UNIT 7

Collective Bargaining and organisational rights
Learning Outcomes

After studying this unit, the student should be able to:

• Discuss the role of collective bargaining in the Namibian labour system
• Analyse the concept of the employer’s duty to recognise and bargain with a trade union
• Explain the legal status of collective agreements
• Discuss the various bargaining levels and structures provided for by legislation
• Evaluate how duties concerned with collective bargaining and organisational rights are dealt with
Key vocabulary

- Collective – a **group** of **entities**
  - _share / motivated by one common issue / interest_
  - _work together on specific project_

- Bargaining /haggling/dickering
  - type of **negotiation** where **buyer & seller of goods/ service dispute** the price and exact transaction that will occur, & eventually come agreement

- Collective bargaining – process through which TU & employer **negotiate scope of the employment relationship/related issues**
Key vocabulary continued

• Collective agreement – establishes wages, hours, promotions, benefits, and employment terms etc. & procedures of handling disputes

• Duty to bargain – *mutual obligation* of management and TU to meet and discuss wages, working hours etc. in good faith
  – such bargaining require neither party to consent to binding proposal, or make any concessions.

• Negotiation – dialogue between two/ more people / parties, to reach an understanding / resolve a point of difference/ gain advantage / to produce an agreement on a course of action. To bargain for individual / collective advantage, OR craft outcomes to satisfy various interests of people / parties in negotiation
What is collective bargaining?

- Very important process in a labour relationship
- Plays major role of building harmonious employment relationships
- Premised on joint purpose of the employment relationship through cooperation, commonality of interest, trust and comprise.
Definition

- Method of determining **terms and conditions** of employment
  /**regulating** the employment relationship
  -utilises the process of negotiation between employers and employees
  -intended **to result in an agreement applicable across group of employees** Salamon (1998:305).
- Mechanism of reconciling conflicting interests.
- Helps **build constructive labour relations** by **identification of mutual goals & realisation of common interests**.
How Labour Act creates a framework that promotes constructive bargaining.

- By extending *organisational rights* to TUs – e.g. right to enter employer’s premises; leave to attend union activities; workplace reps.; access to information etc.
- By establishing various forums, e.g. bargaining councils, statutory councils and workplace forums.
Duty to bargain

• Failure to Bargain constitute unfair labour practice
• Bargaining in good faith vital in limiting spate of industrial unrests
• In SA courts impose general duty to bargain
• TUs. use duty to bargain to gain recognition and a number of organisational rights.
Organisational rights

- Granted TUs by LRA as precursor to CB
- Extended to **registered** TUs.
- Extended to TUs who have established a threshold of representativity
- Includes access to employers’ premises to recruit union members; deduction of dues; appointment of reps.; leave for TU activities, and access to information.
Levels of representation

• Sufficient representation (explanation not clear)– LRA; must be sufficiently representative of employees.

• TU to establish that it represents a significant proportion of the workforce, 50% +1 -in many cases this may fall short of the majority. Two TUs may act jointly to achieve sufficient representation.

• Sufficiently representative TUs rights are; access to employer’s premises, stop order facilities, and leave for office bearers

• If employer feels TU is no longer sufficiently representative, dispute through conciliation and arbitration is prescribed.
Levels of representation

- **Majority representation** – TUs. Independently or jointly representing the majority of employees 50% +1; entitled to:
  - Establish a **closed or agency** shop agreement
  - Establish **workplace forum**
  - Require employer to disclose certain information
  - Appoint workplace representatives
  - Paid leave for reps, and
  - Conclude CAs which specify thresholds of representation in a workplace.
Levels of representation

- **Thirty percent membership** – to establish a statutory council
  - registered TU to represent 30% of employees in particular industry
- Again, two or more TUs may collaborate to achieve this level.
Organisational rights

• **Trade union right to access the workplace** – to recruit / have meetings, holding elections / voting/ballots

• **Deduction of union dues** - in writing employer authorised to deduct union dues in form of levies /subscriptions

• **Trade union representatives** – where an employer employees 10 or more members of majority TU, members may elect workplace representatives.

• **Elected members empowered to:**
  - Assist members in discipline and grievance procedures
  - Monitor employer’s compliance with law and binding CAs
  - Reporting any contraventions to relevant authorities
  - Other functions agreed upon by employer and TU.
Organisational rights

- Leave for TU activities – TU office bearers allowed reasonable time off work to fulfil TU obligations
- Representative TU and employer determine jointly reasonable time off, paid and unpaid, and conditions attached thereof.
Disclosure of information

- Employer obliged to disclose all relevant and necessary information to TU for CB.
- Excludes information that is;
  - Legally privileged
  - If disclosed contravenes/impinges a prohibition imposed by law or court order
  - Confidential and if disclosed can cause harm to employer or employee
  - Is private and personal; if concerning employee, his/her consent required for disclosure. Disputes for disclosure referred to Labour Comm. for conciliation/arbitration.
Establishing thresholds of representativity

- Employer and majority TU or parties to a bargaining council may conclude a collective agreement establishing a threshold of representativeness
- This will be in respect of:
  - Rights to access
  - Deduction of union subscriptions
  - Leave for union representatives (Such agreement not binding unless thresholds are applied equally to any registered union seeking organisation rights).
Exercise of organisational rights

- Registered TU notify employer in writing intention to exercise organisational rights
- Notice accompanies TU registration cert.
- Notice specifies:
  - Workplace in which TU wants to exercise rights
  - Extent of the union’s representativeness
  - Rights TU wishes to exercise and manner
  - Employer must meet TU within 30 days of being notified, to conclude CA governing manner to meet TU request.
  - If parties fail to agree, matter referred to Labour Comm. for conciliation and arbitration
Disputes about organisational rights

• Organisational rights referred to LC for conciliation
• If conciliation fails, arbitration resorted to
• Dispute process resolution:
  - Notification of intention to exercise organisational rights
  - 30 days
  - Meeting
  - No agreement
  - Commission
  - Conciliation
  - No resolution
  - Arbitration
  - 14 days
  - determination
The Collective Bargaining Process

- **Duty to bargain** – not enforceable under LA
- LA promotes bargaining in good faith through creation of institutional frameworks
- LA provides for establishment of bargaining councils and statutory councils
- Employer refusal to bargain gives TU legitimate grounds for strike action
- Employer’s refusal to bargain implies:
  - Refusal to recognise a TU as a CB agent
  - Refusal to agree to establishment of bargaining council
  - Withdrawal of recognition as bargaining agent
  - Resignation from bargaining council or dispute about appropriate bargaining units or levels
Bargaining content

- LA does not stipulate content
- *Any* matter of *mutual* interest brought to bargaining table
- Only exceptions are provisions of LA regulating workplace forums and which set out specific matters for consultation and joint decision making—not involved in wage negotiations though
Bargaining conduct

- Judicial intervention and arbitration only occurs when infringement of rights has occurred.
- The infringed rights could be statutorily determined or contained in CA.
Bargaining styles

• Two broad bargaining styles
• **Distributive bargaining** – best described as win–lose / zero sum bargaining. (Winner takes all).
• One party’s loss is the other party’s gain
  – most true about adversarial bargaining; conflict is commonplace
• Power differentials between parties to employment relationship and shifts in the power balances underscored through distributive bargaining
• Distributive bargaining characterised by issues such as terms and conditions of employment, wages, overtime etc.
Bargaining styles

- **Integrative bargaining** – opposite of distributive bargaining
- Stresses a win-win outcome / produces joint gains
- Relies more on principles of resolution, compromise, and consensus seeking

(Bendix, 1996:264) suggestions for effective integrative bargaining:
- Mutual identification and recognition of problems
- Exchange of and access to all information required to facilitate effective bargaining
- Commitment to identification and evaluation of alternative outcomes
- Climate built on values of trust and support encouraging sharing of ideas,
- minimal confrontation.
Bargaining levels and structures

• Bargaining Levels - mean whether bargaining is between unions and individual employers (plant level or decentralised bargaining)

• Or between one or more unions and a group of employers in specific industry or occupation (sector level or centralised bargaining) (Bendix, 2006:246)
Bargaining structure

- includes concepts of bargaining units and bargaining levels
- The bargaining unit represents employees who are covered by a CA agreement
- How bargaining unit is composed determines on behalf of whom and with whom bargaining is done.
- Bargaining unit also determines whether negotiations are with plant level management, with HO, with number of employees in specific industry or area or employees from different industries
- Bargaining occurs at plant level between individual employers and TUs. (Decentralised bargaining) or at national level between employer organisations and several TUs or TU federations (centralised bargaining)
- Idea behind centralised bargaining is to ensure that employers in the entire industry pay same wages and grant same conditions of service (Discuss advantages and shortcomings of this type of bargaining)
Advantages and disadvantages of centralised and decentralised bargaining

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<th>Advantages</th>
<th>Disadvantages</th>
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<td>Centralised bargaining</td>
<td>• Improved, cost-efficient benefits due to a more wide – scale application</td>
<td>• less flexible</td>
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<td>• Training more effective since its broad-based</td>
<td>• Wages established at a minimum level</td>
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<td>• Dilution of individual employee power</td>
<td>• Smaller organisations may be marginalised</td>
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<td>• Uniform application of employment standards</td>
<td>• Interests of select groups tend to be underrepresented.</td>
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<td>Decentralised bargaining</td>
<td>• wages tend to accommodate the specific conditions of</td>
<td>• more costly to implement training intervention.</td>
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Bargaining agents

- Bargaining agents contemplated by LA are:
- Trade Unions, and
- Employers’ organisations
Trade Union

- Defined as association of employees
  - principal function to regulate relations between employers and employees.
- There to match the power of employers; through collectives of employees.
- Right to join TU constitutionally enshrined through right to freedom of association.
- TUs play crucial role in shaping the employment relationship through representing and protecting members rights in the workplace primarily through CB.
- To this end LA extends number of organisational rights to registered representative TUs.
Employers’ Organisations

• Counterparts of TUs
• Defined as any number of employers associated for the purpose of regulating relations between employers and employees, or with TUs.
• The LA extends a number of organisational rights and benefits to registered representative employers’ organisations
• Right to join an employers’ organisation inherently part of a constitutionally entrenched right to freedom of association.
Collective agreements

• Purpose of CB between employer and employee is to conclude legally binding (enforceable) CAs.
• CA means written agreement concerning terms and conditions of employment or any other matters of mutual interest concluded by one or more registered TUs
• On the other hand, concluded by;
  - One or more employees
  - One or more registered employers’ organisations, or
  - One or more employers and one or more registered employees’ organisations.
The legal effect of CAs

• CAs bind actual parties to agreements plus members
• CAs - agreements regarding employment conditions or the conduct of employers and employees to each other
• Agreements may bind employees not members of TU if TU represents majority in workplace.
• Agreements concluded for indefinite periods may be terminated by either party who has given reasonable notice to other parties, unless otherwise stipulated.
• CA will not vary in any contract of employment where both the employer and employee concerned are bound by the CA. Meaning no contract of employment may prescribe terms and conditions worse than those contained in a CA.
Disputes about CAs

Procedure to be followed

1. conciliation procedure
2. Failure to resolve Conciliation
3. Agreed arbitration procedure
4. Award Arbitration

Award
Procedure to be followed

• Figure shows procedure to follow in CB dispute.
• Except in cases of closed shop and agency shop agreements, all CAs prescribe process of dispute resolution.
• Dispute interpretation and application of CA resolved through conciliation and arbitration.
• Dispute about application and interpretation of CA referred to L Comm. for resolution. (This is where the collective agreement fails to provide a procedure, where the prescribed procedure is inoperative, or where the prescribed procedure is thwarted. L.Comm. try to use conciliation and arbitration to resolve dispute).
• Any disputes relating to closed and agency shop are referred to L.Comm. in the first instance.
Union security arrangements

- Problem of “free riding” rife in Trade Unions
- A “free rider” is an employee not a union member but enjoys all benefits negotiated by union for its members.
- Employers find it easier to apply same improvements in pay and conditions of service negotiated by the trade union to all employees regardless of membership of TU union or not.
- TUs argue that in the interests of justice and equity that all employees who enjoy benefits of the union’s efforts should pay union dues. This achieved through agency shop agreements.
Agency shop agreements

- Established through conclusion of CA between a majority union and employer.
- CA obliges employer to deduct agency fees from salaries of employees not members of TU or TUs not party to the agreement.
- Such deductions made with or without consent of the employee.
- These employees not required to become members of trade union.
- Amount deducted from their salaries not to exceed subscriptions paid by members of representative trade unions.
- Levies used only for employee socio-economic betterment.
- Agency fees paid into a separate account managed by the trade union. Administered by Minister of Labour if there is valid objection.
- Union alleged by employers not representative, given 90 days to prove representativeness, failure of which termination of the agency shop agreement is effected.
Closed - shop agreement

- Established through CA between employer and employee, or representative union and employers’ organisation.
- Unlike agency shop agreement, closed shop agreement require employees not members of union to join it.
- LA prescribe conditions making closed shop agreement binding:
  - Holding of a ballot of all employees to be covered by the agreement in which 2/3 vote must favour the agreement
  - Requirement that employees only need become members of a trade union after taking up employment in an organisation (a post-entry closed shop)
  - Exclusive rights to all deductions to further the socio-economic interests of employees (not to support political parties or political campaigns).
  - NB Closed shop agreements concluded for sectors or areas provided a ballot is held in every workplace in which agreement becomes binding; 2/3 of employees must vote in favour.
Bargaining structures

- LA gives effect to three bargaining structures.
- **Bargaining councils**
  - Voluntary bodies established in terms of LA
  - Established by one or more registered TUs in collaboration with one or more registered employers’ organisations by adopting a constitution and registering formerly.
  - The state can be party to a bargaining council in its capacity as employer.
Registration of bargaining council

- Governed by the LA
- Application gazetted for public to raise any objections on compliance with requirements of Act., appropriateness of the sector for which the application is made, or compliance of parties with requirements of sufficient representation.
- Applicants may respond to objections within 14 days / 30 days of receiving the objections.
- Objections and applications considered by Registrar
Registration of bargaining council

- Nedlac (National Economic Development and Labour Council) demarcates a sector or area and report to registrar
- If Nedlac fails to agree on demarcation, Minister demarcates appropriate sector and area.
- Minister considers whether:
  - constitution of proposed bargaining council complies with requirements set out in LA
  - Adequate provision is made in the constitution for small and medium – sized enterprises.
  - Parties to council are sufficiently representative of the sector and the area.
  - There is no other council registered for the sector and area.
  - If satisfied application meets requirements, Registrar issues a certificate of registration.
  - If not satisfied, applicant granted 30 days to meet requirements failure of which application is denied.
How binding are bargaining council CAs?

- Bind the bargaining council parties and members.
- Application of agreement can be extended to non-parties by the Minister.
- Such extension to be requested in writing and voted by TUs who have majority membership or trade unions party bargaining council and employers’ organisations enjoying similar status.
- Within 60 days of receiving the request Minister must extend the agreement by publishing a notice in the Government Gazette, declaring that from a specific date and for a specified period, the CA will be binding on the non-parties specified in the notice.
What may prevent the Minister from extending a collective agreement

If not satisfied that;

• Majority of employees covered in extension are members of TUs party to BC.
• Members of employers’ organisations party to BC will, after extension employ majority of the employees within registered scope of BC.
• Non-parties specified in request fall within BC’s registered scope.
• CA establishes or appoints an independent body to grant exemption to non-parties and includes fair criteria for consideration of applications for exemption and terms of exemptions from provisions of the collective agreement as soon as possible.
• Terms of the CA do not discriminate against non-parties.
• Minister may cancel, amend, or further extend CA’s by publishing a notice in Govt. Gazette.
• The Act establishes a Public Service Co-ordinating Bargaining Council (PSCBC) to deal with matters regulated by uniform rules and standards applicable across the public service; as well as terms and conditions of service that apply to two or more sectors of the public service.
• Specific bargaining councils can be established for particular sectors within the public service.
Statutory councils

- Included in LA as a compromise in response to labour’s demands for compulsory centralised bargaining.
- LA makes provision for unions and employers’ organisations that represent 30% of the employees or employers in a sector (industry) or geographical area to apply for a statutory council.
- Same requirements looked for by the Registrar as in the case of a BC.
- If the Registrar is satisfied that the applicant is representative and that there is no other statutory Council in the area, a notice is published in the Govt. Gazette establishing the statutory council.
- The notice invites all registered unions and employers’ organisations or any interested parties in the sector or area to attend a meeting presided over by the L. Comm.
- This meeting is intended to reach agreement on parties to the statutory council and the constitution.
- Should no agreement be reached, Commissioner convenes separate meetings for the registered trade unions and employers’ organisations. If still there is no agreement, the Minister decides who to admit.
Functions of a statutory council

- To resolve disputes within areas of jurisdiction.
- To establish and promote training and education schemes, and
- To establish and administer pension, provident, medical aid, sick pay, holiday and unemployment schemes or funds for parties and their members within the council’s jurisdiction.
- May conclude CAs to give effect to the above functions
- May also include functions of a bargaining council in their constitutions.
- Councils not sufficiently representative (falling short of the required 30% membership) may submit CAs to Minister who will treat them as determinations under the BCEA and promulgate them accordingly.
Workplace forums

- Introduced LA as vehicles for promoting employee involvement in decision-making in workplaces
- Also promotion of participative management through information sharing, consultation, and joint decision-making
SUMMARY

- CB remains integral part of constructive labour relations.
- CB fundamental in inculcating a culture and spirit of participation, cooperation and compromise, thus helping in the generation of economic growth.
- A close examination of LA provides a comprehensive framework for the facilitation of collective bargaining:
  - The notion of the duty to bargain is explored. Although there is no legislated duty to bargain, a number of organisational rights are extended by the LA, particularly to unions as a precursor to CB. These various rights are introduced.
  - Good faith bargaining is encouraged through the institutional framework for bargaining contained in the LA. This framework provides for the establishment of bargaining structures such as bargaining and statutory councils and workplace forums as well as for the conclusion of CAs.