will learn little from an applicant.
- Interruptions. Avoid taking telephone calls.
- Failure to confirm references, qualifications and employment history. Discriminatory questions and attitudes related to race, sex, religion, etc.

Practical Tips in Assessing Applicants

- Verify information supplied regarding the applicant's health as it may have an influence on his/her ability to fulfil the job requirements. Be careful so as not to probe medical issues which are not relevant to the applicant's ability to perform the job.
- Enquire about the applicant's housing and transport arrangements.
- Request the applicant to confirm that the details, which you have of him/her from the application form and the interview, are true and correct – to protect yourself in case of discrepancies.
- Ascertain whether the applicant's extra-mural activities could have a negative impact on his ability to fulfil job obligations during working hours as agreed.
- Retain certified photocopies of the following, where relevant — ID documents, driver's licences, professional registrations and educational qualifications.

- **IMPORTANT** – Ascertain the applicant's employment history in order to see whether certain patterns of behaviour are apparent. Example – the reason/s the applicant left his previous place of employment. It is further recommended that the applicant's references be checked and previous employers contacted where possible.

3.5 CONTRACTS OF EMPLOYMENT

Once the recruitment process has been finalised and the decision taken as to whom would be employed, the contract of employment becomes relevant.

A contract of employment comes into being as soon as the employee starts rendering a service to the employer, or there is agreement between the employer and the employee with regard to the employment relationship including the terms thereof, whichever comes first, even if no written contract of employment is issued to the employee. (See **Annexures T and U — Employment Contracts**).

The Main Agreement for the Motor Industry makes it obligatory of employers to issue written letters of appointment to all employees. Remember, however that an employer would not issue letters of appointment to existing staff but could give a letter, confirming the existing conditions of employment i.e. "Confirmation of Terms and Conditions of Employment", which letter would contain almost all the elements of the Employment Contract. Should the employer wish to change any existing conditions of employment, the employer must consult with the employee/s concerned.

Items for Inclusion in the Employment Contract

The following issues must be considered when drafting an Employment Contract. Should they be considered to be major conditions of employment, they should be included in the Employment Contract:

- The full name and address of the employer;
- The name and occupation of the employee, and a job description of the work for which the employee is employed;
- The place of work, and an indication of the various places where the employee is required or permitted to work;
- The date on which the employment began;
- The employee's ordinary hours of work and days of work;
- The employee's wage or the rate and method of calculating wages;
- The rate of pay for overtime work;
- Any other cash payments that the employee is entitled to;
- Any payment in kind that the employee is entitled to and the value of the payment in kind;
- How frequently remuneration will be paid;
- Any deductions to be made from the employee's remuneration;
- The leave to which the employee is entitled;
- Sick leave provisions;
- The period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;
- A description of any council or sectoral determination which covers the employer's business;
- Any period of employment with a previous employer that counts towards the employee's period of employment;
- 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;
- Future reviews; Probationary period;
- Pension/Provident fund arrangements; Medical Aid;
- Reference to disciplinary and grievance procedures;
- Nature and duration of an induction programme; and
- Security and search procedures.

CATEGORIES OF EMPLOYEES

NOTE: In the motor industry, employees may be appointed only in one of the following categories:

Permanent:
Means an employee who is employed for an indefinite period and who is registered with MIBCO except in the case of casual employees.

Relief Employee:
Means an employee who is registered with MIBCO and is temporarily employed:

- For a period of not more than 42 days in any six months, for the purposes of carrying out the duties of an employee who is absent from work; or
- To provide additional labour during peak holiday seasons; or
- For a period of not more than six months in any year, for the purpose of carrying out duties of an employee who is on maternity leave, extended sick leave; or
- Educational leave or skills development careers, or with consent obtained administratively from the Council, is absent with the permission of the employer.

Temporary/Fixed Term Contract Employee

These are contracts of a definite duration, which are normally entered into for a specific project or on the basis that the work for which the employee is employed, will be completed by a certain date. Fixed term contracts cannot be implemented for staff who are already in your employment.

Extensions of fixed term contracts should be approached with caution. Where employment merely continues beyond the agreed date without a further contract being entered into, the contract would take on the status of a permanent Contract of Employment.

The following should be noted when extending a fixed term contract:

- A written contract specifying the new termination date must be agreed; and
- Continual extension of temporary contracts may cause the employee to believe that the contract has become "permanent".
  Note: The Main Agreement for the Motor Industry is also applicable to employees who are employed on a temporary basis.

Casual Employee:
Means an employee who is temporarily or casually employed by the same employer:

- For not longer than 24 hours, continuous or otherwise, in any one month on any of the duties as defined in the Main Agreement;
- For not longer than 104 days in aggregate if any such employee is a student;
- The Main Agreement does not apply except in the case of minimum prescribed rates of pay.

3.6 INDEPENDENT CONTRACTORS

An independent contractor is not an employee. Employers are cautioned against engaging an independent contractor in order to evade or circumvent their obligations in terms of labour legislation towards employees.

A person engaged as an independent contractor may in fact be viewed by labour legislation as an employee. Any person performing motor industry related work in a motor industry establishment, will be presumed to be an employee and not an independent contractor (See Clause 17 of the Motor Industry Administrative Agreement).

In terms of the Act, a person is presumed to be an employee if one/or more of the following factors are present:

- The manner in which the person works is subject to control or direction or another person;
- The person's hours of work are subject to the control or direction of another person;
- In the case of a person who works for an organisation, the person forms part of that organisation;
- The person is economically dependent on the other person for whom he or she works or renders services;
- The person is provided with tools of trade or work equipment by the other person;
- The person only works for or renders services to one person; or
- The person has worked for that other person for an average of at least 40 hours per month over that last three months.

3.7 TEMPORARY EMPLOYMENT SERVICE (USE OF LABOUR BROKERS)

An employer making use of a labour brokering service for the provision of labour will be held jointly and severally liable for any breach of the Main Agreement for the Motor Industry or other labour legislation together with the labour broker. Employers are cautioned against engaging a labour brokering service in order to evade or circumvent their obligations in terms of labour legislation towards employees.

3.8 PROBATION

A newly hired employee may be placed on probation for a period that is **reasonable given the circumstances of the job**. The period should be determined by the nature of the job and the time it takes to determine the employee's suitability for continued employment. When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counselling which is required to enable the employer to render satisfactory service. Should an employer be unhappy with the services of an employee who is on probation, such employer must first warn the employee and indicate the level of service required. An opportunity for the employee

to state a case in response and to be assisted by a trade union representative (shop steward) or fellow employee should precede dismissal during the probationary period.

3.9 REGULATORY REQUIREMENTS

Ensure that all registration forms are completed, such as:

- Pension Fund;
- Medical Aid;
- Unemployment Insurance Fund (UIF);
- IRP2 Income Tax;
- Bargaining Council Returns, etc.

3.10 EMPLOYEE FILE

All documentation must be placed in individual employee files and be retained for a period of three (3) years after the employee has left the services of the employer.

3.11 INDUCTION PROCESS

A new employee will be unfamiliar with the company culture, other employees, channels of communication, administrative rules and procedures. It is therefore important that an induction process be conducted, preferably within the first week of employment. (See **Annexure B — Induction Checklist** to monitor the process.)

4. GRIEVANCES

NOTE:
This is one of the most neglected issues of management when dealing with employees. To be sensitive to employee grievances enables you to be aware of what is happening on the shop floor, and in doing so potential problems may be avoided.

4.1 WHAT IS A GRIEVANCE?

Any dissatisfaction or injustice felt by employees.

4.2 OBJECTIVES OF LODGING GRIEVANCE

- Bring a perceived problem to management's attention;
- Deal with the problem as soon as possible; and
- Find a solution.

4.3 REASON FOR A GRIEVANCE PROCEDURE

- Ensure structured process;
- Neutralise conflict;
- Promote an open and honest relationship between an employee and management;
- Enable management to identify causes of dissatisfaction; and
- Have an effective communication channel for the employee and employer.

4.4 HANDLING OF GRIEVANCES

Steps in the grievance procedure fall into two stages.

4.4.1 INFORMAL STAGE

This is where an open discussion takes place at the supervisory/foreman level.

- Interview complainant privately;
- Witnesses may be called to clarify grievances;
- After listening to grievance:

  - Decide if further investigation is required;
  - If investigation is required, give feedback to the complainant;
  - If the complainant is dissatisfied with decision, advise him to take the next step; and

- Management should be encouraged to, wherever possible, attempt to resolve grievances at this stage.

4.4.2 FORMAL STAGE

This is a more formal structured approach where the problem is submitted in writing.

- The employee is required to complete the **"Grievance Application Form"**, send copies to shop steward/representative and management;
- Convene a formal grievance hearing;
- Summarise what you have heard to make sure you understand the problem;
- Decide upon action to be taken and draw up an action plan where necessary; and
- Follow up.

If a grievance cannot be solved by mutual consent, a third party resolution **may** be the only acceptable way:

- **Conciliation/Mediation** – A third party attempts to resolve the dispute – however, the parties make their own decisions in this regard.
- **Arbitration** – The third party takes over the role of decision-maker.

Some do's and don'ts at a grievance hearing

Do's	Don'ts
Ensure privacy	Do not hurry a person
Create a listening atmosphere (Listen effectively)	Do not try to forget the problem
Obtain all information	Do not look bored
Show empathy, do not sympathise	Do not interrupt a person
Retain self-discipline	Do not be prejudiced/biased
Be honest	Do not be ambiguous or unclear
Take notes	Do not suggest own solutions, ask for suggestions
Focus on the problem	Do not take unilateral action
	Do not think that the problem discussed is necessarily the real problem

NOTE:
Prevention is better than cure! Employers use disciplinary procedures.
Employees use grievance procedures.

5. DISCIPLINE FOR MISCONDUCT

It is the prerogative and responsibility of the employer to exercise discipline in the workplace. Management has the right to determine the standard or behaviour as well as the work standards required of employees in the workplace.

The purpose of discipline is to regulate behaviour, not merely to punish transgressors, and disciplinary action taken must adhere to the principles of substantive and procedural fairness.

5.1 COMPANY RULES

The onus is on the employer to draw up company rules and regulations that are required for the efficient and effective operation of the business. In return, the onus on the employees is to give reasonable co-operation and to comply. If the employer uses a disciplinary code, then that code must be made known to the staff so that they are aware of what is required of them. Refer to **Annexure M — Classification of Offenses and Disciplinary Action**, that should be regarded as an example.

5.2 DISCIPLINARY CODE FOR EMPLOYEES

The functions of a disciplinary code are to:

- Make employees aware of the consequences of specific forms of misconduct;
- Provide behavioural guidelines for both employees and employers;
- Provide for consistency (equality of treatment is an important aspect of fairness); and
- Set a fair and reasonable standard of personal behaviour and industrial justice (similar offences committed in similar circumstances deserve similar punishment).

Disciplinary action should be taken against transgressors, which action may lead to such employees' dismissal in extreme cases.

5.3 DISCIPLINARY PROCEDURE

5.3.1 PRELIMINARY INVESTIGATION

The purpose is to establish the facts in order to decide whether disciplinary action is required and to avoid hasty decisions by management. If the transgression is not of a very serious nature, the employee should be counselled, or in certain instances it may be appropriate to issue the employee with a verbal or written warning in the presence of a shop steward or any colleague of the employee's choice.

5.3.2 VERBAL AND WRITTEN WARNINGS

- Explain what you observed and compare it with the required standard.
- Refer to Counselling and Warning Letters (**Annexures N1 – N4**).
- Ask for and listen carefully to his or her explanation.
- Explain in detail what is required where applicable and by when it must be done.
- Obtain the employee's commitment (plan of action) to meet your requirements and discuss it with him.
- Explain to the employee that this is a verbal warning (**Annexure N2 — Verbal Warning**) or written warning that will be recorded. Written warnings should be precise, especially with regards to the offence. The employer may use **Annexures N3 and N4 — Written Warning and Final Written Warning Templates**.
- Express your confidence in the employee's ability to improve. Arrange for a follow- up discussion to monitor progress.

Certain transgressions may be minor. However, if repeated a number of times, they may have serious implications. Thus, the employer would then issue a number of warnings first and if the transgression persists, the employer could then call a hearing and perhaps even dismiss the employee.

The period of validity of warning letters must be determined by the employer's internal disciplinary procedure. However, a period of six months may be used as a guideline. In the case of a Final Written Warning, the employer may extend it to twelve months. **If an employee refuses to sign a warning, the employer should explain the contents of the warning to the employee in any event and get a witness to sign that the employee was explained the contents of the warning and issued with a written warning and such employee refused to sign receipt thereof. Such a warning is still a valid warning.**

5.3.3 FURTHER DISCIPLINARY ACTIONS

When dealing with transgressions of a serious or repetitive nature, the employer would be advised to call for a disciplinary hearing.

5.4 GUIDELINES ON CONDUCTING A DISCIPLINARY HEARING

The concept of a disciplinary hearing springs from the *audi alterem partem* rule which in essence means that the other party must be heard.

Disciplinary action without a formal disciplinary hearing, which leads to dismissal or a final written warning, is normally regarded as unfair.

Preferably the accused must be given prior notice of 48 hours and not less than 24 hours to attend a

hearing but a longer period of notice is preferable (See **Annexure O1 — Notice to Attend a Disciplinary Hearing**). The employee must be informed of his rights in writing, i.e.:

- Details of the alleged offence – be specific;
- That he may be represented at the hearing by a fellow employee or shop steward. In the case of disciplinary action against a recognised shop steward, a trade union official may act as a representative for that employee;
- That he may bring witnesses and give evidence in his defence;
- That he has the right to ask questions of witnesses brought by the complainant; and
- That he is entitled to the use of an interpreter.

5.5 COMPOSITION OF THE DISCIPLINARY HEARING (Who should be present at the hearing)

- **The accused** – employee;
- **The complainant** – employer;
- **The representative** – the person representing the accused;
- **Witnesses** – persons called by the accused or the complainant to give evidence. These witnesses remain outside the hearing until they are individually called;
- **Person taking minutes** – someone appointed by management (a tape recorder is an excellent back up); and
- **Chairperson** – to be impartial.

5.6 PROCEDURES DURING THE HEARING

- The Chairperson must introduce everybody and explain the reason for the enquiry. He must ensure that witnesses remain outside the venue until called.
- The Chairperson must read the employee's rights to him and ensure that they are understood.
- The Chairperson must state the charge(s) against the employee, ask whether he understands the charge(s) and whether he pleads guilty or not guilty. (If the employee pleads guilty to the charge, it is suggested that the Chairperson satisfies himself of the validity of the guilty plea, hears evidence in mitigation, evidence with regard to extenuating circumstances and considers the previous disciplinary record, prior to making a finding).
- If the accused pleaded guilty, record the guilty plea and establish the facts.
- The complainant is invited to state his case with supportive documentation/evidence against the employee; the employee may then be permitted to examine and ask questions of the complainant. The Chairperson and employee representative may also question the complainant.
- The complainant may then call witnesses, one at a time, to give their statements after which the complainant, employee, representative and Chairperson may question the witness. This procedure may be followed until the complainant has called all his witnesses.
- The employee is then requested to answer to the charge(s) and may then be questioned by the

complainant and Chairperson.

- The employee should now be permitted to call in any witnesses who, after having given their statements, may be questioned by the employee, complainant, Chairperson.
- Once the Chairperson is satisfied that all facts have been heard, he may adjourn the hearing in order to consider all the evidence prior to giving a finding.
- The Chairperson must arrive at a decision (i.e. whether the employee is guilty or not guilty) on his own and neither the complainant nor the employee and/or his representative may be present. The employer does not have to prove guilt "beyond reasonable doubt", but there must be sufficient and reasonable evidence on a balance of probabilities that a transgression has taken place.
- Once a decision has been reached, the hearing must be reconvened, the parties notified of such decision and the reasons therefore.

- **Not guilty** – if the employee is found not guilty, the enquiry will be closed. However, the relevant documentation relating to the case should not be destroyed but retained on file.

- **Guilty** – if the employee is found guilty, then the Chairperson must, prior to deciding the appropriate penalty, take notice of:

  - The employee's service record and valid disciplinary record;
  - Any mitigating circumstances. The employee should be invited to state any mitigating factors, which he may wish to make;
  - Any similar previous cases in the company and the decisions taken in those cases;
  - The **substantive fairness** of the penalty (Refer to Clause 5.7 below); and
  - Any extenuating circumstances.

- The Chairperson may now either adjourn the hearing to consider an appropriate penalty, or a decision may be made immediately. The employee and the complainant must be present when the decision is communicated and the chairperson must ensure that both the employee and the complainant understand the action taken. **In the absence of an appeal procedure, the employer should advise the employee that he has a right to refer the matter to the Bargaining Council.**

- Sometimes it is very difficult for a small employer to get a neutral chairperson. In exceptional circumstances, when an employer cannot get anyone else to chair the disciplinary hearing, such employer would play the role of complainant as well as chairperson. It must however be borne in mind that the employer must be seen to be fair and objective under these circumstances.

NOTE:

- A detailed record of the disciplinary hearing should be made. It is strongly recommended that a tape recording of the disciplinary hearing should be kept.
- Upon request, furnish the employee with a copy of the minutes of the hearing. The employee should be requested to sign an acknowledgement of receipt.
- If it is ascertained that the employee's presence at the workplace may be undesirable for various reasons, **he may be suspended on full pay until the date of outcome of the disciplinary hearing.**
- If an employee has been given proper and timeous notice of a disciplinary hearing and he fails to attend **without a valid excuse**, the hearing may be held in his absence. Because the Act gives employees the right to be present at a disciplinary hearing, an employer will need to prove to the arbitrator (should the case go further), that he did everything in his power to ensure that the accused was present at the disciplinary hearing. The hearing must however still be fair and procedurally correct.

5.7 SUBSTANTIVE FAIRNESS — APPROPRIATENESS OF THE SANCTION

The penalty imposed should be fair. It necessitates an investigation into the following matters:

- The employer's code of conduct;
- Seriousness of the offence;
- The employee's past disciplinary record;
- Years of service;
- Previous service/record;
- Attitude towards the offence;
- Personal circumstances; and
- Consistency.

The Employer's Code of Conduct

The employer's code of conduct will be used as a guideline to determine the severity of the offence.

Seriousness of the Offence

The seriousness of the offence depends upon the circumstances in which it is committed, i.e. lighting a cigarette on the forecourt could be extremely serious, whereas the same offence at a sales counter may not. Not all offences justify termination of service. However, an accumulation of similar lesser offences may justify the penalty of dismissal.

Previous Disciplinary Record

A clean disciplinary record is always a mitigating factor. Refer to the employee's file to establish how many valid previous warnings have been issued for similar offences.

Years of Service

In many cases, long service will constitute a mitigating factor, for which the employee would deserve some leniency, but long service could constitute an aggravating factor where the employee "should have known better". Short service could be a mitigating factor where the employee is still "learning the ropes", but it could constitute an aggravating factor, for example, where the employee is lazy, not co-operative or insolent. For some offences, such as theft in a position of trust, length of service might be irrelevant.

Previous Service/Record

This deals with the quality of the employee's service rather than the length of service. Exemplary service could be a mitigating factor.

Attitude towards the Offence

If the employee shows remorse and indicates that it will not happen again, then that remorse could be a factor in mitigation. On the other hand, if the employee shows defiance this could be an aggravating factor.

Personal Circumstances

These need not be a mitigating factor in all cases, but they must be taken into account if the personal circumstances lead to the employee's misconduct e.g. the employee is absent without permission and explains that a storm had blown down his house.

Consistency

Perhaps one of the most common grounds for the reinstatement of an employee on dismissal cases is inconsistency. Consistency implies that similar offences should be treated alike, taking into account individual circumstances.

An employer is required to act consistently on three levels:

- **Firstly**, an employer who does not normally enforce a rule but suddenly decides to do so, will be acting unfairly. If a rule has not been enforced, the employees should be informed of the employer's

intention to do so in future;

- **Secondly**, an employer is required to charge all employees who are guilty of breach of the rule; and

- **Thirdly**, all those charged should be disciplined in a similar manner. If two employees are guilty of an identical offence they should (at least in theory) receive similar punishment. The other factors relevant to sanction (e.g. years of service, disciplinary record) may justify differential treatment but an employer may only do so by reference to these factors.

NOTE: If dismissal is contemplated, the employer must satisfy himself that all other forms of sanction have been exhausted before resorting to such termination of service.

5.8 APPEAL AGAINST DISCIPLINARY ACTION

Although there is no statutory right to appeal against any form of disciplinary action, it is the employer's prerogative to grant an appeal. However, if the employer historically extended the right of appeal against disciplinary action, then such an employer will be required to act consistently in this regard.

The chairperson of the original disciplinary hearing should not be the same person as the chairperson chairing the appeal hearing. The appeal hearing is further not a re-hearing. The employee lodging an appeal against disciplinary action must provide sound, acceptable grounds upon which he bases his appeal.

TERMINATION OF EMPLOYMENT

Upon termination of employment the employer is required to provide the employee(s) so affected, with a letter, stating that the employment contract has been terminated and a Certificate ofService, containing the following information:

- Full name;
- Name and address of employer;
- The fact that the employee was employed under the scope and jurisdiction of the Motor Industry Main- and related Agreements;
- Date of commencement of work performed (job title);
- Remuneration as at date of termination; and
- Upon request by the employee, reasons for termination of the employment contract.

NOTE: Termination of employment, whether by the employee or the employer, is required to be effected in writing.

6. INCAPACITY

Incapacity should be separated from misconduct, and one must distinguish between an employee who is **unable** (incapacity) or **unwilling** (misconduct) to perform his duties. Incapacity implies the following three separate and distinct grounds:

- Poor performance;
- Incompetence; and
- Ill health (or other medically related reasons).

The guidelines for dealing with poor work performance and incompetence are similar, and they will be discussed together.

6.1 POOR PERFORMANCE AND/OR INCOMPETENCE

6.1.1 SUBSTANTIVE FAIRNESS: Proof of Poor Performance/Incompetence

- Firstly, an employer must be able to show that a standard level of performance exists or can be said to exist. This may be done by reference to job descriptions, contracts of employment, etc.
- Secondly, an employer must be able to show that the employee knew about the required level of performance.
- Thirdly, the employer must be able to demonstrate that the employee is not performing accordingly to the requirements of the position.

Evidence in the form of performance appraisals and productivity targets, which have not been met, may be submitted as proof of performance or incompetence.

6.1.2 PROCEDURAL FAIRNESS

- **Setting of Standards**: It is important to set work standards in order to evaluate an employee's performance. These standards must be reasonable, attainable and known to the employee.

- **Measurement of Performance**: The employee's performance must be monitored so that the employer can determine whether performance meets the required standards. The method of appraisal should be reasonable and objective and not based solely on the subjective opinion who ever carries out the appraisal.

- **Opportunity to Improve**. An employee who is performing below the required standard should be informed of this fact and given the opportunity to improve.

This implies that:

- The employee be granted sufficient time to improve, the length of this period being determined by factors such as qualifications, past experience, the nature of the job, etc.
- Assistance should be provided where necessary by the employer, e.g. by way of training, supervision and support. Regular counselling sessions should be held to give the employee continuous feedback on his performance.

NOTE:

Up to this stage, remedial, rather than disciplinary steps have been taken to redress the situation.

Putting the Employee on Terms

Where the employee's under-performance persists despite having been given an adequate time frame/period, reasonable opportunity and assistance, the employer must call the employee in and formally put him on terms to meet the required standards within stipulated (or agreed) time or face disciplinary action. Record this communication in writing to avoid it being disputed later.

Final Hearing

If there is no improvement in performance after the agreed time has lapsed, an enquiry must be held to give the employee a final opportunity to defend his position.

The employer must adhere to the following requirements:

- Give notice of the hearing in writing;
- Give reasonable time for the employee to prepare his defence;
- Make it clear that the complaints are regarding his consistent under performance and not because of some disciplinary matter;
- He may be represented by a fellow employee or shop steward; and
- He may call witnesses in his defence.

The Decision to Dismiss

Before the actual decision is taken to dismiss the employee, he must be given the opportunity to advance reasons why he should not be dismissed and the employer must consider any suitable alternative position prior to resorting to dismissal.

6.2 ILL HEALTH

6.2.1 SUBSTANTIVE FAIRNESS: ILL HEALTH

- Firstly, an employer must be able to show that a standard level of performance exists or can be said to exist. This may be done by reference to job descriptions, contracts of employment, etc.

- Secondly, the employer must investigate whether the employee is not performing according to the requirements of the position.

- Impact on the ability to perform: Here the impact of ill health on an employee's ability to perform should be assessed, e.g. will the employee still be able to perform his duties or what will the duration of the employee's absence from work be? The effect of the employee's disability on the safety of others and the likelihood of recovery should also be considered.

- The degree of incapacity and its cause may be relevant. For example, in the case of alcoholism and drug abuse, counselling and rehabilitation may be appropriate. Other relevant factors may include the nature of the job, the period of absence and the seriousness of the illness or injury.

- In cases of permanent incapacity, the employer should ascertain the possibility of securing alternate employment, or adapting the duties or work circumstances to accommodate the employee's disability. Alternatively, the avenue of medical boarding should be investigated.

6.2.2 PROCEDURAL FAIRNESS

- **Opportunity to Respond**
  The employee should submit reports. The employee should also be permitted to address the employer on these medical reports.

- **Alternatives**
  Alternative positions should be considered before the decision to terminate is made.

NOTE:

If dismissal is contemplated, the employer must satisfy himself that all other forms of sanction have been exhausted before resorting to such termination of service.

TERMINATION OF EMPLOYMENT

Upon termination of employment the employer is required to provide the employee(s) so affected with a letter stating that the employment contract has been terminates and a certificate of service containing the following information:

- Full name;
- Name and address of employer;
- The fact that the employee was employed under the scope and jurisdiction of the Motor Industry Main and related Agreements;
- Date of commencement and termination of employment;
- Nature of work performed (job description);
- Remuneration as at date of termination; and
- Upon request by the employee, reasons for termination of the employment contract.

NOTE:

Termination of employment, whether by the employee or the employer, is required to be effected in writing.

7. OPERATIONAL REQUIREMENTS (RETRENCHMENTS)

7.1 OPERATIONAL REQUIREMENTS EXPLAINED

The Act defines operational requirements to mean the economic, technological, structural or similar needs of an employer. Accordingly, dismissal for operational requirements refers to workers who become **redundant** or are **retrenched** because of, for example, declining sales, insufficient work, cash flow problems, changes in technology or methods of doing business, reorganising or restructuring the business, and closing down. For the sake of simplicity, retrenchments and redundancy will be assumed to have the same meaning.

7.2 WHEN DISMISSAL IS CONTEMPLATED

Section 189 of the Act deals with retrenchments in some detail, and the Act becomes relevant when an employer "contemplates" dismissal. The following part of Section 189 has been simplified, as might be relevant to the Motor Industry.

When management contemplates retrenchments, the employer must consult:

(a) Any registered trade union whose members are likely to be affected by the proposed dismissal; or

(b) If there is no such trade union, the employees likely to be affected or their representatives nominated for that purpose.

7.2.1 DISCLOSURE OF INFORMATION

Prior to the consultation meetings, **the employer must disclose in writing to the union (or employees) all relevant information,** including, but not limited to:

- The reasons for the proposed dismissals;
- The alternatives to retrenchment that management has considered, and the reasons for rejecting them – possible alternatives would include short-time, voluntary retrenchments, eliminating overtime, transfers to other jobs, retraining for other work, early retirement and reducing use of contract or casual workers;
- The number of employees likely to be affected and the job categories in which they are employed; The severance pay proposed;
- The proposed method for selecting the employees to be dismissed;
- The time when, or the period which, the dismissals are likely to take effect;
- Any assistance that the employer may be able to offer the employees;
- The possibility of the future re-employment of the employees concerned;
- The number of employees employed by the employer; and
- The number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

If the union (or employees) requests any further information, which is relevant to the proposed retrenchments, then that information should be disclosed. The employer must allow the union or the employees an opportunity during consultation to make representations. Management must consider and respond to those representations and if the employer does not agree with them must state the reasons for disagreeing.

7.2.2 THE CONSULTATION

Management and the union (or employees) must in the consultation engage in a meaningful joint consensus-seeking process and attempt to reach consensus on:

- Appropriate measures:
  - To avoid the retrenchments; To minimise the number of job losses;
  - To change the timing of the retrenchments; and
  - To mitigate the adverse effects of the dismissals;
- The method for selecting the employees to be retrenched; and

- The severance pay which will be paid.

7.2.3 SELECTION OF EMPLOYEES

Management must select the employees to be dismissed according to selection criteria:

- That have been agreed to with the union (or employees); or
- If no criteria have been agreed, selection must be by criteria that are fair and objective.

The criterion most favoured by unions is length of service – those workers with the shortest service should be first in line for retrenchment. This is the "LIFO" principle – last-in-first-out, but length of service might not be appropriate in terms of retaining skills, which are needed, in the business. Generally, a combination of criteria such as length of service, skills, experience, and remuneration should be used. While management needs to be fair to the workers being retrenched, it must also ensure that the employer retains the best team to ensure the continued success and survival of the business. Management should be wary about using disciplinary records as selection criteria.

7.3 A GENERAL PROCEDURE

When retrenchments are contemplated, contact your RMI office for advice, but the following general procedure can be adopted:

- Are the employees who are being considered for retrenchment members of a trade union?
- Is there a union which is representative among that group of employees?

If the answer to either question is "yes," then contact that union, preferably in writing (by email) and set up a meeting. The consultation process described above could require more than one meeting, and could be spread over a period of 2 – 3 weeks. Unions seldom demand much in the way of information (such as sales and profits figures), but management should be willing to disclose some basic information in order to justify the retrenchments.

7.4 NOTICE AND THE SEVERANCE PACKAGE

Formal notice of termination is given to the selected employees after the consultation has been concluded, and the severance package will generally consist of:

- Contractual notice pay; Pro-rata leave pay; Pro-rata holiday bonus; and
- Severance Pay – Two weeks for each completed year of service for the first four years' service, and one week after that. Two weeks, calculated on a pro-rata basis after four months of employment in the first year of employment.

DISMISSALS BASED ON OPERATIONAL REQUIREMENTS BY EMPLOYERS WITH MORE THAN 50 EMPLOYEES

Section 189A of the Act, applies to employers employing more than 50 employees. Different procedures apply to employers who employ more than 50 employees and contemplates retrenching:

- 10 employees, if employer employs up to 200 employees;
- 20 employees, if employer employs 201 to 300 employees;
- 30 employees, if employer employs 301 to 400 employees;
- 40 employees, if employer employs 401 to 500 employees; or
- 50+ employees, if employer employs more than 500 employees.

If the employer has retrenched in the preceding twelve months, the numbers must be considered when the employer contemplates a new retrenchment.
Either party may require the appointment of a Facilitator. Should a facilitator be required:

- The employer must request such in the notice served to the employees;
- Should the other party require a facilitator, it must request within fifteen days of the Notice which is served on them;
- The facilitator must be appointed by the Commission (i.e. the CCMA).

At the end of the 60 day facilitation process, or equivalent thereof, the employees or the union may give a notice to strike or refer the matter to the Labour Court if there is a dispute in terms of the reasons for retrenchment.

If an employer does not comply with a fair procedure, the other party may approach the Labour Court by way of an application for an order.

8. ORGANISATIONAL RIGHTS/TRADE UNIONS

8.1 TRADE UNIONS

There are two primary reasons why a union might make contact with an employer:

Organisational Rights

Your employees may have joined a trade union and they, together with the union, may wish to exercise the organisational rights given to them in terms of the Act. Those rights would include access for union officials to your premises, stop order facilities for union subscriptions, election of union representatives (shop stewards) and time off for representatives.

Individual Disputes

An employee might have a grievance concerning wages or working conditions. Alternatively, he was dismissed or retrenched and may believe he was treated unfairly and has turned to the union for help. Thus the union will want to represent his member in an attempt to resolve the matter through discussion with the employer.

- If the initial contact is by telephone, do not refuse out-of-hand to discuss the matter. **Make sure that you know the caller's name, the name of the union, its telephone number and the reason for the call**. If the official requests a meeting you can agree to a provisional time and date, but leave yourself sufficient time to prepare for the meeting and to obtain advice if necessary.
- If the initial contact is by email, do not delete the correspondence, read it carefully and make sure that you understand the contents. Acknowledge receipt of the correspondence, informing the union that you will attend to the matter and reply in due course.
- If the initial contact is an unexpected personal visit, **do not agree to an immediate meeting**, if it is not convenient. If the official is a stranger to you, establish the name of the union, the purpose for the visit and if possible, make an appointment for the official to return at some other time.

You will now have some breathing space in which to reflect on the union's requests. For the manager who is unaccustomed to dealing with unions, it would be wise to seek advice from the RMI. Dealing with a trade union is not difficult and with a little preparation, the average employer can cope quite easily with most union related matters. Outright refusal to deal with the matter would be short-sighted.

In terms of the Constitution, workers have the right to form and join trade unions and the right to participate in the activities and programmes of a trade union. Chapter II of the Act prohibits interference by anyone with an employee or a person seeking employment who wishes to exercise

those rights. Similar rights and protection exist for employers and employers' organisations.

The organisational rights are set out in some detail in Chapter III of the Act but the rights, which can actually be claimed by the union, will depend upon how representative the union is. One has to distinguish between sufficient and majority representivity.

8.2 SUFFICIENT REPRESENTIVITY

The concept of "sufficient" representivity is not defined in the Act and its interpretation will depend on the circumstances of each situation. The figure of 30% - 50% has been suggested as a guide. If a trade union could prove that it is sufficiently representative of the employees in the workplace, then it will be able to claim the following organisational rights:

Access, Meetings & Ballots at the Workplace

An office-bearer or official of the union may enter the employer's premises in order to:

- Recruit members;
- Serve their interests;
- Hold meetings outside working hours at the employer's premises; and
- Conduct ballots.

These meetings are subject to prior written permission from the employers, which permission may not be unreasonably withheld.

These rights are subject to time and place that are reasonable and necessary to safeguard life or property or to prevent the undue disruption of work. Unions, which are represented in the Bargaining Council (i.e. NUMSA, MISA), are given these rights automatically.

Stop Order Facilities

At the request of a union member, the employer must:

- Deduct union membership fees from his wages (a handling fee can be negotiated with the union for this administrative function); and
- Pay them over to the union.

Unions which are represented/party to the Bargaining Council (i.e. NUMSA and MISA) already have this facility in terms of the Main Agreement (no handling fee).

NOTE: In respect of any union, which is not party to the Bargaining Council, the employer must receive written authorisation from the Bargaining Council to deduct union fees. See Annexure F — Notification of Stop Order Facilities.

Leave for Union Activities

An employee who is an office bearer of a trade union is entitled to:

- Take reasonable leave during working hours;
- Paid and/or unpaid leave; and
- Perform the duties of his office.

Remember: An office bearer is not a shop steward.

The number of days leave, paid leave, if any, and the conditions attached to that leave must be negotiated between the union and the employer.

8.3 MAJORITY REPRESENTIVITY

The concept of "majority" representivity is also not defined in the Act, but the principle of 50% + 1 is the accepted yardstick.

If a trade union is able to prove that it represents a majority of the employees in a workplace, then in addition to the rights of access, meetings, ballots, stop order deductions and leave for an office bearer, the union will be able to claim the following organisational rights:

- Election of union representatives (shop stewards) – in a workplace, in which at least 10 members of the union are employed, those members are entitled to elect at least one representative;
- The Act describes the representative's duties;
- Specifies that he is entitled to reasonable time off, during working hours in order to perform his union duties and to be trained in such duties.

The Act provides a formula for the number of representatives in relation to the size of the workforce.

Disclosure of Information

The employer is required to disclose to the union representative all relevant information, which will help him to perform his duties effectively. Conciliation and arbitration can resolve disputes about the disclosure of information.

8.3.1 EXERCISING OF THESE RIGHTS

- The union must submit a written request to the employer in order to exercise one or

more of the organisational rights.

- A meeting must take place **within 30 days** with the union in order to draft an agreement as to the manner in which the rights will be exercised.
- Disputes, which may arise, may be settled by way of conciliation and arbitration.

8.4 SHOP STEWARDS (Referred to as "trade union representatives" in the Act)

A shop steward is an employee who is a member of a majority representative trade union and who is elected by trade union members in the workplace to represent their interests.

- To his fellow employees, he is the link between management and themselves (their spokesperson).
- To management he is:
  - An employee;
  - An union representative;
  - A link between management and employees; and
  - A link between management and the union.
- To the union, he is their representative in the workplace.

8.4.1 FUNCTIONS OF A SHOP STEWARD

<u>As a Shop Steward</u>

- Assist and represent in grievance matters;
- Assist and represent in disciplinary matters;
- Communicate with management;
- Attend to the employees' needs;
- Maintain workplace relations;
- Perform any other agreed function; and
- Report contraventions of any relevant agreements and laws to:
  - The employer;
  - The trade union; and
  - The Motor Industry Bargaining Council.

<u>As an Employee</u>

Shop stewards are subject to the same company rules, procedures and conditions as applicable to all employees.

8.4.2 RATIO OF SHOP STEWARDS (TRADE UNION REPRESENTATIVES)

Shop steward elections may only take place when the union represents a **majority** of all employees i.e. 50% + 1 of all the employees in the workplace.

Members	Number of Shop Stewards
At least 10	1
11 to 50	2
Up to 300	2 for first 50 members plus one for each additional 50 members up to the maximum of 7

Should a trade union have less than 10 members in a workplace, such union will not be entitled to elect a shop steward in terms of the Act. The employer may consider recognising one of these employees as a spokesperson. The spokesperson shall not be entitled to the rights of a "shop steward" or trade union representative in terms of the Act.

9. INDUSTRIAL ACTION

In this regard members must please take cognisance of the Main Agreement for the Motor Industry, as well as the Peace Clause contained therein.

9.1 THE RIGHT TO STRIKE

Workers have a right to strike, which includes the right to participate in secondary (sympathy) strikes, picket and protest action (stay-away). Those rights and the manner in which they may be exercised is spelt out in the Act, but they are restricted.

9.1.1 LIMITATIONS ON THE RIGHT TO STRIKE

Strike action is prohibited where the dispute is one, which in terms of the Act can be referred to an arbitrator or to the Labour Court.

Examples of such disputes would include: unfair dismissals, retrenchments and severance pay, unfair labour practices, unfair discrimination, organisational rights, pickets and picketing rules, among others.

9.1.2 THE LEGITIMATE STRIKE

Legitimate strikes are confined to collective bargaining disputes (disputes of interest), such as refusal to recognise a trade union, refusal to bargain and a dead lock in bargaining.

9.1.3 PROCEDURE FOR A PROPOSED STRIKE (PROTECTED STRIKE)

Employees who are contemplating strike action must first refer the dispute to the Bargaining Council, which is given 30 days to help the parties find a solution to their dispute by way of conciliation or mediation. This is an informal process, but if it is not successful and the employees wish to proceed with a strike, then they must give the employer at least 48 hours' written notice of their intention to do so.

The nature of the dispute can change this procedure slightly. If the dispute concerns a "refusal to bargain", then, before the 48-hour notice may be given, the Council must issue an "advisory award" (the general procedure for lockouts is similar).

If the dispute concerns a unilateral change to employees' terms and conditions of employment, then the employees can request their employer to stop or reverse the change, and management must comply within 48 hours. If the employer fails to comply, then the employees can strike without going through the Council or waiting 30 days.

9.2 SECONDARY (SYMPATHY) STRIKES

The right to strike includes sympathy strikes but there are restrictions. A secondary strike is prohibited unless the primary strike itself complies with the Act, the employer has been given at least 7 days' notice of the sympathy strike, and the nature and extent which it may have on the business of the primary employer is reasonable. The secondary employer can apply to the Labour Court for an interdict if these requirements have not been met.

9.3 PICKETING

A trade union may authorise a picket by its members and supporters, but only for the purpose of peacefully demonstrating in support of a protected strike or in opposition to a lockout. The picket can take place outside the employer's premises, or on the premises with permission, which permission may not be unreasonably withheld. The parties must try to agree on picketing rules before the protected strike or lockout or no picket can take place. If no such agreement is reached, the Commissioner must determine the rules in accordance with The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing, effective 01 January 2019.

9.4 PROTEST ACTION (STAY AWAY)

Employees may participate in protest action to promote or defend their socio-economic interests, but the protest cannot be used for purposes of a strike. The union which wishes to call for protest action must give notice to NEDLAC as to the nature of and reasons for the action, and must then give 14 days' notice of intention to proceed with the protest. Application can be made to the Labour Court to stop the protest.

9.5 COMPLIANT (PROTECTED) INDUSTRIAL ACTION

A strike, secondary strike, picket or protest action, including preparations for those activities which comply with the Act, are protected and employees are immune from criminal and civil prosecution and from dismissal.

Striking workers are not entitled to be paid, but if their remuneration includes payment in kind, such as accommodation or food, then that must be continued if it is requested by the workers. The monetary value of those items can later be recovered from the employees on application to the Labour Court.

Misconduct associated with industrial action is not protected, and can lead to disciplinary steps, including dismissal. Although employees cannot be dismissed for striking in compliance with the Act, they are not protected from bona fide retrenchment, provided that a proper retrenchment procedure is followed.

REACTION TO A PROTECTED STRIKE

It is automatically unfair to dismiss or discipline employees who embark on a strike, which complies with the Act. The employer must "sit it out", give in, or negotiate a settlement. The employer should contact the RMI for guidance.

9.6 NON-COMPLIANT (UNPROTECTED) INDUSTRIAL ACTION

Employees who participate in industrial action, which does not comply with the Act i.e. "wildcat" action, will lose the protection of the Act and they also risk disciplinary action, including dismissal.

REACTION TO AN UNPROTECTED STRIKE ACTION

The employer should contact the RMI to discuss the course of action which management intends to adopt.

- The employer should warn the employees their strike is unlawful, and that they place their jobs at risk.
- The employer must contact the union official.
- If the employees persist with the strike, they should be issued with a clear and unambiguous ultimatum that they face dismissal if they don't return to work. The ultimatum should be given in writing.
- The employer must allow employees sufficient time to reflect on the ultimatum given. Should the employees not return to work, the employer should issue further written warnings.
- The employer must take into account the seriousness of the misconduct and the efforts which the employees made in order to comply with the Act.
- The employer must ensure that sufficient warning is given to the employees as well as a fair hearing, prior to considering dismissals.

10. SALE OF A BUSINESS

The intention of Section 197 of the Act, as amended, is to protect the rights and interests of employees during the sale of a business and the subsequent transfer of ownership between the Seller and the Buyer of the business.

- The employment contracts that exist between the Seller and his employees automatically transfer to the Buyer, together with all the accrued rights and benefits. Neither the Seller nor the Buyer of the business has the sole discretion to agree to anything to the contrary.

- Only in the event that the Seller and the employees agree to an alternative arrangement, such as retrenchment (in accordance with Section 189 of the Act), the Seller and the Buyer may agree that the Buyer does not take-over the employees as part of the going concern. However, the Seller has the discretion to refuse agreement on this regard in which case the employees' contracts of employment automatically transfer over to the Buyer as part of the going concern.

- The Buyer of the business has absolutely no discretion in relation to acceptance of the transfer of employment contracts.

- In the event that the Seller is insolvent or his estate is being wound-up, the employment contracts still transfer over to the Buyer. However, the Seller will remain liable for the disbursement of the value of accrued rights and obligations in relation to the employees.

- The Buyer will be legally liable for any wrongful act committed by the Seller before or on date of transfer of ownership.