

The Right to Freedom of Association and the Protection of Employees against Victimisation in the Workplace

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Abstract

This article deals with employees' right to freedom of association and their protection against victimisation when exercising this right in the workplace. First it explains the concepts of "freedom of association" and "victimisation". It then considers the protection of employees against victimisation for exercising the right to freedom of association internationally and domestically, however, only in the employment context. It considers the protection of the right to freedom of association in South Africa in terms of the *Constitution* and its regulation under various sections of the *LRA*. It also looks at limitations on the right to freedom of association and the remedies available to employees who experience victimisation because of exercising this right. It further considers the regulation of the right to freedom of association in the UK. It argues that although this right is well protected internationally and domestically, employees still experience victimisation as a result of exercising it. It further argues that the protection of this right and its exercise by employees is necessary to bring a balance to an uneven relationship between employers and employees in the workplace. It concludes that trade unions together with employers have a responsibility to ensure that employees exercise their constitutional right to freedom of association with no fear of victimisation.

Keywords

Freedom of association; trade union; victimisation; trade union security arrangements; prejudice; detriment; trade union lawful activities; international labour standards.

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1. Introduction

The right to freedom of association is a fundamental right protected internationally and domestically. According to section 18 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*), everyone has the right to freedom of association. In the employment context, this right is protected in terms of section 23, which states that every person has the right to fair labour practices and the right to form and join a trade union. The right to freedom of association and other labour rights in section 23 of the *Constitution* are largely influenced by the International Labour Organisation (hereafter the *ILO*) *Freedom of Association and Protection of the Right to Organise Convention 87 of 1948*¹ (hereafter *Convention 87*) and *Right to Organise and Collective Bargaining Convention 98 of 1949*² (hereafter *Convention 98*).

The *Labour Relations Act 66 of 1995* (hereafter the *LRA*), regulates this right in terms of its various provisions, such as sections 4 and 5. Furthermore, section 1(b) of the *LRA* indicates that the purpose of the Act is to give effect to obligations incurred by South Africa as a member state of the ILO. Freedom of association for employees entails their right to form, join and participate in the lawful activities of a trade union.³ Employees can therefore associate and form a collective body (a trade union) which will represent them during collective bargaining engagements with their employer.

Although this right is internationally and domestically generally well protected, employees at various levels still experience victimisation as a result of exercising the right.⁴ Employees are often victimised because of their trade union membership or involvement in trade union activities and this amounts to an infringement of their right to freedom of association. The discussion that follows will consider the protection of the right to freedom of association and the protection of employees against

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¹ *Freedom of Association and Protection of the Right to Organise, Convention (87 of 1948) (Convention 87)*. This convention was ratified by South Africa on 19 February 1996.

² *Right to Organise and Collective Bargaining, Convention (98 of 1949) (Convention 98)*. This convention was ratified by South Africa on 19 February 1996.

³ Grogan *Employment Rights* 377.

⁴ *Mashaba v Telkom SA* 2018 39 ILJ 1067 (LC) para 25. Although according to Grogan, cases of victimisation are few, it must be acknowledged that employees are being victimised by employers for exercising their right to freedom of association (*Grogan Collective Labour Law* 26).

victimisation for exercising it in South Africa and will briefly also look at the position in the United Kingdom (hereafter the UK), in order to determine whether there are lessons to be learned for South Africa.⁵

2 The concepts of "freedom of association" and "victimisation"

2.1 Freedom of association

Whereas this right is important in the employment context, the concept of "freedom of association" is not defined by labour legislation, including the *LRA*. According to Madima⁶ there is no agreement on what the concept of freedom of association entails as this has been explained in different ways. Amongst others, Olivier⁷ defines it as the "legal and moral rights of workers to form trade unions; to join trade unions of their choice and also to demand that their trade unions should function independently." Furthermore, Budeli⁸ believes that freedom of association is the right to associate with others, which means that individual employees are entitled to come together and jointly organise in order to secure common interests.

Freedom of association is largely a positive right through which employees form a trade union, which becomes their representative or mouthpiece. In terms of section 213 of the *LRA*, a trade union is "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations". It must, however, be noted that a trade union need not be registered in order to qualify and function as one. Trade unions attain better terms and conditions of employment on behalf of their members and this improves their bargaining power with their employer. The right to freedom of association therefore underpins collective bargaining.⁹ Without freedom of association, workers are at risk of being powerless.¹⁰

Freedom of association also has a negative element in that employees have the right not to associate or the right of non-association. This means

⁵ Industrial relations began in the UK (Great Britain) as a product of the first industrial revolution (see McIlroy *Trade Unions* 1).

⁶ Madima 1994 *TSAR* 545-555.

⁷ Olivier "Statutory Employment Relations" 5: 151.

⁸ Budeli 2010 *Obiter* 20.

⁹ Collective bargaining is a voluntary process in which organised labour in the form of trade unions and employers or employers' organisations negotiate collective agreements with each other to determine wages, terms and conditions of employment or other matters of mutual interest (see item 4 of the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (GN R1396 in GG 42121 of 19 December 2018)); Davies and Freeland *Kahn-Freund's Labour and the Law* 201; Garbers *et al New Essential Labour Law Handbook* 397.

¹⁰ Budeli 2009 *Fundamina* 57.

that no person may force an employee to belong to a trade union other than a trade union of his or her choice, except where trade union security arrangements exist,¹¹ as will be discussed later.

2.2 *Victimisation*

The concept of "victimisation" is not defined in labour legislation. It has, however, been said that this concept covers actions which are prejudicial to employees for conduct permitted by legislation.¹² According to Israelstam,¹³ "victimisation" can be defined as "targeted mistreatment carried out for a specific reason". It has also been stated that victimisation concerns far more than the right of individual workers not to be treated unfairly and is an act of power.¹⁴

Labour legislation prohibits certain practices which may directly or indirectly amount to victimisation and these include the prohibition of unfair dismissals by the employer,¹⁵ the prohibition of unfair discrimination by any person against an employee,¹⁶ and the prohibition of unfair labour practices by the employer against an employee.¹⁷

It is therefore submitted that the victimisation of employees will include detrimental or unfavourable acts by the employer against employees for exercising their labour rights, including the right to freedom of association such as joining a trade union or participating in lawful trade union activities.

¹¹ Garbers *et al Essential Labour Law Handbook* 403, 437. These agreements limit employees' right to freedom of association in that the first type of agreement compels employees to become members of a trade union party to the agreement and the latter requires employees who are eligible to be members of a trade union party to the agreement to pay an agency fee.

¹² Grogan *Employment Rights* 376.

¹³ Israelstam 2005 <http://www.hrpulse.co.za/legal/legal-opinion/231272-is-workplace-victimisation-prohibited>.

¹⁴ Theron 1997 *LDD* 11.

¹⁵ Sections 185 and 187(1) of the *Labour Relations Act* 66 of 1995 (the *LRA*). The *LRA* requires all forms of dismissals to be fair in relation to the reason and the procedure.

¹⁶ Section 6(1) of the *Employment Equity Act* 55 of 1998 (the *EEA*). In terms of this section unfair direct or indirect discrimination against an employee in employment policies or practice on listed or arbitrary grounds is prohibited.

¹⁷ Section 186(2) of the *LRA*. Unfair labour practices have to do with unfair conduct by the employer relating to promotion, demotion, probation, training, benefits; unfair suspension of an employee; failure to reinstate or re-employ a former employee in terms of an agreement and any occupational detriment.

3 Protection of employees against victimisation for exercising their right to freedom of association

The focus below will be only on instruments which are directly relevant to freedom of association in the employment context and on domestic legal protection in South Africa.

3.1 *International and regional protection of employees against victimisation*

Employees' right to freedom of association cannot be enforced domestically without reference to international instruments.¹⁸ Freedom of association is protected in the following international instruments: *Universal Declaration of Human Rights*, 1948 (UDHR);¹⁹ *International Covenant on Economic, Social and Cultural Rights*, 1966 (ICESCR),²⁰ and *International Covenant on Civil and Political Rights*, 1966 (ICCPR).²¹

In addition to the above, the ILO has set and enforces international labour standards in relation to the right to freedom of association.²² First, the *ILO Constitution*, 1919 in its preamble recognises the significance of freedom of association for workers. Secondly, the *ILO Declaration of Philadelphia* adopted in 1944 upholds the principle of freedom of association. The declaration was integrated into the *ILO Constitution* in 1946, and this resulted in the above new preamble been adopted, endorsing the principle of freedom of association. Thirdly, the *ILO Conventions 87 and 98* provide for the safeguarding of the right to freedom of association. *Convention 87* is the main source of international obligations with regard to the right to freedom of association in the context of employment. Its Article 2 states that "workers and employers without distinction shall have the right to establish and subject only to the rules of the organisation concerned to join organisations of their choice without previous authorization." Reference to "without previous authorisation" implies that workers do not have to seek permission before forming or joining an association.²³

¹⁸ Budeli 2009 *De Jure* 139.

¹⁹ Article 20 of the *Universal Declaration of Human Rights* (1948) (the UDHR). This Declaration has become customary international law.

²⁰ Article 8 of the *International Covenant on Economic, Social and Cultural Rights* (1966) (the ICESCR). The Covenant has been signed but not ratified by South Africa.

²¹ Articles 21 and 22 of the *International Covenant on Civil and Political Rights* (1966) (the ICCPR). The Covenant was ratified by South Africa in 1998.

²² For further details on the role of the International Labour Organisation (the ILO) in setting and enforcing international standards, see Tshoose 2022 *PELJ* 1-43.

²³ Article 3 of *Convention 87*.

According to Article 1 of *Convention 98*, workers shall enjoy protection against anti-union discrimination in respect of their employment. Article (2)(a) further states that such protection shall apply particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership.²⁴ The protection applies with regard to acts which subject the employment of a worker to a condition that he or she shall not join a trade union or shall relinquish trade union membership or be dismissed because of participation in trade union activities. The Convention therefore expressly protects workers against victimisation. Fourthly, Article 2 of the *ILO Declaration on Fundamental Principles and Rights at Work*, 1998, states that member states have an obligation to promote, recognise and realise the principles that are subject to core conventions, including those relating to freedom of association.²⁵

The Southern African Development Community (hereafter *SADC*) also adopted a *Charter of Fundamental Social Rights* in 2003, which provides for a general right to associate. Article 4 of the Charter requires member states to create an enabling environment, consistent with *ILO Conventions* on freedom of association. Article 10 of the Charter provides that every individual shall have the right to free association provided that he or she abides by the law. The Charter endorses the right to freedom of association in international instruments such as the UDHR, ICCPR and ICESCR.²⁶

Although the above Conventions cover employees' right to freedom of association and protect them against victimisation; individual employees have no direct remedy through them, as these Conventions can be enforced by workers' organisations only by lodging complaints to the ILO Committee.

²⁴ In terms of Art 2(b) of *Convention 98*, protection also applies in respect of acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer, within working hours.

²⁵ This is a statement made by the ILO that all members, even if they have not ratified the Conventions in question, have an obligation derived from their membership of the ILO to respect, promote and realise in good faith and in line with the Constitution the principles concerning the fundamental rights which are the subject of those Conventions (see Wikipedia 2022 https://en.wikipedia.org/wiki/Declaration_on_Fundamental_Principles_and_Rights_at_Work).

²⁶ Preamble and Art 60 of the *Charter of Fundamental Social Rights* (2003).

3.2 The legal framework on the protection of employees against victimisation in South Africa

3.2.1 Protection under the Constitution

Prior to 1994, international standards played only an ancillary role in developing the South African labour law. Currently the *Constitution* recognises international law as a basis of democracy. It requires the application of international law when interpreting South African legislation and in particular the Bill of Rights.²⁷

Section 18 of the *Constitution* provides for the right to freedom of association for everyone, whereas section 23(2) of the *Constitution* provides that every "worker" has the right to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike.²⁸ When considering the meaning of "worker" in section 23(2) of the *Constitution*, the Constitutional Court in *SANDF v Minister of Defence*²⁹ stated as follows regarding the significance of ILO standards:

Section 39 of the Constitution provides that, when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of 'worker' as used in section 23 of the Constitution.

In this case reference was made to Article 2 of *Convention 87* where it states that workers and employers have the right to form and join organisations of their choice. ILO standards were also considered in *National Union of Metalworkers v Bader Bop (Pty) Ltd*,³⁰ which dealt with the right of minority trade unions to engage in strike action regarding organisational rights and in *Association of Mineworkers and Construction Union v Chamber of Mines of SA*,³¹ which dealt with the constitutionality of section 23(1) of the *LRA*.

Workers in general are entitled to enjoy their right to freedom of association, but section 36 of the *Constitution* allows for the restriction of

²⁷ Sections 39 and 233 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*); *S v Makwanyane* 1995 3 SA 391 (CC) para 104; *Minister of Defence v SA National Defence Force Union* 2006 27 ILJ 2276 (SCA) para 5.

²⁸ Furthermore, based on ss 9(1) (the right to equality) and 10 (the right to human dignity) of the *Constitution*, every worker should enjoy the right to freedom of association, subject to justifiable limitations (s 36).

²⁹ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 25.

³⁰ *National Union of Metalworkers v Bader Bop (Pty) Ltd* 2003 24 ILJ 305 (CC) para 12.

³¹ *Association of Mineworkers and Construction Union v Chamber of Mines of SA* 2017 38 ILJ 831 (CC) para 72.

the rights contained in the Bill of Rights in line with the law of general application, on condition that the restriction is reasonable and justifiable. This implies that provisions of section 23 of the *Constitution* can be subject to limitations. It is submitted, however, that the victimisation of employees for exercising their constitutional right cannot be viewed as a reasonable and justifiable restriction. Section 23(6) of the *Constitution* nevertheless allows for trade union security arrangements which put a limit on the right to freedom of association, as will be discussed below.

3.2.2 Protection under the LRA

Chapter II of the *LRA* specifically focusses on the protection of the right to freedom of association. Although the *LRA* does not specifically use the term "victimisation" nor define it, the Act protects employees against victimisation for exercising the right to freedom of association through various provisions, including sections 4, 5, 187, 64 and 67, which will be discussed below. This protection is an improvement from the *Labour Relations Act, 1956* (hereafter the *LRA, 1956*), which did not meet international labour standards. Unlike the *Constitution* which refers to "workers" and provides for a wider protection of the right, the *LRA* narrows protection to "employees" and "persons seeking employment" in certain cases.³²

3.2.2.1 Protection under section 4 of the LRA

Section 4(1) of the *LRA* protects employees' right to form and join a trade union subject to its constitution. A trade union may in its constitution determine who may or may not become its member. As a voluntary association, under common law a union cannot be forced to admit certain people.³³ A trade union may, however, not discriminate against prospective members based on race or sex as this would disqualify it for registration.³⁴ Section 95(5) of the *LRA* provides for the aspects to be covered in a trade union's constitution. It must be noted that the right to form trade unions is restricted to employees,³⁵ but the right to join a trade

³² The term "worker" has been considered broadly to cover members of the armed forces even though the relationship they have with the Defence Force is different from an ordinary employment relationship (*SANDU v Minister of Defence* 1999 20 ILJ 2265 (CC) paras 26-27), whereas s 213 of the *LRA* defines an employee as "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer."

³³ *Carr v Jockey Club of South Africa* 1976 2 SA 717 (W) 722H-723E.

³⁴ Section 95(6) of the *LRA*.

³⁵ *WUSA v Crouse* 2005 26 ILJ 1723 (LC). In this case the Registrar refused to register the applicant union based amongst other reasons on the fact that it was formed by unemployed people acting for their own gain.

union is expressly extended to "persons seeking employment".³⁶ In *MCI Staff Committee v Midland Chamber of Industries*³⁷ it was found that a committee of dismissed employees would not meet the definition of a trade union.

Section 4(2) grants members of a trade union the right to take part in its lawful activities; in the election of its office-bearers, officials or trade union representatives; to stand for election and be eligible for appointment as an office bearer or official and if elected or appointed, to hold office; and to stand for election and be eligible for appointment as a trade union representative and if elected or appointed, to carry out the functions of a trade union representative. In *National Union of Metalworkers obo members v Transnet*³⁸ (hereafter *NUMSA v Transnet* case) the Labour Court considered the phrase "lawful activities of a trade union" in relation to a ban by the employer on employees wearing trade union t-shirts at work. The phrase was also interpreted by the Constitutional Court in *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board*,³⁹ wherein it was stated that it includes any conduct related to bona fide collective bargaining, except for criminal conduct, but that it excludes "illegal activities and activities that constitute contraventions of the law."

3.2.2.2 Protection under section 5 of the *LRA*

Section 5 of the *LRA* protects employees and those seeking employment against discrimination for invoking rights contained in the *LRA*, including their right to freedom of association.⁴⁰ Section 5(1) of the *LRA* provides widely that no person may discriminate against an employee for exercising any right conferred by the *LRA*. The protection against victimisation is therefore offered to an individual employee and not employees as a collective. The phrase "exercising any right conferred by this Act" has been interpreted to cover all rights of employees contained in the *LRA*, which include organisational rights, the right to strike and the right to refer disputes for resolution.⁴¹ In *FAWU v Pets Products*⁴² discrimination in section 5 of the *LRA* was equated to "unfair discrimination" as referred to in the *Constitution*⁴³ and the *EEA*,⁴⁴ but this approach was rejected in

³⁶ Section 5 of the *LRA*; Grogan *Collective Labour Law* 23.

³⁷ *MCI Staff Committee v Midland Chamber of Industries* 1995 5 BLLR 74 (IC) 77E-H.

³⁸ *National Union of Metalworkers obo members v Transnet* 2019 40 ILJ 583 (LC) (the *NUMSA v Transnet* case) para 29.

³⁹ *National Union of Public Service and Allied Workers obo Mani v National Lotteries Board* 2014 35 ILJ 1929 (CC) para 67.

⁴⁰ Grogan *Collective Labour Law* 22.

⁴¹ Grogan *Employment Rights* 379.

⁴² *FAWU v Pets Products* 2000 21 ILJ 1100 (LC).

⁴³ Section 9 of the *Constitution*.

⁴⁴ Section 6(1) of the *EEA*.

Safcor Freight (Pty) Ltd v SAFDWU,⁴⁵ where Murphy AJA stated that where an Act specifically regulates the rights in question, litigants cannot bypass the *LRA* without challenging its constitutionality. It was further stated that in contrast to discrimination in terms of the *Constitution* and the *EEA*, a contravention of section 5(1) of the *LRA* entails "discriminatory conduct or action" which is "unjustifiable because it is irrational, lacking in proportionality, unreasonable or actuated by improper or illegitimate motives."

Section 5(2) of the *LRA* states that no person may require an employee or a prospective employee not to be a member of a trade union, or to give up membership of a trade union. An employer may therefore not demand that a prospective employee should not be or become a member of a trade union or should give up union membership as a precondition for being employed. An employer may also not require an employee to resign from a trade union as a condition for the employee to be promoted.⁴⁶ In terms of section 5(2)(b) of the *LRA*, no person may prevent an employee or a potential employee from invoking rights in the *LRA*. Furthermore, section 5(2)(c) of the *LRA* protects employees or prospective employees against prejudice because of being members of a trade union; or for their participation in forming a trade union; or for their participation in the lawful activities of a trade union; or for failing or refusing to do something that an employer may not legally permit or require an employee to do; or for exercising any rights conferred by the *LRA*. In *Harding v Petzetakis Africa (Pty) Ltd*⁴⁷ the employer dismissed a manager because she refused to dismiss two employees in breach of the provisions of the *LRA*. The Labour Court found that her dismissal was in breach of section 5 of the *LRA*. As previously stated, in the *NUMSA v Transnet* case it was found that the wearing of trade union t-shirts constituted lawful union activity and that the prohibition by the employer constituted a prejudice contemplated in section 5(2)(c) of the *LRA*. In *TSI Holdings (Pty) Ltd v NUMSA*⁴⁸ the Labour Court found that the harassment of trade union members is a contravention of section 5(2)(c)(i) and not section 4 of the *LRA* as was previously held in *Ceramic Industries Ltd v NCBWU*.⁴⁹ Section 5(3) of the *LRA* proscribes an employer from trying to influence an employee into giving up rights granted by the *LRA*, by offering some form of advantage or inducement to the employee. An employer may not promise an increase in wages to an employee on condition that the employee does not become a member of a trade union or does not engage in a strike. In *Nkutha v Fuel*

⁴⁵ *Safcor Freight (Pty) Ltd v SAFDWU* 2012 12 BLLR 1267 (LAC) para 18.

⁴⁶ Garbers *et al Essential Labour Law Handbook* 399.

⁴⁷ *Harding v Petzetakis Africa (Pty) Ltd* 2012 33 ILJ 876 (LC).

⁴⁸ *TSI Holdings (Pty) Ltd v NUMSA* 2004 6 BLLR 600 (LC) para 6.

⁴⁹ *Ceramic Industries Ltd v NCBWU* 1997 6 BLLR 697 (LAC) 703.

Gas Installations (Pty) Ltd,⁵⁰ (hereafter the *Nkutha* case) three employees were promoted after their resignation from a trade union. The Labour Court found that the employer in this case failed to show that the employees were not promoted as a reward for them resigning from the trade union and it held that there was an infringement of both sections 5(1) and 5(2)(c)(i) of the *LRA*.

Just like any other employee, senior managerial employees have the right to freedom of association, though the right is limited. This was confirmed in *SASBO v Standard Bank of SA*,⁵¹ where the court stated that there must be a limit to the right of senior managerial employees to involve themselves in collective bargaining with their own employer. The issue was also dealt with in *Independent Municipal and Allied Trade Union (IMATU) v Rustenburg Transitional Council*,⁵² (hereafter *IMATU* case) where the employer issued a resolution to the effect that employees in senior managerial positions were not allowed to occupy executive positions in trade unions or be involved in their activities. *IMATU* approached the Labour Court to declare the resolution to be in contravention of both the *Constitution* and section 4 of the *LRA*. The order was granted, but it was stated that there are limitations to section 4 of the *LRA*, because under common law an employee has a duty of good faith and therefore because of the incompatible interests of trade unions and employers; the involvement of senior managers in trade union activities could infringe this duty. Further, that since such employees have access to the employer's confidential information; they must be careful when conducting trade union business.⁵³ This principle was accepted by the Labour Court in *FAWU v The Cold Chain*,⁵⁴ (hereafter the *Cold Chain* case) wherein the employee was retrenched after refusing to move to a higher graded position instead of being retrenched on condition that he stopped participating in trade union activities.

3.2.2.3 Protection under section 187 of the *LRA*

This section deals with automatically unfair dismissals. This is a type of dismissal which an employer cannot defend, because it is automatically unfair. The employer cannot, for example, justify the dismissal on the basis that a fair procedure was followed. It is a type of dismissal which infringes the fundamental rights of employees at the workplace. Based on section 187(1) of the *LRA*, employers may not violate the rights of employees set

⁵⁰ *Nkutha v Fuel Gas Installations (Pty) Ltd* 2000 21 ILJ 218 (LC) (the *Nkutha* case).

⁵¹ *SASBO v Standard Bank of SA* 1998 19 ILJ 223 (SCA).

⁵² *Independent Municipal and Allied Trade Union (IMATU) v Rustenburg Transitional Council* 2000 21 ILJ 377 (LC) (the *IMATU* case) para 19.

⁵³ *JDG Trading (Pty) Ltd v Brunsdon* 2000 1 BLLR 1 (LAC); *Hannsen v Alstom Electrical Machines (Pty) Ltd* 2004 2 BLLR 133 (LC).

⁵⁴ *FAWU v The Cold Chain* 2007 7 BLLR 638 (LC) (the *Gold Chain* case).

out in section 5 of the *LRA*. The section regards dismissals as automatically unfair if the reasons are related to the present, past or anticipated membership of a trade union or refusing to agree not to join a trade union or refusing to give up membership;⁵⁵ exercising rights contained in the *LRA*; or forming, joining or participating in any lawful activity of a trade union. Subsections (1)(a) and (b) further state that it is automatically unfair to dismiss an employee who participated in or supported or indicated an intention to participate in or support a strike or protest action that complies with the provisions of Chapter IV of the *LRA*,⁵⁶ or that the 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 meets provisions of Chapter IV of the *LRA*, unless that work is necessary to prevent an actual danger to life, personal safety or health. The court will be required to establish that the strike is the proximate cause of the dismissal, while dismissed strikers must prove that they were dismissed for the act of striking and not for another legitimate reason.⁵⁷ In *SATAWU v Bosasa Security*⁵⁸ the Labour Court held that, although the formal reason for the dismissal was absence without permission, the most probable inference to be drawn from the evidence was that the employees were dismissed because of their participation in a strike. Employees participating in a protected strike may be dismissed only for misconduct⁵⁹ or for operational requirements.⁶⁰

Section 187(1)(d) of the *LRA* also protects employees against being victimised through dismissal for instituting action or showing an intention to institute action against the employer through invoking any right contained in the *LRA* or participating in any proceedings in terms of the *LRA*. In *Kroukam v SA Airlink (Pty) Ltd*⁶¹ the appellant, who was a senior pilot, was dismissed based on insubordination and being a disruptive influence in the

⁵⁵ *Adams v Coin Security Group (Pty) Ltd* 1998 12 BLLR 1238 (LC) (the *Adams* case).

⁵⁶ *NUM v Black Mountain Mining (Pty) Ltd* 2010 3 BLLR 281 (LC) (the *Black Mountain* case); *Eldelweiss Glass and Aluminium (Pty) Ltd v NUMSA* 2012 1 BLLR 10 (LAC) (the *Eldelweiss* case).

⁵⁷ *Grogan Collective Labour Law* 323.

⁵⁸ *SATAWU v Bosasa Security* 2013 34 ILJ 3305 (LC) para 18. In this case SATAWU members joined a national protected strike in the industry. The company notified its employees by SMS that they were to attend disciplinary hearings for being absent from work without permission. The employees were dismissed *in absentia*. They refused to appeal but lodged an unfair dismissal dispute with the CCMA and the Labour Court, claiming that their dismissal was automatically unfair. It was held that although the formal reason for dismissal was absence without permission, the most probable inference to be drawn from the evidence was that the employees had been dismissed because of their participation in a strike.

⁵⁹ *SACWU v Afrox* 1998 19 ILJ 62 (LC).

⁶⁰ *General Food Industries v FAWU* 2004 25 ILJ 1260 (LAC).

⁶¹ *Kroukam v SA Airlink (Pty) Ltd* 2005 26 ILJ 2153 (LAC).

functioning of the company. The employee argued that the dismissal should be deemed automatically unfair based on section 187(1)(d) of the *LRA*, because it was based on trade union activities and his initiation of litigation against the employer on behalf of the union. The court found the dismissal to be automatically unfair and dispelled the notion that involvement in trade union activities damages the trust relationship.

3.2.2.4 Protection under sections 64 and 67 of the *LRA*

The right to strike flows from and is an important element of the right to freedom of association and the right to bargain collectively.⁶² These rights contribute to bringing a balance to an unequal equilibrium between employers and employees.⁶³ According to Olivier,⁶⁴ a legal system envisioned at protecting employees' and trade unions' right to engage in collective bargaining and to take part in a strike action would be pointless if the primary right to first belong to that union was not protected. Further, that freedom of association would be ineffectual if the right to engage in collective bargaining and to strike were not well safeguarded. If trade unions and employers fail to reach agreement during negotiations, members of trade unions⁶⁵ can use strike action to pressurise the employer to accede to their demands. Ben-Israel⁶⁶ states as follows regarding freedom to strike and freedom of association:

The freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom to strike. Hence, freedom to strike is a contemporary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.

The right to strike is not expressly referred to in *Conventions 87* and *98*, nor in the *ILO Constitution* or the *Declaration of Philadelphia*. Nevertheless, the ILO's Freedom of Association Committee has amongst others construed Article 3 of *Convention 87* to include the right to strike.⁶⁷

In South Africa this right is protected in terms of section 23(2)(c) of the *Constitution*, which provides that every worker has the right to strike. This right may, however, be limited in terms of section 36 of the *Constitution*, in the interest of society in general or by the competing rights of others. The *LRA* regulates the right to strike and limits it in certain respects. Firstly, an

⁶² Myburgh 2004 *ILJ* 966; Manamela and Budeli 2013 *CILSA* 308.

⁶³ Budeli *Freedom of Association and Trade Unionism* 46.

⁶⁴ Olivier "Statutory Employment Relations" 5:153.

⁶⁵ Although s 23 of the *Constitution* grants the right to strike to a worker, a strike can be engaged in only by more than one worker. The definition of strike as per s 213 of the *LRA* refers to a collective action. In other words, the right to strike can be exercised only by a collective.

⁶⁶ Ben-Israel *International Labour Standards* 93.

⁶⁷ Committee on Freedom of Association "Second Report" Appendix 5, 181, para 27.

action will qualify as a strike only if it complies with the definition as provided by section 213 of the *LRA*, which defines a strike as:

The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee ...

Although a worker has the right to strike in line with the *Constitution*, the right can be exercised only collectively, which means that if employees had no right to freedom of association, the right to strike would not be operational.⁶⁸ Secondly, the *LRA* provides for the prohibitions or limitations contained in its section 65(1). The section, amongst other things, mentions that no person may take part in a strike or in any conduct in contemplation or furtherance of a strike if that person is bound by a collective agreement that disallows a strike; or that person is bound by a collective agreement that requires the issue in dispute to be referred to arbitration; or the issue in dispute is one that a party has the right to refer to arbitration or the Labour Court in terms of the *LRA*; or that person is engaged in an essential service or maintenance service; or that person is bound by any arbitration award or collective agreement that regulates the issue in dispute. Although these provisions limit employees' right to strike, they ensure that employees do not engage in a strike if that could be avoided, given the impact industrial action may have on employers and on a country's economy. Thirdly, there are procedural limitations on the right to strike prescribed by section 64(1) of the *LRA*. There must be an issue in dispute,⁶⁹ which should be referred to a bargaining council with jurisdiction or to the Commission for Conciliation, Mediation and Arbitration (hereafter the CCMA), for conciliation. Thereafter, a certificate must be issued to the effect that the dispute remains unresolved or a period of 30 days must have lapsed from the date on which the relevant forum received the referral. Once the above has happened, 48 hours' notice of the intended strike must be given to the employer; where the State is the employer, at least seven days' notice should be given. Although this procedure limits employees' right to strike, it ensures that parties make attempts to resolve disputes before engaging in industrial action.

According to section 67(2) of the *LRA*, employees engaged in a protected strike are guaranteed immunity from civil claims. Section 67(4) of the *LRA* further protects employees against dismissal for their participation in a protected strike. In line with section 187(1) of the *LRA* discussed above, such a dismissal will be regarded as automatically unfair. Employees are

⁶⁸ *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 18 ILJ 1098 (LC).

⁶⁹ *Manamela* 2012 SA Merc LJ 107-114.

also protected against disciplinary action short of dismissal.⁷⁰ The employer may, however, based on section 67(5) of the *LRA* fairly dismiss employees due to misconduct,⁷¹ and operational requirements,⁷² on condition that both substantive and procedural fairness requirements are met.

If the strike is unprotected, section 68(1)(a) of the *LRA* permits the employer to approach the Labour Court for an interdict. Where an employer suffers loss because of an unprotected strike, the Labour Court may award a "just and equitable" compensation in terms of section 68(1)(b) of the *LRA*.⁷³ The employer may also dismiss employees for engaging in an unprotected strike, because such conduct constitutes misconduct and may be a fair reason for dismissal.⁷⁴ This is subject to compliance with both the substantive and the procedural requirements.

All the above provisions of the *LRA* are intended to protect employees against prejudice for exercising their right to freedom of association and their right to strike, but also taking into consideration the rights of others. It is submitted that employees are at times still subjected to victimisation, in spite of all the above international and domestic law provisions guaranteeing employees' protection against victimisation for exercising their right to freedom of association.

3.2.2.5 Protection for those excluded from the *LRA*

Members of the South African National Defence Force (hereafter SANDF) and the State Security Agency (hereafter SSA) do not fall under the *LRA* and therefore are not covered by the provisions of the *LRA* relating to the protection of the right to freedom of association. They enjoy the right to freedom of association as provided for in sections 18 and 23 of the *Constitution*. In *SANDU v Minister of Defence*⁷⁵ the court found that section 126B of the *Defence Act* 42 of 2002, which stated that a member of the Permanent Force cannot become a member of a union, was

⁷⁰ *PSA v Minister of Justice and Constitutional Development* 2001 11 BLLR 1250 (LC).

⁷¹ *CEPPWAWU v Metrofile (Pty) Ltd* 2004 25 ILJ 231 (LAC); *FGWU v The Minister of Safety and Security Group (Pty) Ltd* 1999 ILJ 1258 (LC).

⁷² *BAWU v Prestige Hotels CC t/a Blue Waters Hotel* 1993 14 ILJ 963 (LAC).

⁷³ *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* 2002 1 BLLR 84 (LC) 91F.

⁷⁴ Item 6 of Schedule 8: Code of Good Conduct: Dismissal in the *LRA*; *Modise v Steve's Spar Blackheath* 2000 21 ILJ 519 (LAC) para 80; *Karras t/a Floraline v SASTAWU* 2001 1 BLLR 1 (LAC) para 26; *Mzeku v Volkswagen SA (Pty) Ltd* 2001 22 ILJ 1575 (LAC) para 69.

⁷⁵ *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) para 18. It was held in this case that the constitutional right to form and join trade unions extends to members of the South African National Defence Force, even though they are expressly excluded from the *LRA*.

unconstitutional. It was stated, however, that the nature of their work may justify a limitation of the rights contained in section 23 of the *Constitution*. Such a limitation would be in line with Article 9 of *Convention 87*, which allows States to decide the extent to which members of the armed and police services may exercise the right to freedom of association.

In *Kylie v CCMA*⁷⁶ it was also stated that sex workers are entitled to form and join trade unions but not to participate in activities that amount to furthering the commission of a criminal offence.

3.3 Trade union security arrangements

Section 23(6) of the *Constitution* limits the right to freedom of association. It provides for trade union security arrangements which include closed shop agreements and agency shop agreements. These agreements are regulated in terms of sections 25 and 26 of the *LRA*. On the one hand, a closed shop agreement is "a collective agreement concluded by a majority trade union and an employer or employers' organisation which requires all employees covered by the agreement to become members of the trade union."⁷⁷ It is therefore not unfair to dismiss an employee who refuses to join a trade union party to the closed shop agreement; or who is refused membership of that trade union or who is expelled from a trade union party to the agreement.⁷⁸ On the other hand, an agency shop agreement is "a collective agreement concluded by a majority trade union which requires the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof."⁷⁹

While a closed shop agreement compels employees to join a particular trade union, an agency shop agreement does not compel them to do so, but it requires the payment by non-members of an agency fee to that trade union.⁸⁰ A closed shop agreement seems to be more of a violation on employees' right to freedom of association than an agency shop agreement.⁸¹ As stated previously, the right to freedom of association has both a positive and a negative aspect in that there is also a right not to associate.⁸²

⁷⁶ *Kylie v CCMA* 2010 7 BLLR 705 (LAC) para 58.

⁷⁷ Section 26(1) of the *LRA*.

⁷⁸ Section 26(6) of the *LRA*.

⁷⁹ Section 25(1) of the *LRA*.

⁸⁰ *Greathead v SACCAWU* 2001 22 ILJ 595 (SCA); *Solidarity v Minister of the Public Service Administration* 2004 25 ILJ 1764 (LC); *NMFEA v Bikwani* 1999 20 ILJ 2637 (LC).

⁸¹ Du Toit *et al Labour Relations Law* 227.

⁸² Albertyn 1989 *ILJ* 985; Albertyn 1994 *Employment Law* 101-102.

It is submitted that the limitations in sections 25 and 26 of the *LRA* are reasonable and justifiable for public policy reasons and do not amount to victimisation against employees. These are checks and balances, to ensure that the two agreements are in line with constitutional provisions. In *ACTWUSA v Veldspan*⁸³ it was found that closed shop agreements were actually not contrary to public policy. Both agreements are aimed at stopping "free-riders", who are employees benefiting from work done by a trade union such as negotiating for better terms and conditions of employment, but without having to pay for such services.⁸⁴

3.4 *Employees' remedies against victimisation*

The *LRA* provides employees with various remedies in cases where their labour rights are infringed. First, it gives the Labour Court powers to interdict the victimisation of employees. If victimisation takes the form of a dismissal or an unfair labour practice, the Labour Court or arbitrators may grant an employee relief in the form of reinstatement; re-employment or compensation.⁸⁵ As previously stated, section 187(1) of the *LRA* also makes the dismissal of employees for exercising their right to freedom of association automatically unfair. Section 194(3) of the *LRA* provides a limit regarding compensation, which applies only to automatically unfair dismissals. It states that the compensation must be "just and equitable" taking into account all the circumstances, but may not exceed the equivalent of 24 months' remuneration. An employee who was automatically unfairly dismissed may therefore be awarded 24 months' remuneration as compensation, whereas the one whose dismissal is just unfair may be awarded only 12 months' remuneration as compensation. This means that the employer may have to pay double the amount for an automatically unfair dismissal, which amounts to the victimisation of employees for exercising the right to freedom of association. This serves as a deterrent to employers not to dismiss employees in contravention of section 5 of the *LRA*, for example. A trade union may also refer a case of a victimised employee to the CCMA for conciliation and if that process is unsuccessful, the dispute can be referred to the Labour Court for adjudication.⁸⁶

⁸³ *ACTWUSA v Veldspan* 1993 14 ILJ 1431 (A).

⁸⁴ Grogan *Collective Labour Law* 30.

⁸⁵ Section 193(1)(a)-(c) of the *LRA*.

⁸⁶ Section 191(5)(b)(i) of the *LRA*.

4 The legal framework on the protection of employees against victimisation in the United Kingdom

4.1 General

The UDHR forms the basis of the *Human Rights Act* 42 of 1998 in the UK. The UK also agreed to follow the ICCPR and the ICESCR in 1976. Like South Africa, the UK has ratified both *ILO Conventions 87* and *98* and is therefore bound by their provisions with regard to the right to freedom of association.⁸⁷ The *Constitution* of the UK is, however, not codified in one document. Instead it comprises of various Acts of Parliament, common law developed by judges and some guidelines known as constitutional conventions.⁸⁸ The UK is part of the *European Convention on Human Rights* (hereafter ECHR),⁸⁹ but for many years the terms of the ECHR were not incorporated into its domestic laws. At one stage the Conservative government raised concerns over matters such as the prohibition on the right to trade unions and obligatory trade union membership through closed shop agreements and this created the pressure to introduce some changes. As a result, the Labour Party enacted the above-mentioned *Human Rights Act* 1998, which incorporates the ECHR into domestic law.⁹⁰ Article 11 of the ECHR provides that freedom of association can be limited only by law as is essential in a democratic society.

In the UK the initial provisions relating to the victimisation of employees were included in the *Industrial Relations Act* 36 of 1971. It was the *Report of the Royal Commission on Trade Unions and Employers Associations*⁹¹ (hereafter the *Donovan Report*) in 1968 which provided motivation to the UK trade union victimisation provisions. It must be stated that section 5 of the *Industrial Relations Act* 36 of 1971 is in line with Article 1 of *Convention 98* on anti-union discrimination. The victimisation protections and employees' rights were later consolidated in the *Employment Protection (Consolidation) Act* 44 of 1978 and those included the right not to be dismissed because of membership or participation in the activities of an independent trade union at an appropriate time,⁹² and a right not to be subjected to action short of dismissal.⁹³

⁸⁷ The UK ratified *Convention 87* in 1949 and *Convention 98* in 1950.

⁸⁸ Hepple and Fredman *International Encyclopaedia for Labour Law* 20.

⁸⁹ Hepple and Fredman *International Encyclopaedia for Labour Law* 21.

⁹⁰ Hepple and Fredman *International Encyclopaedia for Labour Law* 21.

⁹¹ Royal Commission on Trade Unions and Employers' Association *Report* 219.

⁹² Section 58(1)(a) and (b) of the *Employment Protection (Consolidation) Act* 44 of 1978.

⁹³ Section 23(1)(a) and (b) of the *Employment Protection (Consolidation) Act* 44 of 1978.

It has been reported that in the UK there is widespread employer victimisation of lay union representatives, including in the construction industry. From January 1998 until December 2018, around 755 cases of victimisation were reported.⁹⁴ In certain instances union representatives are blacklisted and become victims in that they are denied employment opportunities because they are classified as "troublemakers". Most of these are trade union activists who previously performed the roles of site representatives such as shop stewards, conveners and health and safety representatives.⁹⁵ There is also victimisation by employers through suspensions and the dismissal of employees.⁹⁶ Furthermore, lay union representatives are victimised for campaigns to gain union recognition.⁹⁷

Although there are various statutes which protect employees against victimisation; the main piece of legislation protecting employees against victimisation for exercising the right to freedom of association in the UK is the *Trade Union and Labour Relations (Consolidation) Act, 52 of 1992* (hereafter the *TULRCA*).

4.2 Protection under the TULRCA

Although the *TULRCA* does not use the term "victimisation" nor define it, the Act protects employees' right to freedom of association and also protects them against victimisation.⁹⁸ A trade union is defined by section 1 of the *TULRCA* as:

an organisation –

Which consists wholly or mainly of workers of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations; or ...

Although the definition of trade union in the UK is wider and refers to "workers" instead of "employees" as the *LRA* does, the purpose of trade unions is similar to that of South African trade unions. Section 137 of the *TULRCA* is analogous to section 5 of the *LRA* as it prohibits refusal of employment on the grounds of trade union membership. A person who is unlawfully refused employment has the right to lodge a complaint with an industrial tribunal.⁹⁹ Section 145 of the *TULRCA* acknowledges that membership of a trade union is not confined to representation, but also

⁹⁴ Druker 2016 *ILJ* 220-237; Gall 2021 *Capital & Class* 55.

⁹⁵ Druker 2016 *ILJ* 220-237; Gall 2021 *Capital & Class* 55.

⁹⁶ Gall 2021 *Capital & Class* 46.

⁹⁷ Gall 2021 *Capital & Class* 55.

⁹⁸ The *Equality Act, 2010* offers general protection to employees against discrimination, harassment and victimisation.

⁹⁹ Section 137(2) of the *Trade Union and Labour Relations (Consolidation) Act 52 of 1992* (hereafter the *TULRCA*); *Harrison v Kent CC* [1995] ICR 434; *Fitzpatrick v British Railways Board* [1992] ICR 221.

covers services and benefits.¹⁰⁰ Workers therefore have the right not to have offers made to them to relinquish their rights to membership, activities, and the use of trade union services, which include services by an independent trade union by virtue of membership of the trade union, comprising of the raising of grievances with employers and negotiating the terms of individual employees.¹⁰¹ Section 145B of the *TULRCA*, like section 5(3) of the *LRA*, protects workers from inducements to forsake their rights to representation by a trade union for collective bargaining. In *Wilson v United Kingdom*¹⁰² the court found that Article 11 of the ECHR protects the fundamental right of people to join a trade union, engage in trade union activities and take action as a last resort to protect their interests. This resulted in the *Employment Relations Act 24* of 2004, which altered section 146 of the *TULRCA* to state that all workers are protected by the provisions on detriment for being trade union members and for taking part in union activities.¹⁰³

In terms of section 146 of the *TULRCA*, as with the South African position under section 5 of the *LRA*, it is evident that if victimisation happens it must be suffered by an individual worker. This was introduced in the UK in order to prevent claims by rival trade unions and to ensure stable bargaining arrangements.¹⁰⁴ The concept of individualism has been interpreted to make a distinction between individual and collective activities.¹⁰⁵ This protection is therefore effective to workers in their individual capacity. In *FW Farnsworth Ltd v McCoid*,¹⁰⁶ where the employee brought a claim under section 146 of the *TULRCA* indicating that he had been victimised for taking part in trade union activities, the tribunal found that the issue was a collective one rather than an individual one. The concept of "participation in the activities of an independent trade union at an appropriate time" includes matters such as recruitment by trade union representatives.¹⁰⁷ Similar to section 5(2)(c) of the *LRA* which protects employees from being subjected to prejudice because of trade union membership, section 146 of the *TULRCA* protects workers from being subjected to detriment related to trade union membership or

¹⁰⁰ Ewing 2003 *ILJ* 7.

¹⁰¹ Section 145A(4) of the *TULRCA*; Deakin and Morris *Labour Law* 828.

¹⁰² *Wilson v United Kingdom* [2002] ECHR 552.

¹⁰³ In *Bone v North Essex Partnership NHS Foundation Trust* [2016] EWCA Civ 45 (hereafter the *Bone v North Essex* case) it was found that the employee suffered an unlawful detriment because of his trade union membership. *UCL v Brown* UKEAT/0084/19/VP served as a reminder to employers not to take disciplinary action against union representatives for behaviour which may look like misconduct but which constitutes union activity.

¹⁰⁴ *Post Office v Union of Post Office Workers* [1974] ICR 378.

¹⁰⁵ Deakin and Morris *Labour Law* 841.

¹⁰⁶ *FW Farnsworth Ltd v McCoid* (1999) IRLR 626 (the *Farnsworth* case).

¹⁰⁷ *Lyon v St James Press Ltd* [1976] IRLR 215.

participation in trade union activities. A detriment will exist if a reasonable worker sees the conduct as being to his detriment.¹⁰⁸

Members of trade unions and trade union representatives are also protected against victimisation or dismissal for exercising their right to time off for trade union duties or activities. Furthermore, section 146 of the *TULRCA* affords workers the right not to suffer any detriment by any act of deliberate omission on the part of the employer, on condition that the purpose of the omission is to prevent or deter them from joining or taking part in trade union activities. For a person to enjoy protection in the above sense he or she must be a worker, the trade union of which he or she is a member must be independent, and the union activities should have taken place at an "appropriate time". The concept of "appropriate time" is defined in section 146(2) of *TULRCA* as either outside of working hours or in working hours agreed with the employer or set out in an agreement.

Under section 152 of the *TULRCA* a dismissal on the grounds of trade union membership or activities is unlawful.¹⁰⁹ Dismissal for failing to accept an inducement not to be a trade union member is also prohibited under this section. It is moreover important to note that section 103 of the *Employment Rights Act*, 1996 makes it automatically unfair to dismiss an employee who performs or proposes to perform any functions or activities of an employee representative. In terms of section 187 of the *LRA* such a dismissal will also be regarded as automatically unfair. In the UK there is also the *Employment Relations Act* 493 of 1999 (Blacklists) Regulations 2010, which penalises the practice of recording or blacklisting trade union members and leads to possible criminal sanctions for employers.

4.3 The right to strike and the protection of employees against victimisation

As in South Africa the right to strike is an essential element of collective bargaining in the UK. *Demir and Baykara v Turkey*¹¹⁰ affirmed the fundamental right of workers to engage in collective bargaining and take collective action to achieve it. According to the *TULRCA* a strike is a concerted stoppage of work.¹¹¹ Different types of industrial action, for example go-slows or a refusal to work overtime also fall under this definition. Unlike the situation in South Africa, as it stands the law in the UK gives employees "freedom to strike" instead of a positive right to

¹⁰⁸ *St Helen's Borough Council Derbyshire* [2007] UKHL 16; *Gayle v Sandwell and West Birmingham Hospitals NHS Trust* [2011] EWCA Civ 924.

¹⁰⁹ In *Morris v Metrolink* [2018] EWCA Civ 1358, the court of appeal found that a trade union representative had been automatically unfairly dismissed in the course of trade union activities.

¹¹⁰ *Demir and Baykara v Turkey* [2008] ECHR 1345.

¹¹¹ Section 246 of the *TULRCA*.

organise or participate in industrial action.¹¹² Such freedom is acquired subject to a condition that the action is taken in contemplation or furtherance of a trade dispute. Section 244 of the *TULRCA* defines a "trade dispute" as including, amongst other issues, conditions of employment, the termination or suspension of employment, and matters relating to discipline. The dispute must be between workers and their employer.¹¹³ This is also the position in South Africa.¹¹⁴ Although not exactly the same as in South Africa, the UK also has procedural requirements for protected strikes. Section 234A of the *TULRCA* requires a trade union to take such steps as are reasonably necessary to give notice of industrial action to the affected employer. Section 226 of the *TULRCA* further requires that a trade union which wishes to engage in industrial action for a trade dispute must conduct a ballot. The trade union should give 7 days' notice to the employer about the intended ballot; it must indicate the groups of employees to be balloted and it must give a total number of employees to be affected. The *Trade Union Act* 15 of 2016 further requires that such a ballot should have a 50% attendance for a strike to be supported and a 40% of voters supporting a strike in services such as health services, schools, fire, transportation, nuclear and border security. As in section 67(4) of the *LRA*, which protects employees against dismissal for participating in a protected strike, in the UK an employee may not be dismissed for participating in a strike.¹¹⁵ This will be the case if the strike is officially endorsed by the union, but if the strike is not conducted in line with the law an employer can approach the court for an injunction against the union or even claim damages,¹¹⁶ just as in South Africa, in terms of section 68(1) of the *LRA*. The court may grant an injunction against a strike only if there is a "serious question to be tried" and in doing so it must consider where the balance of convenience lies.¹¹⁷

There is no legislation in the UK which limits industrial action in essential services; however, there are provisions limiting the police, armed forces, merchant seamen, postal and telecommunications workers' right to strike.¹¹⁸ In South Africa, based on provisions of section 65(1)(d) of the *LRA*, the right to strike is limited for employees engaged in essential services and maintenance services. An employee dismissed during an official industrial action may allege unfair dismissal if others who participated in the action were not dismissed. Employees are protected

¹¹² Morris and Archer *Trade Unions, Employers and the Law* 207.

¹¹³ *London Borough of Wandsworth v NAS/UWT* [1993] IRLR 344.

¹¹⁴ Definition of strike in terms of s 213 and provisions of s 64(1) of the *LRA* which both refer to the "issue in dispute" in relation to a strike action.

¹¹⁵ Section 238A of the *TULRCA*.

¹¹⁶ Sections 20-21 of the *TULRCA*.

¹¹⁷ *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

¹¹⁸ Bowers *Practical Approach to Employment Law* 621.

against dismissal for participating in an official strike, but in terms of section 237 of the *TULRCA* an employee may not complain about unfair dismissal if he was dismissed while engaged in an unofficial industrial action. The section provides that a strike or other industrial action is unofficial in relation to an employee unless – (a) he is a member of a trade union and the action is authorised or endorsed by that union; or (b) he is not a member of a trade union but there are among those taking part in the industrial action members of a trade union by which the action has been authorised or endorsed.

4.4 Trade union security arrangements

In the UK the right not to join a trade union has the same protection as the right to join a trade union. Unlike in South Africa, all forms of closed shops in the UK are illegal based on the introduction of the *Employment Act 38 of 1990*¹¹⁹ and provisions of section 137(1)(a) of the *TULRCA*. It is therefore almost not possible to enforce closed shops in the UK. Sections 152 and 153 of the *TULRCA* protect employees against dismissal for not being a member of a trade union. Section 146 of the *TULRCA* also protects employees against a detriment through any action or failure to take action, in order to compel them to become a member of a trade union. Different to the position in South Africa, agency shop agreements and their implementation are also outlawed in the UK. As a result, in terms of sections 137(i)(b)(ii); 146(3) and 152(3) of the *TULRCA*, employees are entitled to refuse to comply with the requirement to pay or consent to a deduction from wages instead of being a trade union member.

4.5 Employees' remedies against victimisation

As in South Africa, an employee who has been victimised for exercising the right to freedom of association has remedies in the UK. In terms of section 140 of the *TULRCA*, where the industrial tribunal finds that a complaint under sections 137 and 138 of the *TULRCA* is well-founded, it shall make a declaration to that effect. It may make an order requiring the employer to pay compensation to the complainant or a recommendation that the employer take within a specified period action appearing to the tribunal to be practicable for the purpose of avoiding or reducing the adverse effect on the complainant of any conduct to which the complaint relates.¹²⁰ In terms of section 140(2) of the *TULRCA*, compensation shall be assessed on the same basis as damages for the breach of a statutory duty and may include compensation for injury and feelings. Section 140(3) of the *TULRCA* further provides that if without a reasonable justification

¹¹⁹ Section 1 of this Act provided a right for job applicants not to be discriminated against on the grounds of trade union membership.

¹²⁰ Section 140 of the *TULRCA*.

the employer fails to comply with a recommendation, the tribunal may increase its award of compensation. Furthermore, if the tribunal finds that the complaint under section 146 of the *TULRCA* is well-founded it may make an award of compensation which is just and equitable to be paid by the employer to the complainant. Previously section 157(1) of the *TULRCA* provided that where a tribunal made an award of compensation based on section 152(1) or 153 of the *TULRCA*, unless otherwise, the complaint did not request the tribunal to make an order for reinstatement or re-engagement or the case fell within section 73(2) of the *Employment Protection (Consolidation) Act, 1978*, the award included a special award calculated in accordance with section 158 of the *TULRCA*. However, this position was changed by the *Employment Relations Act, 1999*, which abolished special awards in cases of a dismissal due to union activities.¹²¹ Similar to the dismissal of an employee for trade union membership and activities, the dismissal of an employee is automatically unfair if the reason is that he or she is not a member of a trade union.¹²²

It is evident from the above that the *TULRCA* is more specific in terms of the remedies employees may be granted in case of victimisation based on exercising their right to freedom of association. The remedies are more stringent under the *TULRCA*, for example, as stated above for the purposes of section 140, compensation may include compensation for injury and feelings and the tribunal may increase its award of compensation where the employer without a reasonable justification fails to comply with its recommendation. However, it is submitted that the abolition of special awards for employees dismissed due to union activities not only reduced employees' protection but also the possible deterrence it had against employers who victimise their employees for exercising their right to freedom of association.

5 Conclusion

Employees' right to freedom of association and the protection of employees against victimisation for exercising the right to freedom of association are of importance and therefore are well provided for internationally in terms of different instruments, including relevant *ILO Conventions*.¹²³ In line with these instruments, the domestic labour law provisions of both countries cater for and protect the right to freedom of association and its exercise. In South Africa the *Constitution* protects this right in general terms under its section 18 and in the employment context under section 23. This right is given effect to and regulated amongst others in terms of sections 4 and 5 of the *LRA*. In the UK, although there is

¹²¹ See s 33(1)(b) of *Employment Relations Act, 1999*.

¹²² Sections 152 and 153 of *TULRCA*.

¹²³ *ILO Conventions 87 and 98*.

no codified Constitution, this right is protected and regulated amongst others by sections 137, 145, 146, 152 of the *TULRCA*. Although the concept of victimisation is not used in labour legislation in either country, employees in these countries are protected against victimisation and may not be subjected to prejudice¹²⁴ or a detriment¹²⁵ for exercising the right. They may also not be advantaged or induced in order for them to surrender the exercising of this right.¹²⁶ It must be noted, however, that this right, just like any other right, can be limited in certain respects; including through trade union security arrangements in South Africa, and other provisions relating to strikes. Employees in both countries have remedies in case they are victimised for exercising this right. If they are dismissed for exercising the right, the dismissal will generally be regarded as automatically unfair.¹²⁷ However, it must be noted that in the UK the *TULRCA* provides more stringent measures to protect employees against victimisation for exercising their right to freedom of association.¹²⁸

Despite the vast protection of the right to freedom of association, employees in both countries still experience victimisation in various forms as is seen from case law.¹²⁹ It is submitted that this is due to the persistent unevenness of the power relations between individual employees and their employers, amongst other things. Employees' right to freedom of association remains a threat to employers because in unity employees have power. Practices such as the blacklisting of workers as troublemakers in the UK and other victimisation practices by employers in South Africa are a concern. It is therefore up to trade unions to ensure that their members' right to freedom of association is defended and that they are protected against victimisation. Given that the victimisation of employees for exercising the right to freedom of association is highly likely to cause animosity between the employer and trade unions whose members are victimised, it is also up to employers to refrain from their conduct of victimising their employees for exercising the right to freedom of association. Employers should learn to respect the *Constitution*, which is the ultimate law of the country. The main objective of employers remains the maximisation of profits at all costs, sometimes with disregard to employees' rights, and this should be avoided by employers in a democratic society. South Africa has a unique society which comprises of employees who for many years suffered (especially black workers) without

¹²⁴ Section 5(2)(c) of the *LRA*.

¹²⁵ Section 146 of the *TULRCA*.

¹²⁶ Section 5(3) of the *LRA*; the *Nkutha* case.

¹²⁷ Section 187 of the *LRA*; the *Adams* case; the *Black Mountain Mining* case; the *Eidelweiss* case.

¹²⁸ Sections 140 of the *TULRCA*.

¹²⁹ The *NUMSA v Transnet* case; the *IMATU* case; the *Cold Chain* case; the *Farnsworth* case; the *Bone v North Essex* case.

adequate protection of their labour rights, including the right to freedom of association, and the time has come for them to enjoy the protection now offered under the *Constitution* and the *LRA*. A prohibition of victimisation against employees who exercise their right to freedom of association and more stringent measures against employers who victimise their employees should be clearly and directly provided for in the *LRA* in order to deter employers from engaging in such conduct. It must be noted that there can be no effective workers' organisation without the effective protection of employees from victimisation for exercising the right to freedom of association.

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List of Abbreviations

BAWU	Black Allied Workers Union
CCMA	Commission for Conciliation Mediation and Arbitration
CEPPWAWU	Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union
CILSA	Comparative and International Law Journal of Southern Africa
EEA	Employment Equity Act 55 of 1998
ECHR	European Convention on Human Rights
FAWU	Food and Allied Workers Union
FGWU	Food and General Workers Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ILJ	Industrial Law Journal
LDD	Law, Democracy and Development
LRA	Labour Relations Act 66 of 1995
MCI	Midland Chamber of Industries
NCBAWU	National Construction Building and Allied Workers Union
NMFEA	National Manufactured Fibres Employers Association
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
PELJ	Potchefstroom Electronic Law Journal
PSA	Public Servants Association
SACCAWU	South African Commercial, Catering and Allied Workers Union
SACWU	Southern African Clothing Workers Union
SADC	Southern African Development Community
SAFDWU	South African Freight and Dock Workers Union
SA Merc LJ	South African Mercantile Law Journal
SAMWU	South African Municipal Workers Union
SANDF	South African National Defence Force
SASBO	South African Society of Bank Officials
SSA	State Security Agency
SATAWU	South African Transport and Allied Workers

UDHR	Union
UK	Universal Declaration of Human Rights
TSAR	United Kingdom
TULRCA	Tydskrif vir die Suid-Afrikaanse Reg
	Trade Union and Labour Relations (Consolidated) Act 52 of 1992