

# **THE DISMISSAL OF MANAGERIAL EMPLOYEES FOR POOR WORK PERFORMANCE**

by

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## **DECLARATION**

I declare that the dissertation hereby submitted to the University of Limpopo, for the degree of Masters in Labour Law (LL.M Labour Law) has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in the execution, and that all the material contained herein has been duly acknowledged.

\_\_\_\_\_  
**Surname, initials (title)**

**Date**\_\_\_\_\_

## **DEDICATIONS**

This dissertation is dedicated to my three children Mokokobale Rasakanya, Phetole Rasakanya, Ngwako Freddy Mokumo Mashaole Rasakanya, my late mother Mmagwako Mokumo, my brother Freddy Ngwako Mokumo, my sister Mmapula Constance Pheeha and her husband, my nephew Kholofelo Marcious Mbowane and my late husband Mocheeni Piet Rasakanya.

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## LISTS OF ABBREVIATIONS

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A	APPEAL COURT
BAWU	Black Allied Workers Union
BLLR	Butterworth Labour Law Report
CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act
FAWU	Food and Allied Workers Union
FEDCRAW	Federal Council of Retail & Allied Workers Union
GPSSBC	General Public Service Sector Bargaining Council
IC	Industrial Court
ILJ	Industrial Law Journal
IMSSA	Independent Mediation Service of South Africa
IMATU	Independent Municipal and Allied Trade Union
LAC	Labour Appeal Court
LC	Labour Court
MEC	Member of Executive Council
NEHAWU	National Education Health & Allied Workers Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
PSA	Public Servants Association
SACCAWU	South African Commercial Catering and Allied Workers Union
SACTWU	South African Clothing and Textile Workers Union
SAGAWU	South African General & Allied Workers Union
SALSTAFF	Salaried Staff Association
SANCA	South African National Council on Alcoholism
SCA	Supreme Court of Appeal

# THE DISMISSAL OF MANAGERIAL AND EXECUTIVE EMPLOYEES FOR POOR WORK PERFORMANCE

## I. Introduction

When the case *JDG Trading (Pty) Ltd t/a Price 'n Price v Brunsdon*<sup>1</sup> was heard in the Labour Appeal Court almost at the end of his dissenting judgement Conradie JA said that

'An experienced executive who needs to be counselled on fundamental skills of the job is probably not fit to be an executive. He is there to oversee others. He cannot do that if he cannot even oversee himself.'<sup>2</sup>

Within strict limits of course, this statement is entirely correct: the courts have taken a more flexible attitude in the application of unfair dismissal guidelines for incapacity in relation to senior executives. In other words it is accepted that it would be unfair to expect an employer to apply to a managerial or senior employees those guidelines regarding counselling worked out by the courts in relation to blue collars workers. It posits two categories where the procedural safeguards which must be complied with before dismissal (such as requirement for counselling, notice of contemplated action and granting further opportunity to remedy perceived shortcomings) might not apply. The first category relates to a senior or managerial employee whose knowledge and experience qualify him or her to judge for himself or herself whether he or she was meeting the standards sets by the employer. The second and distinct category relates to employees whose jobs required of them a degree of professional expertise of an extremely high standard and the likely consequences of the slightest deviation from that high benchmark is so grave, that a lapse in judgement is sufficient to warrant dismissal.

Termination of the employment of senior, and especially managerial and executive employees, including directors of companies<sup>3</sup> and municipal

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<sup>1</sup>(2000) 21 ILJ 501 (LAC).

<sup>2</sup>Ibid at 518F-G para [76].



managers,<sup>4</sup> presents a number of interesting problems. The broad issue of the applicability of the Labour Relations Act, 1995, as well as procedural and substantive fairness has been dealt with in some detail by the courts and arbitrators.

Simply put, the courts or arbitrators will uphold the dismissal of a senior employee if the employer has shown, on a balance of probabilities, that the employee concerned has misconducted himself or performed so inadequately that the reasonable expectation of the employer has been defeated.

In many instances where an employer wishes to terminate the employment of a management employee, however, the real cause for the termination may be loss of confidence in the ability of the employee. This loss of confidence may arise out of poor work performance in a team which functions under the leadership and motivation of the manager concerned. In this case the manager may have many plausible reasons why the team targets were not attained, but

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<sup>3</sup> Directors of companies find themselves in a different position. The terms “director” occurs in the Companies Act, 1973, and s 220 specifically allows a company “notwithstanding anything ... in any agreement between it and any director, by resolution ...” to “remove a director before the expiration of his period of office”. If person is simply a director, he may be removed in terms of the Companies Act, but if he is also an employee, the proper equity requirements relating to termination of employment must be met. This principle was clearly illustrated in *Brown v Oak Industries (SA) (Pty) Ltd* (1987) 8 ILJ 510 (IC), where the Industrial Court remarked: “It appears to the court that the mere fact that a person is also a director should not exclude him from the ambit of the Act. It must depend on the *de facto* position of the director. Many ... will be appointed by shareholders in general meeting and they will not be subject to day to day control by anyone. The Act would therefore not apply to them.

On the other hand, there are directors who are primarily employees, subject to the authority and control of more senior directors or managers. This is particularly likely to happen ... in a group set up, where the directors of subsidiary companies are employees subject to the day to day control of group managing director or some other senior director or manager. These directors, being employee, should have available to the protection of the Act.” See also *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (AD); *Turnbull and Amazwi Power Products (Pty) Ltd* (2006) 27 ILJ 237 (BCA). For discussion see: Larkin MP ‘Distinctions and differences: A company lawyer looks at executive dismissal’ (1986) 7 ILJ 248; Note ‘Not on top, but outside: executive dismissals and the court’ (1986) 2 EL 67; Olivier MP ‘The dismissal of executive employees’ (1988) 9 ILJ 519; Note ‘Dismissal executive and managerial employees’ (1988) 2 LLB s 1

<sup>4</sup> See for instance, *Mgoqi v City of Cape Town & another, In re: City of Cape Town v Mgoqi & another* [2006] 9 BLLR 873 (C); *Mafihla v Govan Mbeki Municipality* (2005) 25 ILJ 257 (LC); *Mbatha v Ehlanzeni District Municipality & others* (2008) 19 ILJ 1029 (LC); *Dladla v Council of Mbombela Local Municipality & another* (1) (2008) 29 ILJ 1893 (LC).

the fact remains that the targets were not achieved, and, failure to achieve targets by itself constitutes ground for termination.

Secondly, an employer may lose confidence in a managerial employee, not on the basis of past provable misconduct or poor performance, but on the basis of perceived lack of motivation, which is manifested in a certain attitude, rather than a specific behaviour. The question that arises is: can a manager be dismissed for an attitude rather than behaviour?

Lastly, the question of management styles and the ability to be able to work with colleagues and subordinates is an essential managerial attribute. The question of whether a manager can be dismissed on the grounds of inability to "fit in" is therefore also of substantial importance.

In view of the increasing incidence of contested managerial dismissals, managerial dismissal will be subject of this study. In the first place, the requirements for a fair dismissal for misconduct will be considered. Attention will be accorded to specific acts or alleged acts of misconduct involving senior employees. In the second place, the issue of procedural and substantive fairness for incapacity in relation to both poor work performance and ill-health will be covered.

In the third place, the vexed issue of dismissal of executive and managerial employees for incapacity will be examined in detail. A central question that arises in this context is when will it be fair and reasonable for an employer to conclude that a manager is fully aware of what is required of him or her and fully capable of judging that he or she is not cutting the mustard as in so far performance standards set by the employer - to a large extent by himself or herself are concerned.

Incapacity is often difficult to pin down, particularly when the employee is engaged in tasks incapable of precise measurements. Qualities like leadership, resolve, business acumen, judgement and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable either.<sup>5</sup> Court and labour tribunals are often not well equipped to measure intangibles of unsatisfactory work performance. Sir Hugh Griffiths graphically gave the reason in *Winterhalter Gastronom Ltd v Webb*:<sup>6</sup>

‘There are many situations in which a man’s apparent capabilities may be stretched when he knows what is being demanded of him; many do not know that they are capable of jumping a 5-barred gate until the bull is close behind them.’

## II Sundry Issues: Exercise Statutory Rights<sup>7</sup>

Section 5(1) prohibits an employer from discriminating against an employee for exercising a right conferred under the Labour Relations Act, 1995. A clear example is dismissal of a managerial employee for trade union activities. The employee in *Estelle Frances Keshwar v SANCA*<sup>8</sup> was a senior information officer at the Durban branch of SANCA where the employees had formed a staff association. The applicant was elected chairperson of that association. SANCA objected to members of the management team fostering and actively supporting the staff association in its activities against management. In addition, SANCA objected to the applicant fulfilling the role of chairperson of the staff association as well as management position.

Correspondence was exchanged and in October 1990 and later the company wrote a letter to applicant saying:

‘We must place you on terms to forthwith resign your position as a shop steward and to undertake in writing to the company that you will not hold

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<sup>5</sup>*JDG Trading (Pty) Ltd t/a Price 'n Price v Brunson* at 518A.

<sup>6</sup> [1973] IRLR 120 cited in Bowers, J & Honeyball, *S Textbook on Labour Law* 4 ed (1996) 163.

<sup>7</sup>S 187(1) (d) of the Labour Relations Act, 1996 deals with discrimination for exercising of a statutory a right. Grogan, J “Double Cross: Managers’ right to hold union office” (1999) *EL* 4; Le Roux, PAK ‘Trade union rights for senior employees’ (2000) 9(6) *CLL* 58; Mischke, C ‘Shop stewards: Their rights and obligations’ (2002) 12(1) *CLL* 1.

<sup>8</sup> [Unreported NHN 13/2/2009].

any other position of office in the union. If you are not prepared to adhere to our request then we must advise you that this company will not be in a position to continue to allow you to remain in its employment in a managerial capacity.'

Further correspondence ensued. In November the applicant was given one month's notice of the termination of her services. The letter stated that the executive of SANCA was of the opinion that the position of the applicant both in the "trade union" and in the Society were in conflict with each other.

The matter came before the Industrial Court. The court took the view that the answer to the question whether a managerial employee could be a matter of and hold a position in a staff association which is either a union or which fulfils union functions could not be sought under the concept of a conflict of interests.

The court pointed out that the LRA does not draw any distinction between blue collar workers and white collar workers. All employees are entitled to participate in collective bargaining. The court stated that many trade unions number managerial employees amongst their ranks. These employees are not prohibited by the law from accepting a post an official (more usually an office-bearer).

The court said, however, that there could be restrictions on an employee's right to be an office-bearer of a trade union. These restrictions would arise from an employee's duty not reveal his employer's secrets or confidential information to any other person. The court concluded that:

"A servant may therefore not participate in those union activities which would make it impossible or extremely difficult for him to perform the tasks entrusted to him by his master. Whether a servant is placing himself in such a situation would depend on the facts of the case".

The court gave several examples which principle such as:

- an employee may not be a member of the union negotiating team if it is part of the duties of the employee to negotiate on behalf of his employer.
- a supervisor could not act as a shop steward in a disciplinary inquiry in the division of which he is the supervisor.

The court opined that an employer would be entitled to take disciplinary action against an employee who disclosed confidential information. Depending on the facts the employer may be able to terminate the services of an employee who insists on taking an active part in union activities where it is in breach of the obligation to safeguard employer information. This would depend on such facts as the nature of the information and whether the employee could be transferred to a position where he would not have access to such information.

Having set out the principles the court proceeded to consider whether they were applicable to the present case. The court firstly considered the complainant that there was a conflict of interests between the applicant and SANCA. The only evidence to which SANCA could point were letters written by the applicant: in one she asked that the staff association be recognised and in another she said that the staff association was not a conventional trade union and would prefer to avoid a recognition strike. The court rejected the contention that this constituted an impermissible conflict of interest.

SANCA also relied on one of the functions of the applicants to show that her position in the staff association was detrimental to her job. Her contract of employment provided that she would act as the personal assistant to and understudy for the assistant director in all matters pertaining to the management of the organisation. It was argued that the applicant may be obliged to chair a disciplinary inquiry. This would cause some difficulty.

The court rejected this submission for two reasons:

1. The court said that other persons could be called upon to chair a disciplinary inquiry should this be required.
2. On the contrary, the court said that there was no reason why the applicant as chairperson of the staff association should not chair a disciplinary inquiry. However, said the court:

“The applicant would be entitled to and obliged to recuse herself from the general committee (of the staff association) if any decision is taken question the fairness of any disciplinary inquiry which she chaired or any discipline which she imposed.”

SANCA sought to show that as the applicant attended management meetings she would have access to confidential information, but did not disclose the nature of that information. If the position were to change SANCA could insist that the applicant terminate her office in the staff association.

The court concluded that SANCA had not shown that it was fair to terminate the employment of the applicant on the grounds of operational requirements. The court, therefore, reinstated the applicant.

Further, the case of *IMATU v Rustenburg Transitional Local Council*<sup>9</sup> provides some authority for managerial employees to hold union office. In this case, the council gave three reasons for adopting the stance that a certain level of senior managerial employees could not be allowed to serve in the executive positions of the trade union. They were that those officials would have access to confidential information; that they were required to initiate or conduct disciplinary hearings against employees; and thirdly that these employees may, by reason of their membership of the union executive, find themselves in a position in which they were unable or unwilling to fulfil essential tasks required of them.

Brassey AJ, having considered sections 4 and 5 of the Labour Relations Act had the following to say about the argument presented to him that the

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<sup>9</sup>(1999) 20 ILJ 377 (LC).

legislature could never have intended to bring senior managers within the ambit of the protections given by sections 4 and 5 of the Labour Code:<sup>10</sup>

‘I cannot agree. Bound by a Constitution that confers organizational rights on workers without limitation, the legislature might well have decided that no such limitations should be embodied in the protections conferred by the Act. There is nothing untoward, still absurd, in giving senior management the right to participate in trade union activities: white collar unions have long been recognised as legitimate and there is no reason to believe the legislature intended to curb their scope or activities. The implication of limitations and conditions into statutory provisions is not likely to be undertaken and, even if one were persuaded that they might be legitimate here, it would all but impossible to decide where the legislature implicitly intended the line to be drawn. I could consider that the sections must be read as they stand.’

And further:<sup>11</sup>

‘The protections conferred by the organisational rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By so doing, they legitimise acts that might otherwise constitute a breach of the employee’s duty of fidelity, prohibit victimization and outlaw rules of the sort the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under contract. The employee must still do the work for which he is engaged and observe the secondary duties by which he is bound under the contract. If he does not, he can be disciplined for misconduct or laid off for incapacity.’

Having set out forcefully his position respecting the legal underpinning to the issue of senior employees’ right to hold union office, his Lordship went to discuss an important caveat to this question:<sup>12</sup>

‘The senior employee who becomes a union leader must, in consequence, tread carefully, especially in his handling of confidential information. It is not enough simply to keep the information secret; he must recuse himself from every discussion within the union to which such information might be relevant either directly or indirectly lest he convey, merely by his conduct or simply by silence, facts which the employer would prefer the union not to know. He can, I believe, participate in discussions on strategy to which information given to him in confidence is irrelevant, since this is implicit in his right to participate in union activities, but he must guard even from exercising a judgement on the basis of such information. The delicacy of the discretion which this entails makes his position unenviable one, but the Act gives him the right to enter this minefield if he wishes.’

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<sup>10</sup>*IMATU v Rustenburg Transitional Local Council* at para 15.

<sup>11</sup>*IMATU v Rustenburg Transitional Local Council* at para 17.

<sup>12</sup>*IMATU v Rustenburg Transitional Local Council* at para 20.

The Labour Court held in *FAWU & another v The Cold Chain*<sup>13</sup> that an employee enjoys an absolute right in terms of the Constitution 1996 and sections 4 and 5 of the Labour Relations Act, 1995 to join a trade union and to take part in its activities. Where, therefore, an employee was appointed to a managerial position on condition that he gave up his position as a shop steward, and where he accepted the post but refused to relinquish his union position, the court found that the employer's demand was unlawful, and that the employee's subsequent dismissal was automatically unfair.

The members of the Labour Appeal Court in were required to determine whether the dismissal of a shop steward, who had been dismissed for insubordination and for being a disruptive influence while engaging in union activities, constituted automatically unfair dismissal. The majority agreed that on the evidence before them the dominant or principal cause of the employee's dismissal had been his trade union activities, and that his dismissal was therefore automatically unfair in terms of section 187(1)(d) of the LRA 1995.

What is required is a balance of interests. The right of the employee to freedom of association and participation must be balanced against the operational requirements of the employer. It is submitted that it is not incumbent on the employer to show actual harm; it is sufficient if the employer can show that there is a probability or likelihood of him suffering harm by reason of the participation of the managerial employee in the affairs of the trade union or staff association. In other words, the right of association accorded employees by the LRA is absolute only in the sense that it is not restricted to employees below senior managerial status.

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<sup>13</sup>(2007) 28 ILJ 1593 (LC).



### III The Requirements for a Dismissal for Incapacity

#### 3.1 Substantive Fairness

The Code distinguishes two broad categories of incapacity<sup>14</sup> namely poor work performance<sup>15</sup> and ill health or injury. In essence, the guidelines for a substantively fair dismissal for these categories are the same.<sup>16</sup>

In the case of poor work performance, be it in respect of a probationary employee or an ordinary employee, the employer must counsel the employee.<sup>17</sup> During such counselling, the employee must be informed what is expected of him<sup>18</sup> and warned that dismissal is a real possibility.<sup>19</sup> Provision may also be made for further counselling sessions during which the

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<sup>14</sup> The Industrial Court also distinguished between these two forms of incapacity. See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 219 where they discuss these forms of incapacity distinguished by the court.

<sup>15</sup> The dividing line between incapacity and misconduct in the case of poor work performance is often very fine. The cause for poor work performance must be carefully considered. If there is some measure of culpability on the part of the employee, his dismissal would probably be based on his misconduct and not on incapacity. See further A van Niekerk 'Dismissal for poor work performance: Guidelines from the LRA, the CCMA and the Labour Court' (1998) (9) *CLL* 81 as well as Christianson, M 'Incapacity and disability: A retrospective and prospective overview of the Past 25 years' (2004) 24 *ILJ* 879.

<sup>16</sup> The employer must be careful that a dismissal for permanent or serious temporary incapacity does not amount to an automatically unfair dismissal (see) The employer will be able to avoid this where it can prove that it is not the employee's disability which is the reason for his dismissal but rather the inherent requirements of the job which make the disabled person incapable of doing the work. The employer may also possibly dismiss a disabled person for operation reasons. Under such circumstances, the emphasis will be on the harm which the employee's incapacity is inflicting on the economic well-being of the business and not on the incapacity as such.

<sup>17</sup> See item 8(1) in respect of probationary employees and item 8(2) (a) in respect of ordinary employees. See also Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 224.

<sup>18</sup> See item 8(1) in respect of probationary employees and item 8(2) (a) in respect of ordinary employees. See also Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 224

<sup>19</sup> See item 9(b) (i) of the Code. See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 225.

employee's progress will be monitored.<sup>20</sup> Where appropriate, the employer may be under a duty to provide training and instruction to an employee.<sup>21</sup>

### 3.2 Probationers

In the case of dismissal for poor work performance, the Code provides for a reasonable probationary period.<sup>22</sup> The aims of such period are normally twofold: to allow the employer to determine the employee's suitability for the job and to enable it to dismiss an unsuitable employee for reasons which are "less compelling"<sup>23</sup> than would be required in the case of ordinary employees. However, the guidelines for a fair dismissal of a probationary employee prescribed by the Code<sup>24</sup> are essentially the same as those for ordinary dismissal.<sup>25</sup>

To be able to appreciate changes brought by the 1995 Labour Relations, cursory examination of the rights of probationary employees under old dispensation is imperative. Probationary employees are employees, who, it is envisaged will become permanent employees should they meet the standards of performance and behaviour set by the employer. A probationary period is set during which time the employee is assessed to ascertain whether he meets the required standards. The employee's expectation of permanent employment is subject to him showing that he meets the required standards.

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<sup>20</sup> See item 8(2)(b) and 9(b)(iii) which provide that an ordinary employee must be given a reasonable period to improve. See also Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 224. It is submitted that an opportunity for improvement is also implied in item 8(1) in respect of probationary employees. Le Roux & Van Niekerk at 225, however, indicate that there may be circumstances where the consequences due to poor work performance are so serious that the employee need not be afforded an opportunity to improve.

<sup>21</sup> See item 8(1) in the case of probationary employees and item 8(2) (a) in the case of ordinary employees.

<sup>22</sup> See clause 8(1).

<sup>23</sup> Grogan, J *Workplace Law* (1996) 114.

<sup>24</sup> See clause 8(1).

<sup>25</sup> This is largely in line with the view expressed in the majority of Industrial Court decisions namely that the requirements for a substantially fair dismissal during probation are essentially the same as those for an ordinary dismissal. See Grogan, J *Workplace Law* (1996) 113-114.

The purpose of a probationary period is not only to assess whether the employee has the technical skill or ability to do the job. It also serves the purpose of ascertaining whether the employee in a much wider sense. This would include an assessment of aspects such as his ability to work with existing employees, customers or clients, his demeanour and diligence, as well as his character and his ability to 'fit in'. In the words of a Canadian arbitrator:<sup>26</sup>

'The company during the probation period has the right to lay down the standards it expects a probationary employee to meet if he is to be retained to quality and quantity but also may include consideration of an employee's character, ability to work in harmony with others, potential for advancement and general suitability as an employee of the company concerned'.

A survey of the Industrial Court dealing with probationary employees shows that their legal position is still the subject of some uncertainty. It remains unclear what requirements have to be met by an employer prior to dismissing probationary employees and in what respects their position differs from that of other employees. In decisions given in terms of the pre-1988 definition of an employer did not have an unfettered right to dismiss probationary employees. Perhaps the most emphatic statement to this effect is to be found in *Pelzer v Jaystrong Construction (Pty) Ltd t/a Jay Bee Brickworks and Building Supplies*<sup>27</sup> where the court expressed the view that:

'It is true that an appointment on probation and the brevity of service at a particular employer are always factors that should be considered. It should not be overlooked that the first month or five in the employ of a new employer is a very difficult time for an employee. It might be that an employee has given up his job security at his previous work where he might have worked for many years as is the case in hoc casu. To empower an employer dismiss an employee during probation or during the first few months without a valid reason in the sense that the employee is denied (the) protection of the Act would in principle occur to be most unreasonable. One would expect the legislator to make his (sic) intention clear that he wanted to exclude from the protection of the Act certain employees totally or in certain circumstances.'

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<sup>26</sup>Quoted in Palmer, *EA Collective Agreement Arbitration in Canada* 2ed Butterworths 299.

<sup>27</sup> (NH 11/2/1798 8/8/89).

### 3.3 Procedural Fairness

Some decisions required that the employer go through a process of warnings and consultation prior to dismissal. For example, in *Enslin v Society for the Prevention of Cruelty to Animals*<sup>28</sup> the Court expressed the opinion that where employment is terminated after the expiration of a probationary period on the ground that the employee is not sufficient – it is expected of an employer that it should counsel or consult with an employee during the probationary period if that employee is not meeting the required standards. In *Van Dyk v Markly Investments (Pty) Ltd*<sup>29</sup> the Court envisaged a more formal approach. It indicated that a probationary employee should be entitled to written warnings of poor performance and should be given an opportunity to improve. In addition, a disciplinary inquiry should be held prior to dismissal.

The above decisions can be contrasted with the decision in *BAWU & Others v One Rander Steak House*<sup>30</sup> where the Court expressed the view that the nature of probationary employment meant that the position of a probationary employee could not be equated with that of a permanent employee. Provided that the dismissal of such an employee was substantively fair, a disciplinary hearing could be dispensed with, provided further that the agreed or reasonable notice of termination was given. If the employee was found to be unsuited for the job prior to the completion of the probationary employment, employment could be terminated at that stage. (This latter statement reflects the common law position – see *Ndamse v Fyfe-King, NO*<sup>31</sup> and *Muzondo v University of Zimbabwe*.<sup>32</sup>

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<sup>28</sup> (NHK 13/2/1580 11/11/88, GF 818).

<sup>29</sup> (NH 11/2/1301 14/10/88, GF 764).

<sup>30</sup>(1989) 9 ILJ 326 (IC).

<sup>31</sup>1939 EDL 259.

<sup>32</sup>1981 (4) SA 761 (Z).

### 3.4 Substantive fairness

Implicit in the approach adopted in most of the above decisions is that the Court will also investigate the substantive fairness of the Dismissal. However, it seems that there may be differences as to the extent to which the Court should control the substantive fairness of dismissals. The *Jaystrong Construction* decision seems to support the view that the Court should judge the substantive fairness of probationary dismissals with the same rigour as it would judge the dismissals of non-probationers. On the other hand, there are indications in the *One Rander Steak Housed* decision that it would permit the employer to rely on less substantial reasons for dismissal than would be required in the case of non-probationary employees. The same seems to have been the approach in *Nondzaba v Nanucci Cleaners*<sup>33</sup> where the Court appears to have accorded employers a measure of latitude to determine the suitability of the employee in the following terms:

‘Whenever a person enters into employment there is inevitably a period of adjustment especially when the employee does not bring with him or herself any previous experience required in the new work sphere. It is obviously only management and supervisors that are able to judge whether a new employee “shapes” satisfactory’.

The probationary period of the applicant in *Manqele/Babcock Equipment*<sup>34</sup> was extended for three months after he was found to be struggling with his work. After he failed to improve, he was dismissed. The arbitrator found that the applicant was unable to cope with simple routine tasks, which took newcomers about three weeks to master. The applicant could not therefore claim that he has been given insufficient training. His dismissal was upheld.

After the applicant was appointed to a post as journalist, the employer discovered during her probationary period she did not have her own transport, which had been a requirement of the job, and also that she had

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<sup>33</sup> (NHK 13/2/1061 12/1/88, GF 552).

<sup>34</sup>[2006] 10 BALR 976 (MEIBC). See too *SATAWU v Spoornet, Orex, Saldanha* (2001) 22 ILJ 2120 ARB); (2000) 21 ILJ 2315 (CCMA). (2000) 21 ILJ 2315 (CCMA).

embellished her curriculum vitae. When confronted, the applicant resigned. A few hours later she indicated that she no longer wished to do so. The applicant claimed that the withdrawal of her resignation had been accepted. In *Fraser/Caxton Publishers*,<sup>35</sup> the arbitrator found that the applicant had embellished her curriculum vitae and that she had proved incompatible with her immediate supervisor. This was sufficient reason for the employer to terminate the relationship at the end of the probationary period. However, even though the employee was still on probation, she was entitled to be heard before services were terminated. The applicant's dismissal was therefore procedurally unfair.

#### **IV Incapacity and Disability**

A recurring question is whether or not the terms 'incapacity' for ill health or injury' and 'disability' are interchangeable. Although there is fine line between on the one hand 'incapacity', and 'disability' on the other, the two remains distinct.<sup>36</sup> Incapacity implies that an employee is not able to perform the essential functions of the job. An employee with a disability<sup>37</sup> is suitably qualified and generally able to perform the essential functions of the job albeit with some form of reasonable accommodation.

*IMATU v City of Cape Town*<sup>38</sup> concerns an applicant who suffered from diabetes that was controlled by insulin. He had been denied the position of fire fighter by the respondent employer on the ground that he did not meet the inherent requirements of the position. He claimed, inter alia, that he had

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<sup>35</sup>[2005] 3 BALR 323 (CCMA). See also *Cordioli/AA Bricks & Factory Tile Shop* [2005] 10 BALR 1083 (CCMA)

<sup>36</sup> See Dupper *et al Employment Discrimination Law* (2004) 161 as well as Christianson, M 'Incapacity and disability: A retrospective and prospective overview of the Past 25 years' (2004) 24 *ILJ* 879.

<sup>37</sup> See Employment Equity Act 55 of 1998 s 1 ('people with disabilities'), Code of Good Practice: Employment of People with Disabilities items 5-6.

<sup>38</sup>(2005) 26 *ILJ* 747 (LC).For extensive discussion see Ngwenya, C & Pretorius, L 'Conceiving disability and applying the constitutional test for fairness and justifiability: A Commentary on *IMATU v City of Cape Town* (2007) 28 *ILJ* 747.

been unfairly discriminated on the ground of disability contrary to section 6 (1) of the EEA. The respondent argued that denial of employment was justified by the inherent requirements of the job under section 6(2) of the EEA. The respondent's main argument was that there was always a risk that an employee who was diabetic and dependent on insulin could suffer a hypoglycaemic attack in the course of duty and that such sudden incapacitation posed an unacceptable safety risk to the employee, his or her colleagues and the general public. The respondent decided, therefore, that a blanket ban on employing all insulin-dependent diabetics was justifiable. However, evidence adduced on behalf of the applicant, which was accepted by the court, showed that the applicant was fit and that his diabetes was optimally controlled. Moreover, he was able to fulfil the duties of a fire fighter safely, including anticipating a hypoglycaemic attack and taking remedial action. The degree of risk that the applicant posed to health and safety was according to court not "material". It was a minimal risk and no greater than the risk posed by a fire fighter without insulin-dependent diabetes.

Arbitrator Christie discussed the intersection between the incapacity process and disability in the *NEHAWU obo Lucas and Department of Health Western Cape*<sup>39</sup> case. The full passage need to be quoted so we can get its drift:

'It is trite that if the person is incapacitated for work an employer should determine if the employee falls within the scope of the definition of "people with disabilities" in EEA. I do not consider that it would unduly strain the scope of item 10 of the CGP: Dismissal to construe it as also encompasses "people with disabilities" as defined in the EEA. I say this even though "people with disabilities" are treated as a discrete group or category of persons. After all the LRA dismissal code was published before the EEA was enacted and it deals with dismissal generally, that is including persons who have a disability as defined. Although the LRA code makes only brief reference to people with disabilities as a discrete group, item 11(b)(ii) alludes to people with disabilities in the context of the extent to which an employer should be required to "accommodate disability". Andre van Niekerk in Unfair Dismissal notes that if an employee is permanently incapacitated but is able to perform some work, "[t]he employer's obligation in this case are not dissimilar to those that apply in the case of employees with disability".

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<sup>39</sup>(2004) 25 ILJ 2091 (BCA). See also *Wylie and Standard Executors & Trustees* (2006) 27 ILJ 2210 (CCMA).

Marylyn Christianson in “Incapacity and disability: A Retrospective and Prospective Overview of the Past 25 Years” indicates that “the code [LTA code] used the concepts of incapacity and disability interchangeably in some instances and this is confusing in a decade when disability has a very specific meaning for the purposes of equity in the workplace. A close examination of the issues, however, indicates that incapacity and disability may lie together along a continuum for the purposes of deciding whether a person is indeed capable of performing the required work to the standards set by the employer”. But it seems to me that one ought to take a purposive approach to these interpretive questions. The general objective of the statutory arrangements – both in the LRA and of course in the EEA – is to promote procedural and substantive fairness in relation to “people with disabilities” and to encourage employers to keep people with disabilities in employment if these can reasonably be accommodated. It follows that the general concept of fairness requires an employer to consider whether a particular employee is “a person with disabilities” under the EEA in determining if there is sufficient valid fair reason to terminate employment. And I consider that this ought to be a relevant factor in the arbitration even if – as here – the employee has not specifically sought special treatment by reference to the to the EEA and claimed the status of a person with disability. Item 10 and 11 of the LRA code on dismissal require an employer to consider whether an employee falls within the definition of “people with disabilities” in s 1 of the EEA. I think the reason for this is that disability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions in the chapter II of the EEA, it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability.’

Another leading case is *Wylie and Standard Executors & Trustees*.<sup>40</sup>The applicant, a trust officer employed by the respondent was diagnosed with multiple sclerosis, a degenerative neurological disorder. When she could not perform to the required standards in the trusts division she was transferred to the estates division where there was less pressure. Fewer estates were given to her handle but she still could not manage all her files. Stress worsened Ms Wylie’s condition but a medical panel found that she was not totally and permanently disabled. The panel suggested that the employer consider either:

- (a) accommodating the employee within her current role;
- (b) seeking employment for her in another role in the bank; or
- (c) assisting her to pursue something outside of the bank.

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<sup>40</sup>(2006) 27 ILJ 2210 (CCMA).



The employer did not consider option (a) to be feasible. The applicant was advised that options (b) and (c) would be explored for a period of three months after which, if no solution could be found, her employment would be terminated. No suitable positions became available and her employment was terminated at the end of the three-month period.

In arbitration proceedings the employer contended that it had complied with its Code of Good Practice: Ill Health and had treated the employee with understanding and compassion. In those circumstances it was reasonable to dismiss the applicant. It was common cause that her impairment amounted to a disability. The applicant contended that the Code of Good Practice on the Employment of People with Disabilities and Technical Assistance Guidelines published under the Employment Equity Act 55 of 1998 required much more of an employer in the case of a disabled employee, and the employer had failed to comply with these.

The commissioner first considered the definition of 'people with disabilities' in section 1 of the Employment Equity Act read with the definition of a 'physical impairment' in item 5 of the Disability Code, and found it inescapable that the applicant's condition amounted to a disability as envisaged in the Employment Equity Act and the code. Item 6 of the code provided that employers should 'reasonably accommodate' the needs of people with disabilities. The Labour Relations Act also protected employees against unfair dismissal on the basis of disability. The Code of Good Practice: dismissal distinguished between dismissals for incapacity based on poor work performance and those based on ill-health or injury, and 'disability' was mentioned in passing in items 10 and 11 of that code. The commissioner considered whether 'incapacity for ill-health or injury' and disability were interchangeable, and concluded that they were not. Incapacity implied that an employee was not able to perform the essential functions of the job. An employee with disability was suitably qualified and generally able to perform

the essential functions of the job with some form of reasonable accommodation

The commissioner endorsed the views of the Christie in *NEHAWU obo Lucas and Department of Health Western Cape* and found that the respondent had not treated the Ms Wylie as a person with a disability but as a poor performer. It was clear that the employer had not complied with the guidelines set out in item 6 Disability Code in all respects. It also did not follow its own incapacity management guidelines. When the panel decided that Ms Wylie would be given a pension, the employer did nothing more, but looked for possible posts to become vacant. That was patently not enough reasonably to accommodate a disabled person. It was also unfair first to give notice of termination and then to look for possible alternative.

On the other hand, in the employer was confronted with intersection between incapacity and disability *Insurance & Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*<sup>41</sup>The material facts were that when introducing members of the department to the manager of the internal audit department, the employee's superior, Z, referred to Ms Isaacs as 'our new slut in the department'. Ms Isaacs broke down crying and was very distressed. Although the offending superior subsequently apologized in writing and publicly and, after grievance proceedings, received a written warning, Ms Isaacs was not appeased, and wished not to have to report to him or to have to see him on a regular basis. The incident traumatized Ms Isaacs and triggered a severe depression. From 7 March to 31 May 199 she was off work and for part of the time admitted to hospital suffering from depression and anxiety.

The employee returned to work on 1 June 1999 but was still very emotional about seeing Z again and indicated that she could not work in the department

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<sup>41</sup>(2000) 5 LLD 584.

with him. Z's superior, L, tried to accommodate her by fashioning a new job description for her, and suggested that she go home and return when she felt better. She returned again on 7 June and was ready to work, but was still unhappy to be near Z. She asked the company's human resource manager if she could move to another department, and he agreed to look at alternatives. The following day the employee told L that she no longer wanted to work in the department and that she did not think L wanted to help her or cared for her. He advised her that it would not be possible for her to avoid Z altogether and that retrenchment was not an option.

The employee left work on 8 June and did not return. On 1 June the company send her a letter advising that unless she reported for work by 14 June she would be reported as having absconded. On 17 June she advised that she was regarded as having absconded, and her contract was terminated summarily.

After reviewing the foregoing evidence and the arguments of both sides the commissioner expressed the view that the company's behaviour was inappropriate. L knew that the employee was depressed and she had been hospitalised. He knew that she was not coping at work. Very few alternatives were given any serious consideration. The employee had approached the human resources manager on various occasions looking for alternatives to her dilemma. He knew that she had been off work for depression and should have thought to suggest Pay bridge (a disability benefit available to employees who had been on four weeks' continuous sick leave and who had been traumatized or involved in an accident) to her. This would have given her the opportunity to pull herself together whilst seeking other alternatives.

The commissioner observed that the employee had 15 years' loyal service with the company and was a good and valued employee. To simply follow standard abscondment procedures was not fair. The company was a very large organisation and alternatives must have been available. If the

alternatives did not work out, the correct procedure in circumstances would have been to follow the disciplinary route for incapacity. The dismissal was found to have been substantively unfair.

## V Ill-health or Injury

Where the employee is incapable because of ill health or injury, the employer must also enter into an investigative process and hold discussions with the employee.<sup>42</sup> During these discussions, the employee must be informed what impact his incapacity has on his job security.<sup>43</sup> Provision may also be made for further discussions<sup>44</sup> during which progress regarding his physical well being is considered<sup>45</sup> and, where relevant, alternatives to dismissal or the adaptation of his duties is discussed.<sup>46</sup> In the process of investigation, the employee should be given an opportunity to state his case and to be assisted by a trade union representative or fellow employee.<sup>47</sup>

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<sup>42</sup> This is implied in item 10(1) and (2) of the Code. See, for instance, *Tshaka and Vodacom (Pty) Ltd* (2005) 26 ILJ 568 (CCMA)

<sup>43</sup> See item 10(1) of the Code.

<sup>44</sup> See item 10(2) where mentioned is made of the “process” of the investigation.

<sup>45</sup> Item 10(3) enjoins employers to consider counselling and rehabilitation in the case of alcoholism and drug abuse. See generally *Tanker Services (Pty) Ltd v Magudlela* [1997] 12 BLLR 1552 (LAC); *FAWU obo Klaas v La Fage SA (Pty) Ltd* [2000] 12 BLLR 1370 (CCMA); *NUM obo Nkuna v Western Deep Levels Mine* [2000] 1 BALR 72 (IMSSA); *Castle Lead Works (Tvl) (Pty) Ltd and NUMSA* (1989) 10 ILJ 776 (ARB); *Cane Carriers (Pty) Ltd and Govender* (1989) ARB 8.11.10; *McBain v Afrox Ltd* [1999] 12 BALR 1386 (CCMA); *NUMSA obo Davids v Bosal Africa (Pty) Ltd* [1999] 11 BLLR 1327 (IMSSA); *Price Club and CCAWUSA* (1998) ARB 8.11.5; *Le Roy v SA Express Airways* (1999) 20 ILJ 431 (CCMA); *FAWU obo Peren & others v Meadow Meats* (1999) 4 BALR 403 (CCMA); *Esau & 'n ander v Wynand Boerdery Belange (Edms) Bpk h/a Zetler Bros* (1995) 16 ILJ (LAC); *SACCAWU obo Johnsonv Clover Dairy* (2000) 4 BALR 397 (CCMA); *SACCAWU obo Sekgopi v Kimberley Club* (2000) 4 BALR 413 (CCMA); *Durban Integrated Municipal Employees Society & others v Durban City Council* (1988) 9 ILJ 1085 (IC); *SALSTAFF/AIWU obo Govender v SA Airways* (2001) 22 ILJ 2366 (ARB); *AECI Explosives Ltd (Zommerveld) Mambula* (1995) 16 ILJ 1505 (LAC). For further discussion: Albertyn, C ‘Fair discipline and alcohol abuse’ (1992) 9(2) *EL* 33 and ‘Alcohol abuse – The sanction’ (1993) 9(5) *EL* 116; Albertyn, C & McCann, M *Alcohol, Employment and Fair Labour Practice* (Juta) 1993; Beaumont, P ‘Trade unions, organisations and alcohol policies’ (1983) 14 *IRJ (UK)* no 3 68; Note ‘Alcohol and drugs’ (1986) *IRLIB* no 315; Note ‘Down, down, down ... and out: Drink, drugs and discipline’ (1987) 3 *EL* 25; Van Jaarsveld, M ‘Drinking on duty’ (2002) 10(1) *JBL* 16.

<sup>46</sup> See item 10(1) of the Code. Item 10(4) states that the duty on the employer to accommodate the incapacity of the employee is more onerous where the employee was injured at work or is suffering from a work-related illness.

<sup>47</sup> See item 10(2).

The following principles laid down in *Davies v Clean Deal CC*<sup>48</sup> were similarly by the Industrial Court in *Wilson Madolo v South African Breweries Ltd*<sup>49</sup> and *NUM and Phillip Nongalo v Libanon Gold Mine*<sup>50</sup> endorsed:

(a) A fair employer should approach inability to perform the work previously performed due to disablement in the following manner:

1. there is greater duty to accommodate the employee where the disablement is caused by a work-related injury or illness;
2. the employer must, in the first instance, ascertain whether the employee is or is capable of performing the work he previously performed and for which he was employed, and, if not, the extent to which he will be unable to perform his former duties.
3. this investigation, in which the employee is entitled to participate to the extent necessary to protect his interest, may, in the light of the facts of each case, require further medical investigation and opinion and/or the employee being asked to perform his former tasks to demonstrate his ability;
4. the employer should next, after consultation with the employee, ascertain whether the duties required of the employee or the manner in which those duties are to be performed, can be so adapted that the employee is capable of fulfilling his previous function either alone or with such assistance as is reasonable under the circumstances;
5. the employee must, if the employee cannot be placed in his former position, ascertain whether alternative work, even at a reduced salary, is available within the employer's organisation.

The grievant in *Du Plessis / Eskom*<sup>51</sup> was dismissed after a spinal operation. After the operation, she applied unsuccessfully to the Eskom Provident Fund

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<sup>48</sup>(1991) 2(1) SALLR 11 (IC).

<sup>49</sup>(1991) 2(12) SALLR 6 (IC).

<sup>50</sup>(1993) 4(8) SALLR 29 (IC).

<sup>51</sup>[2001] 5 BALR 427 (P).

to be medically boarded. Eskom then conducted an “incapacity investigation”, during which Ms Du Plessis stated that she intended to appeal against the fund’s refusal to permit her to retire on ill health benefits. Eskom decided that, if the appeal to the fund failed, her services would be terminated unless she returned to work. After her appeal was rejected by the fund, Ms Du Plessis was instructed to return to work, but failed to do so. She was dismissed on notice. Ms Du Plessis claimed that her dismissal was unfair because Eskom had not made sufficient effort to find her an alternative position, or to investigate ways in which her working conditions could be adapted to enable her to continue working.

The arbitrator noted that before dismissing employees on the ground of incapacity an employer is required to consider alternative positions or adapting their working environment. The “incapacity investigation” held before Ms Du Plessis’ dismissal was convened in order to consider those possibilities. However, she had informed Eskom that she intended to persist with her efforts to persuade the fund to board her. She had not objected to the decision that her employment would be terminated if her appeal failed and she did not return to work. Eskom’s failure to consider alternative work had to be assessed in the light of these circumstances. Furthermore, if Ms Du Plessis had accepted the instruction to return to work after her appeal to the fund was rejected, she would have retained her right to apply for early retirement at a later stage. By refusing to return to work, she had sacrificed that right. Ms Du Plessis’ complaint was really against the fund. The arbitrator was precluded by his terms of the fund’s decision. The dismissal was upheld.

The decision in *Bennet and Mondipak*<sup>52</sup> requires employers to take a rethink on work related stress. After corporate restructuring, the employee assumed greater responsibilities and then suffered two nervous breakdowns, involving

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<sup>52</sup>(2004) 25 ILJ 583 (CCMA).

hospitalisation and psychotherapy and being booked off work indefinitely. The employee was offered alternative positions but refused. Fearing a further relapse, the employer terminated his services for incapacity. At the CCMA the Commissioner was satisfied, on the medical evidence, that the breakdown was a direct result of work-related stress.

Relying on the Code of Good Practice: Dismissal, the Commissioner found that where an employee is capable of performing the work, an employer has an obligation to adapt the fully investigating the issues which gave rise to the stress. The employer had to consider whether 'stressors could be removed. The Commissioner found that until this is done, the offer of an alternative position is premature and the employee's refusal to accept them did not warrant a negative inference.

In *Jacobs/Trident Steel*<sup>53</sup> the applicant was dismissed after a disciplinary hearing in which he was charged with constant late coming and absenteeism. The commissioner noted that the absences were all associated with a work related injury, and all had taken place while the employee was on some sort of official leave. Although no link could be found between the incidents of late coming and the injury, the employer should have treated the matter "progressively". Instead, it had effectively condoned the applicant's poor time keeping for about 20 months and then dismissed him without prior warning.

The applicant in *PSA obo Meyer/Department of Correctional Services*<sup>54</sup> resigned after his application for medical boarding was refused, and the respondent deducted pay for a period of unauthorised absence from. The respondent claimed that the applicant should have applied for temporary disability leave. The arbitrator noted that the applicant was required to prove that the respondent had rendered the employment relationship intolerable, and that

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<sup>53</sup>[2005] 1 BALR 1127 (MEIBC).

<sup>54</sup>[2006] 10 BALR 999 (GPSSBC). See also *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 25 ILJ 947 (BCA).

resignation was an act of last resort. Since the applicant was to blame for not applying for temporary disability leave, the financial embarrassment he claimed to have suffered could not be attributed to the respondent. Furthermore, the applicant had already initiated a grievance over the respondent's refusal to board him, and had resigned before that process had been completed. The application was dismissed.

The applicant in *NUMSA obo Ivasen and Whirlpool SA Ltd*<sup>55</sup> was dismissed for 'illness related to absenteeism over an extended period of time'. He submitted numerous sick notes for a wide variety of different illness and was also sometimes absent without a sick note. The employer's occupational health nurse testified that she could detect no pattern to his various illnesses, and there was nothing to show incapacity. The company doctor encouraged him to visit his own doctor to find a solution to his illness. The arbitrator found that the employer's staff has spent much time investigation the employee's ill-health. Schedule 8 to the Labour Relations Act provided that 'employers are entitled to satisfactory conduct and work performance from their employees'. It was clear that the employee's ill health prevented him from attending work, and he was unable to provide the employer with a satisfactory level of performance.

The dismissal for incapacity in *Tshaka and Vodacom (Pty) Ltd*<sup>56</sup> arose after the employee was diagnosed with severe dysphonia, or voice fatigue, which prevented her from performing her duties as a full-time call centre consultant. The position required of her to talk on line with customers for some seven hours a day. Medical specialist recommended that to accommodate her condition the time she spent talking on line should be reduced by one half, or that she be removed to another work environment. The employer was unable to provide alternative employment in Cape Town or to adapt her specific job function. After a hearing she was dismissed for incapacity. She claimed before

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<sup>55</sup>(2005) 26 *ILJ* 985 (BCA).

<sup>56</sup>(2005) 26 *ILJ* 568 (CCMA).



the CCMA that her dismissal was unfair because her employer made no effort to ascertain whether other suitable positions were available outside Cape Town.

It was common cause that the employee's dysphonia was work-related illness, and that the employer had failed to explore the availability of suitable positions outside its Cape Town offices. The commissioner found that item 10(4) of the Code of Good Practice: Dismissal specifically provides that particular consideration be given to employer's duty to accommodate the employee was more onerous in such cases. It was not unreasonable to expect the respondent, a major cell phone operator, to ascertain whether there were other suitable positions available outside Cape Town. By failing to do so the employer had failed to give the employee special consideration, and had flouted the guidelines in item 10(4). The dismissal was substantively unfair, and compensation equal to six months' remuneration.

*NUMSA obo White and Lear Automotive Interiors (Pty) Ltd*<sup>57</sup> concerned the dismissal of an employee suffering from epilepsy. Although the employer complied with the bald requirements of the Code of Good Practice: Dismissal, the arbitrator took the view that more was required in the field of medical investigation before the employer could satisfy the onus of proving that there was a fair reason for the employee's dismissal. A number of recommendations for the management of epileptics in the workplace were referred to for consideration in this regard. The employer was ordered to reinstate the employee on the terms and conditions that he enjoyed at the time of his dismissal, after his demotion.

Finally in *Jansen and Pressure Concepts*<sup>58</sup> the employee was disciplined for poor time-keeping and absenteeism associated with his alcoholism. In this case the

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<sup>57</sup>(2005) 26 ILJ 1816 (BCA).

<sup>58</sup>(2005) 26 ILJ 2064 (BCA). See too *Automobile Association of SA v Govender NO & others* (1999) 20 ILJ 2854 (LC); *Naik v Telkom SA* (2000) 21 ILJ 1266 (CCMA); *HLCAWUSA & another v Fedics*

arbitrator considered that the employer had applied its disciplinary rules inconsistently, and that it should have done more to accommodate the employee's alcohol problem before resorting to dismissal.

As already discussed, in relation to dismissal for ill-health or injury<sup>59</sup> the employer will have to prove that the employee was ill or he was injured and that this made the employee incapable of doing his work.<sup>60</sup> In the second instance, the employer must prove that ill health or injury was a fair reason for dismissal under the circumstances. In this regard, the employer must indicate that the extent to which the employee was unable to perform his work was substantial;<sup>61</sup> that it was not possible or feasible to adapt the employee's work circumstances or change his duties<sup>62</sup> and that no suitable alternative work was available.<sup>63</sup>

An employer who dismisses a partially disabled employee must, before the dismissal consult with the employee concerning the disablement and investigate whether the employee can be accommodated elsewhere in the

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*Group (Pty) Ltd t/a Fedics Food Services* (1993) 3 LCD 303 (IC); *Bahl v St Lucia Sands* [1998] 3 BALR 249 (CCMA); *Naidoo v Rampookar* (1999) 20 ILJ 797 (CCMA); *SACTWU v H C Lee Co (Pty) Ltd* (1999) 20 ILJ 1120 (CCMA); *KleinKopje Colliery v NUM obo Mbenekazi* [1998] 9 BALR 1206 (IMSSA).

<sup>59</sup> The guidelines for a substantively fair dismissal are those, which have been developed by the Industrial Court (See Du Toit *et al* *The Labour Relations Act 1995* (1996) 360 and 364). See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 229 for a discussion of the Industrial Court guidelines).

<sup>60</sup> See clause 11(a) of the Code. See too *Rikhotso v MEC for Education* (2004) 25 ILJ 2385 (LAC); *Khuzwayo and Somta Tools (Pty) Ltd* (2005) 26 ILJ 947 (BCA); *CEPPWAWU obo Qhelile and First National Batteries* [2002] 12 BALR 1275 (CCMA); *Barnard and Telkom SA Ltd* WES997-02 (CCMA).

<sup>61</sup> See clause 11(b)(i) read with clause 10(3) of the Code. In the case of temporary incapacity, it must prove the extent of the incapacity is so great that continued employment is not a feasible option. It may prove this where the facts show that the employee will be absent for an unreasonably long time (see clause 10(1) of the Code). Where an employee is permanently incapable, the employer must prove that it cannot accommodate his disability by adapting his duties or work circumstances or that there is no alternative employment (see clause 10(1) of the Code).

<sup>62</sup> See clause 11(b)(ii) of the code. The Code indicates that an employer's duty to accommodate an employee who is injured at work or who is suffering from a work-related illness is more onerous under these circumstances (see clause 10(4)).

<sup>63</sup> See clause 11(b)(iii) of the Code. In clause 10(4) the Code stipulates that the duty on the employer to try and find suitable alternative work is more onerous where the illness or injury is work-related.

employer's business. The obligation to consider this alternative to dismissal is greater where the employee's disability or incapacity is sustained in the course of the employee's employment.<sup>64</sup> However, where the employee is permanently totally disabled it serves no purpose to offer the employee alternative employment and the employer is under no obligation to keep the employee in employment.<sup>65</sup>

## **VI Judging for yourself that you are that cutting the mustard? Managerial employees on the firing line**

### **6.1 Substantive fairness in respect of senior executives**

It is trite that the fairness or otherwise of the dismissal of the senior managerial employee will be determined by both substantive and procedural considerations. A dismissal for poor work performance must satisfy the test of substantive fairness. The employer must establish whether the employee failed to meet a required performance standard.

Substantive proof of poor work performance is often a difficult issue, particularly when the employee is not engaged in tasks capable of precise measurement. Substantive proof is best offered on the basis of an assessment or appraisal conducted by the employer. The purpose of the assessment is to establish the reasons for the employee's shortcomings and to apply a value judgement of his performance which is both 'objective and reasonable'.<sup>66</sup>

'[T]here are decisions which, correctly it is suggested, indicate that the court will, to some extent at least, be prepared to defer to the opinion of

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<sup>64</sup> See *Abdullah Hendricks v The Mercantile & General Reinsurance Company of SA Ltd* (1993) 4(4) SALLR 41 (IC); *Ventersdorp Town Council v President of the Industrial Court, SAAME and M M S du Plessis* (1993) 4(2) SALLR 101 (LAC).

<sup>65</sup> See *Free State Consolidated Gold Mines Bpk h/a Western Holding Goudmyn v Labuschagne* (1999) 20 ILJ 2823 (LAC).

<sup>66</sup> See *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith* (1993) 14 ILJ 171 (IC) at

management regarding the competence of managerial employees'.<sup>67</sup> The Labour Appeal Court has established two important principles which impact on the assessment of performance:

First, an employer is entitled to set his own standards as to the performance required of his employees and the court will only interfere where such standards are grossly inappropriate.<sup>68</sup> The question whether or not the required standard has been met, and the court will interfere only if the performance assessment made by the employer is grossly unreasonable. An employer is entitled to set the standards it requires its employees to meet and the court will not intervene unless those standards are grossly unreasonable. The further comment may be added that it also within the employer's province to make the assessment whether or not those standards have been met and again the court will not interfere, unless the assessment is grossly unreasonable.<sup>69</sup> A loss of confidence by a superior in a subordinate will, in appropriate circumstances, constitute a good for dismissal.

The proposition 'that the general managerial employee is no less deserving of protection against unfair dismissal than ordinary employees seems clear. Nevertheless, there are categories of senior managers who, by reason of their seniority and relationship with other seniority and relationship with other senior staff or the owners (or controllers) of the business occupy a completely different position to that of ordinary employees. In this situation aspects such as personality conflicts, management style, and simple of confidence in the ability or willingness of the manager to do the job in the way the owners or senior colleagues desire could justify dismissal. The use of formal procedures prior to dismissal also seems to be less relevant in these circumstances. Here the court should be less willing to intervene unless there is clear evidence of

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<sup>67</sup> See Le Roux, PAK & Van Niekerk, A *The Law of Unfair Dismissal* (1994) 76.

<sup>68</sup> See *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC); *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC) at 979E-F; *Palmer v S Maxor Aluminium CC* 1997 (3) 3 LLD 108.

<sup>69</sup> See *Eskom v Mokoena* [1997] 8 BLLR 965 (LAC) at 979E-F; *Palmer v S Maxor Aluminium CC* 1997 (3) 3 LLD 108.

bad faith or improper motives. In most cases, these employees will have had the necessary ability to negotiate favourable conditions of service and might prefer to rely on any contractual remedies they may have.<sup>70</sup>

The evidence reveals that the legal precedent foremost in the deliberations was the decision of the Industrial Court in *Stevenson v Sterns Jewellers (Pty) Ltd*.<sup>71</sup> The facts in that decision were that after three weeks' service when his home and business remained *in situ* (ie his relocation to his employer was not finalized) Stevenson was dismissed peremptorily on grounds of incompatibility on grounds of incompatibility. The court found that life at the top often involves quick decisions which may be deemed harsh with hindsight.

## 6.2 Procedural fairness regarding the dismissal of senior executives

In *Wright v St Mary's Hospital*<sup>72</sup> in dealing with the performance and compatibility related dismissal of the medical superintendent of respondent - in medical parlance a senior executive - the court held that this was an incidence of dismissal for operational requirements which nevertheless required a fair procedure including prior warning, and an opportunity to correct the conduct.

In *Lubke v Protective Packaging (Pty) Ltd*<sup>73</sup> dealing with the dismissal of a managing director, the court approved the opinion of Oliver (in the article referred to above) concerning senior employees to the effect that:

'Certain guidelines, however, have been laid down by the court in cases of alleged incompatibility or incompetence. The employer should

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<sup>70</sup> See Le Roux, PAK & Van Niekerk, *A The Law of Unfair Dismissal* (1994) 80-1.

<sup>71</sup>(1986) 7 ILJ 318 (IC).

<sup>72</sup>(1992) 13 ILJ 987 (IC) at 1002D-1005A

<sup>73</sup>(1994) 15 ILJ 422 (IC) at 424D. See the decisions on dismissals of senior employees for incompetence and in particular the procedure preceding the dismissals in *Cooper v Kloof Tiles* (1991) 2 (6) SALLR 13 (IC); *Scheepers v Toll Road Concessionaires*<sup>73</sup>; *De Villiers v Fisons Pharmaceuticals* (1991) 2 (4) SALLR 14 (LC).

inform the employee with regard to the alleged deficiency and should help towards the remedying thereof. Furthermore, the employer should discuss the situation with the senior employee and endeavour, if possible, to find alternatives in order to avoid dismissal.'

In *Turks v Parns Projects*<sup>74</sup>the court emphasized that the procedural requirements for the dismissal of other employees, whatever the reason, do not differ materially from such requirements for the dismissal of other employees.

The English court in *W A McPhail v T McR Gibson*<sup>75</sup>stated:

'It seems to us that where you have a man . . . in a managerial capacity there is a greater obligation on the employer to take preliminary steps to bring to the manager's notice that he, the employer is dissatisfied and, in particular, that he, the employer is contemplating a possible dismissal.'

And in *E C Cook v Thomas Linnel & Sons*<sup>76</sup>the English court stated:

'It is well settled that though a failure in proper procedure will usually render a dismissal unfair, it is not necessarily invariably the case. The rules of procedure are of the greatest possible importance in dealing with alleged incapacity, provided that the complaints have been brought to the attention of the employee concerned over a period of time... requirement even where the employee holds a position in which he can, within reason, be expected to monitor his own performance (id a senior employee).'

The approach in English law was approved in *Gostelow v Datakor Holdings (Pty) Ltd t/a Corporate Copilith*<sup>77</sup>in relation to the dismissal of a senior employee (a manager) and in particular concerning the requirements that the employer appraise performance, discuss criticisms with the employee, warn of the consequences of continued bad performance and grant a reasonable opportunity to improve.

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<sup>74</sup>(1991) 2 (7) SALLR 17 (IC).

<sup>75</sup>(1976) IRLR 254 (EAT).

<sup>76</sup>(1977) IRLR 132.

<sup>77</sup> (1993) 14 *ILJ* 171 (IC) at 174H-176B

In *Hansen v University of Natal*,<sup>78</sup> De Villiers SC noted with regard to the dismissal of a senior lecturer for incapability and incompetence that normally an employer will have to inform the employee that he is not maintaining the required standard, give details, warn that termination of employment may follow on no improvement and give an opportunity to improve. In so doing, the court in the Hansen judgement did nothing more than restates the position adopted in *Venter v Renown Food Products*<sup>79</sup> and in *Van Renen v Rhodes University*.<sup>80</sup>

Insofar as the article by Paul Pretorius published in *Labour Law News and Court Reports* vol 2 no 8 March 1993 is at all persuasive given the developments in our law and the fact that the sentiments expressed in that article have not been followed, one should have regard to the author's view that: (a) the executive employee is entitled to a reasonable opportunity to state his case, and (b) the executive must fail to meet the standards of ability and skill set by employer.

### **6.3 The evolving jurisprudence**

To what extent should employer's failure to comply with the requirements of counselling, assistance and audi alteram partem rule before dismissing a managerial employee who has shown himself or herself to be manifestly incapable of doing the job be condoned? Courts and arbitrators have prevaricated on this issue, depending on the degree of incapacity demonstrated by the employee's acts or omissions, or that employee's willingness to co-operate in order to remedy defective performance.

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<sup>78</sup>(1989) 10 *ILJ* (IC) at 1180A-B.

<sup>79</sup>(1989) 10 *ILJ* 320 (IC).

<sup>80</sup>(1989) 10 *ILJ* 926 (IC).

The case that started ball rolling was *Taylor v Alidair*<sup>81</sup> where the English Court of Appeal was confronted with a situation where an air pilot was dismissed because he was thought to be at fault for a bad landing which had caused serious damage to the company's aircraft. According to the Court of Appeal, the employers had reasonably demanded a high degree of care and fairly dismissed the pilot when he failed to measure up to it on one occasion. He was engaged in a special category of:<sup>82</sup>

'activities in which the degree of professional skill which must be required is so high, that the potential consequences of small departures from that high standard is so serious that the failure to perform in accordance with those standard is sufficient to justify dismissal'.

The Court of Appeal specifically approved of Bristow J's examples of other such employees as, 'the scientist operating the nuclear reactors, the chemist in charge of research into the possible effects of, for example, thalidomide, the driver of the Manchester to London Express, the driver of an articulated lorry full of sulphuric acid'. Few procedural safeguards were than necessary in relation to such employees.

In the early case of *Visser v Safari freighters (Edms) Bpk*<sup>83</sup> the Industrial Court considered the question of dismissal of a senior manager for incompetence. In this case the applicant was, at the time of his dismissal; the financial manager of the company, and had been in the employment of the company for some three and a half years.

The employment record of the applicant was one which is not frequently found in practice. Although the applicant had received increases, these increases had been lower than the average increases awarded in the company. His performance was such that a number of measures were taken in relation to his employment. His administrative functions were, according to the company, taken away from him. Although he was given accountability for

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<sup>81</sup>[1978] IRLR 82.

<sup>82</sup> See Bowers, J & Honeyball, *S Textbook on Labour Law* 4<sup>th</sup>ed (1996) 161.

<sup>83</sup> (Unreported NH 13/2/4289). For discussion see Note (1989) 2(8) *Labour Law Briefs* 55-58.



management information systems and loss control during 1987 these functions, according to the company, were natural part of his duties.

These developments took place against the background of a number of other events. In 1986 the applicant was vaguely told that he should pay attention to his dress, but shortly thereafter the managing director congratulated him on budget presentation. In March 1988, however, the applicant was told that the auditors were dissatisfied with him, but when the applicant questioned one of the auditors this was denied.

Whatever the defects in the performance may be, there were signs that the applicant had tried to remedy these. As early as 1986 the applicant registered for a senior management programme and successfully completed the curriculum. During 1987 the applicant registered for the MBA degree on his own initiative, but had to abandon his studies for that year due to pressure of work. He registered again for the same studies during 1988.

Matter came to head in July 1988 when the managing director, in a routine visit to the applicant, told him that he was not happy with the applicant's knowledge of his functions, that he could not keep him in employment, and that he had three months to find another job. The financial manager was astonished at this news because, according to him, he was unaware of any complaints in relation to his job, and the financial position of the company was sound. It was at this stage that the managing director alluded to the dissatisfaction on the part of the auditors.

Subsequently the applicant approached the managing director and requested a lateral transfer to the post of administrative manager with additional responsibility for a building project and loss control. This offer was refused and applicant was requested to come with an alternative offer.

Applicant then suggested that he be paid twelve months salary and fringe benefits. A few days thereafter the company wrote to the applicant to the effect that he would, at his own re-iterated its offer, and negotiations between the applicant and the company continued until early October 1988, when the company wrote to the applicant that “[w]e are satisfied in this regard that sufficient negotiation has taken place and that no purpose would be served by further negotiation in this regard”.

The company also admitted that it had dismissed the applicant without a hearing as such and maintained that this had been done because the applicant should have known what the reasons were. The company also maintained that a hearing would have made no difference.

### **6.3.1 The merits of the dismissal**

In determining the merits of the dismissal the court considered both substantive and procedural fairness.

As far as substantive fairness was concerned, the court considered a number of earlier authorities. The incompetence must be of such a serious nature that it justifies dismissal. Furthermore, the matter must be discussed with the senior employee must be assisted to redress the incompetence.

In this case, the court accepted that the employee was sometimes told of his shortcoming, but the court was not convinced that all reasonable steps had been taken to avoid the dismissal, or that the employee had been given all reasonable help to remedy the situation, in spite of the fact that the employee had remained in his position for some three and a half years, was sometimes praised for work done and was even awarded increases, left a question mark concerning the seriousness of the incompetence and, even if the fault was serious, whether it could not have been corrected.

In relation to substantive fairness, the court was not prima facie convinced that the employee was incompetent enough to justify his dismissal, and if there was incompetence, or incompatibility of managerial style, that this could not have been redressed by following reasonable steps. Consequently the court found that the dismissal was substantively unfair.

### 6.3.2 Procedural fairness

With regard to procedural fairness, the court re-iterated the principle that managers are also entitled to a fair hearing, and that, although a more flexible approach may be taken in relation to managerial hearings than in relation to hearings concerning other workers, a proper hearing should nevertheless be held.

In the present case the necessity for a hearing was even more evident, because the managing director had come to the conclusion only in the middle of 1988, after the employee had been employed for some three and a half years that the employment relationship should not continue. Although there had been complaints, the complaints were not of such a nature that the applicant could have known that they justified his dismissal. Consequently the court came to conclusion that the dismissal was also procedurally unfair.

When the substantive and procedural fairness aspects of the *Visser* case are carefully considered, it would seem that without proper appraisal may not be able to prove that he has taken adequately taken a reasonable view of the employee's incapacity. It is most important where the required level of performance is uncertain and independent judgement thereof. Sir Hugh Griffiths graphically gave the reason in *Winterhalter Gastronom Ltd v Webb*<sup>84</sup> thus:

'There are many situations in which a man's apparent capabilities may be stretched when he know what is being demanded of him, many do not know

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<sup>84</sup>[1973] IRLR 120.

that they are capable of jumping a 5-barred gate until the bull is close behind them.”

Where the prospects of an employee improving are next to nil, however, a warning and opportunity of improvement can be of no benefit to the senior employee.<sup>85</sup>

#### **6.4 The Labour Appeal Court judgement in *Blue Circle Materials*<sup>86</sup>**

In this case, the employee was employed as the “Head Accountant”. The employer terminated her services because of alleged incapacity. The Industrial Court came to the conclusion that she had been unfairly dismissed and awarded her compensation.

On appeal the LAC overturned the decision and found for the employer. An important aspect which exercised the court’s mind was the question of whether the employee, who it found had not been performing satisfactorily, should have been assisted to overcome her shortcomings. The LAC referred to the general approach adopted by the Industrial Court that, for the termination of services on the grounds of incompetence, incompatibility or inability to be substantively fair, the employee concerned must have been given proper notice or warning of his shortcomings and that he should be assisted in overcoming these shortcomings. However, in the present case the LAC came to the conclusion that the Industrial Court had erred in requiring the employer to have learnt the employee a helping hand to assist her to improve her performance.

The came to this conclusion on three grounds:

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<sup>85</sup> See *James v Waltham Holy Cross UDC* [1973] IRLR 202; *Turner v Pleasurama Casinos Ltd* [1976] IRLR 151; *Bevan Harris Ltd v Gair* [1981] IRLR 520; *Springbank Sand & Gravel Ltd v Craig* [1973] IRLR 278.

<sup>86</sup>*Blue Circle Materials (Pty) Ltd v W A Haskins*(1992) 2 LCD 6 (LAC).

In the first instance, it never formed part of the employee's case – on the pleadings or on the evidence – that she should have been warned of precisely what her shortcomings were, told what the consequences would be if she failed to correct them and assisted to overcome them. This aspect was, in the opinion of the LAC, never an issue in the proceedings. The Industrial Court should therefore have ignored it.

In the second instance, only the presiding officer put questions to the employer's witnesses and this aspect was not fully canvassed by the parties.

In the final instance, the LAC said that, in any event, it disagreed with the Industrial Court's assessment that the employee did not realise that her employment was in jeopardy. The LAC concluded by remarking that:<sup>87</sup>

'[T]he Industrial Court should have held that in this case, where a senior employee who was employed in a managerial post was involved, the facts clearly showed that the respondent was fully capable of judging for herself whether or not she met the standards which were set for her ... There is no reason why she would not have been able to decide for herself that she was not measuring up to the standards expected of her.'

The respondent employee in *New Forest Farming CC v Cachalia*<sup>88</sup> was appointed to manage a farm. He was given a free hand on how he worked, provided the farm remained self-sufficient. After the farm suffered substantial losses for a number of years, the manager was dismissed. A CCMA commissioner held that the dismissal was both substantively and procedurally unfair, and he ordered New Forest Farming to compensate the employee. On review, New Forest Farming claimed that the award was unjustifiable. The Labour Court noted that the award was based on a finding that the manager should have been made aware of those areas in which his performance was defective, that he should have been given an opportunity to explain himself, and that he should have been provided with the skills necessary to remedy the alleged deficiencies.

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<sup>87</sup>*Blue Circle Materials (Pty) Ltd v W A Haskins*(1992) 2 LCD 6 (LAC).

<sup>88</sup>[2003] 10 BLLR 1051 (LC).

In reaching this conclusion, the commissioner had relied on a passage in *Somyo v Ross Poultry Breeders (Pty) Ltd.*<sup>89</sup>In that judgement, the LAC had held that the rule that, before dismissing an employee for poor work performance, an employer must appraise and warn the employee does not necessarily apply in the case of managers knowledgeable enough to judge for themselves whether they are not meeting required performance standards. When purportedly applying dictum, the commissioner had misconstrued what the Labour Appeal Court had actually said. The dictum referred to two distinct situations, and the commissioner had treated those situations as one. By so doing, the commissioner had neglected to ask whether the employee ought to have been able to judge for himself whether he was meeting the standards set by his employer; she had instead only whether the employee “possessed the necessary professional skill required for the position”. The result of this error was that the commissioner precluded herself from a proper assessment of whether the exceptions to the “normal” requirements for dismissals for incapacity were applicable. The award accordingly lacked rationality. The matter was remitted to the CCMA to be heard by another commissioner.

## 6.5 Learning from failure

Proving that a salesperson does not possess the physical, mental or attitudinal wherewithal to perform his or her duties properly can be a complex task.<sup>90</sup> The matter becomes more complicated in cases where sales staff on the firing line for failing to “pulling their weight counter by asserting that their below par performance was to some extent attributable to extraneous factors other than lack of commitment or poor performance, such as market downturns, other duties, which took time but did not generate sales directly, and to a period of indisposition. *White/Medpro Pharmaceuticals*<sup>91</sup> and *Robinson/Sun*

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<sup>89</sup>[1997] 7 BLLR 862 (LAC).

<sup>90</sup> For detailed discussion see ‘Death of a salesperson: Sell or be bust’ (2000) *EL* 9; ‘Death of a salesperson Act II’ (2001) *EL* 4; ‘Rebirth of a salesman: curtain falls on Act III’ (2003) *EL* 13.

<sup>91</sup>[2000] 10 BALR 1182 (CCMA).

*Couriers*<sup>92</sup> provide the clearest illustration of the difficulty of proving defective performance when a salesperson fails to attain sales targets. Both cases dealt with the dismissal of salespersons for failing to reach sales targets, while other sales personnel has managed to meet their targets.

Although they operate in diverse sectors, Medpro and Sun Couriers raised essentially the same justification. In the case of *Medpro*, the employer claimed that setting of sales targets was consistent with the industry norm, that its sales representatives were trained to attain these targets, and that with reasonable effort they could be met. In similar vein, *Sun Couriers* maintained that the targets set for its sales staff took into consideration the history and performance of each branch, and that if salespersons could not be dismissed for failing to attain those targets, it was pointless having them.

At the one extreme the salesperson in *Medpro* was dismissed for failing to meet performance standard by 50 percent of monthly sales targets for eight of nine months consecutive months, and for not making the required number of calls on customers or potential customers in the same period. The company claimed that various “action plans” had been devised for Ms White and that, when these foundered, she was given a fair hearing. Ms White claimed that she was unable to achieve the targets because she had been sick at times and because the targets were, in any event, impossible to attain during some of the months in question. She said that the notice she had been given to attend the disciplinary inquiry which preceded her dismissal had come as a complete surprise, and that she had not been given sufficient time to obtain effective representation and to prepare her defence.

Although the hearing was styled “incapacity inquiry”, the presiding officer was not *au fait* with the difference between the procedures to be followed in cases of incapacity and those involving alleged misconduct. The “charges”

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<sup>92</sup>[2001] 5 BALR 511 (CCMA).

had been drafted in a form of wilful dereliction of duty, or to incapacity. Ms White had been suspended pending the outcome of the inquiry. However, by whatever standard it was measured, the procedure followed by the company was unfair. The notice that the hearing would be held on a Monday had been handed to Ms White at the close of business on the immediately preceding Friday. It was impossible for her to find, let alone brief, a competent representative in that time

At the other extreme the salesperson in *Sun Couriers* was dismissed for failing short during a particular year by 8 percent of the minimum of 80 percent of the annual sales target the company's sales executive are required to attain. In 1999, the company introduced a "Circle of Champions Target" for its sales representatives. The target was set annually by the company's national sales director on the basis of the projected budget of the branch next year, taking into account structural factors. Admission to the "circle" was an inducement for salespersons. However, salespersons who fell short of the target by 20 percent were considered to have fallen by the wayside. The first to do so was Mr Robinson, of the company's Port Elizabeth branch. He was subjected to an inquiry. His plea that the branch prevailing economic circumstances was to blame fell on deaf ears.

In *Sun Couriers* the commissioner said:<sup>93</sup>

"Certainly failure to meet a target is not insignificant. Often failure to meet a target results from poor work performance, and to that extent it alerts the employer to the possibility that a certain employee may not be pulling his or her weight. At the same time the mere failure to reach a target is not itself conclusive. There may be a number of perfectly acceptable explanations for failure to reach a target ... The important point is that the employer is required to show not only that the employer is required to reach a target, but also that target is due to poor work performance."

The commissioner in *Medpro* went to explain that the object of the inquiry is directed, not simply at establishing whether the employee had failed meet the

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<sup>93</sup>*Robinson/Sun Couriers*[2001] 5 BALR 511 (CCMA) at para 513E-F.



employer's performance standard, but whether that failure is attributable to poor work performance:<sup>94</sup>

“Failure by employees to meet performance standard set by their employers may of course justify the employee's dismissal. However, the right of employers to jettison under performing employees has now been qualified by the requirement that the performance be reasonable and consistently applied, and that the employer must, before resorting to dismissal, endeavour to ascertain the reason for the under performance, and to assist the employee to maintain the required performance standard. Although these requirements may be less rigorous in the case of certain kinds of work, they must nevertheless be applied in every case when dismissal for poor work performance is considered.”

What is manifest is that both employers failed to persuade the commissioners that the mere failure of the employees concerned to attain their targets did not justify the inference that the employees had not been “pulling their weight”. Grogan provides incisive analysis of the two cases:<sup>95</sup>

“First, the rule itself must be objectively reasonable. *Medpro* indicates that the mere fact that the performance standard complies with industry norms is not enough. The rule must also be fairly applied, given the circumstances of the branch or area in which the employee operates, and possible business cycles. Mr Robinson claimed that the industry was undergoing difficult times during the year in which he failed to reach his sales targets. This claim was fortified by the fact that he had managed to attain the target for each of the previous eight years he had been with the company. Ms White's similar claim was supported by the fact that there was no proof of number of calls the company insisted should be made would necessarily result in the number of sales required by the sales targets – i.e. that a given number of calls would necessarily generate a given number or value of sales.”

In *Sun Couriers*, the company relied heavily on the fact on the fact that the other sales executive in the region had exceeded the target for the period in question. However, as the commissioner noted, this was due largely to the fact that she had secured one lucrative contract. Had she not done so, she would also have fallen short of the target, and would have faced dismissal herself. There was insufficient evidence to enable the commissioner to establish whether the contract was a stroke of fortune or the result of years of hard work. Furthermore, the result of the contract was to yield figures which

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<sup>94</sup>*White/Medpro Pharmaceuticals* [2000] 10 BALR 1182 (CCMA) at 1185B-C.

<sup>95</sup> ‘Death of a salesperson: Sell or be bust’ (2000) *EL9*; 11.

reflected that Mr Robinson's colleague was an above average performer. It was accordingly unfair to use her sales figures to establish a benchmark for an average performer.

In *Medpro*, the company aggravated the situation by purporting to dismiss Ms White for incapacity, but by dealing with her as if she had committed misconduct. The commissioner found that the 'incapacity inquiry' to which Ms White was subjected had all the hallmark of an arrangement for misconduct - quite apart from the fact that the hearing was conducted in a coffee shop in full view of curious waitrons and patrons. Significantly, however, the commissioner noted that neither the initiator nor the presiding officer had made any attempts to establish why Ms White had failed to attain the call target. In fact, said the commissioner,<sup>96</sup>

"... apart from the discrepancy between the target and the actual sales and call rates, [the presiding officer] had no evidence before her to warrant the conclusion that there was 'no prospect of significant acceptable performance improvement' and the applicant "lacked the potential and drive to succeed". This may have been true. However, the point is that the deduction was drawn solely from call rates and actual sales figures. There was no independent evidence to show whether, and in what respects, the applicant was remiss."

Without proper appraisal the employer may not be able to prove that he has adequately taken a reasonable view of the employee's incapacity. This particularly important in cases where the employer rely solely on deficient sales figures to justify the conclusion that a sales personnel is underperforming. A fair chance to rectify underperformance is vital in the cases where the employer relies on the fact that other salespersons managed to reach the targets during the relevant period as a proof that the performance standard is attainable. In the cases at bar, employers did not afford non-achieving employees a fair opportunity to rectify their defective performance. For example, Ms White's services were terminated for failing to achieve her sales targets in the first year of her employment. On the other hand, Mr

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<sup>96</sup>*White/Medpro Pharmaceuticals* [2000] 10 BALR 1182 (CCMA) at 1189D-E.

Robinson was dismissed for failing to reach the company's targets in his ninth year with the company, after having reached the targets for eight successive years. In *Sun Couriers*, the commissioner was sensitive to the nature of the dilemma confronting modern management in ensuring that sales staff reach their targets. However, his observations in this regard serve as a caveat to all employers with their own sales personnel:<sup>97</sup>

'I am mindful of the fact that it is not an easy task to prove poor work performance in relation to a position such as that of sales executive. It seems quite natural to rely on a seemingly objective criterium (sic) such as sales figures. To adduce evidence to show that a sales executive did not make a concerted effort to secure new business may well be difficult. *However, the fact that it is difficult for a litigant to prove a particular point in dispute does not relieve that litigant of the duty to prove the point.*'

It must be obvious from the foregoing analysis that, if an employer wishes to terminate the services of a sales executive, it must be able to prove at least that the employee's failure to reach sales targets is attributable to wilful neglect of his or her duty or incapacity on his or her part. This means that, before resorting to dismissal, the employer must be thoroughly investigated the circumstances of the employee and the market. Failure to do so could prove costly than having to carry salesperson who is not a rainmaker.

### **6.5.1 *Sun Couriers'* second bite at the cherry**

Following the commissioner's finding that Mr Robinson dismissal was unfair, the company was ordered to reinstate him retrospective effect. Dissatisfied with the outcome, Sun Couriers took the matter on review to the Labour Court, in an attempt to prove that the award was not justifiable. The company's main contention was that the commissioner had 'failed to properly conceptualise the reason for Robinson's dismissal and thus confused issues applicable to dismissals for incapacity in the form of poor work performance (which was the reason for Robinson's dismissal) with issues applicable to dismissals for misconduct.'

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<sup>97</sup>*Robinson/Sun Couriers*[2001] 5 BALR 511 (CCMA) at para 514A [Emphasis added].

In turn the court summarised its understanding of this submission in the following terms:<sup>98</sup>

“The applicant’s challenge to that determination is premised on the Code of Good Conduct contained in Schedule 8 to the Act and in which, it is submitted, a clear distinction is drawn between dismissals for misconduct and dismissals for incapacity and which, in turn, can be constituted by poor work performance or by ill-health or injury.”

In pith and substance, the company’s argument was that, since Mr Robinson had not terminated for “misconduct”, the commissioner’s inquiry into whether the company had proved that he was guilty of neglecting his duties was misdirected. The employee was dismissed for “incapacity” a form of dismissal in which fault has no role. The commissioner has been apprised of the fact that Mr Robinson had been dismissed because he “did not possess the physical, mental or attitudinal wherewithal – through no fault of his own – to perform his duties properly”.

The assessed this submission thus:<sup>99</sup>

“The simple fact, in the end result, was that Robinson was dismissed as a consequence of a negative assessment of his performance when measured against the standard determined by management policy. Comprehensive evidence was submitted to the [commissioner] regarding the structuring of that policy and the setting of that standard, reference being made inter alia to its empirical determination in relation to each individual sales person, the recognised and accepted performance standards for sales executives ... the continuous monitoring of their sales performance throughout the year, and the process of counselling which was undisputedly established in the course of evidence to have been applied on a quarterly basis as far as Robinson was concerned.”

Having accepted that Robinson was dismissed for poor work performance, the court held that the guidelines for cases for dismissals for this reason were “more than adequately observed by the company in its dealings with Robinson”. The award was accordingly set aside and referred the matter to another commissioner.

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<sup>98</sup>Grogan, J’ Death of a salesperson Act II’ (2001) *EL* 4, 5

<sup>99</sup>Death of a salesperson Act II’ (2001) *EL* 4, 6.

### 6.5.2 *The second arbitration in Robinson/Sun Couriers*<sup>100</sup>

The second commissioner approached the matter by returning to the pain which the company placed much reliance at the earlier arbitration. This was that Robinson had refused its offers of further assistance and/or training to help him reach the sales target. The commissioner found this argument unpersuasive. He noted that Robinson had never claimed that his training was deficient or that he needed help; he had simply said that the target was unattainable in due to depressed regional economy.

The next issue was whether such counselling as Robinson was given met the requirement of the Code. The commissioner held that it did not. While assistance had been offered, the substance of the counselling sessions was directed at “re-confirming the target [Robinson] was expected to meet and re-confirming that not reaching that target will (sic) result in disciplinary action being taken, with the possibility of dismissal”. According to the commissioner, a more active role is required of an employer, especially when, as in Robinson’s case, there was no evidence of misconduct and the employee fell short of a target which he had achieved for eight years running. In particular, counselling should have included an attempt to establish the reasons for the unsatisfactory work performance. Thus, said the commissioner:<sup>101</sup>

“I do not believe that an employer can merely rely on the fact that it had set certain targets, which on the face of it were reasonable and rational and then when this target is not met by an employee, the employee’s services are terminated after a reasonable opportunity to meet the targets, without identifying what on a balance of probabilities was the cause of such failure. This is especially so if the employee maintained that factors external to his control was (sic) in fact reasonable for the failure”.

Without a proper investigation into the causes of the employee’s poor performance, it is impossible to establish whether the cases concerns

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<sup>100</sup>[2003] 1 BALR 97 (CCMA).

<sup>101</sup> Grogan, J ‘Rebirth of a salesman: curtain falls on Act III’ (2003) *EL*13., 14.

misconduct or poor work performance. In the Labour Court proceedings the company's contention was that it had treated Robinson's matter not as one of misconduct, but as one of "incapacity" because the employee lacked the requisite attributes required of a successful sales executive. According to the commissioner, it was simply insufficient for the employer to speculate after the event. Even in the case of a dismissal for incapacity, an employer is required to prove on a balance of probabilities that the dismissal is the appropriate "sanction". Sun Couriers had not done so.

In his useful analysis, Grogan observes:<sup>102</sup>

"For as long as the second commissioner's award in *Robinson/Sun Couriers* goes unchallenged, it sets the record straight as far as dismissals for alleged poor performance are concerned. The award confirms that employers are entitled to set reasonable performance standards for their employees. In the case of salespersons, these performance standards can be expressed in volumes, but if an employee is dismissed for failing to attain the required target, it is not enough for the employer to simply allege as much. The first thing that the employer must do is to investigate the reasons for the employee's failure to attain the target was due to factors which had nothing to with his ability. The investigation, the employer will not be able to prove that, at the time of the dismissal, the employee was indeed incapable of performing his duties."

The second award in *Sun Couriers* teaches employers a number of valuable lessons about the limits of an employer's right to set performance standards. An employer is required to prove that the target set for the employee is reasonable. Reasonableness in this context means not only that the target must be attainable by employees in the position of the dismissed employee in ordinary circumstances, but also that the target must be attainable in circumstances in which it was applied. The employer can prove that a target was reasonable in the latter sense if other employees managed to attain the target during the period concerned. But, as *Sun Couriers* demonstrates, the fact that other employees happened to hit the target does not prove that the employee who missed was remiss. It may well be that the employee's

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<sup>102</sup> 'Rebirth of a salesman: curtain falls on Act III' (2003) *EL* 13, 16.

successful colleagues merely had enjoyed a stroke of luck. It is clearly unfair to dismiss an employee for bad luck, because fortunes may well change.

The respondent employee in *Danzas AEI (SA) (Pty) Ltd v Wanza NO & others*,<sup>103</sup> then the company's development manager, was dismissed for failing to meet the sales target set in her contract of service. The employee was informed after six months that her performance was below par. She was invited to suggest whether and how she could be assisted. Three months later, she was given a warning. This time, the employee gave several explanations for her failure to meet the target. A few months later she was given a final warning, which she claimed was procedurally and substantively unfair. After once again offering the employee "all reasonable assistance", management consulted the employee in a final vain attempt to resolve the problem. The employee was then dismissed after a hearing.

In subsequent CCMA arbitration proceedings, the commissioner held that the employee's dismissal was procedurally and substantively unfair because, *inter alia*, the employee had not been assisted. On review, the Labour Court held that these findings were not supported by the evidence before the commissioner. The commissioner had also ignored material evidence, including the facts that the employee had fallen dismally short of her sales target for more than a year, and that she had made no effort to improve. Moreover, the matter concerned poor work performance, not misconduct. Finally, the commissioner had offered no motivation whatsoever for his decision to award the employee compensation equal to nine months' salary. The award was set aside.

The applicant in *Kannemeyer/Workforce Group*<sup>104</sup> resigned because she thought she was being victimised after lodging a complaint about the respondent's unilateral decision to reduce her commission rate. She claimed she had been

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<sup>103</sup>[2003] 11 BLLR 1133 (LC).

<sup>104</sup>[2005] 8 BALR 824 (CCMA).

constructively dismissed. The respondent claimed that the applicant had resigned because disciplinary proceedings had been instituted against her for poor work performance. The commissioner found that the applicant had good reason to be aggrieved over the reduction of her commission rate, and that nothing had come of her grievance before disciplinary proceedings had been launched against her. She had then been kept waiting for the outcome of the disciplinary action for nearly two weeks before she decided to resign. Under these circumstances, her feelings that she was being victimised were understandable. Although the applicant could have lodged a further grievance, it was also understandable that by then she had lost all faith in the company grievance procedure. The commissioner found that the applicant had been constructively dismissed. She was awarded compensation.

## **6.6 Lifeboat cases**

What happens where following abortive process of counselling and advice and warning, instead of dismissing a managerial employee who is not pulling her weight for poor work performance, the employer adopts benevolent approach and offers him or her an alternative position? Where an employee is offered a new position and is then dismissed soon after taking up the new position for incapacity, the dismissal will be unfair if the employee is dismissed before having the opportunity to prove herself in the new position.

The issue arose in *Brundson* where the company dissatisfied with the General Manager's performance and offered him the position of General Manager: Credit and Administration which the employer reluctantly accepted. After taking leave for a short period, Mr Brundson was informed at a management meeting that his services were to be terminated. The employee claimed that he had been informed that his dismissal was due to operational requirements. The company insisted that he had been dismissed for poor work performance.



The Industrial Court found that the dismissal was unfair and ordered the appellant to pay Mr Brundson compensation of R241 500.00

The Labour Appeal Court found that the principal reason for the decision to dismiss Brundson was his poor inter-personal skills. However, this was the reason that had been given for the decision to demote him from the position of General Manager. There was no evidence that, after assuming the position of General Manager: Credit and Administration, Brundson had done or failed the alternative position, Brundson was told that the new position was better suited to him precisely because his lack of inter-personal skills. The company had failed to indicate the relevance of interpersonal skills to the requirements. It was more probable that, after appointing Brundson to the new position, the company changed its mind about retaining him. The company would have been entitled to dismiss Brundson, because of his deficiencies as General Manager, before offering him the alternative position; he could only be dismissed for lack of skills required for the new position. As it happened, Brundson had been permitted to serve in the new position for only two weeks. This was too brief a period for him to prove himself. Furthermore, he was not given an opportunity to make representations before the decision to dismiss him was taken. The court held that there was no basis for interfering with the compensation awarded by the court of first instance.

In similar vein, the employer in *Brolaz Projects (Pty) Ltd v CCMA & others*<sup>105</sup> had second thoughts about retaining an under performing executive in the alternative position. The employee, Mr Fountas had been employed as client liaison manager: Vodacom on 15 March 1999. On 3 December 1999, merely nine months after his appointment Mr Fountas was dismissed after several counselling meetings were held with him in respect of his unsatisfactory work performance.

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<sup>105</sup>(2008) 29 ILJ 2241 (LC).

At arbitration proceedings<sup>106</sup> the company denied that it had dismissed Mr Fountas and contended the Mr Fountas had in fact resigned. In upholding the dismissal to be substantively fair, the commissioner reasoned as follows:<sup>107</sup>

‘I am satisfied that the respondent [the company] has discharged the onus of showing that there was fair cause to dismiss the applicant. The applicant was clearly not capable of performing his work satisfactory, despite admonitions and assistance. His one contribution to which he referred with pride on more than one occasion was designing a minute in which the name of the person who had a task to perform, would be reflected. He never accepted that he had any responsibility for his inadequacies, and was never at fault. My own impression of the applicant at the arbitration was of a difficult man who never seemed to absorb the process or to follow its procedures and who was never seemed to absorb the process or to follow its procedures and who was determined to follow his own route without regard to any laid down processes or requirements. He was amply alerted to the fact that dismissal was a possibility if he did not improve but he did not do so. The respondent could have terminated his employment at an earlier stage but elected to give him further opportunities despite the serious frustration it must have experienced. I find the dismissal was substantively fair.’

What was also accepted by the commissioner was there was fair appraisal of the manager’s performance and he was warned that there was no improvement in his performance, more drastic action would have to be taken to remedy the situation and that the possibility of dismissal as an option could not be ruled out. The commissioner then made the following findings:<sup>108</sup>

‘In the overall picture of the applicant’s poor performance involving an inability to conduct meetings on his own, absence of interaction between the client and the company’s support staff, mistakes in reports involving numerous complaints from clients and staff which was exacerbated by his stubborn refusal to acknowledge that there was anything wrong either with his work, his attitude or entrepreneurial relations, it is probable that the warning was given. Applicant had a serious personality problem which was an ongoing source of concern. It is highly unlikely that the company would not have tried to address the problem.’

Reading the award it is apparent that the commissioner was of the view that the dismissal was procedurally fair up until when the employer decided to

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<sup>106</sup> Unreported case no GA87635 cited in *Brolaz Projects (Pty) Ltd v CCMA & others* (2008) 29 ILJ 2241 (LC).

<sup>107</sup> *Brolaz Projects (Pty) Ltd v CCMA & others* at para [9].

<sup>108</sup> *Brolaz Projects (Pty) Ltd v CCMA & others* at paras 9-10.

offer Mr Fountas an alternative position. The commissioner made the following findings:<sup>109</sup>

‘What had commenced as a reasonable proper process of counselling and advice and warnings of the consequences of applicant failing to improve descend into a shambles of untruthfulness and even deceit. When the meeting of 30 November ended, the applicant was advised that Mr Ferraris would get “further management input” and he would be advised of the outcome, in fact, the decision to dismiss him already taken place, applicant continued to work normally thereafter. Yet, when he applied for unpaid compassionate leave to go to the UK where his brother was having a major surgery, he was summarily dismissed. There was nothing to cause him to have the belief that the “management input” would be summary dismissal, or indeed dismissal at all bearing in mind the seemingly generous offer made to him to take as long as he liked...

Had the respondent continued with the process of counselling as reflected in the various recordals of meetings and also the on-going assistance and advice of Van Vuuren, I would have had no difficulty in finding that the respondent complied with the requirements of the 8<sup>th</sup> schedule and that the dismissal was procedurally fair.

However, the process fell apart starting with the proposal to [Fountas] of the alternative position – an offer that turned out to be a charade when [Fountas] accepted it. There was no bona fide offer and when [Fountas] accepted it, it disappeared from the table. As [Fountas] had only been promised what he was entitled to in law by way of monetary compensation (leave part, etc) he was not prepared to resign. Hence the [company] elected to terminate his employment summarily.

The conduct of the [company] after 24 November is inconsistent with the standards of good practice. It is clear that the [company] wished to get rid of [Fountas] as quickly as possible and there was no bona fide attempt to engage him further. I do not accept that summary dismissal constituted a proper advice as to management’s “input” referred to above.’

On review the Labour Court found that the evidence did not support the commissioner’s conclusion that the employee had been procedurally unfairly dismissed. According to the Basson J his dismissal had been preceded by consultation which the commissioner found to be fair. The fact that an offer of an alternative employment was made and later withdrawn did not in itself render the consultation process tainted, as evidence clearly indicated that the offer was bona fide and that the employer had given a reasonable explanation for the withdrawal of the offer. Moreover, the commissioner’s conclusion that

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<sup>109</sup>*Brolaz Projects (Pty) Ltd v CCMA & others* at para 11.

the employer had an ulterior motive for withdrawing the offer was not supported by the evidence and was in conflict with the commissioner's finding that the employee's dismissal had been substantively fair. In the result the award was set aside.

An employer which wants to dismiss an employee for poor work performance<sup>110</sup> must firstly prove that there was a performance standard and that the employee failed to meet the required performance standard.<sup>111</sup> In the second instance, the employer must prove that this reason for dismissal was fair under the circumstances. In this regard, it must prove that the employee knew what was expected of him;<sup>112</sup> that he was given a fair opportunity to meet the required standard<sup>113</sup> and that dismissal was the appropriate sanction.<sup>114</sup>

## **VII Borderlands between Misconduct, Incapacity and Operational Requirements**

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<sup>110</sup> Essentially, the Code has codified the guidelines developed by the Industrial court for a substantively fair dismissal (See Du Toit *et al The Labour Relations Act 1995* (1996) 360). See Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 221-22 for a discussion of the court's guidelines).

<sup>111</sup> See clause 9(a). The required stand is essentially that which is required in terms of the common law, namely that the employee is able to do the work that he has undertaken to do. However, the circumstances of the job may such that a certain amount of training or guidance or instruction is required from the employer. Under such circumstances, the employer must prove that the employee did not meet the standard demanded by the peculiarities of the job or the workplace.

<sup>112</sup> See clause 9(b)(i) read with clause 8(2)(a). Normally, it could be argued that the employee would have been aware of the requirements, as he had indicated, by accepting the job offer, that he could do the work. The Code (see clause 8(2)(a) nevertheless appreciates that circumstances may be such that the employer may be required to evaluate, instruct, guide or counsel the employee. All these actions are aimed at informing the employee what is expected of him and how he must go about achieving this.

<sup>113</sup> See clause 9(b)(ii) read with clause 8(2)(b).

<sup>114</sup> See clause 9(b)(iii) of the Code. In this regard, aspects such as the nature of the performance standard, the period given for improvement, the number of chances given for improvement, the employee's personal circumstances, his explanation for non-compliance as well as the alternatives to dismissal which have been considered, will be relevant. See also Le Roux, P A K & Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) 227 where they suggest that the employer must show that the possibility of alternative employment was at least considered.

As the preceding discussion shows, the division between dismissal for misconduct and dismissals for poor performance should not be rigidly compartmentalised.<sup>115</sup> The Labour Relations Act, 1995 may distinguish them by name, and the Code may prescribe different procedures for each form of dismissal, but whether a dismissal is for misconduct or poor work performance, the final inquiry is the same: Was the employee indeed in breach of his or her obligations to the employer, and did such breach justify termination of the relationship? If, as in *Robinson's* case, the answers are not supplied by the employer, the dismissal will be found to be unfair.

## 7.1 Stock Losses Shrinkage

It is incontestable that combating internal theft shrinkage remains an uncontrollable problem for employers. For example, in the matter of *Metro & Cash v Tshehla*<sup>116</sup> the majority of the court stated that:

“Employers especially those in the retail industry are frequently faced with the situation where it is necessary to introduce measures to control losses of stock, merchandise and money. An employer is entitled to introduce procedures to protect its commercial integrity and to expect compliance therewith. It is further entitled to treat disregard or non-compliance with such procedures with severity such as dismissal.”<sup>117</sup>

It has become common practice in the retail industry to dismiss the entire staff if shrinkage levels continue at an unacceptable rate. Such a dismissal came before the CCMA in *DICHAWU obo Qwabe & others /Pep Stores*.<sup>118</sup> Pep's Idutywa store had been visited by management several times. On each

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<sup>115</sup>See Campanella, J 'Dismissal for Misconduct for incapacity - What is the difference?' (1995) 4(7) *LLCR* 1; Van Niekerk, A 'Absence illness incapacity and operational requirements' (1993) 3(4) *CLL* 31.

<sup>116</sup>(1996) 17 *ILJ* 1126 (LAC); [1997] 1 *BLLR* 35 (LAC).

<sup>117</sup>*Metro & Cash v Tshehla* supra at 1133B-F. In *SACCAWU obo Nyusela v Woolworths(Pty) Ltd* [1999] 8 *BLLR* 947 (CCMA) at 953B-G, the arbitrator observed: "it is well settled that an employer may introduce strict rules in order to protect its property. Such rules may take the forms of prohibiting certain types of conduct, which, though closely associated with offence involving misappropriation of company property, do not themselves necessarily have dishonestly as an element. This makes it unnecessary to prove that actual theft was intended." See also: *Mphatane v Shoprite Checkers (Pty) Ltd* (1996) 17 *ILJ* 964 (IC); *SACCAWU & others v Cashbuild Ltd* [1996] 4 *BLLR* 457 (IC).

<sup>118</sup>[2000] 2 *BALR* 130 (CCMA).

occasion, the staff was warned that, if shrinkage did not drop to below two per cent, action would be taken. The employees of the store all signed documents acknowledging these warnings. Six months later, shrinkage had risen to 28 per cent but, after further intervention by management, it dropped to six per cent in the following three months. Further “action plans” were implemented, but shrinkage did not drop to below eight per cent during subsequent months. The manager of the store was then instructed to rotate cashiers and discipline them for cash shortages and failure to complete daily control sheets. The manager did not heed this instruction and was given a final warning. After the stock losses continued, the entire staff was dismissed. The company conceded that none of the employees could be individually linked to the losses, but claimed that they were collectively responsible. The commissioner noted that, although Pep claimed to have dismissed the applicants for poor work performance, in reality it suspected them of gross negligence and theft. If they had been dismissed for misconduct, the company would have had to provide evidence directly linking each of the employees to the misconduct. Although Pep had not attempted to lead such evidence, it was clear that the store manager had neglected her duties. Employers are obliged in cases of alleged poor work performance to prove that the employees’ work was, in fact, in good standard and that dismissal was the appropriate penalty. The difficulty of proving incompetence had led the company to rely on the doctrine of “collective responsibility”. However, the commissioner held that, before an individual can be disciplined on the basis of collective responsibility, the employer must be able to prove it that was part of each individual’s function to prevent stock losses. It was also necessary to prove that each individual’s work was below standard. The commissioner observed that the doctrine of “collective responsibility” is repugnant to both the principles of natural justice and the principle that an individual employee should not suffer because of the poor performance of his or her colleagues.

The manner in which the doctrine of “collective responsibility” Pep had applied in this case showed traces of the doctrine “collective guilt” which rests on the assumption that, where wrongdoing was performed by an individual member of the group, the entire group can be punished. That doctrine does not form part of the law. Even if the company had introduced its policy to protect its commercial integrity, the arbitrating commissioner is bound to determine whether the application of the policy had unfair results. The mere existence of stock losses over a fairly long period of and the presence of the applicants at the branch and during training and counselling sessions was not enough to warrant the conclusion that all of them were poor performers. The store manager’s incompetence was to blame. She was employed to see that the staff performed adequately. She failed to do so, in spite of warnings. Her dismissal was accordingly fair. However, had the manager been dismissed sooner, there was every reason to believe that remainder of the staff would still have been in employment. All the employees other than the manager were reinstated.

After suffering high stock losses in one of its stores, Pep introduced stringent stock control measures and a training programme aimed at limiting stock losses to 2% of stock held. Employees were warned that, if stock losses continued in excess of that figure, disciplinary action would be taken. After the store manager was dismissed, stock losses continued. The remaining staff were counselled and cautioned that they would be held individually and collectively responsible for further losses. In the course of these counselling sessions, employees were issued with warnings and final warnings. The employees’ union was involved in attempts to curb further shrinkage. After stocktaking, the employees at the store were summoned to a disciplinary hearing and dismissed. The employer went to the CCMA.

The employees in *FEDCRAW obo Phindiwe & Another/Snip Trading (Pty) Ltd*<sup>119</sup> were dismissed when stock losses at the store at which they worked exceeded the level tolerated by Snip Trading. The company raised its now familiar defence that, the employees' contracts of service provided that they accepted liability for stock loss and that the company's disciplinary code required employees to explain stock losses, failing which they could be dismissed. The commissioner noted that Snip relied on a presumption that if a stock loss occurred, there was misconduct on the part of all employees; the onus was then placed on employees to disprove that none was guilty of misconduct. Snip also relied on the principle of collective responsibility. However, said the commissioner, justice requires that if an employer has reason to believe its employees are committing misconduct, they cannot be dismissed on mere suspicion; they must prove on a balance of probabilities that the employees actually committed misconduct. The commissioner acknowledged that it might be difficult to prove individual involvement in acts leading to stock loss. But held that, even so, it is unfair to hold all employees responsible, unless they are aware of the identity of the perpetrators. The onus of proving such knowledge rests on the employer; to reverse the onus by requiring employees to prove their innocence is contrary to the LRA. That the employees' contracts of service permitted dismissal for stock loss did not preclude an arbitrator from inquiring into whether such dismissals were fair. Turning to the merits, the commissioner noted that both employees had admitted that they knew that the manager of the store was not banking money and that he had declined to charge people who had been caught stealing at the store. This failure to inform the company of the manager's actions amounted to a breach of their duties as employees, warranting dismissal. That an employee who had been transferred from the store after the stock losses had occurred had escaped dismissal was

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<sup>119</sup>[2002] 7 BALR 718 (CCMA). See also *Pep Stores (Namibia) (Pty) Ltd v Iyambo & others* (2001) 22 ILJ 1995 (HCN); *Federal Council of Retail & Allied Workers v Snip Trading (Pty) Ltd* (2001) 22 ILJ 1945 (ARB).



immaterial, given that the employee's misconduct had destroyed the employment relationship.

## 7.2 Incompatibility

The most difficult category of substantive fairness to deal with is the category that involves managerial styles and clashes of personality. Occasionally a dismissal will be precipitated, or substantially contributed to, by a senior employee's incompatibility with other staff. Whilst the court has accepted incompatibility as ground for a fair dismissal<sup>120</sup> each case must be considered on its own merits.<sup>121</sup> It could be that an employee who behaves in a manner which is grossly insubordinate or insolent, giving rise to perceived incompatibility, may be justifiably charged with misconduct. Alternatively, in the manner of *Wright v St Mary's Hospital*,<sup>122</sup> the employee's incompatibility was regarded as a dismissal due to operational requirements. However, given narrow definition of dismissal due to operational requirements as contained in the Labour Relations Act it has become accepted that because of incompatibility, in the absence of elements of misconduct, arises out of the subjective relationship between the employee and others in the organization, it is best dealt with as form of incapacity.<sup>123</sup>

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<sup>120</sup> See generally Benjamin, P 'The Italian job: eccentric behaviour as grounds for dismissal' (1993) *EL* 105; Note 'Not on top, but outside: executive dismissals and the court' (1986) 2 *EL* 67; Olivier, MP 'The dismissal of executive employees' (1988) 9 *ILJ* 519; Note 'Dismissal executive and managerial employees' (1988) 2 *Labour Law Briefs* 1.

<sup>121</sup> See generally, *Van Reenen v Rhodes University* (1989) 10 *ILJ* 926 (IC); *Joslin v Olivetti Systems and Network Africa (Pty) Ltd* (1993) 27 (IC); *Visagie v Prestige Skoonmaakdienste (Edms) Bpk* (1995) 16 *ILJ* 421 (IC); *Hapwood v Spanjaard Ltd* [1996] 2 *BLLR* 187 (IC); *Davmark (Pty) Ltd and Dally* (1997) 1 *CCMA* 8.1.30; *Nathan and the Reclamation Group (Pty) Ltd* (2002) 23 *ILJ* 547 (CCMA); *Subrumuny and Amalgamated Beverages Ltd* (2000) 21 *ILJ* 2780 (ARB); *MWU Obo Calitz v Toyota SA* [2003] 3 *BLLR* 152 (CCMA).

<sup>122</sup>(1992) 13 *ILJ* 987 (IC).

<sup>123</sup> See Le Roux, PAK & Van Niekerk, A *The South African Law of Unfair Dismissal*, (1994), 286-287. In Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2000) at 376-377 the authors say 'While accepted as a valid ground for dismissal under the previous LRA in certain circumstances, it was not one of the three fundamental reasons for fair dismissal recognised by the ILO and opinions were divided on where it belonged. Rycroft and Jordaan treated incompatibility as a species of unsatisfactory work performance or incapacity whereas Le Roux and Van Niekerk, in the light of the decision in *Wright v St Mary's Hospital* classified it as a form of dismissal for operational purposes.

It will be recalled that *Council for Scientific & Industrial Research v Fijen*<sup>124</sup>the court remarked that the contract of employment contained an implied term that an employee shall not act in a manner as to cause disharmony and a breakdown in the employment relationship. Furthermore, at common law, it is accepted that an employee has a duty to act in good faith and to further the interest of the employer. A confrontational attitude on the part of employee as where, for instance, the employee is not interested in conciliation and where he perceives himself to have been wronged or slighted will be satisfied with nothing less than an unequivocal pronouncement by management that he, the employee, was right and the other party totally wrong, may well justify an employer's termination of the employee's on the grounds of incompatibility.<sup>125</sup>

When it is alleged that a manager does not "fit in" with the style of his new organization, or that his managerial style is not conducive to the well being of the company, the matter is more complex. Incompatibility often arises from the clash of personality differences. *Harvey on Industrial Relations & Employment Law*<sup>126</sup>cites the case of *Gorfin v Distressed*,<sup>127</sup> an example. The employee who described as a "determined and forceful lady", worked as a domestic servant a geriatric home and was dismissed after complaints had been received from other staff members, that she had dissension in the home. It was held by the Industrial Tribunal, as summarised by Harvey, that<sup>128</sup>

"... before any dismissal arising from personality difference will be considered fair, the employer must show that not only is there a breakdown

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The new LRA made it vital to resolve the uncertainty. Unless incompatibility is brought under one of these two headings, it cannot be a valid ground for dismissal (s 188). But, since different rules apply to dismissal on the grounds of incapacity and dismissal for operational reasons, it is necessary to be clear under which heading it belongs. The LRA itself, unfortunately, is silent on the question.'

<sup>124</sup>(1996) 17 ILJ 18 (A).

<sup>125</sup>See *R Anderson v Toyota SA Motors (Pty) Ltd t/a Toyota SA Stamping Division* (1993) 4(4) SALLR 38 (IC).

<sup>126</sup> Vol I, Div II, Para 1046, Issue 102.

<sup>127</sup>(1973) IRLR 290.

<sup>128</sup> Cited in M.P Olivier 'The dismissal of executive employees' (1988) 9 ILJ 519; 522.

in the working relationship but it is irremediable. So every step short of dismissal should first be investigated in order to seek an improvement in the relationship: *Turner v Vestric Limited* (1981) IRLR.”

In deciding whether a dismissal, arising from friction between employees, is fair or not, the potential injustice which the dismissed employee may suffer is an important. Harvey discusses this aspect as follows:<sup>129</sup>

“... when seeking to determine whether or not the dismissal is fair in all circumstances, an industrial tribunal must consider whether the employer has taken into account the potential injustice suffered by the employee. This was the clear view of the Court of Appeal in the case of *Dobie v Burn International Security Services (UK) Ltd* (19984) ICR 812 CA, where a security officer at Liverpool Airport was dismissed at the behest of Merseyside County Council. The industrial tribunal in considering the fairness of the dismissal held that they had to consider solely the conduct of the employer and ignore the question of whether the employee had suffered any injustice. The EAT held that this was misdirection.”

Olivier discusses some of the principles surrounding the incompatibility:<sup>130</sup>

‘The reasons which are usually given for the dismissal of senior employees concern alleged incompatibility with the employer’s business, alleged incompetence or alleged misconduct. On one occasion the Court found that the managing director’s management style was incompatible with the employer’s business and that the manager could not get along with a large section of staff. The incompetence of a senior employee to execute his assigned responsibility has also been raised before the court. Certain guidelines, however, have been laid down by the Court in cases of alleged incompatibility or incompetence. The employer should inform the employee with regard to the alleged deficiency and should help towards the remedying thereof. Furthermore, the employers should discuss the situation with the senior employee and endeavour, if possible, to find alternatives in order to avoid dismissal ...’

De Kock SM explains the approach and the procedure which an employer should adopt as follows:<sup>131</sup>

“... What is required where there is incompatibility is that the employee must be advised what conduct allegedly causes the disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto, that he be given a proper opportunity of putting his version; and where it is found that he is

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<sup>129</sup> Cited in M.P Olivier ‘The dismissal of executive employees’ (1988) 9 *ILJ* 519; 522.

<sup>130</sup> ‘The dismissal of executive employees’ (1988) 9 *ILJ* 519; 520.

<sup>131</sup> *Wright v St Mary Hospital* at 1004H.

responsible for the disharmony be must given a fair opportunity to remove the cause of disharmony.”

The leading case is *Stevenson v Sterns Jewellers (Pty) Ltd*.<sup>132</sup> In this case the applicant was appointed as the managing director of the company. His managerial style was not acceptable to a broad front of employees, including the chairman of the company, a number of managers and the auditor.

As far as procedural fairness was concerned the applicant had had personal interviews with the chairman of the company. He had assumed duties on 1 September 1986, and on 13 September the chairman had confronted with complaints against his managerial style. Matters did not improve and on 23 September further complaints had been received from senior managers. Applicant’s applied for reinstatement in terms of s 43 of the Labour Relations Act, 1956, inter alia, because he had not been given any warnings, and had not had the benefit of a hearing.

The court was of the opinion that:<sup>133</sup>

“those employed in senior manager may be the nature of their job be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent”.

This does not mean that the requirements of procedural fairness were not followed:

“Applicant was confronted with allegations. He replied to them and gave his considered view. He replied to them and gave his considered view. Whether he was also warned or not, is in this case not decisive.”

Again, it is clear that, although an opportunity must be given to a manager to explain his actions, formal enquiry in cases of clashes of style is not always necessary.

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<sup>132</sup>(1986) 7 ILJ (IC).

<sup>133</sup>*Stevenson v Sterns Jewellers (Pty) Ltd* at 324.

The case of *Larcombe v Natal Nylon Industries (Pty) Ltd*<sup>134</sup> was decided along similar lines, although in this case the employee was reinstated. Larcombe was accused of being incompatible with other members of the staff, although the managing director indicated that he was satisfied with Larcombe's work and that his position was secure. The reinstatement order was granted primarily because the employee, who was a financial manager, was not given a proper hearing, coupled to the fact that he had been assured that his position was secure.

When considering the issue of compatibility within the employment relationship, it was held in *Erasmus v BB Bread Ltd*<sup>135</sup> that an employer may expect an employee to foster harmonious relationships within the workplace, and where disharmony is caused, the employer should address the matter, and if no improvement is shown, may dismiss the employee. In this case the managerial employee, who was a distribution manager told an employee that he should shower because he "stink", and that the black staff did not know how to use taps. These were but two in a number of incidents of a similar nature.

### **7.2.1 *A new broom sweeps clean ...***

In *Lubke v Protective Packing (Pty) Ltd*<sup>136</sup> a new broom set about her task with so much diligence and gusto that it seemed to have caused annoyance to some subordinates. Her fault, it seemed lay, not in what she did, but rather in the manner in which she went about her work. The company's senior employees began to complain that she moved too quickly to change things and that she was bent on changing the "culture" of the company.

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<sup>134</sup>(1986) 7 ILJ 326 (IC).

<sup>135</sup>(1987) 8 ILJ 537 (IC).

<sup>136</sup>(1994) 15 ILJ 422 (IC).

To recapitulate the facts surrounding the dismissal: Ms Lubke, a managing director of the respondent company for a relatively short period of 56 days was relieved of her position on grounds of incompatibility. Following her appointment, she set to work in nothing less than a vigorous manner, to redefine the internal functioning and operation of the company. Within a matter of days of her assuming her she position she had set to work in re-organising the factory as well as the administrative and sales staff. In this she succeeded because the financial reports of the company for June 1993 showed reasonable profit attributable to increased sales.

Although the company's management acknowledged that Ms Lubke possessed positive qualities that she had brought to bear on her position as managing director. The persons who were disgruntled with her style of work were certain senior employees who complained that in introducing certain changes she had acted unilaterally and had not consulted with her personnel in the company's administrative and sales divisions. Bulbilia DP writing of the Industrial Court held that the senior personnel, who fall under the supervision of a new executive appointee, such as a new managing director, should learn to live with, and to adapt themselves to, changes and new work patterns, instead of crying foul-play simply because the bristles of the new broom happen to be hard and irksome. The court found that no fair or proper assessment can be made of a senior employee's alleged incompatibility until a sufficiently reasonable period of time had elapsed. In the present case, two months is far too short a period within which such incompatibility could be gauged. Consequently, the ordered the applicant be reinstated.

In the matter of *Jardine v Tongaat Hulett Sugar Ltd*<sup>137</sup> the commissioner considered what an employer must do to establish that a dismissal was justified on the basis of incompatibility, and suggested a number of

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<sup>137</sup>(2002) 23 ILJ 547 (CCMA).

guidelines, based on decided cases and other authorities. These guidelines may be summarized as follows:

- whether the employee had caused disharmony in the workplace;
- whether the disharmony had an adverse or potentially adverse effect on the organization;
- whether the employee was put on terms to correct the behaviour causing the disharmony and given a reasonable opportunity to make amends;
- whether dismissal was the only reasonable way to deal with the matter.

A related aspect to incompatibility relates to a dismissal at the behest of third party.<sup>138</sup> The principles for determining the substantive fairness of a dismissal in response to a demand by a third party were expounded by Kroon JA in *Lebowa Platinum Mines Ltd v Hill*<sup>139</sup> as follows:

- the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair;
- the demand for the employee's dismissal must have good and sufficient foundation;
- the threat of action by the third party if its demand was not met had to be real or serious;

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<sup>138</sup> *Dismissal* (2002) 279-280, where Grogan neatly points out, that "...dismissals at the behest of third parties are more closely akin to classic dismissal for operational reasons than dismissal for incompatibility, because the tension arising from the employee's continued presence cannot be alleviated even if the employees concerned adapt their conduct. However, the two classes of dismissal may shade into each other because the employees' demand that offending employees be dismissed may be caused by the latter's unacceptable conduct. However, the distinguishing aspect of dismissal at the instance of third parties is that, had it not been for the pressure exerted by the third party, the employer would not have dismissed the employee. Such dismissals are effected because employers regard the cost of keeping offending employees on their payroll as outweighed by the actual or potential costs of the third parties' reaction if the employees are not dismissed."

<sup>139</sup> *Lebowa Platinum Mines Ltd* (1998) 19 ILJ 112 (LAC); [1998] 7 BLLR 666 (LAC). See also *Govender v Mondi Kraft-Richards Bay* (1999) 20 ILJ 2881 (LC) at 2887C-H; *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distributors* (2002) 23 ILJ 492 (LC) at para [19].

- the harm that would be caused if the third party were to carry out its threat must be substantial; mere inconvenience is not enough to justify dismissal;
- the employer must make reasonable efforts to dissuade the party making the demand to abandon the demand;
- if the third party cannot be persuaded to drop the demand, the employer must investigate and consider the alternatives to dismissal; and
- in the process of considering alternatives, the employee must be consulted and made it clear to him or her that the rejection of the any possible will result in dismissal.<sup>140</sup>

The case of *Lebowa Platinum Mines* dealt with a situation in which a supervisor had called a black subordinate a “bobbejaan”.<sup>141</sup> The supervisor received a final warning for this offence and was told not to do it again. The employees and their union were dissatisfied with the leniency of that sanction and demanded that the supervisor be fired. The employees threatened to embark upon industrial action if the offending employee was not dismissed. After exhaustive negotiations, the company decided to terminate the services of Mr Hill for operational reasons. In light of uncompromising stance adopted by the workers, the union’s unshakeable intention to implement the threat of industrial action in the form of a strike, the fact that the employee’s safety could not be guaranteed, the court held that the employee, in unreasonably refusing the transfer, left the door open for his discharge.

The regional manager in *Lotter and SA Red Cross Society*<sup>142</sup> challenged the fairness of his dismissal for alleged incompatibility. After tracing the development of that legal concept as a ground for dismissal the commissioner summarized and applied a number of established guidelines for determining

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<sup>140</sup>At 671-3.

<sup>141</sup>Which means a ‘baboon’.

<sup>142</sup>(2006) 27 ILJ 2486 (CCMA).



in what circumstances a dismissal for incompatibility would be justified. The commissioner also considered when dismissal at the behest of a third party would be justified, and found that in the circumstances before him the dismissal was substantively unfair.

### **7.3 Dismissal for operational reasons**

A dismissal for poor work performance cannot be 'disguised' as a retrenchment to avoid proving that the employee was in fact incompetent. In *Muller v Unilong Freight Distributors (Edms) Bpk*<sup>143</sup> Mynhardt J held that using voluntary retrenchment as a device to induce an employee to leave in the face of a threat of dismissal for poor performance is a constructive dismissal for poor work performance. In the subsequent litigation in *Unilong Freight Distributors (Pty) Ltd v Muller*,<sup>144</sup> the Supreme Court held that even if a senior or managerial employee was involved, the employee concerned also had the right to be warned and given an opportunity for improvement. The court, however, conceded that a more flexible and lenient approach might well be adopted in such cases. The court rejected as unacceptable the submission that a warning and an opportunity for improvement would serve no purpose.

This ruse was also exposed in *SA Mutual Life Assurance Society v Insurance & Banking & Staff Association & Others*<sup>145</sup> The company decided to restructure its employment services department after other divisions lost confidence in its employment officers. Those officers were invited to apply for positions in the restructured department. Some refused to do so, and were dismissed. The court held that the restructuring exercise was a method of dismissing the employment officers for reasons relating to incapacity or poor work performance. The company was unable to prove that the employees concerned would have been unable to perform adequately in the restructured

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<sup>143</sup>[2001] 9 BLLR 1045 (LAC).

<sup>144</sup>(1998) 19 ILJ 229 (SCA).

<sup>145</sup>(2001) 9 BLLR 1045 (LAC).

department. The court held that the evidence did not provide a 'rational justification' for the decision to dismiss the employees.

Similarly, an employer may not use employee's perceived poor work performance as legitimate reason to dismiss for operational requirements without prior compliance with guidelines in schedule 8 to LRA relating to dismissal for poor work performance.<sup>146</sup> Dismissal substantively unfair - *Hedley v Papergraphics Ltd*<sup>147</sup>

## VIII SUMMARY

As far as poor performance and incompetence are concerned, the requirement for a hearing will usually be more flexible than in the case of misconduct or dismissal for operational reasons. In most cases the manager concerned will not have met his targets, or the team responsible for the targets will not have met them under his direction. Because a record of failure will already have been build up, a hearing would be of a rudimentary nature, and would simply confirm historical facts and provide an opportunity to the manager to justify these facts.

Problems of managerial styles, if sufficiently grave, are grounds for the termination of the employment relationship, provided the employee concerned has had an opportunity to address his deficiencies, and provided the company acts upon these deficiencies in the early stages of their manifestations.

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<sup>146</sup> See also *Hedley v Papergraphics Ltd* (2001) 22 ILJ 935 (LC).

<sup>147</sup>(2001) 22 ILJ 1421 (LC).

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