

DISMISSAL FOR EXERCISING STATUTORY RIGHTS

By

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DECLARATION

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

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ACRONYMS

| | |
|-------------|---|
| AIRC | -Australia Industrial Relations Commission |
| ANC | -African National Congress |
| CCMA | -Commission for Conciliation Mediation and Arbitration |
| DG | -Director General |
| ECHR | -European Convention on Human Rights |
| EEA | -Employment Equity Act |
| ERA | -Employment Rights Act |
| EUC | -European Union Convention |
| EU | -European Union |
| ILJ | -Industrial Law Journal |
| ILOC | -International Labour Organisation Convention |
| ILO | -International Labour Organisation |
| IRRA | -Industrial Relation Reform Act |
| LRA | -Labour Relations Act |
| LAC | -Labour Appeal Court |
| LC | -Labour Court |
| NGO | -Non-Governmental Organisation |
| NMW | -National Minimum Wage |
| RSA | -Republic of South Africa |
| SAA | -South African Airways |
| UK | -United Kingdom |
| WTO | -World Trade Organisation |
| WRA | -Workplace Relation Act |

FOREWORD

To my gracious and merciful Father, thank you God for the gift of life, knowledge and your sustenance from the beginning until completion of my studies. If it was not for your strength and power I would not have managed.

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OVERVIEW

Since the advent of constitutional democracy, there has been a steady growth in the volume of employment and labour protection legislation.¹ More than a decade following the enactment of the new labour code has witnessed an avalanche of decisions of courts and arbitration awards of labour adjudicatory tribunals.² Many of them involve unfair dismissals generally, unfair suspensions,³ residual unfair labour practices,⁴ disputes over promotion hinging on affirmative action, employment equity and unfair discrimination,⁵ the recurrent problem of jurisdiction,⁶ and review of arbitration proceedings.⁷ While wage and disputes⁸ on the one hand, and strikes⁹ on the other will always feature as perennial events in the labour-management calendar, truly important interface over several years has been dismissal of employees for automatically unfair reasons.

¹ See eg, Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998; Educators Employment Act 76 of 1988; Promotion of Administrative Justice 3 of 2000; Protected Disclosures Act 26 of 2000; Public Service Act (Proc 103 of 1994) Skills Development Act 97 of 1998; Skills Development Levies Act 9 of 1999; Unemployment Insurance Act 30 of 1966; The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

² See generally; Zondo, R 'The new Labour Courts and labour law: The first seven months of the new LRA' (1998) 19 *ILJ* 686; Wallis, M.J.D. 'The new era – How decisive is the break from the past (1999) 20 *ILJ* 902.

³ *Ngwenya v Premier of KwaZulu-Natal* [2001] 8 BLLR 924 (LC); *MEC for Tourism Affairs: Free State v Nondumo & others* (2005) 26 *ILJ* 1337 (LC); *SAPU & another v Minister of Safety & Security & another* (2005) 26 *ILJ* 524 (LC).

⁴ *Department of Finance v CCMA & others* (2003) 24 *ILJ* 1969 (LAC).

⁵ See eg: *Minister of Finance & another v Van Heerden* (2005) 26 *ILJ* 1593 (CC). For a detailed discussion: Zondo, R 'The new Labour Courts and labour law: The first seven months of the new LRA' (1998) 19 *ILJ* 686; Wallis, M.J.D. 'The new era – How decisive is the break from the past (1999) 20 *ILJ* 902.

⁶ See eg: *Old Mutual Life Assurance Co SA Ltd v Gumbi* (2007) 28 *ILJ* 1499 (SCA). See also Pretorius SC, P 'A dual system of dismissal law: Comment on *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 *ILJ* 2209 (SCA) (2007) 28 *ILJ* 2172;

⁷ See generally *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC); *Sidumo & another v Rustenburg Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC).

⁸ See generally, Du Toit, D 'What is the future of collective bargaining (and Labour Law) in South Africa?' (2007) 28 *ILJ* 1405; Landman, A 'The duty to bargain – an old weapon pressed into service' (2004) 25 *ILJ* 39.

⁹ *Modise v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC); *PSA v Minister of Justice & Constitutional Development & others* [2001] 11 BLLR 1250 (LC). See also Myburgh, JF '100 years of strike law' (2004) 25 *ILJ* 962.

In pith and substance, the study concerned with dismissals that undermine the fundamental values that labour relations community in our country depends on to regulate its very existence.

In the first part of the study, the constitutional and statutory framework will be briefly considered. An early appreciation of the constitutionalisation of the right to fair labour practices will provide a point of reference for evolving contemporary labour law corpus on automatically unfair dismissals.

The second part takes a frontal examination of novel questions of constitutional vintage concerning automatically unfair dismissals. In turn, this raises questions of dismissals for exercising statutory employment rights. The other aspects are instances of employee victimisation resulting from lodging a grievance, protected disclosures, as well as trade union activities. Also arising are dismissals that can be ascribed to unfair discrimination.

While the first part of this study concentrates on those situations where the employer has victimised and/or dismissed for exercising statutory rights, part three examines that question which has vexed the Labour Court, Labour Appeal, and to a lesser extent the Supreme Court of Appeal in recent times, the intersection between automatically unfair dismissals on the one hand, and corporate restructuring, on the other. In effect, the contentious issues naturally call for discussion: the uneasy relationship between corporate restructuring and collective bargaining, dismissal of protected strikers for operational reasons, dismissals in support of employer's demands as well as dismissals of transferred employees consequent to transfer of undertaking.

Before moving onto the heavyweight topic of automatically unfair dismissals, it is perhaps appropriate at this stage to reflect on the constitutional and statutory framework underpinning the Labour Relations Act 66 of 1995.

1. THE CONSTITUTION AND STATUTORY SCHEME

In any discussion of fundamental rights, the starting point is the Constitution. In that regard it is important to bear in mind that the Constitution is the supreme law such that every other law or conduct must bow to the force of this supreme instrument.¹⁰ Another point of note is that constitutional provisions establish substantive and procedural rights by way of a Bill of Rights; it creates obligations that “must be fulfilled” by organs of State.¹¹ There are other provisions of the Constitution that impel the discussion of the elements of constitutionalism even in pure labour law matters. Because our constitutional jurisprudence has illustrated the need to find the space in appropriate cases to move away from unduly rigid compartmentalization so as to allow judicial reasoning to embrace fluid concepts of hybridity and permeability.¹² Indeed, Sachs J makes this explicit when he states that:¹³

‘The Bill of Rights does specifically identify a number of rights for special constitutional protection. Each is independently delineated, reflecting historical experience pointing to the need to be on guard in areas of special potential vulnerability and abuse. Each has produced an outgrowth of special legal learning. Yet enumerating themes for dedicated attention does not presuppose or permit detaching the listed rights from the foundational values that nurture them. Nor does it justify severing the rights from the underlying values that give substance and texture to the Constitution as a whole. On the contrary, in a value-based constitutional democracy with a normative structure that is seamless, organic and ever-evolving, the manner in which claims to constitutional justice are typified and dealt with, should always be integrated within the context of the setting, interests and values involved.

¹⁰ S 2, Constitution of the Republic of South Africa 1996; *Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 at para 12.

¹¹ S 2, 1996 Constitution.

¹² For instance in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 83 where Yacoob J stated: ‘The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom ... The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity ... In short, I emphasize that human beings are required to be treated as human beings ...

See also *S v Makwanyane & another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 ©; 1995 (2) SACR 1 (CC) at para 80 per Chakalson P; *National Coalition for Gay & Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 206 (CC); 1998 (12) BCLR 1517 (CC); 1998 (2) SACR 556 (CC) at paras 15-32 per Ackermann J and paras 112-113 per Sachs J; *Khosa & others v Minister of Social Development & others*; *Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at paras 102 and 126 per Mokgoro J.

¹³ *Sidumo & another* at para 150.

The first of such obligation is that the State must respect, promote and fulfil the rights in the Bill of Rights expressly declared by the Constitution to be the “cornerstone of democracy in South Africa”.¹⁴

The second is that the Constitution binds all three sphere of state (the Legislature, Executive, and the Judiciary) including all organs of state.¹⁵ This necessarily imposes an obligation on the State to live up to the dictates of the Constitution.¹⁶ One such dictate on the part of the Courts is the specific injunction that they must develop the common law where they find it not in tune with the spirit, purport, or objects of the Bill of Rights.¹⁷ This is further strengthened by section 173 whereby in vesting the inherent powers on the superior Courts, the Constitution enjoins them to develop the common law having regard to the interests of justice.¹⁸ The Bill of Rights entrenches, among others, the right to the protection of the security of the person including the right to be free from all forms of violence from either public or private sources;¹⁹ the right to life;²⁰ the right to human dignity;²¹ the right to privacy;²² the right to equality before the law and the prohibition against unfair discrimination based, for example, on grounds of race, gender, sex or sexual orientation.²³

¹⁴ S 7(1) & (2), 1996 Constitution.

¹⁵ S 8, 1996 Constitution.

¹⁶ Note that the President and Deputy President are required to take an oath before assuming office in which they swear to ‘obey, observe, uphold and maintain the Constitution and all other laws of the Republic’. Cabinet ministers, premiers of provinces, members of the executive council of provinces, members of the National Assembly, delegates to the National Council of Provinces and members of the provincial legislatures are all required to take a similar oath before assuming office in which they swear to ‘obey, observe, uphold and maintain the Constitution and all other laws of the Republic’. See s 87, s 90(3), s 95, s 129, s 131(3), s 135, s 48, s 61(6) and s 107, read with Schedule 2, items 1-5.

¹⁷ S 39(2), 1996 Constitution.

¹⁸ E.g. *Charmichele v Minister of Safety & Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Minister of Safety & Security v Hamilton* 2004 (2) SA 216 (SCA); *K v Minister of Safety & Security* 2005 (6) SA 419, (9) BCLR 835 (CC). Further reading: Leinius, B & Midgely, JR ‘The impact of the Constitution on the law of delict: *Carmichele v Minister Safety and Security*’ (2002) 119 SALJ 17; Okpaluba, C ‘Government liability for acts and omissions of police officers in contemporary South African Public Law’ (2007) 21(2) *Speculum Juris* 233.

¹⁹ S 12(1) 1996 Constitution.

²⁰ S 11, 1996 Constitution.

²¹ S 10, 1996 Constitution.

²² S 14, 1996 Constitution.

²³ S 9, 1996 Constitution.

There are number fundamental rights pertinent to labour law. Right to freedom of association,²⁴ access to courts,²⁵ and the right to have access to social security.²⁶ Of particular importance is section 33(1) which provides that ‘everyone has the right to administrative action that is lawful, reasonable and procedurally fair’. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was enacted to give effect to rights contained in section 33.²⁷ Until recently the relevance and application of PAJA and the right to fair administrative action to the sphere of employment and labour disputes in the public sector²⁸ spawned conflicting decision by the Labour Court²⁹ and High Court.³⁰ However, employment and labour relationship issues do not constitute administrative action. In its groundbreaking decision in *Gcaba v Minister of Safety & Security & others*³¹ the Constitutional Court made it clear that the dismissal of an employee in the public service did not constitute administrative action.

1.1 Right to Fair Labour Practices³²

²⁴ S 18, 1996 Constitution.

²⁵ S 34, 1996 Constitution.

²⁶ S 27, 1996 Constitution.

²⁷ See section 33(3), 1996 Constitution.

²⁸ For excellent exposition see: Van Eck, S & Jordaan-Parkin, R ‘Administrative, labour and constitutional law – A jurisdictional labyrinth’ (2006) 27 *ILJ* 1987; Note ‘Enter the PAJA: Administrative justice in labour matters’ (2004) 20(5) *EL* 12. See recent split decision of the Supreme Court on whether dismissal of public service employee involve exercise of public power in *Transnet Ltd & others v Chirwa* (2006) 27 *ILJ* 2294 (SCA).

²⁹ *Public Servants Association obo Haschke v MEC for Agriculture & others* (2004) 25 *ILJ* 1750 (LC) at par 11. See also *Western Cape Workers Association v Minister of Labour* (2005) 26 *ILJ* 2221 (LC) at paras 9 and 10; *Louw v SA Railway Corporation Ltd & another* (2005) 26 *ILJ* 1960 (W); *SA Police Union & another v National Commissioner of Police Service & another* [2006] 1 *BLLR* 42 (LC).

³⁰ *Police & Prisons Civil Rights Union & others v Minister of Correctional Services & others* (2006) 27 *ILJ* 55 (E) at para 60. See too *United National Public Servants Association of SA v Digomo NO & others* (2005) 26 *ILJ* 1957 (SCA); *Dunn v Minister of Defence & others* (2005) 26 *ILJ* 2115 (T); *Despatch High School v Head of Department of Education, Eastern Cape & others* 2003 (1) SA 246 (C).

³¹ 2010 (1) *BCLR* 35 (CC). See also *NDPP & another v Tshavhunga & another, Tshavhunga & another v NDPP & others* [2010] 1 *All SA* 488 (SCA).

³² In the *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) *BCLR* 1253 (CC) at para [7] the Constitutional Court remarked in relation to s23 in general: “The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT23 are honoured.” In *National Education Health & Allied Workers Union v University of Cape Town* 2003 (3) SA 1(CC); (2003) 24 *ILJ* 95 (CC) (“*NEHAWU*”) the Constitutional Court recorded that our Constitution is unique in constitutionalizing the right to fair labour practices. Since the advent of our Constitution, Malawi has followed suit. See also Cheadle *et al* South

Section 23(1) provides that everyone has the right to fair labour practices.³³ Although the right to fair labour practices extends to employees and employers alike, for employees it affords security of employment. One primary purpose of the LRA is to give effect to the fundamental right conferred by s 23 of the Constitution. The relevant part of s 1 of the LRA reads as follows:

'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary object of this Act, which are –

- (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
- (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation ...
- (c) to promote - ...
- (d) The effective resolution of labour disputes.

Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. Where an employee claims that he or she has been unfairly dismissed, the dismissal dispute is submitted to compulsory arbitration in terms of s 191(5)(a), either before the CCMA, or a bargaining council. On the other hand, s 192 of the LRA, under the title 'Onus in dismissal disputes', provides that once an employee establishes the existence of the dismissal, the employer must prove that the dismissal is fair.

The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair. In terms of section 138 of the LRA, a commissioner should do so fairly and quickly. First he or she has to determine whether or not misconduct was committed on which the employer's decision to dismiss was based.³⁴ This involves an enquiry into whether or not there

African Constitutional Law: The Bill of Rights (2 ed LexisNexis Butterworths Durban 2005); Schooling, H 'Does an employer have a constitutional right to fair labour practices?' (2003) 13(5) *CLL* 45; Note 'Unfair resignation: Employer's right to fair labour practices' (2004) 20(1) *EL* 12.

³³ *NEHAWU* at paras 37-38.

³⁴ Particularly important in this regard is item 7 of schedule 8 to the LRA, which reads:

- 'Any person who is determining whether a dismissal for misconduct is unfair should consider-
- (a) whether or not the employee contravened a rule or standard regulating conduct I, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;

was a workplace rule in existence and whether the employee breached that rule. This is a conventional process of factual adjudication in which the commissioner makes determination on the issue of misconduct. This determination and the assessment of fairness, which will be discussed later, is not confined to what occurred at the internal hearing.

The elevation of the right to fair labour practices to the status of a fundamental right in the South African Constitution has afforded significantly stronger protection to job security and rights associated with employment. The right to fair labour practices have been invoked in recent landslide labour law decisions. In discussing a claim of wrongful dismissal, Froneman J addressed the issue of fair labour practices and in plain terms stated:³⁵

‘Section 23(1) of the constitution provides that everyone has the right to fair labour practices. It seems to me almost uncontested that one of the most important manifestations of the right to fair labour practices that developed in labour relations in this country was the right not to be unfairly dismissed. Had the Act not been enacted with the express object to give effect to the constitution right to fair labour practices (amongst others), the court would have been obliged, in my view to, develop the common law to give expression to this constitutional right in terms of s 39(2) of the constitution. To the extent that the Act might not fully give effect to and regulate that right, that obligation on ordinary civil courts remain.’

And Landman J reasoned as follows:³⁶

‘Section 23(1) of the constitution provides that everyone has a right to fair labour practice. This concept is not defined in the constitution but embraces the right to job security. This right should not be terminated except if it is lawful and fair to do so.’

In the case of *NEHAWU V UCT*³⁷ the Constitutional Court examined the purpose of the LRA and section 23(1) of the constitution (the right to fair labour practice). The case was based on whole evaluation of section 197 of the LRA. The university contracted with an independent contractor and retrenched some of its employees (cleaners). The employees were given an

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard.’

³⁵ *Fedlife Assurance Ltd v Wolfaardt* (2001) 21 ILJ 2407 (SCA); 2002 (1) SA 49 (SCA) at para 15.

³⁶ *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* (2003) 24 ILJ (LC) at 1726D.

³⁷ 2003 (3) SA 1 (CC). The right to fair labour practice was also discussed by JMC Smith J, in *SANDU and Another v Minister of Defence and Others: In re SANDU v Minister of Defence and others* 2003 (9) BCLR 1055 (T).

opportunity to apply to the new independent contractor for employment, and they were eventually employed but at a lower wage that they had received from the university.

The union declared a dispute on the basis that the university's action amounted to transfer as a going concern in terms of s197 of the LRA. After the majority of the LAC had ruled that a contract of employment may not be transferred without consent from both parties NEHAWU appealed to the Constitutional Court.

Considering the issue of fair labour practice Ngcobo J (as he then was) said:³⁸

'Our constitution is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the constitution. The concept of fair labour practice is incapable of precise definition. This problem is confounded by the tension between the interests of the workers and the interests of the employer that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept ...The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning in the first instance, from the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and the application of the LRA, a statute which was enacted to give effect to section 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity-based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organization. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance...That is not to say that this court has no role in the determination of fair labour practices. Indeed, it has a crucial role in ensuring that the rights guaranteed in section 23(1) are honoured.'

Ngcobo J (as he then was) continued.³⁹

'The focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible these interests so as to arrive at the balance required by the concept of fair labour practices.'

³⁸ *NEHAWU supra* at paras 33-35. See also *Govender and Dennis Port (Pty) Ltd* (2005) 26 ILJ 2239 (CCMA) paras 12-14.

³⁹ *NEHAWU supra* at paras 40-41.

The issue of fair labour practices was also discussed in *NUMSA & others v Bader Bop (Pty) Ltd*.⁴⁰ The main question in this case was whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognize its shop stewards (section 14 of the LRA). The rights conferred by section 14 were conferred upon trade unions that have as members a majority of the employees employed in the work place, and NUMSA had minority members. The court touched on the right to fair labour practice and it said:⁴¹

'In s 23, the constitution recognizes the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employers organizations to engage in collective bargaining, illustrates that the constitution contemplates that collective bargaining between employers and workers is key to a fair industrial environment....In interpreting the rights in s23, therefore, the importance of those rights in promoting a fair working environment must be understood.'

It is easy to forget that the purpose of labour is to serve as a countervailing force against the power of the employer.⁴² In other words, the concept of preserving job security is one of the paramount aims of the LRA. This protection is afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies.⁴³

As a result of the above, the employer being in much stronger bargaining position enables it to virtually dictate the terms and conditions of the contract

⁴⁰ 2003 (3) SA 513 (CC). See further, Grogan, J 'Poor relations: minority unions under the new LRA' (1996) 13(2) *EL* 27, 'Minority Unions (1) (2002) 18 (1) *EL* 4 and 'Minority Unions (2) (2002) 18 (1) *EL* 10; Macun, I. 'Does size matter? The Labour Relations Act: majoritarianism and union structure' (1997) 1 *Law, Democracy & Development* 69.

⁴¹ *NUMSA v Bader Bop (Pty) Ltd supra* at para 13.

⁴² The relationship between employer and an isolated employee and the main object of labour law is set out in the now famous dictum of Otto Kahn-Freund:

'[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'

Kahn-Freund, O. *Labour and the Law* (1977) at 6; See generally; Ewing, K 'The death of labour law' (1989) 8 *Oxford Journal of Legal Studies* 293; Thompson, C 'The changing nature of employment' (2003) 24 *ILJ* 1793; Davies, P & Freedland, M. *Labour Legislation and Public Policy* (1993).

⁴³ Cheadle *et al* *South African Constitutional Law: The Bill of Rights* (2 ed 2005) at 18-5.

of employment. Beatty explains the position of a person seeking employment as follows:⁴⁴

'The material and psychological constraints facing these persons [job applicants] make them so dependant on the particular employment relationships which are made available to them as to preclude their serious participation in the distribution of rights and benefits within any of those relationships.'

So protection against the invalid and unfair termination of an employment relationship has a special significance.⁴⁵ The gravity, indeed, the ramifications of dismissal for employees hardly be overstated:

'It is unarguable that dismissal, whether fair or not is usually a devastating blow for an employee. Hurt to pride, dignity and self-esteem and economic dislocation are all readily foreseeable. Alternative employment may not be easy to find, and a damaged reputation may be a grave or even fatal hindrance. Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her identity, self-worth, and emotional well-being.'⁴⁶

The vulnerability of employees is underscored by the fact that dismissal has been aptly if colourfully called 'the labour relations equivalent of capital punishment'.⁴⁷ The foregoing considerations may well be most amplified at

⁴⁴ Beatty, DM 'Labour is not a commodity' in Barry J Reiter and John Swan (eds) *Studies in Contract Law* (1980) 334.

⁴⁵ *Netherburn Engineering Ceramic v Mudau & others supra* at 1725E.

⁴⁶ Maloka TC, 'Fairness of a dismissal at the behest of the third party: *Kroeger v Visual Marketing*' (2004) 1 *Turf Law Review* 108 at 109 (citations omitted). 'In their work *A Guide to South African Labour Law* (1992) at 230 Rycroft & Jordaan state that for the retrenched worker 'at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed."' Basson *et al*, *Essential Labour Law* (2002) Ch. 1 at 3, the authors say the following about employment: "...the fact remains that we need to work in order to survive. In its simplest form, we work because we need the money we earn by working, and using the money we earn, we support ourselves."

⁴⁷ *BAWU v Edward Hotel* (1989) 10 *ILJ* 357 (IC) at 373G-H; *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe & Others* (1994) 15 *ILJ* 277 (LAC) at 281I; *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) at para. 70. See generally Landman, A. 'Unfair dismissal: The new rules for capital punishment in the workplace (part one)' (1995) 5(5) *CLL* 41, 'Unfair dismissal: The new rules for capital punishment in the workplace (part two)' (1996) 5(6) *CLL* 51. Collins, H. *Justice in Dismissal: The law on termination of employment* (1992) at 15 writes that dismissal means that '... the worker is excluded from the workplace which is likely to constitute a significant community in his or her life. It may be through this community, for instance, that the worker derives his or her social status and self-esteem. The workplace community may also provide the principal source of friendships and social engagements.' In their work *A Guide to South African Labour Law* (1992) at 230 Rycroft & Jordaan state that for the retrenched worker 'at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed"'. For example it has been pointed out in "Termination of employment by the employer: the debate on dismissal", *Termination of Employment Digest* (Geneva, ILO) 2000 at 8: "that because of

the point of termination employment induced by automatically unfair reasons and/or based on arbitrary grounds.

1.2 Automatically Unfair Reasons

Automatically unfair dismissals are dealt with in section 187. When a dismissal is actuated by one of the reasons referred to in this section, it cannot but be unfair. The specified circumstances are those in which the dismissal abridges human rights or collective bargaining standards that the legislature regards as fundamental. The High Court has concurrent jurisdiction with the Labour Court if the dismissal infringes a constitutional right.⁴⁸ Automatically unfair dismissals carry a higher level of maximum compensation than their counterparts: section 194(3).

The section protects an employee against dismissal for exercising his statutory rights regarding collective bargaining⁴⁹ and collective action.⁵⁰ It also protects him against victimisation where he or she institutes legal action against his employer in terms of the Act.⁵¹ It furthermore protects him against an infringement of his contractual rights in that it brands a dismissal in order to compel him to accept a demand in respect of any matter of mutual interest as automatically unfair.⁵² The section also endeavours to protect employees against dismissal on unfair discrimination grounds such as race, gender, age, disability, marital status, pregnancy, intended pregnancy, or any reason related to her pregnancy.⁵³

its economic and social implications, and in spite of regulation at the highest level, the termination of employment by the employer is one of the most sensitive issues in labour law today. Protection against dismissal is seen by most workers as crucial, since its absence can lead to dire economic consequences in most countries.”

⁴⁸ S 157 of the LRA 1995.

⁴⁹ S 187(c).

⁵⁰ S 187(1)(a) and (b).

⁵¹ S 187(1)(d). Note also *Mackay v Absa Group & another* (1999) 12 BLLR 1317 (LC); *NUMSA obo Joseph and Hill Side Aluminium* (2004) 25 ILJ 2264 (BCA); *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC). See too *Nkutha & others v Fuel Gas Installations (Pty) Ltd* [2000] 2 BLLR 178 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union & another v Glass Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC); *IMATU & others v Rustenburg Transitional Council* (2000) 21 ILJ 377 (LC).

⁵² S 187(c). See *Chemical Workers Industrial Union v Algorax (Pty) Ltd* (2003) 24 ILJ 1917 (LAC).

⁵³ See for eg: *Collins v Volkskas Bank (Westonaria Branch)* (1994) 15 ILJ 1398 (IC); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC); [2000] 6 BLLR 640 (LAC);

Section 187(1)(g) renders a dismissal automatically unfair if the transfer or a reason connected with it is the reason or principal reason for dismissal. This provision will prohibit the dismissal of any employees “on account of a transfer covered by this section”. An addition to section 187 renders any dismissal effected in these circumstances “automatically unfair”. However, this prohibition is qualified by the same proviso that lessens protection against dismissal of employees for reasons based on operational requirements of the former or new employer, provided that the employer concerned complies with the provisions of section 189.

The preceding survey of the salient features of constitutional and statutory framework has been undertaken in order to place the inquiry into the troublesome question of dismissals for the exercise of statutory rights in context.

2. DISMISSAL FOR EXERCISING OF STATUTORY EMPLOYMENT RIGHTS

2.1 Lodging of Grievance

Section 187 (1) (d) overlaps significantly with the introductory paragraph of section 187 (1) which renders automatically unfair dismissals contrary to section 5 read together the two provisions render automatically unfair dismissal effected because the employee took the action against the employer by exercising any right conferred by the LRA confers many rights on employees, including the right to join and participate in the activities of unions & workplace forum, strike, picket act as union representatives. If an employee

Wardlaw v Supreme Mouldings (Pty) Ltd (2004) 25 ILJ 1094 (LC); *Sheridan v The Original Mary-Ann's at The Colony (Pty) Ltd* (1999) 20 ILJ 2580 (LC); *Mashava v Cuzen & Wood Attorneys* (2000) 21 ILJ 402 (LC). For in depth treatment see Dupper, O 'Maternity protection in South African: An international and comparative analysis' (2001) 13 *Stell LR* 83 and 'Maternity protection in South African: An international and comparative analysis' (2001) 13 *Stell LR* 421; Smit, N & Olivier, M 'Discrimination based on pregnancy in employment law' (2002) *TSAR* 783; Van Jaarsveld, M 'Parental leave: For the sake of employees and their children: A comparative study' (2002) 14 *SAMLJ* 783.

is dismissed for exercising any of these rights, the dismissal is deemed automatically unfair.

In *Mackay v ABSA Group & Another*,⁵⁴ the question arose whether the rights contemplated in section 187 (1) (d) are limited to rights conferred by the Act itself or whether they also include rights Akin to those conferred in the statute but arising from collective agreements or grievance and disciplinary procedures. Mr. Mackay was dismissed for lodging a grievance in terms of the company's grievance procedures. The court held of the intention behind section 187 1(d) was to include the exercise of rights arising from agreements binding on employers and employees. The purpose of the section is to ensure that employees are not dismissed for exercising rights that have been conferred on them by any legislation.

In *Jaban v Telkom SA Pty Ltd*⁵⁵ the court found out that there was no basis for Telkom's claim that Jaban had accused disharmony in the work place. The true reason as the court found out for his dismissal was that he had laid complaints against management. That Jaban had refused to accept a voluntary severance package was merely a secondary reason for the dismissal and flowed from the first. In conclusion the court found out that applicant had been victimized & that his dismissal was automatically unfair. An employee may be dismissed for referring a matter for adjudication or arbitration if the action is based on a mala fide claim. In *NUMSA obo Joseph v Hill side Aluminium*,⁵⁶ the arbitrator held that the dismissal of an employee for making frivolous allegations of sexual harassment was automatically unfair because the dismissal prejudged the finding of the Court. In that case it is prudent to await the outcome of the case before taking such action.

⁵⁴ (2000) 21 ILJ 2054 (LC).

⁵⁵ (2006) 27 ILJ 1854 (LC).

⁵⁶ (2004) 25 ILJ 2264 (BCA).

2.2 Protected Disclosures

Section 18 (1)(h) renders automatically unfair a contravention by an employer of the protected Disclosures Act (PDA). That Act makes 'provision for mechanisms or procedures in terms of which employees may, without fear of reprisal, disclose information relating to suspected or alleged criminal or other irregular conduct by their employers whether in the private or public sector'. To enjoy protection, the employee who disclosed the information must bona fide have believed that it was true.

If this was not the case, the fairness of the dismissal of a 'whistleblower' must be assessed according to the normal principles relating to dismissal for misconduct. The PDA protects only certain disclosures made in particular circumstances. The disclosure must be made by an employee who has reason to believe that a wrongful act is being committed.⁵⁷ The wrongful act must either be a criminal offence which has been, is being, or likely to be committed, or a failure to comply with any legal obligation, or a 'miscarriage of justice'. The endangering of the health and safety of any individual, damage to the environment, or unfair discrimination,⁵⁸ or the deliberate concealment of such matters. The disclosure is protected only if made in good faith to a legal advisor, an employer, member of the Cabinet or Executive Council of a province, or an employer. Disclosures the making of which constitute criminal offences are not protected.

An employee making a disclosure must also use the procedure prescribed or authorized by the employer for reporting or remedying the impropriety concerned. 'occupational detriment' includes being subjected to disciplinary action, dismissed, suspended, demoted, harassed, transferred or refused promotion or otherwise being adversely affected in respect of employment,

⁵⁷ See generally *Charlton v Parliament of the Republic of SA* (2008) 29 ILJ 2263 (LC); *Grieve v Denel (Pty) Ltd* 2003) 24 ILJ 551 (LC); *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd)* (2006) 27 ILJ 362 (LC).

⁵⁸ The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

including employment opportunities and work security.⁵⁹ The final conditions are that the employee must reasonably believe the information disclosed, and the disclosure must not be made for personal gain or reward. Employees confronted with disciplinary action for making protected disclosure may approach either the Labour Court or the High Court for interdict restraining the employer from dismissing them pending an action under the PDA.

A number of recent cases deserve particular attention. The most intriguing *Tshishonga v Minister of Justice & Constitutional Development & another*⁶⁰ in which an employee voluntarily resigned after being persecuted for spilling the beans on a former Minister and then successfully sued for damages. Tshishonga was awarded compensation for being hounded for trying to disclose irregularities in the appointment of administrators of insolvent estates. In the subsequent case of *v State Information Technology Agency (Pty) Ltd*,⁶¹ the applicant was fired after he has reported irregularities, in which the CEO had allegedly been involved, to the Public Protector. Like the Department of Justice in, SITA did not even bother to lead evidence; its only 'defence' was that its tender procedures were not binding, and could be departed from at the CEO's discretion. The court found that the Public Finance Management Act 1 of 1999 and treasury regulations bind SITA as it is a public entity. That being the case, and because Sekgobela had reason to believe that the Act and the regulations were being flouted, his report to the Public Protector constituted a protected disclosure. In the absence of evidence from SITA, the court accepted Sekgobela's evidence that that was the only reason for the dismissal. He was awarded compensation equal to 24 months salary.

Unlike the factual scenarios in both *Tshishonga* and *Sekgobela*, the factual matrix in *Radebe & another v Premier of the Free State*⁶² illustrates that PDA

⁵⁹ Protected disclosures award of *H and M Ltd* (2005) 26 *ILJ* 1737 (CCMA). Subjecting a whistleblower to an 'occupational detriment' short of dismissal also constitutes an unfair labour practice (see section 186(2) (d) of the LRA). Whistleblowers may also sue for damages under the PDA itself.

⁶⁰ (2007) 28 *ILJ* 195 (LC).

⁶¹ (2008) 29 *ILJ* 1995 (LC).

⁶² [2009] 6 *BLLR* 564 (LC).

could be a recipe for abuse. Two applicants in *Radebe* signed a document calling for an investigation into allegations of fraud, nepotism, corruption and fruitless and wasteful expenditure in the department. They forwarded the petition to the President, the National Minister of Education, the Free State MEC for Education and high-ranking officials in the department.

2.3 Discriminatory dismissals

2.3.1 Race and Age

It has been said that where a dismissal infringes upon employee's fundamental rights, a stricter test based on necessity, and not reasonableness, is applicable in determining the fairness of dismissal. The early case of *East Rand Proprietary Mines Ltd v UPUSA*⁶³ provides an example of such circumstances where the dismissal of an employee in response to a third party demand had its origins in direct or indirect discrimination. In this case Cameron J (as he then was) was faced with a situation where mass dismissal of employees of one ethnic group was effected to placate the demand of another. The learned judge said:

'Where a dismissal is actuated by operational reasons which arise from ethnic or racial hostility, the court will in my view countenance the dismissal only where it is satisfied that management not only acted reasonably, but it had no alternative to dismissal... In a country that consists of linguistic, ethnic and other minorities, public policy... requires that a test of necessity, and not reasonableness, should be applied in scrutinising management's action in dismissing workers in such circumstances.'⁶⁴

Mention might also be made of the decision in *Chemical Workers Industrial Union & Others v Boardman Bros (Pty) Ltd*.⁶⁵ In that case black workers were dismissed following an illegal industrial action, which was triggered by the recruitment of coloured employees. They demanded that coloured workers be dismissed. In an appeal against their dismissal the workers contended that, although their strike was illegal, it was justified because of the fear that their job security was in jeopardy as a result of the change in recruitment policy.

⁶³ (1996) 17 *ILJ* 1134 (LAC).

⁶⁴ (1996) 17 *ILJ* 1134 (LAC) at 1151B & F-G.

⁶⁵ (1991) 12 *ILJ* 864 (IC).

The court found that the change in recruitment policy was not racist and the fears of black workers that the introduction of coloured would lead to their dismissal were unfounded. Maritz AM felt their discontent was understandable, but not morally defensible or supportable by the court. In upholding the fairness of the dismissal, the court noted that the striking workers' stance was unjustified and their demand enjoyed no legitimate foundation.

Another stark case of discrimination arose in *Mutale v Lorcom Twenty CC*⁶⁶ where the dismissal of a black employee after she complained about salary disparities between black and white employees was held on the probabilities to be the main reason for her dismissal, rendering it automatically unfair. Nonetheless, the Supreme of Appeal in *Raol Investments (Pty) Ltd t/a Thekwini Toyota v Madala*⁶⁷ send a caution against the assumption that, because employees of different race groups are treated differently, the differential treatment is racially motivated. In the present case, the respondent employee, a black man, was dismissed for assaulting a white supervisor. Two years earlier, the respondent employee had been assaulted by a white employee, who had merely been given a warning. The Labour Appeal Court found that his dismissal was not only unfair because of the inconsistent application of discipline, but that the dismissal was automatically unfair because it was predicated on the employee's race. In application for leave appeal, the Supreme Court of Appeal held that the LAC had reasoned merely because there was unjustified disparity of treatment of a white and a black employee, it followed axiomatically that the company had discriminated against the black employee on the basis of race, The court held that this reasoning was unsound.

The approach of the Supreme Court of Appeal in *Madala*, it is respectfully submitted that it is untenable, if one has regard that to the fact that racism and the use of racial slurs have attracted the strongest opprobrium from labour

⁶⁶ (2009) 20 ILJ 634 (LC).

⁶⁷ (2008) 29 ILJ 267 (SCA).

tribunals⁶⁸ and courts.⁶⁹ There is absolute no place in contemporary labour relations for the use of racial epithets, demeaning conduct or disrespect between races. The firmest hand is required in this regard. In the instant matter the applicant had predilection for the use of the word 'kaffir'. The fact that the person did not intend to offend, as the applicant contended that he used the word in jest, is irrelevant. In this regard the court stated:

... the applicant was insensitive to the feeling aroused by the word. A strong response to hearing the word 'kaffir', the applicant regarded as an overreaction. Taking action in favour of those who feel offended by the word, he deemed a sign of weakness.⁷⁰

Racially focused conduct deserves a firm indication of disapproval from the not only the employer, but the courts as well.

The other minor troublesome issue pertains to the question of discrimination on the grounds of age. Under section 187(2)(b) where there is no agreement as to specific retirement age, the 'normal' retirement age⁷¹ applies, the form being determined by the 'capacity' in which the person is employed, taking into consideration the practice in the particular sector. When a retirement age has been agreed, a dismissal prior to that date premised solely on the employee's age is automatically unfair, even if the agreed age of retirement is well beyond the norm.⁷² The onus is on the employer to prove that the employee has in fact reached the normal or agreed retirement age.⁷³ In general, employees who have been permitted to continue working beyond retirement age cannot claim to be dismissed since their contract had simply

⁶⁸ See for instance *Protea Gardens Hotel (Pty) Ltd and Commercial & Allied Workers Union of SA* (1988) ARB. 81.3; *Union Spinning Mills (Pty) Ltd and Amalgamated Clothing & Textile Workers Union of SA* (1988) ARB 8.13; *Table Bay Spinners Ltd and SA Clothing & Textile Workers Union* (1989) ARB 8.13; *SACCAWU obo Louw v Metro Cash & Carry* [2002] 1 BALR 74 (CCMA); *SATAWU obo Collins v Spoornet* [2000] 8 BALR 825 (IMSSA).

⁶⁹ See also *Allied Workers Union of SA obo Ncube v Northern Crime Security CC* (1999) 20 ILJ 1954 (CCMA); *Oerlikon Electrodes SA v CCMA & Others* (2003) 24 ILJ 2188 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union obo Evan and Poly Oak* (2003) 24 ILJ 2204 (BCA); *Myers and SA Police Service* (2003) 24 ILJ 2212 (BCA).

⁷⁰ *Kroeger supra* at 1983G-H.

⁷¹ See *Rubin Sportswear v SACTWU & others* (2004) 25 ILJ 1671 (LAC); *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 27 ILJ 281 (LAC).

⁷² Grogan, J *Workplace Law* 10th ed (2010) 194.

⁷³ See *SACTWU & others v Rubin Sportswear* (2003) 24 ILJ 429 (LC).

lapsed.⁷⁴ Similarly, judicial assistance has been declined in circumstances where an employer had permitted an employee to work beyond retirement age for 'humanitarian reasons' as this did not deprive the employer of its prerogative to request him stop working at any time thereafter.⁷⁵

2.3.2 HIV Status

In *Hoffman*, the employer had refused to employ the applicant, who had passed the employer's selection and screening processes as cabin attendant, when it discovered that he was HIV positive. Having held that the denial of employment on the ground that the applicant was living with HIV impaired his dignity under section 9 of the Constitution,⁷⁶ the next issue considered by the Court was that of appropriate relief. Ngcobo J concluded that instatement, that is, an order that the Hoffman be appointed to the position which he was denied, was the appropriate and most practicable relief in the circumstances

Furthermore, the dicta in *Hoffman v South African Airways*⁷⁷ suggests that in appropriate circumstances the Constitutional Court will intervene to protect the right of a person to work and earn a livelihood. In this regard, it is instructive to quote a passage from the judgement, which says:

'An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. *It is an expression of the general rule that where a wrong has been committed, the aggrieved person should as a general matter, and as far as possible, be placed in the same position the person would have been but for the wrong suffered.* In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who suffered a wrong as a result of unlawful

⁷⁴ See *Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 ILJ 1333; *Coetzee v Moreesburgse Korinboere Kooperatief Bpk* (1997) 18 ILJ 1341 (LC); *Datt v Gunnebo Industries* [2009] 5 BLLR 449 (LC); *Rockcliffe v Mincom (Pty) Ltd* (2008) 29 ILJ 399 (LC).

⁷⁵ See *Harris v Bakker & Steyger (Pty) Ltd* (1993) 14 ILJ 1553 (IC).

⁷⁶ The trial judge had held in *Hoffman v South African Airways* 2002 (2) SA 628 (WLD) that no breach of the plaintiff's right to equality had occurred through the corporation's policy which was the result of a careful and thorough research and was consistent with international trends and that even if the corporation's policy constituted unfair discrimination, it was justified within the meaning of section 36 of the Constitution.

⁷⁷ 2001 (1) SA 1 (CC).

discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.⁷⁸

The Employment Equity Act also contains express prohibition on unfair discrimination on the basis of a person's 'HIV status'. For in *Bootes v Eagle Ink Systems KwaZulu-Natal*⁷⁹ a sales person was dismissed after informing the employer that he had contracted a full-blown AIDS. The employer claimed that Bootes had been dismissed for secretly competing with it for his own gain. The court held that the employer had seized on alleged misconduct to dismiss the employee because management did not wish to have HIV-infected employees on its staff. By disguising its true motive in this way, the employer had perpetrated 'the most insidious' form of unfair labour practice.

Two cases deserve a particular mention as they seem to indicate that risk of running foul of the prohibition on discriminatory may apply also when employees suffer from other forms of disability. For instance in *Standard Bank of SA v CCMA & others*,⁸⁰ the court held that, had an employee been dismissed after developing incapacitating backache referred an application under the automatically unfair dismissal provisions of the LRA rather than referring it to the CCMA as an 'ordinary' unfair dismissal, it would have ruled the dismissal of a bank official disabled by backache automatically unfair. In same vein, in *Marsland v New Way Motor & Diesel Engineering*⁸¹ the court ruled the constructive dismissal of a marketing manager automatically unfair because the true reason why his working life had been rendered unbearable

⁷⁸ Per Ngcobo J in *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at 24-25 paras 50-52 which was cited with approval by Pretorius A in *IMATU obo Xameko/Makana Municipality* [2003] 1 BALR 4 (BC) at 9E-F where the employee was unfairly refused promotion and the disputed post no longer existed the remedy of "protective promotion" was ordered. See also *Walters v Transitional Local Government Council, Port Elizabeth* (2000) 21 ILJ 2723 (LC). In *X v Y Corp* [1999] 1 LRC 688 (Bombay HC) at 726 para 761, where the applicant was found to be medically fit for his normal job requirements and would not pose a threat to other workers due to his HIV positive status, the court ordered that the applicant's name be restored to the list of casual workers and be given work as and when available until such a time he would be considered for permanent employment. It was held that the medical test which had shown him to be HIV positive was unconstitutional and invalid. For further authorities and discussion see Okpaluba, C 'Extraordinary remedies for breach of fundamental rights: Recent developments' (2002) 17 *SA Public Law* 98 esp.111-117,

⁷⁹ (2008) 29 ILJ 139 (LC).

⁸⁰ (2008) 29 ILJ 1239 (LC).

⁸¹ (2009) 30 ILJ 169 (LC).

was that he had suffered a nervous breakdown after being deserted by his wife while on holiday.

2.3.3 Pregnancy and Family Responsibility

The dismissal of an employee for any reason related to her pregnancy or intended pregnancy is rendered automatically unfair by section 187(1)(e). According to section 187(1)(e) an employer cannot dismiss a pregnant employee because she is physically incapable of doing her work while pregnant, or because she has become physically incapable of doing her work as a result of the pregnancy. In this sense pregnant women enjoy more complete protection than employees who are discriminated for other reasons. The section places no time limit on the protection afforded to women who have been pregnant⁸².

In *Mashava v Cuzen & Woods Attorneys*⁸³ the Labour Court was unsympathetic to an employer's attempt to rely on the claim that the reason for the dismissal was not the employee's pregnancy but the employer's failure to offer her a position as candidate attorney without disclosing the fact that she was pregnant. The employer claimed that the trust required to offer her a position had been undermined. The court relied on English case law and held that deceit could provide a ground for dismissal in instances when the underlying reason was the employee's pregnancy. However the court found that although the employee's failure to disclose her pregnancy was indeed the true reason why the employer had failed to offer her articles of Clerkship, the employee's failure to disclose her pregnancy did not in circumstance amount of deceit. In that line of thinking if an employee cannot be dismissed because she is pregnant, why should the employer be entitled to dismiss her if she declines to disclose that she is pregnant?

⁸² Van Jaarsveld M, the dismissal of pregnant employees (2005) 24 (1) *LLN* 2
Smit, N & Oliver, M 'Discrimination based on pregnancy in Employment 'law' (2002) *TSAR*
783

⁸³ (2000) 21 *ILJ* 402 (LC).

In *Lukie v Rural Alliance CC t/a Rural Development Specialist*⁸⁴, the employee was told before going on maternity leave that she need not return to work when she had delivered her child. The dismissal was ruled by the court as an automatically unfair dismissal. However in cases where the employer is disingenuously frank about the reason for the dismissal or where the reason is patently obvious as discussed in *Mnguni v Gumbi*⁸⁵, whether the reason for the dismissal is in fact related to the employee's pregnancy is a question of fact or, where the employer claims that other reasons were more pressing, a question of legal causation which was one of the question the court had to decide on in *SACWU v Afrox Ltd.*⁸⁶

The causation test was applied in *Wardlaw Supreme Moulding Pty Ltd*;⁸⁷ the employee was summoned to a disciplinary hearing for failing to keep proper financial records, a fact which was discovered when the employee was a maternity leave. She claimed the reason for her dismissal was that the company was irritated by the fact that she had maternity leave. In turn the company claimed that her negligence was only noticed when she was on maternity leave. The court held that the employers' version court could not be sustained in the face of the evidence; she had been dismissed for misconduct.

However in *Woolworths (Pty) Ltd v Whitehead*⁸⁸ the court was not sympathetic to the employee who was given a fixed term contract due to the fact that the employer found out that she was pregnant. That treatment on its own amount to unfair labour practice because she was discriminated on the ground of pregnancy. It remains a major challenge for women to be in senior managerial position and to be in both formal and informal jobs because they are mainly discriminated on the ground of pregnancy, such treatment lessens women upliftment processes and subsequently few women are found standing against men in the corporate world let alone the construction.

⁸⁴ (2004) 25 *ILJ* 1445 (LC).

⁸⁵ (2004) 25 *ILJ* 715 (LC).

⁸⁶ (1999) 20 *ILJ* 1718 (LAC)

⁸⁷ (2004) 25 *ILJ* 1094 (LC)

⁸⁸ (2000) 21 *ILJ* 571 (LAC); [2000] 6 *BLLR* 604 (LAC)

However with the progress of the democracy eventually women will be felt in the height of power.

2.3.4 Trade union security

What of trade union security cases? A classic example is *Hill v AC Parsons & Co Ltd*,⁸⁹ in which the English Court of Appeal granted an interim injunction preventing both employer and union from implementing the closed dismissal. The plaintiff had been employed by the defendant for 35 years and was due to retire in two years time. The defendant, under an agreement with a union, required Hill to join that union. On the plaintiff's failure to comply, the company, acting because of union pressure, gave Hill one month's notice to terminate the employment. It was not a term of the plaintiff's employment that he be a member of any particular union. Hill sought an injunction preventing the company and union implementing the notice to dismiss should be granted.

Lord Denning MR and Sachs LJ thought that in this case the normal arguments against enforcement did not apply, as it was the union and not the employer who had sought to remove the employee and damages would not be an adequate remedy. In addition, before the expiry of the six months period, the provisions of the Industrial Relations Act 1971 would be in force granting protection to Hill against both the requirement that he join a particular union and against unfair dismissal. Under this legislation, an industrial tribunal could recommend re-engagement or alternatively compensation for unfair dismissal. The issue of an injunction restraining the company from continuing with the dismissal would give Hill the benefit of this legislation. Lord Denning MR said that injunctive (and declaratory) remedies were available where special circumstances could be made out. His Lordship, however, made it clear that the court would not order the employer to provide work for the employee and presumably would not order the employer to render services. His Lordship in granting the injunction said:

⁸⁹ [1972] 1 CA 305, [1971] 3 All ER 1345. See also *Langston v Amalgamated Union of Engineering Workers* [1974] 1 I.R.L.R. 180.

‘Suppose that a senior servant has a service agreement with a company under which he is employed for five years certain –an, in return, so long as he is in the service, he is entitled to a free house and coal – and at the end to a pension from a pension fund to which he and his employers have contributed. Now, suppose that, when there is only six months to go, the company, without any justification or excuse, gives him notice to terminate his service at the end of three months. I think it plain that the court would grant an injunction restraining the company from treating the notice as terminating his service. If the company did not want him to come to work, the court would not order the company to give him work. But, so long as he was ready and willing to serve the company whenever they required his services, the court would order the company to do their part of the agreement that is, allow him his free house and coal, and enable him to qualify for the pension fund ...

It may be said that, by granting an injunction in such a case, the court indirectly enforcing specifically a contract for personal services. So be it. Lord St Leonards did something like it in *Lumley v Wagner* ... And I see no reason why we should not do it here.’⁹⁰

Sachs LJ spelled out the special circumstances that made the injunctive remedy appropriate. His Lordship distinguished earlier cases refusing to grant injunctions in the absence of express negative stipulations in the contract on the following basis:

‘Over the last two decades there has been a marked trend toward shielding the employee, where practicable, from undue hardship he may suffer at the hands of those who may have power over his livelihood – employers and trade unions. So far has this now progressed and such is the security granted to an employee under the *Industrial Relations Act* 1971 that some have suggested that he may now be said to acquire something akin to a property in his employment. It surely is then for the courts to review and where appropriate to modify, if that becomes necessary, their rules of practice in relation to the exercise of a discretion such as we have today to consider – so that its practice conforms to the realities of the day.’⁹¹

In *Turner v Australian Coal and Shale Employee Federation*⁹² Turner had been offered and accepted employment in Elcom. He was, however, not allowed to commence work because of the refusal by the relevant union to admit him to union membership. In accordance with an alleged industry, custom requiring union membership for employment Elcom purported to withdraw its offer of employment. However, by then Turner had commenced proceedings in the Federal Court seeking a declaration against Elcom that he was entitled to be admitted to the union as a member. This required the court

⁹⁰ [1972] 1 Ch 305 at 314-315.

⁹¹ *Ibid* at 321.

⁹² (1984) 6 FCR; 9 IR 87; 55 ALR 635. For further discussion see Macken *et al Law of Employment* (2002) 267-275

to decide, *inter alia*, whether a contract of employment existed at the relevant time. The court held that Turner was entitled to be admitted and remain a member of the union by virtue of section 144 of the Conciliation and Arbitration Act 1904 (Cth), and that Elcom's withdrawal of the offer of employment constituted a repudiation of the contract which had been accepted by Turner. The Federal Court adopted the view that the courts should no longer set their faces against the grant of equitable remedies. Their Honours continued:

'There have been suggestions in some cases that, where special circumstances exist, a declaration might be granted as to the continuing existence of a contract of employment; see *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 WLR 1411 at 1417-18. and *Gordon v State of Victoria* [1981] VR 235 at 239. Cases where continuing obligations and rights are in question might give rise to such special circumstances. It is possible to envisage situations in which the desire to acquire, or to continue membership of an organisation special circumstances.'⁹³

A discussion of several cases will help illustrate the applicable principles. At one extreme is *Hill v AC Parsons & Co Ltd*,⁹⁴ in which the English Court of Appeal granted an interim injunction preventing both employer and union from implementing the closed dismissal. The plaintiff was dismissed after 35 years service with the defendant company as a chartered engineer because of his refusal to join the union DATA with which the employer had just signed a closed agreement. Lord Denning MR and Sachs LJ thought that in this case the normal arguments against enforcement did not apply, as it was the union and not the employer who had sought to remove the employee and damages would not be an adequate remedy.

*Mazibuko & other v Mooi River Textiles Ltd*⁹⁵ is a case in which the Industrial Court refused to countenance interference with the employees' right to associate freely. It pointed out that the union insisting on the dismissal of 13 employees

⁹³ (1984) 6 FCR 177 at 193; 9 IR 87 at 98; 55 ALR 635 at 649.

⁹⁴ [1972] 1 CA 305, [1971] 3 All ER 1345. See also *Langston v Amalgamated Union of Engineering Workers* [1974] 1 I.R.L.R. 180.

⁹⁵ (1980) 10 ILJ 875 (IC). For example, a closed shop agreement could not sanction harmful or oppressive results: *Chamber of Mines v Mineworkers' Union* (1989) 10 ILJ 133 (IC); *Municipal Professional Staff Association v Municipality of the City of Cape Town* (1994) 15 ILJ 348 (IC); *MWU v O'Kiep Copper Co* (1993) 4 ILJ 150 (IC); *MWASA v Die Morester en Noord-Transvaler* (1991) 12 ILJ 802 (LAC); *Mbobo v Randfontein Estates GM Co* (1992) 13 ILJ 1485 (IC).

who have defected to a rival union had itself in the past been at the receiving end of the closed shop and that it had relied on the Industrial Court for assistance. The court considered whether the employer's conduct was fair because it acceded to a legitimate demand from the majority of its employees? The court was convinced that the dismissed employees' decision to leave the majority union and join the rival union was a result of sincerely held convictions. It stated that the cause of their dismissal was their insistence on remaining members of the rival union and remarked:⁹⁶

'The fact that the respondent does not wish to deny them this right but has dismissed them because of the consequences of their insisting on their freedom of choice does not derogate from the fact that they have been denied the right to remain in employment whilst retaining their membership of TAWU. The effect of their dismissal is that the ACTWUSA members and the respondent have introduced a practice which requires that employees belong to ACTWUSA or face dismissal.'

In considering the company's acquiescence in attempts by the majority union members to introduce a practice that employees must be members of that union to retain their employment introduced an obligation which previously did not exist. It was on this basis that the court drew analogy with the case of *Young, James and Webster v The United Kingdom*.⁹⁷ This was landmark decision of the European Court of Human Rights. It held that:

'In the present circumstances of the present case, where such compulsion was directed against persons engaged by British Rail before the introduced of any obligation to join a particular union, it did strike at the very substance of the freedom guaranteed by article 11.'

Article 11 of the European Human Rights Convention provided that every one has the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest. The Industrial Court held that any agreement or practice, which obliges employees to be a member of a particular trade union or to remain, employed or which provides that he shall be dismissed if he belongs to a particular union interferes with the freedom to associate or not to associate.

⁹⁶ Note 'Inter-union Rivalry: *Johannes Mazibuko and others v FAWU Ltd* (1989) 3(3) *Labour Law Briefs* 19, at 20.

⁹⁷ [1981] IRLR 408.

2.3.5 Trade Union Activities

Fundamental to any system of law designed to promote collective bargaining is the right of employees to join unions of their choice and take part in their lawful activities. To dismiss an employee for joining or participating in the affairs of a union is therefore automatically unfair.

At common law, an appointment as a trade union representative means that an employee is in breach of his contractual duty of good faith because such an employee is representing the interests of the trade union during working hours instead of promoting the business of his employer.⁹⁸ Labour legislation has made provision for an employee(s) to be appointed as a trade union representative (s) provided certain requirements are met by the trade union.⁹⁹

This aspect was pertinently addressed in *IMATU v Rustenburg Transitional Council*¹⁰⁰ where the question was whether a managerial employee may hold

⁹⁸ The common law does not recognise the appointment or recognition of shop stewards. Nor does the common law provide for an employee to act in a representative capacity as a shop steward on behalf of a trade union. However, various statutory provisions make provision for the appointment of a shop steward (s). An employee is provided with a statutory exception to act in such a manner provided he fulfils his duties as a shop steward within the statutory parameters. See s 14(5) of the LRA in terms of which the duties of a shop steward include (i) to assist fellow workers at disciplinary and grievance proceedings; (ii) to monitor the employer's compliance with statutory duties, (iii) to report contravention in the latter respect; and (iv) to perform other functions agreed to between the employer and the trade union; s 18 of the Constitution which provides for the freedom of association. See generally Mischke, C 'Shop stewards' (2002) *CLL* 1, 2.

⁹⁹ See s 4 of the LRA which deals with freedom of association, and involves the following aspects: the right of an employee to join a trade union (s 4(1)(b)); the right of an employee to participate in the activities of a trade union (s 4(1)(a)); to stand for election and be appointed as an office bearer (s 4(2)(c)). Further, protection is offered to an employee when the latter exercises any right in terms of the LRA, including the right with regard to freedom of association. The following sections of the LRA provide for protection when an employee exercises his rights in terms of the LRA: s 5(1) which prohibits discrimination; s 5(2)(b) in terms of which an employee may not be threatened based on him exercising rights in terms of the LRA; s 5(2)(a)(i) in terms of which an employee may not be asked not to become an office bearer; s 5(2)(c)(i) in terms of which an employee may not be prejudiced based on his trade union membership; s 5(2)(c)(i) in terms of which an employee may not be prejudiced because of his involvement with forming a trade union or participating in its activities; s 5(3) in terms of which an employee may not be promised an advantage in exchange for not exercising any one of the rights he is entitled to in terms of the LRA; also s 14(1) of the LRA in terms of which a registered trade union representatives, often referred to as shop stewards. See generally Basson *et al Essential Labour Law Vol 2* (2002) 27-29.

¹⁰⁰ (2000) 21 *ILJ* 377 (LC).

office and join a trade union despite his position as a managerial employee.¹⁰¹ Firstly, Brassey AJ referred to the work specification of managerial employees of the respondent employer, and explained that these employees perform functions usually assigned to top management.¹⁰² Further, when managerial employees join a trade union, they commit themselves to a body whose primary object is to maximise the benefits their members derive from employer.¹⁰³ Therefore, by joining a trade union an employee commits himself to a body that stands in direct opposition to his employer. 'There can be a breach of the duty of fidelity owed by an employee to his employer.'¹⁰⁴

This duty is breached when an employee, for example, moonlights for a competitor, when confidential information is disclosed, when an employee touts for business on another's behalf, or even when co-workers are encouraged to take up business elsewhere.¹⁰⁵ Although an employee cannot be dismissed for joining a trade union in terms of statutory provisions, a termination of employment might have been legitimate at common law.¹⁰⁶

¹⁰¹ See s 23(2) of the Constitution in terms of which 'every worker' has the right to join a trade union and participate in its activities and programmes, s 23(4) of the Constitution in terms of which a trade union *inter alia* has the right to organise, s 14(2) of the LRA in terms of which a registered trade union that enjoys majority representativeness in a workplace may appoint a trade union representative(s) depending on the number of employees employed at the workplace. Another important consideration is the fact that every right in the Bill of Rights may be limited, subject to s 36(1) of the Constitution.

¹⁰² See *IMATU & others v Rustenburg Transitional Local Council* at 378H-379C where the following functions of managerial employees were referred to: (i) to give advice; (ii) to make recommendations to councillors who formulate policy and (iii) to direct, motivate and discipline other staff under their control. It is clear from these functions why managerial employees must enjoy the trust and confidence of their employer to perform functionally in terms of their employment contracts.

¹⁰³ See *IMATU & others v Rustenburg Transitional Local Council* at 379F-H. A trade union *inter alia* protects the rights and promotes the interest of members and negotiates the most favourable conditions of service. The point is that trade unions are competitors for a share in the revenue of the enterprise and are established for that purpose (at 379F-H).

¹⁰⁴ Brassey AJ in *IMATU & others v Rustenburg Transitional Local Council* at 380E-F. See also the much earlier decision in *Premier Medical* at 867H-I where it was emphasised that during the currency of his contract of employment an employee owes his employer a fiduciary duty which involves an obligation not work against the latter's interests.

¹⁰⁵ See Brassey AJ in *IMATU & others v Rustenburg Transitional Local Council* at 380G-I.

¹⁰⁶ See *IMATU & others v Rustenburg Transitional Local Council* at 380I. Brassey AJ explained that the termination of employment at common law is based on the idea that the employee assigns himself with a body that is designed and established to 'counterweight' the employer. At common law such an alignment is regarded as a greater infringement than taking up a part-time position with a competitor. See also *Kroukam v SA Airlink* (2005) 26 12 BLLR 1172 (LAC) where it was held that the appellant-employee has a constitutional right to participate in the lawful activities of a trade union. The termination of the appellant's employment based on his employer's contention that he was disloyal based *inter alia* on his

Secondly, Brassey AJ explained that the status of the employee is the determining factor regarding the degree of fidelity expected. The more senior the employee's position, the greater degree of loyalty expected of him.¹⁰⁷ Betrayal is regarded in a more serious light when a senior employee takes up a leadership position in a trade union.¹⁰⁸ Next, Brassey AJ explained the common law position in this regard by stating inter alia that at common law an employee breached his fiduciary duty when the employee, as a member of management, took up a leadership in a union.¹⁰⁹ Brassey AJ referred to the possibility of limiting the right to associate by applying the limitation clause of the Constitution.¹¹⁰

It was argued on behalf of the employer that participation by the senior managerial employees in the activities of the trade union constituted either a breach of contract, or a delict which fell outside the protection offered by legislation. These arguments were not accepted. Brassey AJ explained that the Labour Relations Act enshrines the right to hold office, and pertinently outlaws a rule which prohibits top-management from participating in the

trade union activities was regarded as constituting an automatically unfair dismissal in terms of s 187(1) of the LRA.

¹⁰⁷ See *IMATU & others v Rustenburg Transitional Local Council* at 381A. It was explained that the same principle applies when an employee joins a trade union. A senior employee is expected to stand by the employer in 'battles' with the trade union. A senior employee is often asked to keep production going when a strike takes place.

¹⁰⁸ See *IMATU & others v Rustenburg Transitional Local Council* at 381B-C where it was stated that if a senior employee is merely an ordinary member of the trade union, his participation in the decisions taken by the trade union is usually nominal. However, when a senior employee is acting in a leadership capacity on behalf of the trade union he is much more involved in the management of the trade union and its activities.

¹⁰⁹ At common law it is permissible to take action against such employees. Also, in common law it is not unreasonable to force a managerial employee choose between his involvement with the trade union and his managerial status - *IMATU & others v Rustenburg Transitional Local Council* at 381D-E.

¹¹⁰ See *IMATU & others v Rustenburg Transitional Local Council* at 381J. This limitation is possible in terms of s 36(1) of the Constitution. Brassey AJ observed that the rights conferred by the Constitution are in some aspects broader than those conferred by the LRA. Further, the Bill of Rights provides the context in which the LRA must be considered and interpreted. In this regard the provisions of s 39(2) of the Constitution must be applied in terms of which a court is obliged, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. Reference to this latter obligation is made in s 3(b) of the LRA which provides that the LRA must be interpreted 'in compliance with the Constitution' – at 382A-B. It was argued that the applicants could only derive their protection in terms of s 4(2) of the LRA, in terms of which the right to participate in the activities of a trade union is subject to lawfulness.

governance of a trade union. These statutory provisions are thus not qualified by lawfulness.¹¹¹

Brassey AJ remarked in fourth place that a collective bargaining statute, such as the Labour Relations Act, seeks to escape from and not to submit to contract.¹¹² Moreover, it was explained that there is nothing inappropriate in giving senior management the right to participate in union activity. However, although white-collar unions are recognised as legitimate, reading implied limitations into statutory rights should not be undertaken lightly.¹¹³ Nonetheless, it should also be acknowledged that these protective provisions legitimise actions, which might otherwise constitute a breach of an employee's duty of fidelity, and prevent *inter alia* victimisation based on this reason.¹¹⁴ However, Brassey AJ stated:¹¹⁵

'Beyond that, they [the provisions] do nothing to exempt employees from doing their duties under contract. The employees must still do the work for which he is engaged and observe the secondary duties by which he is bound under contract.'

Although an employee may not be punished for taking up a leadership role in a union, his status as such does not give him the right to do less than his job, unless this is specifically provided for.¹¹⁶ Therefore, a senior employee who

¹¹¹ See *IMATU & others v Rustenburg Transitional Local Council* at 383A-D with reference to s 4(2)(c) of the LRA, which recognises the right of every employee to be elected as an office bearer of a trade union. It was added by Brassey AJ that the qualification of lawfulness governs the activities of the union and not of their members.

¹¹² In this example reference was made to s 67(2) of the LRA in terms of which participation in a protected strike is not regarded as a breach of contract.

¹¹³ See *IMATU & others v Rustenburg Transitional Local Council* at 383H. It was remarked that given the express language of the LRA it is impermissible to view them as a rule prohibiting senior management from taking up executive positions within the union.

¹¹⁴ See *IMATU & others v Rustenburg Transitional Local Council* at 383C-D.

¹¹⁵ See *IMATU & others v Rustenburg Transitional Local Council* at 384E. If any employee, also in this context a managerial employee, fails to perform his duties as he is contractually obliged to do, he may be disciplined for misconduct, or his employment may even be terminated based on incapacity due to poor work performance. Therefore, apart from the provisions of ss 14-15 of the LRA, an employee has no right to take time off work for trade union activities. If he does so without the permission of his employer he will be liable for misconduct. An employee's right to participate in union activities is not a general right.

¹¹⁶ See *IMATU & others v Rustenburg Transitional Local Council* at 384; generally *Premier Medical & Industrial Equipment* at 867H where it was stated that an employee owes a fiduciary duty to his employer during the period of his employment which *inter alia* entails not work against his employer's interests.

becomes a trade union leader must 'tread carefully', especially if he is privy to confidential information.¹¹⁷

With reference to the contention that this reservation places an employer in a difficult position *Brassey AJ* held:¹¹⁸

'The common law meets this problem by prohibiting people in positions of trust from taking up positions that might potentially compromise their duties.'

Finally *Brassey AJ* stressed that the Labour Relations Act, in an effort to promote trade unionism and collective bargaining, makes to promote unionism and collective bargaining, makes the act of breach of good faith the focus of its attention, and allows an employee to have divided loyalties.¹¹⁹

Two years later a less tolerant stand was taken in *Williams and Volkswagen of SA (Pty) Ltd*¹²⁰ where it was held that a managerial employee who associated himself with the illegal strike of workers by making press comments, acted in breach of the trust placed in him by his employer. It was explained that the nature of a supervisor's employment requires him to represent the interests of management on the floor.¹²¹ Moreover, it was explained that the relationship between an employer and employee is one of trust and confidence. A managerial employee is appointed in a position to pursue the best interests of his employer in accordance with the latter's requirements, and he may not through his conduct fail pursue the best interests of his employer by choosing to pursue his own interests to the

¹¹⁷ It is not sufficient to keep such information secret. The senior employee must recuse himself from every discussion within the union where such information might become relevant in any way when he knows his employer would not prefer the trade union to know. See *IMATU & others v Rustenburg Transitional Local Council* at para 19.

¹¹⁸ See *IMATU & others v Rustenburg Transitional Local Council* at 385C-D.

¹¹⁹ See *IMATU & others v Rustenburg Transitional Local Council* at 385D.

¹²⁰ (2002) 23 ILJ 1500 (CCMA). The services of the applicant, a former supervisor, were terminated based on misconduct because he had associated himself with the unlawful strike action of workers. By associating himself with their conduct, he failed to comply with his employer's legitimate requirements to comply with his duty of good faith in his capacity as manager. It was contended that the applicant breached the trust relationship between him and the respondent that was essential for the continuance of their employment relationship. The applicant contended that his dismissal was unfair because he was not the spokesperson for the striking workers, nor was his conduct sanctioned by disciplinary code of his employer.

¹²¹ See *Williams* at 1506A where it was held that the only reasonable conclusion was that the supervisor was supportive of the workers' cause, and that he knew that publication of a statement undermined his employer's authority. In acting like he did, the employee knew he was breaching the trust placed in him by the company.

detriment of the latter.¹²² It was stated that if the conduct of the applicant was considered in its entirety, it was clear that

‘[i]n the circumstances ... the applicant acted in fundamental breach of the trust placed in him by the company ... if the circumstances of the matter are considered the misconduct is a serious offence ... the relationship of trust between the parties lies at the heart of the employment contract ... A destruction of that relationship renders continuation of the contract intolerable.’¹²³

It is submitted that the interaction between the contractual principle of good faith and regulatory legislation is evident. When an employee acts contrary to his duty of good faith, his employment is terminated on grounds of misconduct, which is provided by the Labour Relations Act as a fair reason to effect a dismissal.

The question that remains are does this mean that all employees are free to exercise these rights, irrespective of their position in the employer’s organization? This question is particularly relevant to managerial employees. Problems will be created for an employer if a senior manager responsible, like, for representing the employer in collective bargaining, belongs to the trade union with which that manager bargain on behalf of the employer, or is a dilemma created by this situation has been examined in cases decided before and after the implementation of the current LRA.

In *Keshwar v SANCA*,¹²⁴ a manager was dismissed for refusing to resign as chairperson of a staff association formed to cater for the interest of employees of her employer. The employer argued that the employee had placed herself in a conflict of interest. The Industrial Court found that all the employee had done was to write a letter requesting that the staff association be recognized; in the court’s view, this did not amount to a conflict of interest. However, the court warned that if managers indeed assume union responsibilities in conflict

¹²² See *Williams* at 1507I-J.

¹²³ See *Williams* at 1508A-C. This important aspect was emphasised years before in *Central News Agency v CCAWUSA & another* (1991) 12 *ILJ* 340 (LAC). Grogan & Myburgh ‘Cracking the code’ (1997) *EL* 118 at 123 explain that an employee’s services may be fairly terminated because of the latter’s breach of trust.

¹²⁴ (1991) 12 *ILJ* 816 (IC).

with their duties to their employer, dismissal might be justified. The Labour Court has adopted a similar view.

In *IMATU & other v Rustenburg Traditional Council*,¹²⁵ the union sought an order declaring a prohibition imposed on employees at managerial level from taking part in union affairs to be in breach of the Constitution and the LRA. The court noted that under the common law there is no reason why managerial employee should not be dismissed for joining unions; by so doing they align themselves with a union against their employers. Although this is arguably a more serious breach of fidelity than taking up a part-time position with a competitor, the possibility of such a conflict was not enough in itself to warrant the inference that the legislature did not join a union and hold office. However, the court warned that managers who act as union officials must 'tread carefully', especially when handling confidential information. The court observed:

'it is not enough to simply keep the information secret; he must refuse 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...participate in discussion on strategy to which such information given to him in confidence is irrelevant, since this is implicit in his right to participate in trade union activities, but he must guard himself from exercising a judgment on the basis of such information. The delicacy of discretion that this entails makes his position an unenviable one, but the Act gives him the right to enter this minefield if he wishes.'

The court made it clear that if a manager places himself (or herself) in a position where conflict between the interest of the employer and the interests of the union reach the point where then employee can no longer do his (or her) work, dismissal is at least an option. The Rustenburg TLC judgment illustrates the difficulties that may arise when an employee is dismissed for a number of reasons, one of which may be related to a reason proscribed by section 5, read with section 187(1). Employees charged with misconduct 'victimization'. However, the mere fact that an employee dismissed for, say, absenteeism also happens to be a shop steward is not enough in itself to indicate that the dismissal is automatically unfair. If these employees were to

¹²⁵ (2000) 21 *ILJ* 377 (LC).

allege that their dismissals were automatically unfair, the onus should rest on them to produce sufficient evidence to prove that the fact that they were shop steward materially influenced the decision to dismiss them.

The locus classics of judgments in this arena is *Kroukam v SA Airlink (Pty) Ltd*.¹²⁶ Captain Kroukam, an airline pilots Association. In that capacity he becomes embroiled in a dispute between the airlines pilots and management over who was to fly jets recently purchased by the company. That dispute found its way to the Labour Court. The union won the case, but that was not the end of the dispute. Soon after the order was granted, Kroukam met two members of management over lunch in the company canteen to discuss the situation on what the company later claimed was an 'off the record' basis. Soon after this, the union launched yet another application, the aim of which was to have company's CEO and its operations director committed for contempt of court. Once again, Kroukam was the deponent of the foundation affidavit, in which reference was made to his lunchtime discussion with management. Soon after this, the company's attorney expressed management's indignation by informing the union that Kroukam's conduct would 'not be forgotten'. Later, when Kroukam failed to submit a psychologist's report on his health, he was grounded pending submissions of that report, and given specific instructions to have it completed by a certain date. Management now decided to take disciplinary action. Kroukam was charged with insubordination and being a 'disruptive influence to [sic] the orderly operation of the organization' for the alleged breach of the confidentially agreement and for failing to submit the report. He was also charged with failing to notch up the required number of flying hours for the year. Kroukam was duty tried, found guilty on both counts and dismissed. His appeal was unsuccessful. The labour court rejected his claim that his dismissal was automatically unfair. On appeal, the court held that the critical issue for determination was the reason the company had decided to dismiss Kroukam. Although the company had clearly had enough of Kroukam, the ultimate question was whether he had been dismissed because of his

¹²⁶ (2005) 26 ILJ 2153 (LAC).

deficiencies as an employee, or whether he had been dismissed because he had, to use the words of section 5 of the LRA, exercised rights conferred by the Act, participated in the lawful activities of a trade union, or participated in proceeding in terms of the act.

The court took its cue from *SACWU & others v Afrox Ltd*,¹²⁷ in which the test for causation used in delicate and criminal cases, was applied to establish whether striking employees had been dismissed for striking, or for operational reasons. In the context of SA Airlink, the first question was whether the dismissal would have occurred had Kroukam not engaged in his union activities; the second question was whether those activities were the main or dominant reason for his dismissal. Kroukam was assisted by the manner in which the company had formulated its own case. Since the outcome turned largely of this point, the extract from the heads of argument to which Davis AJA referred is instructive. It read:¹²⁸

‘Neither Captain Kroukam nor his legal representative challenged the statements that he made on several occasions show no confidence in the breakdown and trust in management- her had on several occasions called for the resignation of key personnel including the operations direct or, the chief pilot and he required to areas and detention of his operation director and his chief executive. His justification for these disruptive actions was that he had acted in his capacity as shop steward. The complainant illustrated that, as Captain Kroukam’s affidavit had been signed in both his capacities as an employee and his capacity as shop steward, it had been difficult to separate these roles and differentiate which disruptive action were attributable to his persona. Captain Kroukam further admitted that a requirement for the resignation of chief pilot, after only fur months in office during the time of dynamic change requiring intense management of the change process, was circumstances. The irrationally demonstrate a breakdown without reason and disruption without reason.’ In other words, the company itself (somewhat disingenuously, as it turned out) admitted that Kroukam’s actions as a shop and those performed on his own name were difficult to unscramble. But, said the court, the company was not entitled to throw the baby out with the bathwater. The court had little hesitation in finding that the main or dominant reason for Kroukam’s dismissal was his trade union activities-in particular the role he played in the two court applications.

Another instructive case is *BIFAWU & another v Mutual & Federal Insurance Company Limited*, a decision decided soon after *SA Airlink*. *Mutual & Federal* also involved the dismissal, of a shop steward, Mr. Nhlapo, who had also

¹²⁷ (1991) 17 ILJ 1718 (LAC). The test for legal causation in criminal cases, see *S v Mokgethi & others* 1990 (1) and *Minister of Police v Skosana* 1977 (1) SA 31 (A).

¹²⁸ Quoted at para 32 of the judgment.

discharged his functions with a zeal, which his employer (and this time also the court) regarded as excessive. Like Kroukam, Nhlapo became involved in litigation with the employer but, unlike *SA Airlink*, the employer had no basis for criticising Nhlapo's performance as an employee, or at least had never raised any such concerns. Nhlapo's problems began when he represented a colleague in a disciplinary hearing. The colleague was found guilty of fraud and dismissed. When the matter came before a CCMA arbitrator, the dismissed employee was again represented by Nhlapo. Nhlapo, who proved a prodigious point taker, managed to persuade the commissioner that the dismissal of his former colleague was procedurally fair. His forensic skills cost the company nearly R40 000 in compensation. Had Nhlapo been dismissed for his reason alone, his dismissal would clearly be because of his forensic success. Nhlapo was dismissed because one of the points he took in support of his argument that the dismissal was procedurally unfair was that the chairman of the disciplinary hearing had unreasonably refused the employee's request for a postponement. The company took exception to his submission because it was simply untrue. The Labour Court also found it untrue, and ruled that Nhlapo committed misconduct as an employee.

Although on appeal the court referred to the Kroukam judgment, the problem before it was slightly different. In *Mutual & Federal*, the court had to determine whether Nhlapo had exceeded the limits of his role as shop steward, not whether his performance in that role loomed larger in the employees mind than his deficiencies as an employee. In that sense, *Mutual and Federal* was more in line with *Adcock Ingram Critical Care v CCMA & others*, in which the shop steward concern was dismissed for uttering threats at the commencement of a meeting with management aimed at ending a strike. As in *Adcock Ingram*, the *Mutual and Federal* court began by noting that some latitude ought to be extended shop steward when they seek to advance the interest of their union and its member's in particular:

'The second appellant is not a trained lawyer. The ethical that would have been expected of a lawyer in the same situation as this is not necessary the appropriate yardstick by which to measure the second appellant's conduct. Less than perfect ethical which might have come to the fore in a surfeit of enthusiasm to defend a fellow employee, could conceivably have cried out for

a general dose of forgiveness which would have included a lesser sanction than dismissal.’

Of great emphasis in this case is that when employees who are participating in union activities and services should not be dismissed for exercising this right. Employers must not give a defence that the employee was not charged for union activities but for incompetence. This approach should not be used because it will make employees scared to exercise their rights thereby that action becomes unconstitutional.

In this section, we have considered the dismissal for assertion of statutory rights; the next section examines the intractable issue of automatically unfair dismissal arising out of business restructuring. The interconnection between automatically unfair dismissals and corporate restructuring is not altogether happy, and the tensions are apparent in the case law.

3 TENSION BETWEEN CORPORATE RESTRUCTURING AND AUTOMATICALLY UNFAIR DISMISSALS

3.1 Introduction

Sections 189 and 197 of the LRA 1995 are key provisions for both employers and employees in a business environment characterised by corporate restructuring. Corporate restructuring has given momentum to outsourcing as businesses seek to be more profitable by streamlining their operations and focusing their attention as well as capital on their “core” functions. The outsourced function is provided more cheaply (and hopefully more efficiently) by an outside service provider who takes responsibility for the burden of administration.¹²⁹

The concept of outsourcing has been defined as ‘[t]he policy of hiring outside consultants, trainers, technicians and other professionals to take over the complete function of a particular department (eg human resources) rather

¹²⁹ Theron & Godfrey *Protecting Workers on Periphery* Institute of Development and Labour Law Monograph 1/2000 at 26-7.

than employing full-time personnel. These non-core activities include catering, gardening, communications, and data processing.¹³⁰

Business restructuring is having serious consequences for worker protection under labour law, as this commonly translates into 'the traditional outsource/retrench/offer of employment with a service provider¹³¹ or a labour broker route'.¹³² Craig Bosch sums up this dilemma nicely:¹³³

'The employees in the part of the businesses that are outsourced are in an unenviable position. They are redundant to the needs of their old employer as a result of its decision to outsource the activity in which they were engaged, while the work that they were doing is still available and being undertaken by the contractor. There is the possibility that an employee will be offered the opportunity to work for the contractor, and that employment may be on the same or better terms and conditions than those enjoyed with their old employer. On the other hand, and this is apparently more often than the case, workers are in no position to refuse an opportunity to work for the contractor and are therefore compelled to work for that entity on terms and conditions of employment that are far less beneficial than those they previously enjoyed.'

Although the LRA, 1995 provides a definition of what constitutes "operational requirements", the definition does not provide clear guidance as to when

¹³⁰ Barker & Holtzhausen *SA Labour Glossary* (Juta, 1997).

¹³¹ Note for instance *SATAWU v Old Mutual Life Assurance Co Ltd* (2005) 26 *ILJ* 293 (LC) at para 13, where the company restructuring strategy was described as follows:

'1 A business as usual case. This scenario envisages continuation of our current thrusts, which are essentially to continue to refine the nature of our services and to focus heavily on cost management.

2 A gradual outsource case: This scenario envisages outsourcing of elements of our services in a methodical way as the external service provider community develops and is able to demonstrate cost and know-how advantages over the in-house service.

3 An empowerment or privatisation case: This scenario envisages creation of a new services company and the outsourcing, with some from of contractual underpin or guarantee, of facilities services from Old Mutual to a new company. Existing staff would be transferred from Old Mutual to the new company and staff would own a meaningful share of the new company.'

While in *NEHAWU v UCT*, the University opted for a 'phased approach' to outsourcing campus protection services. This apparently allowed affected employees a choice between 'remaining with CPS [and likely ultimately being retrenched]; voluntary retrenchment; early retirement with incentives; redeployment with UCT where vacancies exist and employment by the service provider should the service provider find the employee suitable'.

¹³² In *Springbok Trading (Pty) Ltd v Zondani & others* (2005) 26 *ILJ* 1681 (LAC) the employer decided to retrench part of its labour force and to re-engage their services through a labour broker. Their new terms of employment would be less advantageous. The employer claimed that the transfer was affected by agreement between itself and the employees' union. However, the Labour Appeal Court found, on the evidence, that no valid agreement had been established. It found it most unlikely that an experienced trade union official would not have challenged the proposed new conditions on behalf of its members. The retrenchments were accordingly unfair.

¹³³ 'Transfers of contract of employment in the outsourcing context' (2002) 23 *ILJ* 840, 841.

dismissal will be justified. The question of whether or not an employee dismissal for operational reasons is fair is a factual one.¹³⁴ The employer will firstly have to prove that the proffered reason is one based on operational requirements of the business.

The term “operational requirements” is defined as “requirements based on economic, technological, structural or similar needs of an employer”.¹³⁵ “Technological reasons” refer to the introduction of new technology which leads to the redundancy of employees.¹³⁶ “Structural reasons” refers to post becoming redundant following a restructuring of the enterprise.¹³⁷

“Economic reasons” is an all-encompassing concept, covering all those reasons which relate to economic well-being of the enterprise. One of the most common economic reasons is financial difficulties experienced by a business, for example, due to a recession. This causes employees to become redundant and necessitates their retrenchment.¹³⁸

“Economic reasons” may also include circumstances where employees do not actually become redundant, but economic considerations necessitate their dismissal. For instance, where the employee whose presence or actions negatively affects the economic well-being of the enterprise, could be fairly dismissed. This could happen where certain actions of the employee creates

¹³⁴ In *NUMSA v Atlantis Diesel Engines (Pty) Ltd* (1993) 14 ILJ 642 (LAC) at 648C-D the Labour Appeal Court states:

‘What is at stake here is not the correctness or otherwise of the decision to retrench, but the fairness thereof. Fairness in this context goes further than bona fides and the commercial justification for the decision to retrench. It is concerned, first and foremost, with the question whether termination of employment is the only reasonable option in the circumstance in the circumstances. It has become trite for the courts to state that termination of employment for disciplinary and performance-related reasons should always be a measure of last resort. That, in our view, applies equally to termination of employment for economic or operational reasons.’

¹³⁵ See s 214 of the LRA, 1995.

¹³⁶ Which may involve introducing technologically more advanced machinery, mechanisation or computerisation.

¹³⁷ Such restructuring is not restricted to the cutting of costs and expenditure; it may also be aimed at making profit. See for instance *Morester Bande (Pty) Ltd v NUMSA & another* (1990) 11 ILJ 687 (LAC) at 689A-B or increasing profit or even ensuring more efficient enterprise: *Seven Abel CC t/a the Crest Hotel v Hotel & Restaurant Workers Union & others* (199) 11 ILJ 504 (LAC) at 508H-1.

¹³⁸ See *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A) at 494A as to the meaning of retrenchment.

disharmony amongst co-workers¹³⁹ or detrimentally affect the relationship between the employer and the rest of its workforce¹⁴⁰ or a customer.¹⁴¹

It is also accepted that a dismissal could be justified because of the operational requirements of the business where an employee's conduct had led to a breakdown of the trust relationship between him and the employer.¹⁴² This could occur, for example, where the employer suspected the employee of breaching the duty to act in good faith¹⁴³ or of serious dishonesty, but did not have sufficient evidence to establish this.¹⁴⁴

Furthermore, business requirements could be such that changes needed to be made to existing employees' terms and conditions of employment.¹⁴⁵ Where employees were not prepared to agree to such changes, the courts were prepared to accept that their dismissals were fair, provided that the changes were reasonable. However, an employer trying to persuade the labour court of the fairness of a dismissal on this ground could face the

¹³⁹ The employee may, for instance be incompatible with his or co-employee or a clients of the employer. See, for eg, *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 543J where the employee 's uncompromising and difficult attitude as well as his racist remarks created disharmony amongst his co-workers. See also *SA Quilt Manufacturers (Pty) Ltd v Radebe* (1994) 15 ILJ 115 (LAC) at 123G-I; *Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC) at 1003J and 1004A; *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 2\422 (IC) at 424A-B.

¹⁴⁰ See, for instance, *Mazibuko & others v Mooi River Textiles Ltd* (1989) 10 ILJ 875 (IC) where the employer endeavoured to justify the dismissal of employees who were all members of a minority union, on the ground that their dismissal had become necessary to ensure continued productivity and industrial peace in the workplace. The court accepted that there was a commercial rationale for the employer's decision to dismiss but held that the dismissals were not legitimate in the face of protective provisions of freedom of association of the LRA, 1956. See also *Jonker v Amalgamated Beverage Industries* (1993) 14 ILJ 199 (IC) at 208E-F.

¹⁴¹ See *Mnguni v Imperial Systems (Pty) Ltd t/a Imperial Distributors* (2002) 23 ILJ 492

¹⁴² Consider, for instance, *Rostoll & 'n ander v Leeupoort Minerale Bron (Edms) Bpk* (1987) 8 ILJ 366 (IC) at 370H-J; *East Rand Proprietary Mines Ltd v UPUSA* (1996) 17 ILJ 1135 (LAC) at 1150A-B; *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 112 (LAC); *Govender v Mondi Kraft-Richards Bay* (1999) 20 ILJ 2881 (LC); *Kroeger v Visual Marketing* (2003) 24 ILJ 1979 (LC). Grogan J, *Dismissal*, (2002) at 279-280.

¹⁴³ Cameron JA in *Chauke & other v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) at 1447H-I. See too *NUM & other and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB). See further Note 'Derivative misconduct: the offence of not informing' (2004) 20(3) *EL* 15; Note 'Dismissal for group misconduct' (2004) 13(7) *CLL* 68.

¹⁴⁴ See also *FAWU v Amalgamated Beverage Industries* (1994) 15 ILJ 1057 (LAC).

¹⁴⁵ See, eg, *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC) where the employer reorganised its staff requirements by changing the command structure and the job requirements of the posts in the command structure. See further *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 665 (LAC) at 658C-D where the company proposed a four-day week as a measurement to save it from going bankrupt.

problem of 187(1)(c) of the LRA, 1995. In terms of section 187(1)(c), a dismissal to compel employees to accept a demand in respect of any matter of about which the parties may bargain collectively, constitutes automatically unfair dismissal.¹⁴⁶ Nevertheless, protection against dismissal is not absolute; in appropriate circumstances, an employer may still be able to dismiss employees for operational reasons.

The difficult question is when it is 'fair' for an employer, in the course of restructuring its business, to dismiss an employee for declining to accept changes in her or his terms and conditions of employment? The answer to this vexed and much-debated question reveals underlying tension created by negotiated compromise struck between business and labour at the time of the drafting of the new Labour Code.¹⁴⁷

3.2 Dismissal to Enforce Changes to Terms and Conditions of Employment

3.2.1 *Fry's Metals* Litigation

In summary, the facts in *Fry's Metals* were as follows: During the course of negotiation process with NUMSA, the company proposed changes in working hours and the removal of the transport subsidy. Following a deadlock, the company tabled a letter stating that it would retrench employees who did not agree to the new shift system and its attendant changes, which included the

¹⁴⁶ See generally: Thompson, C 'Bargaining, business restructuring and the operational requirements dismissal' (1999) 20 *ILJ* 755; 'The changing nature of employment' (2003) 24 *ILJ* 179 and 'Retrenchments and restructuring' in Cheadle *et al Current Labour 2004* (LexisNexis Butterworths 2004); Rycroft, A 'The evolving (but confusing) law on business restructuring' (2003) 24 *ILJ* 68; Theron, J 'Employment is not what is used to be' (2003) 24 *ILJ* 1247; Bosch, C 'Of business parts and human stock: Some reflections on section 197(1)(a) of the Labour Relations Act' (2004) 25 *ILJ* 1856; Cohen, T 'Dismissal to enforce changes to terms and conditions of employment – automatically unfair or operationally justifiable?' (2004) 25 *ILJ* 1993; Todd, C & Damant, G 'Unfair dismissal – operational requirements' (2004) 25 *ILJ* 896; Du Toit, D 'Business restructuring and operational requirements dismissals: *Algorax* and beyond' (2005) 26 *ILJ* 595.

¹⁴⁷ See generally, Jordaan, B 'The new LRA: Some problems and puzzles' (1995) 5(12) *LLNCR* 1; Basson, AC & Strydom, EML 'Draft negotiating document on labour relations in bill form: Some thoughts' (1995) 58(2) *THRHR* 251; Grogan, J 'Unilateral Change: How is it to be effected?' (2000) 18(4) *EL* 15 and 'Chicken or egg: Dismissals to enforce demands' (2003) 19(2) *EL* 4; Note 'Dissecting an automatically unfair dismissal from a valid operational requirements dismissal' (2004) 13(4) *LLN* 2

removal of transport subsidy. At a subsequent meeting of 28 September 2000, the company placed beyond any doubt, that the retrenchments would proceed 'unless the employees acceded to the respondent's demand that they accept the new two-shift system'.

NUMSA representatives disputed the merits of the new shift system and raised concerns about its health consequences for the employees affected. The impasse continued. Then on 3 October 2000, just over a month after the start of negotiations, the company formally notified the affected employees of their impending retrenchment with effect from 13 October 2000. The ensuing exchanges between served to delay matters a little, but on 18 October 2000 the company issued employees with final letters informing them of their retrenchment with effect from 20 October 2000. The letters added that the company will not be paying severance pay because the employees could avoid retrenchment by accepting its proposals. 'Again the respondent reiterated its offer not to retrench individuals if they agreed to its shift proposals.'

NUMSA responded to the termination notices by bringing urgent proceedings in the Labour Court, asking that the pending dismissals be interdicted. The applicants submitted that the company's proposed course of conduct ran counter to the prohibition embraced by section 187(1)(c) of the LRA against dismissals that has as their reason 'to compel the employees to accept a demand in respect of any matter of mutual interest between the employer and the employee.'

The LC found for the union and its members. It did so on a fairly widely acknowledged but by no means uncontested approach that the subsection deserved a wide reading, giving employees protections against both threats of dismissal or actual dismissal if the employer's object was to secure changed terms and conditions of employment. This decision was reversed on appeal by the LAC.

In *NUMSA & others v Fry's Metal (Pty) Ltd*¹⁴⁸ the Supreme Court of Appeal confirmed the decision of the Labour Appeal Court in *Fry's Metal (Pty) Ltd v NUMSA & others*,¹⁴⁹ finding that only conditional dismissals intended to compel employees to accede to an employer's demands on a matter of mutual interest can constitute an automatically unfair dismissal in terms section 187(1)(c) of the LRA. The final dismissal of employees for refusing to accept a change to their terms and conditions of employment was held not to be automatically unfair.

3.2.2 The Litigation in *Algorax, General Food Industries, and Mazista Tiles*

Like *Fry's Metals*, the main bone of contention in *Chemical Workers Industrial Union v Algorax (Pty) Ltd*¹⁵⁰ was the employees' refusal to accede to the employer's shift demands. In the present matter, the union brought a dual challenge: they said the dismissals were automatically unfair under section 187(1)(c) but also under the general protection offered by section 1888(1)(a)(ii).

There were dissimilarities with *Fry's Metals*. For instance the demands in *Algorax* did not emanate from the course of a wider bargaining exchange but were traceable to a stand-alone restructuring plan. The demands were triggered by explicit viability concerns – the company said that international competition required costs to be cut and employee performance improved, and that the proposed shift system was the way to do it.

The LAC proposed a split decision. The minority view preferred the employer on both counts, while the majority decision was that, on a fine balance, the case for an automatically unfair dismissal had been made out. Of particular interest here is that the majority also held the dismissal to be unfair because

¹⁴⁸ (2005) 26 *ILJ* 689 (SCA). See discussion in Irvine, H 'Dismissal based operational reasons and the jurisdiction of courts- *National Union of Metalworkers and others v Fry's Metal (Pty) Ltd*' (2005) 14(9) *CLL* 81. See too *General Food Industries v FAWU* (2004) 25 *ILJ* 1260 (LAC)

¹⁴⁹ (2003) 24 *ILJ* 133 (LAC).

¹⁵⁰ (2003) 24 *ILJ* 1917 (LAC).

the alternative operational requirements defence failed. It has been correctly pointed out that *Algorax* cannot be regarded as more than merely suggestive of how *Fry's Metals* may have turned out had the latter case involved a full section 1888 challenge, and the interplay between the LRA's collective bargaining objectives and the merits of the operational requirements dismissal was not directly examined there either.

The LAC in *General Food Industries Ltd v FAWU*¹⁵¹ reversed an earlier decision of the Labour Court which found an employer's decision to outsource certain of its work, and to reduce its workforce accordingly, to constitute an automatically unfair dismissal in terms of section 187(1)(c) of the LRA. The outsourcing took place in the context of a dispute between the parties over wage increases, the employer seeking a wage freeze in order to ensure its continued viability and the union refusing to moderate its demands. After considering the implication of the LAC decision in *Fry's Metals (Pty) Ltd v NUMSA & others*¹⁵² the court accepted that an employer is entitled to retrench in order to increase its profits and not only when its survival is under threat, and found the outsourcing decision to have been genuine and the retrenchments to be substantively fair. The employer's decision to consult at local than at national level over the issue was held to comply with the requirements of section 189.

In *Mazista Tiles v NUM*¹⁵³ the contentious issues of wage negotiations and restructuring proposal had initially been handled together, but the parties then decided to deal with the latter in a separate consultation process. However, character of the envisaged reorganisation impacted heavily on the terms and conditions of employment of employees. In effect, in order to make the business more competitive, the company initially asked and demanded on pain of dismissal that all employees become either independent contractors or what it term 'incentivised employees', receiving a very basic pay and then

¹⁵¹ (2004) 25 *ILJ* 1260 (LAC).

¹⁵² (2003) 24 *ILJ* 133 (LAC).

¹⁵³ (2004) 25 *ILJ* 2156 (LAC).

performance payment. The latter option would be temporary only; after year all former employees would become independent contractors.

After abortive nine months of negotiations and consultation, the company insisted that only a new mode employment could save its future, while the worker held on to the status quo. In the end, all workers who refused 'offer of alternative employment' were dismissed. Severance pay was denied them on the basis of the offer of another form of employment.

The LC held that the dismissals were automatically unfair under section 187(1)(c) and unfair under section 188 as well. In relation to the standard grounds of unfairness, the court stated that alternatives other than dismissal were open to the employer, including the expedient form of using power in the form of a lock-out to exact compliance. The LAC decided on the facts that there had been no conditional dismissal, only a permanent one. Accordingly, the rule in *Fry's Metals*, the dismissals could not be automatically unfair.

3.3 Retrenchment of Protected Strikers

Another category of economic reasons that may justify dismissal for operational reasons is economic harm caused by employees to the enterprise through industrial action. As economic harm through industrial action was both expected and accepted by all parties involved in collective bargaining,¹⁵⁴ the employer had to prove that the economic harm caused by industrial action was more than it could have been expected to suffer under the circumstances.¹⁵⁵ In other words, it had to prove that the economic harm had become unbearable.

¹⁵⁴ In *MAN Truck & Bus (SA) (Pty) Ltd and United Motor & Allied Workers Union* (1991) 12 ILJ 181 (ARB) at 189H-I the arbitrator stated that, "industrial action is the exercise of collective muscle in support of collective goals".

¹⁵⁵ See, for eg, *BAWU & others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) at 972F; *Cobra Watertech v NUMSA* (1995) 16 ILJ 582 (LAC) at 616F; *NUMSA v Vetsak Co-operative & others* (1996) 17 ILJ 455 (A); *NUM v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA); (1997) 18 ILJ 439 (SCA).

But the power to dismiss is lessened by the fact that dismissal of strikers who participated in a protected strike is branded an automatically unfair dismissal.¹⁵⁶ Consequently, the critical question in each case is whether the employees were dismissed for participating in a protected strike¹⁵⁷ or whether they were dismissed for the operational requirements of the employer. If the reason for the dismissal is participation in a protected strike, and not the employer's operational requirements, then the dismissal will be automatically unfair in terms of s 187(1)(a) of the Act.

This was the question that came before the Labour Appeal Court in *SACCAWU & others v Afrox Ltd*. There the court concluded as follows:¹⁵⁸

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will be merely one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to

¹⁵⁶ In *SACCAWU & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at para 41 Froneman DJP summed the position as follows:

'The general approach of the LRA is to immunize employees participating in a protected strike from normal delictual and contractual consequences (s 67(2)). In return an employer is not obliged to remunerate employees during a protected strike (s 67(3)) and it may employ replacement labour during a protected strike, except for designated maintenance services and during offensive lock-outs (s 76)). The outcome, or a resolution of a strike is thus normally left to the respective positions of power of the opposing parties. Dismissal only becomes weapon in exceptional circumstances, when operational requirements dictate its use (s 67(5)). Even in non-strike dismissals, employer must seek appropriate measures to avoid dismissals, minimize their number, change their timing and mitigate their adverse effects (s 189(3)(a)) These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reason.'

¹⁵⁷ Employees who commit misconduct during the course of a protected strike are, however, not protected against disciplinary action. In *CEPPWAWU & others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC) at paras 53-54, the LAC succinctly summarised the position as follows:

'The purpose of a protected strike is to enable employees to engage in a form of power play with the employer with a view to influencing the employer into offering better conditions of employment. What this entails in practice is that employees are entitled to withdraw their labour and are also entitled to engage in pickets in furtherance of their strike action. *What is also clear, however, is that the right to engage in a protected strike is not is not licence to engage in misconduct.*

An employer has the right to institute disciplinary action at any time against employees engaging in misconduct particularly of a criminal nature ... At the end of the day employees engaging in protected strike action need to know that they may only engage in legitimate activities intended to advance the course of their protected strike. Fairness also demands that an employer should not wait for a strike to end to institute disciplinary action for strike-related misconduct. By its nature, illegitimate strike-related misconduct, if unchecked, affords strikers an unwarranted advantage. Due to the illegitimacy of the misconduct it cannot be expected of an employer to tolerate it indefinitely.' [Emphasis added].

¹⁵⁸ *SACCAWU & others v Afrox Ltd* at 1726 para 32.

causation applied in other fields of law, should not be applied here ... The first step is to determine factual causation: was participation or support, of the protected strike in sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is no, that does not immediately render the dismissal automatically unfair: the next issue is one of legal causation, namely whether such participation or conduct was the “main” or “dominant” or “proximate”, or “most likely” cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 4). I would respectfully venture to suggest that the most practical way of approaching the issue is to determine what the most probable inference is that may be drawn from the established facts as cause of the dismissal, in much the same way as the most probable or most plausible inference is drawn from circumstantial evidence in civil cases.’

*Early Bird (Pty) Ltd v Food & Allied Workers Union & others*¹⁵⁹ concerned employees who were employed in separate bargaining units but who were members of the same union. The union demanded increased wages for its members generally, and declared a dispute in respect of employees in the employer’s processing plant. The employer considered that employees in its farming division were not entitled to take part in the ensuing strike, and dismissed them. The Labour Court found that the farming division strike was not protected, and that the dismissals were not automatically unfair. They were, however, considered unfair for other reasons.

On appeal the Labour Appeal Court found the correct approach to be not whether the farming employees were entitled to take part in it. Having found that they were so entitled the court found that their dismissal was automatically unfair. To the extent that they were striking in support of their own demands for increased wages, the court found that the dispute had been properly referred for conciliation, and to the extent that their strike could be said to be in support for their colleagues demands the court found that it was not necessary for the union to refer the matter again when other employees wished to join in.

¹⁵⁹ (2004) 25 *ILJ* 2135 (LAC). See too *SACWU & others v Afrox Ltd* (1998) 19 *ILJ* 62 (LC); *SACWU & others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC).

The employees in *NUMSA & others v Dorbly Ltd & another*¹⁶⁰ were actually taking part in a protected national strike when they were retrenched. The Labour Court was required to determine whether their retrenchment constituted a dismissal for operational requirements or whether it was automatically unfair in terms of s 187(1)(a) of the LRA. Allied to this was the question how much economic hardship an employer is required to tolerate before it is entitled to retrench striking workers. The court found the dismissal to have been genuinely grounded in operational requirements, but held that they were procedurally unfair because the employer took the decision to close down its operation before engaging in proper consultations with the union.

3.4 The question of “Transfer of Business”

Where an entire business is transferred, the categorisation of the transfer will seldom create problems. Problems can arise, however, when the transfer is only of a portion of the business.¹⁶¹ In such cases, there is a transfer of a ‘business trade or undertaking’ and, if so, is it transferred ‘as a going concern’. This question arose in *Schutte & others v Powerplus Performance (Pty) Ltd & another*,¹⁶² in which certain functions of the business were ‘outsourced’. In concluding that there had been a transfer within the meaning of the present section, the court considered the relationship between the outsourcing business and its new supplier and the terms of the ‘working agreement’ between them. The in-principle agreement under which the new supplier would require the workshops of the outsourcer was an important factor in the decision, as was the fact that the supplier was using same premises, the same equipment and most of the same employees to do substantially the same work. The issue, it should be clear, is not a black or white one. *Schutte* is no authority for the proposition that outsourcing will always fall within the scope of s 197.¹⁶³

¹⁶⁰ (2004) 25 *ILJ* 1300 (LC).

¹⁶¹ For excellent exposition see Bosch, C ‘Of business parts and human stock: Some reflections on section 197(1)(a) of the Labour Relations Act’ (2004) 25 *ILJ* 1865.

¹⁶² (1999) 20 *ILJ* 655 (LC).

¹⁶³ *Schutte* at 671.

Whether or not a transaction or series of transactions give rise to 'transfer' of a business is not a black or white one. Different approaches have emerged in European and Canadian jurisprudence. One test has been whether there is 'continuity in the work and activities carried out by employees' and whether the business 'operated for the same purpose'. The acid test, in the words of Seady AJ is whether 'the economic entity remained in existence, its operation was being taken over by the [new employer] and the same or similar activity is being continued by it.'¹⁶⁴ If it is in doubt whether or not a transaction is subject to section 197, the Labour Court can order disclosure of information bearing in mind in the rights that employees may enjoy.¹⁶⁵

The ECJ has held that sectors where activities are based essentially on manpower, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity even though that entity does not comprise significant assets or equipment. For instance, in *Allen v Amalgamated Construction Co Ltd*¹⁶⁶ the ECJ held that 'the [Acquired Rights] Directive can apply to a transfer between two companies in the same corporate group which have the same ownership, management, premises and which are engaged in the same works'.¹⁶⁷ The new Directive 32/2001/EC (Safeguarding of Employees' Rights in the Event of Transfers of Undertaking) defines an economic entity as 'an organised grouping of resources, which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary'. Article 1(cc) makes it clear that the directive shall apply 'to private or public undertakings engaged in economic activities whether or not they are operated for gain'.

¹⁶⁴ *Schutte* at 672C-F. This follows the approach in the leading European case of *Spijkers v Gebroeders Benedik Abbatoir CV 24/85* [1986] 2 CMLR 296 cited by Seady at para 36, and in the House of Lords decision in *Kenmir Ltd v Frizzell* [1968] 1 All ER 414 HL.

¹⁶⁵ *Kgethe v LMK Manufacturing (Pty) Ltd* (1998) 19 ILJ 524 (LAC) at para 39.

¹⁶⁶ [2000] IRLR 119 (ECJ).

¹⁶⁷ *Allen v Amalgamated Construction Co Ltd* at para 21.

*Schmidt v Spar-und Leihkasse der Fruheren Amter Bordesholm, Kiel und Cronshagen*¹⁶⁸ stands for the proposition that it is not a stumbling block that the entity contains only one for the purposes of the Acquired Rights Directive. In that case Ms Schmidt was employed as the only cleaner in a bank. When the bank decided to outsource the cleaning of the bank, she was dismissed. She claimed that her dismissal was contrary to legislation protecting employees in the transfer context. When the matter came before the ECJ the court held that the Acquired Rights Directive could apply in a case like this, inter alia, because its operation was not precluded by the fact that an activity was performed by a single employee. It was a decision which prompted Mr Justice Lindsay of the English Employment Tribunal (EAT) to remark that:¹⁶⁹

‘*Schmidt* still stands as a reminder of how little is required to amount to something capable of being an undertaking – one cleaning lady and her organisation – once due regard is paid to the safeguarding of employees’ rights, the subject matter of the Directive.’

The Australian¹⁷⁰ approach is illustrated by the decision of the High Court in *PP Consultants (Pty) Ltd v Finance Sector Union of Australia*¹⁷¹ where the court stated that –

¹⁶⁸ [1994] IRLR 302 (ECJ). In *Dudley Bower Building Services Ltd v Lowe* at para 48 the Employment Appeal Tribunal noted that ‘[a]t one extreme, if the activity consists of no more than one cleaning lady and her mop, an economic entity may not exist, whereas if the task to be performed is complex and sophisticated and requires careful planning, specification and costings, it may be that an entity exists even though the work is performed by a single employee. There may well be some activities where the work of two or three employees is less complex and needs to be less structured and pre-planned from the work of a single employee. As a general rule it may be less common for one employee to constitute an entity but the fact there is only one employee cannot preclude the existence of such entity’.

¹⁶⁹ *RCO Support Services & Aintree Hospital Trust v Unison* [2000] IRLR 624 (EAT) at para 28. McMullen *Business Transfers and Employee Rights* (issue 4 2003) at 5 [104], points out that the decision of the ECJ in *Schmidt* may be open to criticism because the court did not apply its mind to the question of whether the entity to be transferred had a ‘minimum level of organizational framework’.

¹⁷⁰ S 149(1) Workplace Relations Act 1996 provides:

‘(a) all parties to industrial dispute who appeared or were represented before the Commission;
(b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear before as parties to the industrial dispute (whether or not they appeared);
(c) all the parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;
(d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;

'because "business" is a chameleon-like word, it is not possible to formulate any general test to ascertain whether, for the purpose of s 149(1)(d) of the Act, one employer has succeeded to the business or part of business of another ...

As a general rule, the question whether a non-government employer who has succeeded to the business or part of business of that other employer will require identification or characterisation of the business or the relevant part of business of the first employer, as a first step. The second step is the identification of the character of the transferred business activities in the hands of the new employer. The final step is to compare the two. If, in substance, they bear the same character, then it will usually be the case that the new employer has succeeded to the business or part of business of the previous employer'.

The Federal Court further stated the words 'part of a business'¹⁷²-

'denote a particular bundle of activities that constitute an identifiable portion of the total activities that constitute a business. Sometimes the part will be a discrete profit centre, sometimes it will not. That does not necessarily mean that everything done in the course of conducting a business is a "part of business"'.¹⁷³

The question whether radiology services provided at a clinic by Medical Diagnostic Imaging Group (MDIG), which was being succeeded by Gribbles, were a business or part of a business for the purposes of s 149(1)(d),¹⁷³ came before a full bench of the Federal Court of Australia in *Gribbles Radiology (Pty) Ltd v Health Services Union of Australia*.¹⁷⁴ The clinic provided a variety of medical and related services under one roof, but the clinic did not at any relevant time employ the radiographers who worked on the premises of the clinic. From time to time, the proprietor or manager entered into contracts with business entities that provided radiology services for the provision of those services at the clinic. The Federal Court went on to explain the difficulties that may arise in seeking to formulate a general test whether a business has been transferred in these circumstances.¹⁷⁵

(e) all organizations and persons on whom the award is binding as a common rule; and
(f) all members or organizations bound by the award.

¹⁷¹ [2000] HCA 59 (16 November 2000) at paras 14-15.

¹⁷² *Finance Sector Union of Australia v PP Consultants* (1999) 91 FCR 337 at 350.

¹⁷³ In *North West Health Care Network v Health Services Union of Australia* [1999] FCA (2 July 1999), at para 28, R D Nicholson J stated that '[t]he purpose of s 149, as appears from its terms, is so extend the binding nature of awards beyond the parties who appeared or were represented before the Commission in relation to the industrial dispute. The policy objective of this provision is to make the power to settle industrial disputes effective by extending the instrument of settlement to 'the ever changing body of persons within the area of such disturbances' (references omitted).

¹⁷⁴ [2003] FCAFC 56 (28 March 2003).

¹⁷⁵ *Gribbles Radiology (Pty) Ltd v Health Services Union of Australia* at para 31.

'[W]hile the provision of radiography services at the ... clinic could be viewed as an activity it was discrete activity of the business of both MDIG and Gribbles undertaken for the purpose of enabling both to carry on their entire business. It was undertaken for the purpose of enabling the entire business to generate both income and profit as a commercial activity. Both that part of the business and the business as a whole were directed towards generating profit as a commercial enterprise. Indeed, it is to be recalled that both MDIG and Gribbles ceased providing radiography services at the Clinic because it was not profitable. To suggest that a "part of a business" must itself generate a net income or profit (typically aspects, as High Court noted in *PP Consultants*, of business) does not allow for the possibility that s 149(1)(d) can, having regard to its terms, operate not only on a business but on part of a business. We do not see any basis for confining the expression "part of a business" for the purposes of the section to a discrete profit earning part or unit of a business.'

The approach of the Australian Federal Court and High Courts in *PP Consultants* and that of the Federal Court in *Gribbles* should be endorsed by our courts.

3.4.1 The question of a Business as a 'Going Concern'

This question, like the question of when a business etc is transferred, is one fact and will sometimes be difficult to answer. In considering the question, the court must not allow form to prevail over substance.¹⁷⁶ The Constitutional Court in *NEHAWU v UCT* has set out the test for transfer of a business as a going concern for the purposes of s 197. The test to determine whether there is a 'going concern' is an objective one (thus not dependent on the intentions of the parties involved in the transfer) and one which has regard to substance and not form.¹⁷⁷ Nevertheless, one is required to establish whether there is the transfer of a business in operation 'so that the business remains the same, but in different hands'. Factors indicating whether there has been a transfer as a going concern include whether the employees were taken over by the transferee, whether customers transferred and whether the same business activity is being carried out by the transferee, This is not an exhaustive list and no single factor is elevated to be decisive factor.

¹⁷⁶ *Schutte* at 1189D-E; *Kgethe & others* at 535F.

¹⁷⁷ Bosch, C 'Section 197 transfer of business as going concern: Reigning in the Labour Appeal Court – *NEHAWU v UCT* 2003 24 ILJ 95 (CC)' (2003) 24(1) *Obiter* 232.

In *Velen and West 'n Bell Catering Equipment*¹⁷⁸ a close corporation ceased doing business and its trading equipment and certain of its employees were absorbed into another newly formed entity. The bargaining council arbitrator found that some part of the business had been transferred as a going concern and that s 197 of the LRA therefore did apply to the transaction.

3.4.2 Dismissal consequent to transfer of undertaking¹⁷⁹

Prior to the 2002 amendments, termination of employment for reason and in accordance with a fair procedure was not affected by section 197 merely because it takes place simultaneously with or pursuant to the sale of business or transfer of business.

Section 187(1)(g) renders a dismissal automatically unfair if the transfer or a reason connected with it is the reason or principal reason for dismissal.¹⁸⁰ This provision will prohibit the dismissal of any employees “on account of a transfer covered by this section”. An addition to section 187 renders any dismissal effected in these circumstances “automatically unfair”. However, this prohibition is qualified by the same proviso that lessens protection against dismissal of employees for reasons based on operational requirements of the former or new employer, provided that the employer concerned complies with the provisions of section 189.¹⁸¹

In order to achieve a fair balance between the interests of the employees and employers, employer who claim that their dismissals fall within the purview of section 187(1)(g) must prove that the dismissal is casually linked to a transfer as contemplated by the section 197. If the employee discharges that burden,

¹⁷⁸ (2005) 26 *ILJ* 2500 (BCA)

¹⁷⁹ For further reading: Bosch, C ‘Balancing the Act: Fairness and Transfers of Businesses’ (2004) 25 *ILJ* 923 and ‘Operational requirements dismissal and section 197 of the Labour relations Act: Problems and possibilities’ (2002) 23 *ILJ* 641 Smit, N “Should transfer of undertaking be statutorily regulated in South Africa?” (2003) 14(2) *Stell LR* 205 and ‘A chronicle of issues raised in the course of dismissals by the transferor and/or transferee in circumstances involving the transfer of an undertaking’ (2005) 226 *ILJ* 1853.

¹⁸⁰ See Workman-Davies, B ‘The right of employers to dismiss employees in the context of unfair dismissal provisions of the Labour relations Act’ (2007) 28 *ILJ* 2133.

¹⁸¹ See eg, *Western Cape Workers Association v Halgang Properties CC* (2001) 22 *ILJ* 1421 (LC).

the only escape is for the employer is to establish that the true reason for the dismissal was not related to the transfer. If the transfer was not the principal reason, the court must still determine whether the object of the dismissal was to avoid the employer's obligations under section 197. If that was so, the reason for the dismissal is related to the transfer for the purposes of section 187(1)(g).

A useful guidance may be found in the European Union's Transfer of Undertakings (Protection of Employment) Regulation 1981 render a dismissal automatically unfair if the transfer or a reason connected with it is the reason or principal reason for dismissal. However, where the reason of principal reason was 'an economic, technical organisational reason entailing changes in the workforce of either the transferor or transferee before or after a relevant transfer',¹⁸² in such as case, the reason is treated as substantial reason for dismissal.¹⁸³ For example, in *BSG Property Services & Mid Beds DC v Tuck*, the employees were all employed by the Mid Bedfordshire District Council in the Housing Maintenance Direct Services Organisation ('DSO') in bricklaying, carpentry and plumbing work. The Council contracted with their own DSO for a five-year period. The DSO board, however, decided to terminate the contract and not put in a bid for a further contract since they had failed to make the required 5% return on capital and were thus in breach of the appropriate regulations. The Council gave them notice on 12 February 1993 which was to expire on 15 May 1993. One day before the expiry of the notice, the Council concluded a contract with BSG for the provision of day-to-day jobbing maintenance work by self-employed tradesmen. The Council and BSG argued that there was no transfer of undertaking, But EAT upheld the decision of the industrial tribunal that the relevant economic entity was 'the provision of maintenance services to Council tenants in the Area concerned' and that there was a transfer.

¹⁸² Transfer of Undertakings (Protection of Employment) Regulation Reg. 8(2).

¹⁸³ See *Gorictree Ltd v Jenkinson* [1984] IRLR 391.

The industrial tribunal has also decided that the reason for dismissal was an economic or organisational reason and the dismissal were fair in all the circumstances.

*Van der Velde v Business & Design Software (Pty) Ltd*¹⁸⁴ raised pertinent issues of concerning the prospective application of the protection of employment rights provisions of section 187(1)(g). The facts in the case were as follows. Van der Velde was retrenched just before the merger of the first respondent with another entity. He claimed that his dismissal was automatically unfair because it was linked to the pending transfer of the undertaking. The respondents claimed that Van der Velde had been retrenched for valid operational requirements of the second respondent, the court had first to establish that the dismissal was casually linked to the prohibited reason. It held that if the employee makes out a prima facie case that the dismissal is linked to the transfer, the employer must prove that the dismissal was for some other and acceptable reason. However, in cases of alleged dismissals relating to transfer the phrase 'or a reason related to a transfer' suggests that the scope of section 187(1)(g) may be somewhat wider than in other cases: the reason for the dismissal need not be transfer itself, but some reason – including operational requirements – connected with the transfer. The court further noted that it would be absurd to suggest that every dismissal that would not have occurred 'but for' a transfer must inescapably be construed as automatically unfair. On the facts, the court was satisfied that Van der Velde had proved that his dismissal and the transfer of the business were casually linked.

A significant limitation on the statutory employment protection following transfer of business was revealed by Labour Appeal Court decision in *Forecourt Express (Pty) Ltd v SATAWU & another*.¹⁸⁵ In this case the Labour Appeal Court was prepared to accept that the new employer was entitled to restructure its business to the extent necessary to accommodate the

¹⁸⁴ (2006) 27 ILJ 1738 (LC).

¹⁸⁵ (2006) 27 ILJ 2437 (LAC).

acquisition of another company, even if it entailed the retrenchment of employees of the old employer.

On the face of it, these decisions seem to confirm the aphorism that each case must depend on its facts as to how long transferred employees will be protected against retrenchment by the purchaser. The only option for the employer to circumvent section 187(1)(g) is to obtain consent from the employees or their representative union, prior to transfer of undertaking. The employer did, however, contend in *Douglas & others v Gauteng MEC for Health*, they have done so before it terminated the services of the applicants after they refused to accept offers of alternative posts with department at about one third the salary they had received from their former employer, the Gauteng Ant-Tuberculosis Society, before it was taken by the department. The court considered that the fact that Douglas and his colleagues had been party to the negotiations preceding the transfer did not make them parties to a subsequent formal agreement between the society and the department. Even if they had been parties to the agreement, they could not in any case be taken to have agreed to the startling reduction in their remuneration the department had eventually proposed. Since the department had no other defence, the court held that the applicants' dismissal were automatically unfair, and awarded them each compensation equivalent to two years' salary, calculated at the time of the transfer.

A similar result was reached in *Fernandes v Lezmin 108 CC t/a Jazztime Club*¹⁸⁶. In this case the court found that section 197 applied to the takeover by the respondent of the business of another café for which the applicant had worked. The issue was whether the applicant's dismissal a week after the transfer was hit by section 187(1)(g). The court dismissed the respondent's argument that the 'old employer' was to blame for not informing the applicant that she was not part of the 'deal', and found that her dismissal by the

¹⁸⁶ (2008) 29 ILJ 641 (LC).

respondent was directly related to the transfer. The applicant was also awarded compensation equal to 24 months' remuneration.¹⁸⁷

By contrast, the applicant in *Buys v Impala Distributors & others*¹⁸⁸ failed to sustain claim that his dismissal for operational reasons fell within the terms of section 187(1)(g). The applicant in that case was employed on a fixed-term contract by Premier Foods when it outsourced some of its warehousing and distribution functions to the respondent. Impala employed him on a fresh fixed-term contract of three months' duration, and then permanently. Later, when Premier Foods reduced the tonnage allocated to Impala, Buys was retrenched. The court held that the outsourcing arrangement did not constitute a transfer of part of Premier Foods' business as a going concern and that, even if it had, Buys' dismissal would not have been the result of the transfer. As Impala had proved that there was a fair reason for the dismissal and because the company had done what it could to consult the applicant, he was not entitled to relief.

7. SUMMARY AND CONCLUSION

Section 23 of the 1996 Constitution provides that everyone who has a right to fair labour practice in South Africa, subsection (2) which is the crux of this research narrows down the right employees have which are, the right to form and join a trade union, to participate in the activities and programmes of a trade union and to strike and the right to collective bargaining.

From the discussion above the right to fair labour practice is a right that has its origin in the equity jurisprudence. The right was created so as to control labour relations in a charged political climate. The Industrial Court developed this jurisprudence pronouncing what is an acceptable standard of labour

¹⁸⁷ See e.g. *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC).

¹⁸⁸ (2008) 29 ILJ 641 (LC).

practice. Thus the interim and final Constitution had to entrench the right so as to constitutionalise the gains that had been made by the Industrial Court. From the jurisprudence formed it surfaces to say that unfair conduct or fair conduct regarding labour practices involved a degree of subjective judgment. The Constitution being the highest law of the land contains the fundamental right that employees must exercise without fear. It gives a platform that even though one can be denied rights to fair labour practice from any other statute; the Constitution will protect and provide such rights to the individual. The discussion above also portrays one significant aspect of the South African Bill of Rights, in that traditionally, Bill of Rights are intended to regulate legislation and public power not the conduct of the employees. Indeed such a right to fair labour practice is unique to the South African Bill of Rights.

My conclusion is that having employees rights in the constitution is of greater importance in that it enriches the rights of employees a concern that the international Labour Organization has been advocating for. Therefore the South African Constitution should be applauded to having entrenched such an important right that gives employees an opportunity to express their concerns. Such a right as discovered during the course of this research tries to set the boundaries between political and labour issues; because once these two elements of power are mixed it may result in an ungovernable state. It is my recommendation that other states follow the example given by the South African Bill of Rights.

The rationale behind this study was to determine why employees should be dismissed when exercising rights that have been conferred to them by statute in a democratic state. Further that is it really necessary for employees to have these rights if subsequently they are not protected when practicing them. Lastly how can employees exercise these rights without fear of losing their employment or being victimized at the workplace?

In conclusion, to the first rationale of study employees often get dismissed during the exercise of their statutory rights when they commit misconduct or they are exercising the right illegally without following all the regulation that

will have protected the rights. In cases of strikes for example if the strike is illegal then employees can be dismissed for participating in it thereby limiting the right inferred to them. Further, these rights can not be exercised absolutely without checking any limitations. These limitations might be from Constitution e.g. 536 of South African Constitution of 1996 or any law of general application. However as noted from the discussion above dismissal of employees for exercising their statutory rights should be a last measure of resort because if exercised without caution it removes the very essence of the rights conferred to employees. In the same light employees should adhere to regulations accompanying the right to prevent dismissals. However much leaves to be desired in these dismissals because , these dismissals are only enforced due to technicalities in the court proceeding but given only the factual views to take into cognizance employees should not be automatically dismissed for any reason, because they are exercising any of the right conferred on them.

The second rationale of the study is the importance of these rights to employees if subsequently they cannot exercise them fully. The conclusion/ reached in this rationale after a critical analysis of the jurisprudence in study is, these rights are seldom important if they cannot be exercised. It would be equally better for employees to work without rights than to know they have them but cannot exercise them for fear of being victims. What I have found is employees need these rights and equally so need protection when exercising them, otherwise their existence will not be felt because protection is not afforded when practicing such right. The Courts still need to provide much protection to employees when exercising their rights because it will help in collective bargaining processes, it greatly improves employees' morale when doing their jobs, and subsequently it leads to a growth in economy because employees feel that their voices can be heard.

The last rationale focuses on how can employees exercise their rights without fear of losing employment or having to be victimized at the workplace. Automatically unfair dismissals are dismissals that occur when an employee is

under the belief that whatever he/she is doing is lawful. For example in a collective bargaining process an employee believes he is enforcing the rights of other employees but subsequently he might be dismissed. In this case the employers' reason for dismissing the employees might be a way for enforcing a demand on the employee. However, such conduct from an employer derails or deflects the whole idea of a collective bargaining process. Employees go through psychological and emotional pain when dismissed for rights, which have been conferred to them. From this study, what I have concluded after critical analysis of these rights is that employees need to know the limitations to these rights whether in statutes or regulations. By having such knowledge employees will know the boundaries of their rights and how best to exercise them to deviate from any possible dismissal. The fact that the dismissal is classified as automatically unfair dismissal is classified as automatically unfair dismissal does not take away the anguish employees face but it rather increase the fear of exercising these rights on the contrary. Further to dissolve this fear and to enrich employees knowledge the employer should hold workshops for employees and educate them on how to exercise these rights so that any dismissal will not be justified on technicalities from the employers side. Laws keep changing and as they do employees need to be aware of the changes so that they do not exercise their rights out of context.

Open discussions between Unions and employers are encouraged so as to dissolve issues before they get to a dismissal stage. The courts in South Africa need to move away from overprotection of employers when there is a rights question in a case. Such adjustment will help in employees feeling the sense of being protected also just as the employers are protected by the courts.

To crown it all much needs to be desired in the South African exercise of employees' rights especially in cases of transfer of business, retrenchment of protected strikers, transfer of business as a going concern and dismissal consequent to transfer of undertaking . Although strides have been made in this regard, there is still need for protection of employees' right. To say the

least if employees feel unprotected it hampers the growth of the economy in that they will forever be disgruntled employees and no production. Thus in the third world as South Africa the need to recognize employees' rights is an essential in that it drives away fear and cultivates a culture of productivity for the betterment of the employer and the economy at large.

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