

## NOTES / AANTEKENINGE

### THE RIGHT OF TRADE UNIONS TO DISCLOSURE OF INFORMATION UNDER THE LRA: BALANCING THE INTERESTS OF TRADE UNIONS AND EMPLOYERS

“Negotiation does not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant ...” (Kahn-Freund *Labour and the Law* 3ed (1983) 110).

#### 1 Introduction

Access to information promotes values of transparency, openness, and accountability that are important for a progressive constitutional democracy. Section 32(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter “the Constitution”) provides that “everyone has the right of access to information held by the state or by another person that is required for the exercise or protection of any rights”. It is submitted that the word “everyone” in this provision, includes trade unions and employees and that the words “another person” in the provision include employers. Employees and their trade unions, therefore, have the right of access to information that the employer has, which may be required for the exercise or protection of their rights. Section 32(2) of the Constitution, further provides that “legislation may be enacted to give effect to this right”. The Promotion of Access to Information Act (2 of 2000 (PAIA)) gives effect to the right of access to information in general, however, for purposes of this discussion, the Labour Relations Act (66 of 1995 (LRA)) gives effect to the right through a number of provisions; including its sections 16 and 189. While section 16 requires the employer to disclose to a representative trade union all relevant information that will enable trade union representatives to effectively perform functions, which are listed in section 14(4); section 189 regulates the disclosure of information in the context of dismissals based on operational reasons of the employer.

The above is in line with the International Labour Organisation’s (ILO) Collective Bargaining Standards Recommendation 163 (1981) which provides that “measures adapted to national conditions should be taken, if necessary so that parties have access to the information required by meaningful negotiation”. Section 23(5) of the Constitution grants every trade union a right to engage in collective bargaining. This right is protected and supported through provisions mentioned above which permit trade unions to request relevant information, which is important for the effective exercise of the right. This, however, has often proved to be problematic (see eg, *Atlantis Diesel Engines (Pty) Ltd v NUMSA* [1995] 1 BLLR 1 (A)); largely due to the

fact that on the one hand, trade unions need information, while on the other hand, employers sometimes regard this as an invasion of privacy. Employers often refuse to divulge information requested by trade unions (Brand and Cassim "The Duty to Disclose – A Pivotal Aspect of Collective Bargaining" 1980 1(4) *ILJ* 251) as they think that the disclosure of information will also negatively affect their bargaining power or that sensitive information may get to competitors and jeopardize their business. Business South Africa (BUSA) raised concerns regarding the right to disclosure of information in its submissions to the National Economic Development and Labour Council (NEDLAC) during the drafting of the LRA as it regarded the obligation to disclose information to trade unions as a threat and an encroachment into management prerogatives. This argument was largely based on commercial secrecy; confidentiality and that disclosure of information would impede effective decision-making (Representations on the Draft Labour Relations Bill (April 1995) 3–4; see also Bellace and Gospel "Disclosure of Information to Trade Unions: A Comparative Perspective" 1983 122(1) *International Labour Review* 58).

In view thereof, it is important that there be a balance between the right of trade unions to information and the employer's duty to disclose the information (Jordaan "Disclosure of Information in terms of the LRA" 1996 6(2) *Labour Law News* 1; Landman "Labour's Right to Employer Information" 1996 6(3) *CLL* 25). This analysis will consider the relevant provisions of the LRA that grant trade unions the right to information and employers' duty to disclose the information, to determine the balance between the interests of trade unions and employers regarding disclosure of information. It will also look at the position in the United Kingdom (UK) in order to determine whether there are lessons to be learned for South Africa.

## **2 Disclosure of Information in South Africa under the LRA**

### *2 1 Disclosure of information for collective bargaining purposes*

#### **2 1 1 Introduction**

This is one of the organisational rights provided for in terms of Chapter III: Part A of the LRA. The purpose of organisational rights, in general, is to assist trade unions in counter-balancing the strength of employers. These rights assist trade unions to gain bargaining power (*HOSPERSA v Zuid-Afrikaanse Hospitaal* GA 637 (unreported CCMA award: 3 February 1997)). In terms of the LRA (s 12–16), in order to qualify for any of the organisational rights, a trade union must be registered (*Unica Plastic Moulders CC v NUSAW* (2011) 32 *ILJ* 443 (LC)) and be either sufficiently representative or have majority representation (*Mutual and Federal Insurance Co Ltd v BIFAWU* [1996] 4 *BLLR* 403 (A); *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 *BLLR* 662 (CCMA) 670). A trade union may acquire these rights either through concluding a collective agreement with the employer (s 20);

membership of a bargaining council (s 19); section 21 procedure (s 21); or strike action (*NUMSA v Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (CC)).

In terms of section 16(2) of the LRA, the employer must disclose to a representative trade union all “relevant information” which will “enable the trade union representatives to effectively perform their functions” (*National Workers Union v Department of Transport* KN 913 (unreported) CCMA award, 29 August 1997; *DISA v Denel Informatics (Pty) Ltd* [1998] 10 BLLR 1014 (LC); *Visser v SANLAM* [2001] 3 BLLR 319 (LAC); *SACCAWU v Pep Stores* (1998) 19 ILJ 1226 (LC)). Subsection (3) states that “information must be disclosed whenever an employer is consulting or bargaining with a representative trade union to allow it to engage effectively with the employer”. It is submitted that the word “must” in subsection (2) and (3) shows that the employer has a duty to disclose the information, as long as the set requirements or conditions are met. In the context of section 16, a representative trade union is described as “a registered trade union or two or more registered trade unions acting jointly, which have as members the majority of the employees employed by an employer in the workplace”. However, it must be noted that in terms of the Labour Relations Amendment Act, (2014 (LRAA)) a commissioner may grant the right to disclosure of information to a trade union which does not represent the majority of employees, but it is the most representative trade union in the workplace, on condition that it already acquired rights in sections 12; 13; 14 and 15 and there is no other trade union exercising the right to information in that workplace (s 21(8A)(b) read with s 21(8B) of the LRAA).

## 2 1 2 The purpose for which information may be disclosed

The purpose of the disclosure of information is to enable the trade union representatives to effectively perform their functions. Trade union representatives’ functions, for which information should be disclosed as provided by section 14(4) of the LRA, include the representation of employees in grievance and disciplinary proceedings; monitoring employer compliance with workplace-related provisions of the LRA and other employment standards; and reporting alleged contraventions of such standards. Disclosure of information is important for trade unions because effective collective bargaining will require all parties involved to have the information that will enable them to make factually supported demands and offers (see *Brand and Cassim* 1980 1(4) *ILJ* 251; *Construction and Allied Workers’ Union v Avbob Funerals* EC903 (unreported) CCMA award 11 June 1997). Failure to disclose information may, therefore, have a negative impact on the role of a trade union representative and consequently on employees and on the success of collective bargaining itself.

The disclosure of information will not only benefit trade unions, but also employers, for example, information on the financial status of the business will provide more clarity to bargaining issues and improve employee co-operation and more commitment to strategic objectives of the company (Gospel “The Disclosure of Information to Trade Unions: Approaches and Problems” 1978 9(3) *Industrial Relations Journal* 18). This is also necessary in order to improve and strengthen the trust relationship between employers and trade unions, given the adversarial nature of collective bargaining

(Manamela “Regulating Workplace Forums in South Africa” 2002 14 SA Merc LJ 728). Under the Labour Relations Act, (1956), the duty to disclose information was part of the duty to bargain in good faith (*MAWU v Natal Die Castings Co (Pty) Ltd* (1986) 7 ILJ 520 (IC)), however the duty to bargain no longer exists in our Law; whereas information is still necessary for effective bargaining.

Although employees and trade unions have the right to disclosure of information, in terms of section 16(2), the right is limited, as it will be discussed below.

### 2 1 3 Limitations on the right to disclosure of information under section 16 of the LRA

The right to disclosure of information is not absolute. The purpose discussed above and other limitations discussed below should be met in order for the employer to disclose the requested information. In terms of section 16(2) of the LRA, the employer is required to only disclose relevant information to a trade union (*Atlantis Diesel Engines (Pty) Ltd v NUMSA supra*; *Kgethe v LMK Manufacturing (Pty) Ltd* [1998] 3 BLLR 248 (LAC); *Benjamin v Plessey Tellumat SA Ltd* 1998 ILJ 595 (LC); *SACCAWU v Pep Stores supra*). It is therefore incumbent upon the trade union to establish that the information it requires from the employer, is relevant for purposes of collective bargaining. The employer is not obliged to comply with a general demand for information unless an explanation is offered by the trade union on the relevance of the information (*UPUSA v Grinaker Duraset* [1998] 2 BLLR 190 (LC)). The test in this regard is an objective one (*SACCAWU v Pep Stores supra*) which requires that there must be an actual link between the required information and the function of the trade union representative and also between the required information and the collective bargaining demand (Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 5ed (2009) 265; Grogan *Collective Labour Law* 2ed (2014) 78)). In *Public Servants Association obo Strydom v Department of Housing and Local Government* ((1997) 18 ILJ 1127 (CCMA)), an employer was ordered to disclose information regarding the outcome of a recommendation that an employee be granted a merit award as it was deemed to be relevant to collective bargaining.

Information is important because without it trade unions and their representatives will find it difficult to effectively perform their functions. Section 16 does not list information which the employer must disclose, however, in line with trade union representatives' functions, relevant information may include the following: files containing disciplinary proceedings; managerial salaries; production and marketing plans (Grogan *Collective Labour Law* 79; *NEHAWU v University of the Western Cape* [1999] 4 BALR 484 (IMSSA)); information on financial status of the organisation; employee absenteeism; industrial relations and productivity; annual reports of companies; information on wages and benefits; safety information; etc. (Grogan *Workplace Law* 381; Everingham “Financial Reporting to Employees” 1991 *Accounting South Africa* 217; Grosett “Managerial Perceptions of the Effect of the Disclosure of Company

Information to Employees: Results of an Empirical Study” 1997 21(3) *South African Journal of Labour Relations* 43–58 39–40). A trade union representative may also request personal files of employees for purposes of representing them in disciplinary hearings if such files contain relevant information. For purposes of a retrenchment exercise, an audited financial statement of the company may be relevant (*Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 15 ILJ 1247 (A)). Collective bargaining based on inadequate access to information may lead to industrial action (Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 292) and in order to avoid this, trade unions and their representatives should have access to relevant information. The circumstances of each case and the purpose for the information must, however, assist in determining whether the requested information is relevant (Van der Walt and Campbell “Disclosure of Business Information” 2003 27(3) *South African Journal of Labour Relations* 69). Notwithstanding the above, it must be noted that the duty to disclose information only becomes operative when the employer is engaged in consultation or bargaining with the trade union (*PSA obo Nortier v State Attorney* [2003] 3 BALR 342 (CCMA)). An intention to consult or bargain in the future will therefore not trigger the duty.

Although the employer is required to disclose relevant information to a trade union, section (16)(5) of the LRA provides for certain types of information that the employer need not disclose. Firstly, the employer may not disclose legally privileged information. In order for information to be regarded as legally privileged, it must have been obtained for professional legal advice (*Bogoshidi v Director for Serious Economic Offences* 1996 (1) SA 785 (A) 792–793). A document will be deemed as obtained for professional legal advice only if it has been prepared for that purpose. Such document must also have been obtained in reference to actual pending litigation (*Basson et al Essential Labour Law* 167). This may include correspondence between the employer and its lawyers, for the purpose of pending litigation. Secondly, the employer may not disclose information, which cannot be disclosed without contravening a prohibition imposed by a law or court order. This may include the secrecy provisions of the Income Tax Act of 1962 (Landman 1996 6(3) *CLL* 23). Thirdly, the employer may not disclose information that is confidential and which if disclosed may cause substantial harm to an employee or employer (*NEWU v Mintroad Saw Mills (Pty) Ltd* (1998) 19 ILJ 95 (LC)). An inconvenience or embarrassment will however not be enough reason not to disclose information (Grogan *Collective Labour Law* 79). In *NUMSA v Atlantis Diesel Engines* ((1993) 14 ILJ 642 (LAC)) it was found that confidential information refers to “work-related information such as trade secrets” (see *Langa v Active Packaging (Pty) Ltd* [2001] 1 BLLR 37 (LAC) wherein it was stated that the financial statements of public companies are confidential until they are published). In terms of section 16(4) of the LRA, where confidential information is disclosed, the employer must notify the union in writing. Examples of harm contemplated by section 16(5)(c) of the LRA include threats to a company’s security or dissemination of information that may undermine its competitive position. In order to justify a refusal to disclose confidential information the employer must prove that harm will follow from disclosure and in this regard,

a possibility of harm will be enough (Grogan *Workplace Law* 381). Harm, in this case, will include pecuniary harm and harm to a reputation (Landman 1996 6(3) *CLL* 24). Fourthly, the employer may not disclose information that is private and personal relating to the employee, unless the employee consents to its disclosure (*CWIU v Lennon Ltd* [1994] 10 BLLR 1 (LAC); *Van Rensburg v Austen Safe Co* 1998 19 ILJ 158 (LC)). Medical records are regarded as an example of private and personal information (Du Toit *et al Labour Relations Law* 266).

For the first and second types of information mentioned above, there must be a factual determination on whether the information can or cannot be disclosed. For the third and fourth type of information above, there must be a discretionary determination. With regard to the third and the fourth types of information, the question should be whether the relevant information required by a trade union is confidential or private and personal (Du Toit *et al Labour Relations Law* 265–266). If the information is confidential, the enquiry will go further to determine whether the information may cause substantial harm to the employee or employer.

The above discussion demonstrated that although the right to disclosure of information is entrenched in the Constitution and protected in terms of PAIA and the LRA in the employment context, it is not automatic as certain requirements or conditions should be complied with before a disclosure can be made and directly or indirectly these requirements attempt to bring a balance between the interests of trade unions and employers.

## 2 2 *Disclosure of information for purposes of a dismissal based on operational reasons*

### 2 2 1 Introduction

Section 189 of the LRA regulates the disclosure of information in the context of consultation in relation to dismissals for operational reasons. In this case, information must be disclosed in writing, as verbal disclosure will not be sufficient (Basson *et al Essential Labour Law* 265; *Kgethe v LMK Manufacturing (Pty) Ltd supra*; *Visser v SANLAM supra*). Unlike section 16, section 189(3) of the LRA provides examples of relevant information, which the employer must disclose during the consultation. The employer must amongst others disclose the following information: the reasons for the proposed dismissals; alternatives that the employer considered before proposing the dismissals; reasons for rejecting those alternatives; the number of employees likely to be affected and job categories in which they are employed; the proposed method for selecting which employees to dismiss; the time when or the period during which the dismissals are likely to take effect; the severance pay proposed; any assistance that the employer proposes to offer to the employees likely to be dismissed; and the possibility of the future re-employment of the employees who are dismissed; the number of employees employed by the employer; and the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months (s 189(3) of the LRA). Although the above is not an exhaustive list, it is aimed at placing the

employee parties in a position to make informed representations on the listed topics (Grogan *Workplace Law* 332; *FAWU v National Sorghum Breweries* (1998) 19 ILJ 613 (LC)). Disclosure of information in this regard enables trade unions or employee parties to determine whether retrenchments are indeed unavoidable.

For purposes of disclosure of information under section 189 of the LRA, the onus is on the employer to establish the lack of relevance of the information requested (s 189(4)(b) of the LRA). In *National Union of Metalworkers of SA v Comark Holdings (Pty) Ltd* ((1997) 18 ILJ 516 (LC)), the Labour Court held that if the reason for the retrenchment relates to financial difficulties experienced by the employer, it may be required to make its financial statements available to the other party. However, it has been held that if the reason for the retrenchment relates to a decline in orders for one of the products rather than financial difficulties, disclosing financial statements might not be necessary (*UPUSA v Grinaker supra*).

## 2 2 2 Limitations on the right to disclosure of information under section 189 of the LRA

It must be noted that the provisions of section 16 with regard to information that the employer may not disclose to trade unions, apply *mutatis mutandis* to the disclosure under section 189 of the LRA. The employer may not disclose information, which is legally privileged; which cannot be disclosed without contravening a Law or an order of a court; which is confidential and may on disclosure cause harm to the employer or an employee (*NEWU v Mintroad Saw Mills (Pty) Ltd supra*); is private and personal and relates to the employee or is irrelevant (*SACCAWU v Pep Stores supra*).

From the provisions of sections, 16 and 189 of the LRA and the discussion above, the disclosure of information is evidently process-dependent and event-dependent in that it becomes operative only when the union and the employer engage in consultation or bargaining or alternatively when a need to retrench employees arise.

## 2 3 Resolution of disclosure of information disputes under the LRA

If a dispute arises regarding the disclosure, of information, it may be referred to the CCMA for conciliation and if this fails, the dispute should be referred for arbitration. The arbitrator will first determine whether the information is relevant (*NUMSA v Nissan SA (Pty) Ltd* [1999] 4 BALR 494 (IMSSA); *NUMSA v Behr Climate and Control* [2004] 3 BALR 364 (CCMA)). In this regard, it must be noted that legally privileged information and information, which cannot be disclosed without contravening a prohibition imposed by a Law or court order will not be disclosed even though it is found to be relevant. In relation to information that is confidential and which if disclosed may cause substantial harm to an employee or employer or information which is private and personal relating to the employee, the arbitrator must decide whether it has to be disclosed based on a "balance of harm" test. The arbitrator must balance the harm which the disclosure is likely to cause to

the employee or employer against the harm that the failure to disclose is likely to cause to the ability of a trade union representative to perform his or her functions or the ability of the union to engage effectively in consultation or collective bargaining as required by section 16(11) of the LRA. If the balance favours disclosure of information, the arbitrator is allowed to impose terms to limit the harm to the employer (*Du Toit et al Labour Relations Law* 266). Although the LRA does not impose any criminal liability for breach of confidentiality (*Van Rensburg v Austen Safe Co supra*), it prescribes two sanctions. Firstly, when the arbitrator determines whether information must be disclosed he or she will take into account past breach of confidentiality (s 16(13) of the LRA). Secondly, if there is a dispute about an alleged breach of confidentiality, the CCMA may order that the right to disclosure of information be withdrawn for a certain period as prescribed by section 16(14) of the LRA.

It is again evident from the provisions of section 16(11) of the LRA and the discussion above that, the LRA makes efforts to bring a balance between the interests of trade unions and employers.

### **3 Disclosure of Information in the UK under the TULRCA**

#### *3 1 Introduction*

In the UK, a legal obligation has been placed on employers to provide information to workers and their unions since the early 1970s. The disclosure of information was earlier regulated in terms of the Industrial Relations Act, (1971) and later by the Employment Protection Act of 1974 (Bellace and Gospel 1983 122(1) *International Labour Review* 58). For purposes of collective bargaining, a statutory provision for disclosure of information was first outlined in the Labour Government's White Paper, *In Place of Strife* in 1969 and is currently regulated in terms of the Trade Union and Labour Relations (Consolidation) Act (1992 (TULRCA)). The provisions regulating disclosure of information in the TULRCA are however to a large extent similar to those contained in the earlier legislation. Section 181(2) of TULRCA obliges an employer to disclose in writing information without which a trade union would be "materially impeded" in collective bargaining and which it would be in accordance with "good industrial relations practice" to disclose for collective bargaining (see also *Daily Telegraph Ltd and Institute of Journalists Central Arbitration Committee (CAC) Award No. 78/353*, par 20). Section 181(1) however, provides that collective bargaining must be about "matters and in relation to workers in respect of which the union is recognised by the employer" (see also *Daily Telegraph and Institute of Journalists* par 25; *BL Cars and General and Municipal Workers' Union et al CAC Award No 80/65*, par 27)). In other words, the employer can only disclose information to a trade union if the above tests or limitations are met. The disclosure of information is therefore restricted to certain matters and only to a unit in which the employer has recognised the trade union.



### 3.2 *Disclosure of information: Comparing the UK and South Africa*

Similar to the South African position, although the right to disclosure of information is recognised in the UK, it is not absolute. As seen above, the TULRCA sets a number of tests or limitations, in an attempt to bring a balance between trade unions' right to disclosure of information and the employer's duty to disclose the information (s 181 of the TULRCA). The tests or limitations have however been criticized in that they are very restrictive; that they are limited to matters for which the union is "recognised"; that the test for "good industrial relations" is vague as information that is commonly disclosed in one sector may be a guarded secret in another; that the test for "material impediment" is an obstacle to trade unions, which previously managed without the information; further that this test narrows the condition from one of relevance to one of importance (see *Daily Telegraph and Institute of Journalists*). If the above tests or limitations were not met, the employer would not be obliged to disclose the information. It is submitted that, although the tests or limitations in both countries are not exactly the same, they are both restrictive in nature. In South Africa, it is required that the trade union must be registered and must represent the majority of employees (see s 16(1) of the LRA). It is also required that the information requested must be relevant and that there must be an actual link between the required information and the function of the trade union representative and also between the required information and the collective bargaining demand (s 16(2) and (3) of the LRA; see also *National Workers Union v Department of Transport supra*; *DISA v Denel Informatics (Pty) Ltd supra*; *Visser v SANLAM supra*; *SACCAWU v Pep Stores supra*). In as far as collective bargaining is concerned, in both countries disclosure of information is process-dependent as it is triggered by consultation or bargaining (*PSA obo Nortier v State Attorney supra*; *Daily Telegraph and Institute of Journalists*), but also event-dependent, especially during retrenchments (Gospel and Willman "Comparatively Open: Statutory Information Disclosure for Consultation and Bargaining in Germany, France and the UK" (February 2004) Centre for Economic Performance, London School of Economics and Political Science <http://eprints.lse.ac.uk/archive/00000382/> (accessed 2016-11-09)).

In the same manner in which the LRA prohibits certain information to be disclosed, section 182(1) of TULRCA states that the employer may not disclose the following information: any information, which would be against the interests of national security to disclose; which it would be illegal to disclose; which had been communicated to the employer in confidence; which relates specifically to an individual; which would cause substantial injury to an employer's undertaking for reasons other than its effect on collective bargaining or which relates to legal proceedings. The employer is further not required to disclose information, the compilation of which would involve a disproportionate amount of work. It must be highlighted that some of these exclusions are similar to those excluded under the LRA (see s 16(5) of the LRA).

Unlike in South Africa, where there is no Code of Conduct dealing with disclosure of information, in the UK, the ACAS (Advisory Conciliation and Arbitration Service): Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purpose (the ACAS Code), issued under section 201 of TULRCA compliments the Act and specifically lists items that are relevant for collective bargaining and those items which might cause substantial injury to the employer. The ACAS Code has however also been criticized as not providing clear guidance on certain points and that there are contradictions in the lists contained in the Act itself and in the ACAS Code (*Daily Telegraph and Institute of Journalists*). In terms of the ACAS Code, the following are examples of information relating to the undertaking which could be relevant for collective bargaining for purposes of disclosure: pay and benefits (principles and structure of payment systems; job evaluation systems and grading criteria; etc.); conditions of service (policies on recruitment, redeployment, redundancy, absenteeism, etc.); performance (productivity and efficiency data; savings from increased productivity and output, etc.); financial (cost structures, gross and net profits, assets, liabilities, etc.). Under the LRA, there is no specific provision which lists the information which the employer should disclose to the trade union during bargaining, however, for this purpose, relevance may be determined by matters listed under sections 84 and 86 of the LRA over which it requires the employer to disclose information during consultation or joint decision-making with the workplace forum (Manamela 2002 14 *SA Merc LJ* 731–732).

In terms of section 188 of the TULRCA, for purposes of dismissal based on operational reasons, where 20 or more persons are redundant the employer must consult with either the trade union or the employee representatives. The information to be disclosed must cover the following: reasons for the redundancies; the methods of selection and implementation and the calculation of redundancy payments. If an employer fails to disclose information to a trade union or employee representatives or to consult, the affected employees can present a collective complaint to an industrial tribunal for a financial settlement in terms of amongst others section 188(4) of the TULRCA. The Collective Redundancies and Transfer of Undertakings amended some of the consultation provisions of TULRCA in certain respects (Protection of Employment) (Amendment) Regulations 1999 to clarify what needs to be done by employers to undertake genuine consultation in the event of planning redundancies. In providing information the employer is not required to produce original documents for inspection or copying, nor is it required to compile or assemble information, which would entail work or expenditure out of reasonable proportion to the value of the information in the conduct of collective bargaining; and the employer is not required to provide documents other than those specifically prepared for the purpose of providing the information. Under section 189(3) of the LRA, there is also a list of information, which the employer must disclose to the other consulting parties during dismissal based on operational reasons.

In the UK, if a trade union considers that an employer has failed to disclose to its representatives information, which it was required to disclose in terms of section 181 of TULRCA, or to confirm such information in writing in accordance with that section, such trade union may refer a complaint to the Central Arbitration Committee (CAC), which may ask the ACAS (a body

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similar to the CCMA in South Africa), to conciliate over the matter (see s 183 of TULRCA). If conciliation fails, ACAS shall inform the CAC accordingly, which shall proceed to hear and determine the complaint. Generally, the CAC assists employers and trade unions to resolve disclosure of information disputes by informal meetings. This approach of using both formal and informal procedures has been commended as successful for the effect it has on the practice of information disclosure (Gospel and Lockwood "Disclosure of Information for Collective Bargaining: The CAC Approach Revisited" 1999 28(3) *Industrial LJ* 243).

If the CAC upholds the complaint, it is required to specify the information that should have been disclosed or confirmed in writing, the date the employer failed to disclose, or confirm in writing, any of the information and a period of time within which the employer ought to disclose the information, or confirm it in writing. If the employer does not disclose the information, or confirm it in writing, within the specified time, the union (except in relation to Crown employment and Parliamentary staff) may refer a further complaint to the CAC. If the further complaint is upheld by the CAC, an award may be made against the employer (see s 183–185 of TULCRA). The sanction does not force disclosure of information or provide punishment in the award. In South Africa, the dispute over disclosure of information is referred to the CCMA for conciliation, and if conciliation fails, it is referred for arbitration. When the arbitrator determines whether information must be disclosed he or she will take into account past breach of confidentiality and where there is a dispute about an alleged breach of confidentiality, the CCMA may order that the right to disclosure of information be withdrawn for a certain period (s 16(14) of the LRA). Although the dispute resolution approach is similar in South Africa and the UK, in certain respects, South Africa does not have an informal meeting system, which the CAC in the UK uses before referring a dispute for conciliation. If introduced, this could assist in reducing the number of disputes that are referred for conciliation.

#### **4 Conclusion**

Employees and trade unions have a right to disclosure of information, in terms of the Constitution and the LRA, however, if employers are reluctant or refuse to disclose information to them; this will negatively affect the effectiveness of trade unions. Being open and making efforts to disclose information to trade unions is therefore important for employers, which is relevant and does not fall under exceptions stated in section 16(5) of the LRA. Information is important to trade unions as it helps them in making informed demands knowing whether or not the employer is able to meet them or in determining whether the offer made by the employer is reasonable or not. It is submitted that disclosure of information will discourage the adversarial approach inherent in collective bargaining. As stated by Van der Walt and Campbell (Van der Walt and Campbell 2003 27(3) *South African Journal of Labour Relations*) successful participation by employees in decision-making requires that relevant information be disclosed to them. This is one of the means by which industrial democracy can find expression in the workplace. In cases where disclosure of information is refused, employers must state the reasons for such refusal.

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Serious sanctions should also be introduced for employers who deliberately refuse to disclose relevant information and for trade unions, which breach the confidentiality of the information. It is submitted that the interests of the parties must be weighed up against the negative effects that the disclosure or non-disclosure of the information may have. Trade unions and employers may also conclude agreements that will regulate the disclosure of information within the workplace, which may also provide for dispute resolution processes (see Gospel and Lockwood 1999 28(3) *Industrial LJ* 248). A Code that provides guidelines on the disclosure of information between the parties could also be developed in South Africa, similar to the one in the UK. Although not binding to the parties, the Code must, unlike the ACAS Code, provide clear direction and guidelines on disclosure of information. This could include the criteria to be used in determining which information to disclose and which not to disclose with provisions of section 16(5) of the LRA in mind. There is also a need for trade unions to train their representatives in order to enable them to understand, evaluate and utilise information disclosed by the employer; otherwise, the exercise will be fruitless and futile as the value of information depends on the ability of the recipient to use it (Gospel and Lockwood 1999 28(3) *Industrial LJ* 247). The success of the consultation and collective bargaining to a large extent hinges on the knowledge or information the parties have about issues under discussion.

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