

LABOUR AND EMPLOYMENT

1. Labour Relations Act No. 66 of 1995

GN 1517 of 16 July 1999: NOTICE OF CODE OF GOOD PRACTICE ON DISMISSAL BASED ON OPERATIONAL REQUIREMENTS

Note:—This notice was published in Gazette 20254 of 16 July 1999.

NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

Notice is hereby given in terms of section 203 (2) of the Labour Relations Act, 1995 (Act No. 66 of 1995), that the National Economic Development and Labour Council has issued under section 203 (1) of that Act a code of good practice on dismissal based on operational requirements as set out in the Schedule.

SCHEDULE

Code of Good Practice: Dismissal based on operational requirements

(1) The Labour Relations Act, 1995 (Act No. 66 of 1995) (“the Act”) defines a *dismissal* based on the *operational requirements* of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a *dismissal* for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. 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 the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.

(2) *Dismissals* for *operational requirements* have been categorised as “no fault” *dismissals*. In other words, it is not the *employee* who is responsible for the termination of employment. Because retrenchment is a “no fault” *dismissal* and because of its human cost, *the Act* places particular obligations on an employer, most of which are directed toward ensuring that all possible alternatives to *dismissal* are explored and that the *employees* to be dismissed are treated fairly.

(3) The obligations placed on an employer are both procedural and substantive. The purpose of consultation is to enable the parties, in the form of a joint problem-solving exercise, to strive for consensus if that is possible. The matters on which consultation is necessary are listed in section 189 (2). This section requires the parties to attempt to reach consensus on, amongst other things, appropriate measures to avoid *dismissals*. In order for this to be effective, the consultation process must commence as soon as a reduction of the workforce, through retrenchments or redundancies, is contemplated by the employer, so that possible alternatives can be explored. The employer should in all good faith keep an open mind throughout and seriously consider proposals put forward.

(4) *The Act* also provides for the disclosure by the employer of information on matters relevant to the consultation. Although the matters on which information for the

purposes of consultation is required are specified in section 189 (3), the list in that section is not a closed one. If considerations other than those that are listed are relevant to the proposed *dismissal* or the development of alternative proposals, they should be disclosed to the consulting party. In the event of a disagreement about what information is to be disclosed any party may refer the dispute to the CCMA in terms of section 16 (6) of *the Act*

(5) The period over which consultation should extend is not defined in *the Act*. The circumstances surrounding the consultation process are relevant to a determination of a reasonable period. Proper consultation will include:

- (a) The opportunity to meet and report back to *employees*;
- (b) the opportunity to meet with the employer; and
- (c) the request, receipt and consideration of information.

(6) The more urgent the need by the business to respond to the factors giving rise to any contemplated termination of employment, the more truncated the consultation process might be. Urgency may not, however, be induced by the failure to commence the consultation process as soon as a reduction of the workforce was likely. On the other hand, the parties who are entitled to be consulted must meet, as soon, and as frequently, as may be reasonably practicable during the consultation process.

(7) If one or more *employees* are to be selected for *dismissal* from a number of *employees*, the Act requires that the criteria for their selection must be either agreed with the consulting parties or, if no criteria have been agreed, be fair and objective criteria.

(8) Criteria that infringe a fundamental right protected by *the Act* when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are neutral on the face of it should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.

(9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally the test for fair and objective criteria will be satisfied by the use of the “last in, first out” (LIFO) principle. There may be instances where the LIFO principal or other criteria need to be adapted. The LIFO principle, for example, should not operate so as to undermine an agreed affirmative action program. Exceptions may also include the retention of *employees* based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should, however, be treated with caution.

(10) *Employees* dismissed for reasons based on the employer’s *operational requirements* are entitled to severance pay of at least one week’s remuneration for each completed year of continuous service with the employer, unless the employer is exempted from the provisions of section 196. This minimum requirement does not relieve an employer from attempting to reach consensus on severance pay during the period of consultation. The right of the trade union, through collective bargaining, to seek an improvement on the statutory minimum severance pay is not limited or reduced in any way.

(11) If an *employee* either accepted or unreasonably refused to accept an offer of alternative employment, the employee’s right to severance pay is forfeited.

Italicised words and phrases bear the same meaning as accorded to them by section 213 of the Labour Relations Act, 1995.

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Reasonableness is determined by a consideration of the reasonableness of the offer of alternative employment and the reasonableness of the *employee's* refusal. In the first case, objective factors such as remuneration, status and job security are relevant. In the second case, the *employee's* personal circumstances play a greater role.

(12) (1) *Employees* dismissed for reasons based on the employer's *operational requirements* should be given preference if the employer again hires *employees* with comparable qualifications, subject to:

- (a) The employee, after having been asked by the employer, having expressed within a reasonable time from the date of dismissal a desire to be rehired.
- (b) A time limit on preferential rehiring. The time limit must be reasonable and must be the subject of consultation.

(2) If the above conditions are met, the employer must take reasonable steps to inform the employee, including notification to the representative trade union, of the offer of re-employment.

GNR.1393 of 19 December 2018: Picketing Regulations
(Government Gazette No. 42121)

DEPARTMENT OF LABOUR

I, **MILDRED NELISIWE OLIPHANT** Minister of Labour, hereby under section 208 of the Labour Relations Act, 1995 (Act No. 66 of 1995) and after consulting NEDLAC, made the regulations in the Schedule with effect from **1 January 2019**.

(Signed)

M N OLIPHANT, MP
MINISTER OF LABOUR

DATE: 12/12/2018

1. Definitions.—In these regulations, unless the context indicates otherwise—

Any word or expression to which a meaning has been assigned in the Labour Relations Act, 1995 (Act 66 of 1995) bears that meaning;

“**bargaining council**” means the bargaining council with the jurisdiction over the parties to the dispute;

“**certificate of non-resolution**” means the certificate contemplated in section 64 (1) (a) (i) of the Act;

“**Code**” means any code of good practice published in terms of section 203 of the Act dealing with picketing;

“**collective agreement**” means any collective agreement that—

- (i) regulates picketing; and
- (ii) is binding on the trade union or employees party to the dispute;

“**conciliator**” means in respect of a dispute that may give rise to a protected strike or lockout and referred to—

- (i) the Commission, a commissioner appointed by it to conciliate the dispute;
or
- (ii) a bargaining council, a person appointed by it to conciliate the dispute;

“**A dispute**” means a dispute that may give rise to a protected strike or lockout and which has been referred to the Commission or a bargaining council in accordance with section 64 (1) (a)

“**the Act**” means the Labour Relations Act, 1995 (Act 66 of 1995).

2. Agreement on picketing rules.—(1) The Commission or bargaining council must notify the parties to a dispute that, if the dispute is not resolved, a trade union may not engage in a picket unless—

- (a) there is a collective agreement regulating picketing;
- (b) an agreement on picketing rules is reached in the conciliation proceedings;
or
- (c) picketing rules are determined by the Commission in terms of section 69 (5) of the Act.

(2) The Commission or bargaining council must in that notice request that the trade union submit a copy of any collective agreement regulating picketing to the conciliator.

(3) If the appointed conciliator is satisfied that there is no collective agreement that regulates picketing, the conciliator must, before issuing a certificate of non-resolution, attempt to secure an agreement between the parties to the dispute on picketing rules using the default picketing rules as a basis.

3. Determining picketing rules.—(1) If there is no collective agreement and the parties to the dispute do not agree on picketing rules, the commissioner must determine the rules in accordance with the default picketing rules and in doing so must take account of—

- (a) the particular circumstances of the workplace or other premises where it is intended that the right to picket is to be exercised;
- (b) any relevant code of good practice; and
- (c) any representations made by the parties during the course of the conciliation proceedings.

(2) If the parties to the dispute fail to make representations for the purpose of determining picketing rules or provide the conciliator with the necessary information, the conciliator may—

- (a) in the case of the employer, designate the owner or senior manager of the employer as the person appointed in terms of clause 8.1 of the default picketing rules;
- (b) in the case of the trade union, not determine the picketing rules until the information required in respect of the union convener and marshals has been submitted to the conciliator.

(3) The conciliator must determine the picketing rules and issue them at the same time as the certificate of non-resolution is issued to them.

4. Binding nature of the picketing rules.—A collective agreement is an agreement contemplated in section 69 (4) and regulation 2 (3), and picketing rules determined in terms of section 69 (5) and regulation 3.

5. Distribution of picketing rules.—(1) If there is a collective agreement or an agreement reached in terms of section 69 (4) of the Act and regulation 2 (3), the agreement must be submitted by the trade union to—

- (a) the responsible officer appointed in terms of section 2 (4) of the Regulation of Gatherings Act, 1993 (Act 205 of 1993);
- (b) the member of the South African Police Services contemplated in terms of section 2 (2) of that Act.

(2) If the conciliator has determined picketing rules in terms of section 69 (5) and regulation 3, the conciliator must in addition to the persons referred to in subregulation (1) give copies of the picketing rules to the parties to the dispute.

(3) The employer party to the dispute must distribute copies of the picketing rules to—

- (a) its appointed representative and the managers on duty during the strike or lockout;
- (b) its security personnel or any private security company contracted to protect the employer's property and the safety of person on the property; and

- (c) place copies of the rules on the notice boards to which employees have access.
- (4) The trade union party to the dispute must—
 - (a) distribute copies of the picketing rules to its convenors and marshalls; and
 - (b) take the necessary steps to ensure that the convenors, marshals and picketers understand the rules.

DEFAULT PICKETING RULES

Established in terms of section 69 (5) of the Labour Relations Act 66 of 1995 (“the LRA”)

NOTES

1. These Rules are default rules applicable if the employer and trade union parties to the dispute fail to conclude an agreement on picketing rules in terms of section 69 (4) of the LRA. The Rules are made in terms of section 69 (5) of the LRA and the Commissioner must impose these Rules, in the absence of agreement.
2. These Rules are intended to apply to protected pickets only. The Commissioner must ensure that all the requirements in terms of section 69 of the LRA for a lawful picket have been complied with before issuing these Rules, in particular that the picket is authorised.
3. These Rules are generic and intended to cover varying circumstances, including—
 - 3.1. when strike action or picketing has not yet commenced;
 - 3.2. when parties need to revisit picketing rules;
 - 3.3. different kinds of employment and workplaces.
4. These Rules include substantive and procedural rights of the parties deriving from the Act, which the Commissioner or the parties do not have the power to amend.
5. These Rules are intended to apply to secondary pickets as well as primary pickets, subject to the different procedural requirements that may apply.

1 LEGAL CONTEXT

- 1.1 These Rules are drafted in accordance with—
 - 1.1.1 Section 17 of the Constitution of the Republic of South Africa, 1996, which guarantees the right to picket peacefully and unarmed;
 - 1.1.2 Section 69 of the LRA, which regulates the right of members and supporters of a registered trade union to picket;
 - 1.1.3 The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing;
- 1.2 Where these Rules are silent, the relevant provisions of the Constitution, LRA and the Codes apply.
- 1.3 The meaning of terms defined in the LRA apply to the use of the terms in these Rules unless the context indicates otherwise.

2 PURPOSE OF THE PICKET

- 2.1 These Rules are determined in terms of section 69 (5) of the LRA in the absence of an agreement between the parties to the dispute on picketing rules in respect of an authorised picket—
 - 2.1.1 in support of the protected strike commencing / having commenced* on (date)

or

2.1.2 in opposition to a lock-out by the employer commencing / having commenced* on (date)

or

2.2 in any protected secondary strike involving employers (name and address of the workplace(s) of those employers).

3 CIRCUMSTANCES OF WORKPLACE

In establishing these Rules, the following circumstances of the workplace or other premises where pickets are intended have been taken into account—¹

3.1 (It is necessary to itemise the particular nature of the circumstances relating to the nature of employment and the workplace that have been taken into account in formulating these rules)

4 LOCATION OF PICKET

4.1 The picket may only be held at the following places outside the employer's workplaces—

4.1.1 (details of the place or places within which a picket may be held at the address or addresses of the employer's workplace or workplaces described in Annexure A).

4.2 The picket may be held at the following places inside the employer's workplaces if the employer has agreed to a picket being held in those places—

4.2.1 (details of the agreed place or places inside the employer's premises described in Annexure A)

4.3 If the employer has not agreed to the picket being held within its premises, the Commissioner may determine that the picket be held within the following places in the premises if the Commissioner considers the employer's refusal to permit a picket inside its premises to be unreasonable—

4.3.1 (details of the place or places inside the employer's premises described in Annexure A)

4.4 If picketing is to take place within a shopping mall, business complex or business park in which employers share private or public premises, the Commissioner may, but only after consultation with all interested parties, determine that the picket be held within the following places and subject to such terms as the Commissioner considers reasonable—

4.4.1 (details of the place or places outside the mall, complex or business park described in Annexure A) and

4.4.2 (details of the place or places inside the mall, complex or business park described in Annexure A)

5 DETAILS OF PICKET

5.1 Date and duration

¹ See s 69 (5) (a). See also *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 2681 (LC) at par 31: "The matrix of permissible conduct that evolves ultimately as the picketing rules is a particular permutation that balances logistics, the nature of the business, the industrial relations history of the enterprise and the union with the impact of the picket so that the rules are determined not too narrowly or too broadly to exacerbate industrial conflict or obstruct the substantive resolution of the dispute."

- 5.1.1 Picketing may begin at or after (time) on (date) and may continue until the settlement of the dispute, subject to clause 5.2.
 - 5.1.2 Picketing may take place between (times) on every working day for the duration of the strike.
 - 5.1.3 If there is any breach of clauses 4, 5.5 or 6 of these Rules, the trade union must suspend its picket until it has satisfied the Commissioner that it can exercise control over its picket.
- 5.2 Number of pickets—
- 5.2.1 A maximum of (...) persons may take part in the picket at any given time at each location(s) specified in clause 4 above and set out in Annexure A.²
 - 5.2.2 Only members of the trade union and other employees of the employer may take part in the picket.

6 NATURE AND CONDUCT OF PICKET

- 6.1 Picketers must at all times conduct themselves in a peaceful, unarmed and lawful manner and not interfere with the constitutional rights of other persons.
- 6.2 Subject to clause 6.3, picketers may—
 - 6.2.1 carry placards;
 - 6.2.2 hand out pamphlets;
 - 6.2.3 chant slogans, sing and dance;
 - 6.2.4 be addressed by union officials; and
 - 6.2.5 approach and peacefully seek to persuade clients and customers of the employer, members of the public, other employees who are not on strike and replacement workers not to enter the premises and/or to support the strike.
- 6.3 The Commissioner may limit the activities limited in clause 6.2 in respect of specific locations and detail them in Annexure A.³
- 6.4 Picketers may not—
 - 6.4.1 forcefully prevent clients and customers of the employer, members of the public, other employees who are not on strike and replacement workers from entering or leaving the premises of the employer;
 - 6.4.2 commit any action which may be unlawful, such as intimidating, coercing, threatening or assaulting any person or causing damage to any property;
 - 6.4.3 wear masks; or
 - 6.4.4 have any dangerous weapons or inflammable materials in their possession.

2 The Commissioner may set different numbers of pickets for particular locations. For example, a Commissioner may set 10 pickets at a time outside a shopping mall or business complex but only two pickets outside the premises of the employer in the mall or complex.

3 The Commissioner may for example limit the activity of a picket in a shopping mall or business complex to carrying placards and handing out pamphlets.

- 6.5 For the purposes of these Rules, dangerous weapons includes the dangerous objects listed in clause 22 (2) of the Code of Good Practice on Collective Bargaining and Industrial Action.

7 CONTROL OF PICKETS

- 7.1 The trade union must appoint a member or official as convenor with responsibility to oversee the picket as well as a person to oversee the picket in the absence of the convenor.
- 7.2 The convenor will at all times during the picket have a copy of these Rules in his possession for purposes of reference.
- 7.3 The employer will provide the convenor with the name and contact details, including mobile number, of the person appointed to represent the employer in matters related to the picket.
- 7.4 The trade union will also appoint the following number of marshals to monitor the picket at each location where it is taking place—
- 7.4.1 (number of marshals for each of the locations at which the picket is to take place)
- 7.5 The marshals will—
- 7.5.1 have the telephone numbers of the convenor and of the person appointed to oversee the picket in the absence of the convenor;
- 7.5.2 wear armbands and/or vests to identify themselves as marshals; and
- 7.5.3 be present from the start to the end of each day of the picket.
- 7.6 The names and telephone numbers of the convenor and marshals must be set out in Annexure B.
- 7.7 Any change to a convenor and marshal must be sent by a text message to the persons listed in Annexure B.

8 EMPLOYER CONDUCT

- 8.1 The employer must—
- 8.1.1 appoint a person to liaise with the convenor and marshals on its behalf to ensure compliance with this agreement; and
- 8.1.2 receive communications as and when requested to do so by the union.
- 8.2 The employer or any person in authority at the workplace or acting on the employer's behalf may not—
- 8.2.1 in any way hinder or obstruct the lawful conduct of the picket;
- 8.2.2 undermine any employee's right to participate in the picket or discipline or threaten to discipline any employee for doing so;
- 8.2.3 engage in or permit conduct which is provocative or may incite conflict; or
- 8.2.4 carry a weapon of any kind while in contact with the pickets.
- 8.3 Ensure that any private security company employed by the employer complies with the requirements relating to such companies under the Code of Good Practice on Collective Bargaining and Industrial Action.

9 PICKETING ON EMPLOYER'S PREMISES

- 9.1 If picketing is to take place on the employer's premises, the employer must provide the trade union with written confirmation of the health and safety rules to be observed before, during and after the picket.
- 9.2 The employer must make the following facilities available before the commencement of the picket—
 - 9.2.1 toilet facilities to be used by the participants in the picket;
 - 9.2.2 running water to be used by participants for drinking and hygiene purposes;
 - 9.2.3 appropriate shelter within the designated picketing area(s); and
 - 9.2.4 a telephone to be used by the convenor, marshals, shop stewards or other responsible union officials for purposes of ensuring the proper conduct of the picket.
- 9.3 Participants in a picket on the employer's premises shall, in addition to the requirements set out in paragraph 7 above—
 - 9.3.1 remain within the designated picketing area(s);
 - 9.3.2 observe the health and safety rules and regulations applicable in the workplace;
 - 9.3.3 refrain from causing any damage to property or allowing any damage to be caused; and
 - 9.3.4 leave the premises and the facilities in the condition in which they found it.

10 DISPUTE RESOLUTION

- 10.1 Any dispute about the interpretation or application of these Rules or any alleged breach thereof shall be dealt with in accordance with section 69 (8), (9), (10) and (11) of the LRA. This does not affect any other right that any person may have in terms of the LRA or any other law.
- 10.2 It is recorded that the employer, the union and persons taking part in the picket are subject to the protections and provisions set out in section 67 of the LRA.

11 POLICE INVOLVEMENT

- 11.1 These Rules do not affect the right of any person to ask the South African Police Service or any security organisation responsible for maintaining safety and security at the workplace to investigate or deal with any unlawful conduct or alleged unlawful conduct.
- 11.2 If this happens, the employer and the union undertake to cooperate with the police or security organisation in the performance of their duties and the union undertakes to do everything possible to ensure that its members and supporters will do the same.

12 TERMINATION

These Rules will remain in effect until the settlement of the dispute, the termination of the strike, termination of the picket by the union or until it is terminated or reviewed by mutual agreement, whichever may come first.

**ANNEXURE A
DESCRIPTION OF PLACE OR PLACES FOR THE PICKET**

Address/es

- 1.

2.

Physical location⁴

3. (number of pickets) (limitation of activity)

4. (number of pickets) (limitation of activity)

**ANNEXURE B
NAMES AND DETAILS OF PARTICIPANTS**

Commissioner

1. (Name, email address and mobile telephone number)

Convenor

2. (Name, designation of status⁵, email address and mobile telephone number)

Employer representative

3. (Name of person appointed in terms of clause 8.1, designation of status, email address and mobile telephone number)

Marshalls

4. (Name, work number and mobile telephone number)

5. (Name, work number and mobile telephone number)

6. (Name, work number and mobile telephone number)

7. (Name, work number and mobile telephone number)

(Editorial Note: Wording as per original *Government Gazette*.)

4 The physical location may be described in words or drawn or both. So for example the location may be described as 5 metres from the entrance to the employers premises on XX road and extend no more than 2 metres onto the pavement – accompanied with a drawing to that effect.

5 Whether a trade union official, shop steward or member. If a shop steward or member, then the employee’s work number must be included)

