

LABOUR NEWS

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BEYOND UNFAIR: THE SEVERE CONSEQUENCES
OF AUTOMATIC DISMISSALS

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Automatic Unfair Dismissals

One of the most critical aspects of the Labour Relations Act in South Africa is *Section 187*, which addresses automatic unfair dismissals, as it outlines specific circumstances under which a dismissal is deemed automatically unfair, potentially leading to significant consequences.

Understanding Automatic Unfair Dismissals:

Automatically unfair dismissals are covered by section 187 of the Labour Relations Act 66 of 1995 as amended ("LRA").

An automatically unfair dismissal is different from an "ordinary" dismissal, in other words a dismissal for reasons relating to the employee's conduct, capacity or the employer's operational requirements. The essence of the unfairness in these situations comes from the reason for the dismissal. The reasons are regarded by the law as being so serious that such dismissals are automatically unfair.

Automatically unfair dismissals are often related to the infringement of a fundamental right. Freedom of association, for instance, is a fundamental right enshrined in section 23 of the Constitution of the Republic of South Africa, 1996. Where the reason for the dismissal relates to an infringement of that fundamental right, it is an automatically unfair dismissal. So too, the right to strike is a fundamental right; accordingly, a dismissal for participation in a protected strike (a strike which complies with the LRA) will be automatically unfair.



If a dispute relating to an automatically unfair dismissal remains unresolved after conciliation by the CCMA or bargaining council, the dismissed employee may refer the dispute to the Labour Court for adjudication. If the dismissal is found to be unfair the Labour Court may award the employee compensation of up to 24 months' remuneration. The CCMA does not have the power to arbitrate disputes involving alleged automatically unfair dismissals unless the employee and employer agree, in writing, to arbitration by the CCMA.

Dismissing an employee for any of the following reasons could be an automatically unfair dismissal:

- ✓ **Section 187 (1): If an employer in dismissing an employee acts contrary to section 5 of the LRA** – If an employer dismisses an employee because of his/her membership of a trade union or involvement with the trade union's lawful activities, it may amount to an automatically unfair dismissal.
- ✓ **Section 187 (1) (a): Dismissal of an employee because the employee participated in or supported, or indicated an intention to participate in or support a strike or protest action that complies with the provisions of the LRA** – if an employee is dismissed for involvement in a protected strike (a strike which complies with the provisions of the LRA). Dismissal is an infringement of the right of employees to strike in compliance with prescribed procedures in order to further their collective interests.
- ✓ **Section 187 (1) (b): Dismissal of an employee because an employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of the LRA or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health.** - This section protects employees from dismissal if they are not on strike, but refuse to assist the employer in carrying out the work of those employees who are lawfully on



strike as this would weaken the right to strike for those participating in the protected strike.

- ✓ **Section 187 (1) (c): A refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer.**- If employees do not want to accept, for example, a wage increase offered by the employer during a strike, the employer may pressurise the employees to accept the wage increase by implementing a lockout, but may not dismiss the employees for refusing to accept the employer's demand as such action would amount to an automatically unfair dismissal.
- ✓ **Section 187 (1) (d): Dismissal of the employee because the employee took action or indicated an intention to take action against the employer by exercising any right conferred by the LRA or participated in any proceedings in terms of the LRA.** – If an employee refers an unfair labour practice dispute to a bargaining council or CCMA or indicated that she/he intends to refer the dispute, a dismissal for that reason would be automatically unfair.
- ✓ **Section 187 (1) (e): Dismissal of an employee because of the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy** - An employee may not be dismissed because she is pregnant or intends to fall pregnant. The Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child outlines the obligations of employers towards pregnant and breast-feeding employees in order to protect the health and safety of these employees.
- ✓ **Section 187(1) (f): The employer unfairly discriminated against an employee, directly to indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility** - An employee may not be dismissed because of his/her race, gender, sex, political or religious beliefs, disability, age, etc. unless the employer can show that this relates to an essential requirement of the job. Dismissal based on age may not be automatically



unfair if the employer can show that the employee has reached the agreed or normal retirement age for that job.

✓ **Section 187 (1) (g): Dismissal of an employee as a result of a transfer, or a reason related to a transfer, contemplated in section 197 or 197A of the LRA. -**

This refers to instances where the employer dismisses an employee because of the transfer of the business as a going concern (section 197 of the LRA) or in circumstances of insolvency (section 197A of the LRA). In such instances the dismissal is not due to misconduct, incapacity or the employer's operational requirements.

✓ **Section 187 (1) (h): Dismissal of an employee as a result of a contravention of the Protected Disclosures Act 26 of 2000 by the employer, on account of an employee having made a protected disclosure defined in that Act.-**

A protected disclosure relates to an employee 'blowing the whistle' on his/her employer. In other words, disclosing to an appropriate authority or person the conduct of the employer or fellow employees. Dismissing an employee who in good faith makes a protected disclosure may amount to an automatically unfair dismissal.

Safeguarding Your Business: The Benefits of Understanding Section 187

- ✓ **Legal Compliance:** Awareness and understanding of *Section 187* helps to ensure compliance with labour laws and prevent costly legal disputes.
- ✓ **Fair Treatment:** Emphasizing fair treatment of employees fosters trust and a positive workplace culture, reducing the likelihood of grievances and disputes.
- ✓ **Risk Management:** Proper knowledge of the grounds for automatic unfair dismissals aids in managing risks and making informed decisions regarding disciplinary actions.



- ✓ **Prohibition of Unfair Discrimination:** Understanding Section 187 is crucial for recognizing and avoiding unfair discrimination in dismissal processes. This section mandates that dismissals should not be based on unfair criteria such as race, gender, age, disability, or any other protected characteristic. Ensuring adherence to these principles helps maintain a fair and equitable work environment, preventing legal challenges and promoting a culture of inclusivity and respect.

Hypothetical Case Study: Automatic Unfair Dismissal and the Labour Court
Case: Dlamini v Technician Solutions (Pty) Ltd

Background:

Thandiwe Dlamini was a highly regarded senior software developer at Technician Solutions (Pty) Ltd with a five-year history of exceptional performance.

The Incident:

Following Dlamini's announcement of her pregnancy, her work environment shifted noticeably. Her workload increased substantially, she was excluded from crucial project meetings, and her previously positive performance reviews became less favorable. Instead of issuing a final written warning, the company initiated a counseling process, citing concerns about her performance.

Despite these challenges, Dlamini consistently met her targets and maintained a high standard of work. Unexpectedly, she was dismissed on grounds of operational requirements. Convinced that this was a pretext for terminating her employment due to her pregnancy, Dlamini believed her dismissal constituted an automatically unfair dismissal.



Legal Proceedings:

Dlamini referred the matter to the Commission for Conciliation, Mediation, and Arbitration (CCMA). When conciliation failed to yield a resolution, the dispute proceeded to arbitration. The commissioner ultimately ruled in favor of the employer, concluding that the dismissal was based on a genuine operational requirement.

Unsatisfied with this outcome, Dlamini appealed the decision to the Labour Court. She argued that the commissioner erred in finding the dismissal fair and contended that her pregnancy was the true motive behind her termination.

Labour Court Proceedings:

The Labour Court meticulously examined the evidence presented by both parties, focusing on the following:

- ✓ Whether the employer successfully demonstrated a genuine operational requirement for retrenchment.
- ✓ The fairness of Dlamini's selection for dismissal.
- ✓ The employer's efforts to explore alternative employment opportunities for Dlamini.
- ✓ The potential causal link between the timing of Dlamini's dismissal and her pregnancy.
- ✓ Evidence of discriminatory treatment or other factors indicating the dismissal was a pretext for terminating Dlamini's employment due to pregnancy.

Potential Outcomes:

The Labour Court could:



Uphold the CCMA Award: If the court determined the commissioner's decision to be correct, it would dismiss Dlamini's appeal.

Set Aside the CCMA Award: In the event of a material error of law or fact by the commissioner, the court could overturn the award and remand the case back to the CCMA for a new arbitration.

Substitute its Own Decision: Under specific circumstances, the Labour Court might replace the CCMA's decision with its own, declaring the dismissal either fair or unfair or even automatically unfair.

The final outcome would hinge on the persuasiveness of the evidence presented by both parties and the strength of their legal arguments.

Note: This case study is hypothetical and does not reflect an actual case. The facts and potential outcomes are provided for illustrative purposes only.

Conclusion

Understanding and adhering to the provisions of *Section 187* of the Labour Relations Act is paramount for employers and employees alike. Automatic unfair dismissals carry severe consequences for employers, including substantial compensation payouts.

By comprehending the grounds for automatic unfair dismissals, employers can proactively implement measures to prevent such occurrences. This includes fostering a workplace culture that respects employee rights, adhering to fair labour practices, and providing comprehensive training to management on labour law compliance.

Employees, on the other hand, must be aware of their rights under Section 187 to protect themselves from unfair treatment. Knowledge of the law empowers



employees to recognize potential violations and take appropriate action to challenge unfair dismissals.

Ultimately, a thorough understanding of automatic unfair dismissals contributes to a more equitable and just workplace for all.

Empower your workplace with knowledge and fairness—because a legally sound team is a successful team!

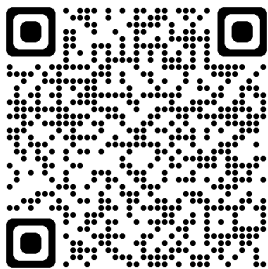
Sincerely yours!

Chanté Oosthuizen

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Minuteman Press Silverton opened in March 2006 at the Silverwater Crossing Shopping Centre in Silverton, Pretoria.

In February 2010 we relocated to the Spaces Lifestyle Centre in Simon Vermooten Road, and in May 2014 we relocated to the N4 Gateway Industrial Park. In December 2018 we relocated to Six Fountains Adventure Centre. We are in the Silver Lakes area.

We were the 40th Minuteman Press franchise in South Africa (there are over 900 worldwide). The Head office is in New York, USA. Minuteman Press has been in South Africa since 1997.

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COMPANY HISTORY

We're proud of the strong roots we've established in our community. Support for each other in the community is vital and contributes to the social upliftment of our area.

Our Staff
Leon and Wendy Krause are the owners of Minuteman Press Silverton.

Although we're proud of our products, services, and technology, nothing matches the pride we have in our staff. You see, we learned long ago that we're really in the business of building relationships. For that reason, we put a premium on hiring only the most qualified individuals to serve on our team.

Every person on our staff is committed to providing excellent customer service and producing high-quality products and services. As you work with us in the future, we're confident that you'll find this to be true.



Minuteman Press International, the world's leading design, marketing and printing franchise celebrating 50 years in business, has been awarded the 2024 #1 Printing & Marketing Franchise ranking by Entrepreneur Magazine. The Minuteman Press franchise team has now achieved this 1st rating for an impressive 33 years and 21 years in a row.

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