BALANCING THE INTERESTS OF EMPLOYER AND EMPLOYEE IN DISMISSAL FOR MISCONDUCT

by

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DECLARATION

I, Prushothman Subramoney Pillay Student Number 215408624, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that all the sources I have used or quoted have been indicated and acknowledged as complete references. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the Magister Legum Degree in Labour Law.

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ACKNOWLEDGEMENT

Thank you universe for letting me be the reincarnation of Father Christmas.

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION AND BACKGROUND TO THE STUDY

South Africa emerged from a history dogged by an oppressive system in which race was used as a medium of oppression. Workers and in particular African workers' rights were severely curtailed. However, following the advent of the Constitution,[1] several employees' rights and freedoms are now entrenched key amongst them in the right to fair labour practices is enshrined in section 23 (1) of the Constitution. Post 1994, South Africa adopted various new forms of labour legislation, including the Labour Relations Act.[2] This marked the watershed in changing the balance of power away from the employer. The LRA gives form and content to the rights enshrined in the Constitution by establishing substantive and procedural requirements prior to dismissal.

Equally important is the guidelines contained in schedule 8 to the LRA which depict an attempt by the legislature to ensure that employees are protected against unfair dismissal.

The historical background of the employment relationship stems from the Master and Servant Act.[3] The common law evolved in South Africa from Roman-Dutch and English practices. The common law was shaped against the backdrop of Apartheid modified to some extent through the Wiehahn Commission[4] and more recently politically through union and National Economic Development and Labour Council (NEDLAC) involvement regulating labour practices through legislation.

In South Africa, the employment relationship is regulated by three main sources of law. These include the Constitution, labour legislation and the law of contract.[5] Besides these sources, South Africa is a member state of the International Labour Organisation

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1 The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as "the Constitution").

2 The Labour Relations Act 66 of 1995 as amended (hereinafter referred to as "the LRA").

3 Act 15 of 1856.

4 Commission of Inquiry was appointed in 1977 and was entrusted with the task of overhauling the labour laws of South Africa. To date, the Commission is considered to be a watershed in the history of the South African labour relations system.

5 Van der Walt, Le Roux and Govindjee *Labour Law in Context* 1ed (2012) 17.

(ILO) and therefore the ILO Conventions forms an important source of labour law within our legislative structure.[6] Contract of employment, which is an agreement between an employer and an employee sets out their employment rights, responsibilities and duties. These are normally referred to as the "terms" of the contract.

Tracing the history of the employment relationship shows that the balance of power in terms of controlling the relationship lay largely with the employer hence the phrase "Master and Servant". In South Africa, this was even more stark with its Apartheid and slavery legacy placing inordinate power in the hands of the employer and on a race based argument. The Wiehahn Commission attempted to moderate this by allowing other races to organize through Unions. Whilst this did shift the balance between employer and employee the emphasis on the relationship was following the prescripts of the law rather than fairness.

Decisions around misconduct were accordingly dealt with by the law with fairness not being a consideration. It is an inevitable concomitant of employment that misconduct will follow. There are various categories of misconduct. An attempt is made to list these categories of misconduct in the LRA and Code of Good Practice.[7]

Notably, dismissal[8] is the most severe sanction pursuant to misconduct. The LRA identifies three categories of misconduct. They include misconduct,[9] incapacity (including poor performance)[10] and operational requirements (retrenchments).[11] Dismissal generally takes place when an employer terminates the employment of an employee, either with or without notice. Therefore, where an employee has voluntarily resigned the Court or arbitrator is not able to intervene as there has been no dismissal. Resignation is a unilateral act and does not require the acceptance of the employer.

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6 Van der Walt, Le Roux and Govindjee *Labour Law in Context* 19. South Africa was re-admitted as a member of the ILO on 26 May 1994. This followed a period of 30 years of isolation from international labour forums after the country withdrew from the ILO in 1964 as a result of political pressure.

7 Code of Good Practice

8 See s 186 (1) of the LRA for the definition of the term "Dismissal".

9 For eg, if the employee is guilty of theft, being absent without authorisation, refusing to obey the employer's instructions and so on.

10 For eg, when an employee fails to meet the employer's performance standard or when an employee fails to perform the work s/he was employed to do because of his/her ill health.

11 For eg, if the employer had a drop in sales and cannot afford the employee any longer.

This is a codification of the jurisprudence developed by the labour courts in terms of the unfair labour practice jurisdiction afforded them by the previous LRA of 1956. This study deals with dismissal arising from misconduct.

It is clear under the LRA that every employee has a right not be unfairly dismissed.[12] *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others*,[13] the onus of proof rests on the employee to prove that he or she has been dismissed and the employer has to prove that the dismissal was a fair and appropriate sanction. In order to dismiss substantively fairly, an employer must not only have a valid reason, but must prove such reason. Section 192 of the LRA provides that the employer bears the onus of proving, on a balance of probabilities, that the dismissal was fair, both substantively and procedurally.[14] The Code of Good Practice: Unfair dismissal[15] states that the penalty of dismissal is determined by the facts of each case. This Code of Good Practice deals with some of the key aspects of dismissal for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances.

The LRA establishes the Commission for Conciliation Mediation and Arbitration (CCMA) as a statutory but independent body, although it is funded by the state. The primary function of the CCMA is to conciliate and arbitrate disputes. These are disputes referred to the CCMA in terms of the LRA and other labour statutes such as the Basic Conditions of Employment Act,[16] Employment Equity Act,[17] the Skills Development[18] and the Unemployment Insurance Act of 2001 (UIF). The CCMA and Bargaining Council forms the guts of the dispute resolution system created by the LRA. In particular, when an employee who has been discharged for misconduct declares an unfair dismissal dispute at the CCMA or any relevant Bargaining Council, the employee must establish the existence of the dismissal. The employer is then required not only to prove that the dismissal was procedurally and substantively fair but also to show

12 S 185 (a) of the LRA.
13 [2014] ZALCD 72.
14 *Edcon Ltd v Pillemer NO and others* [2010] 1 BLLR 1 (SCA).
15 Schedule 8 of the LRA.
16 Act 75 of 1997 (hereinafter referred as “the BCEA”).
17 Act 55 of 1998 (hereinafter referred as “the EEA”).
18 Act 97 of 1998.

that the affected sanction of dismissal was an appropriate penalty in light of the circumstances of the employee's transgression and all the relevant facts in their totality.

Awards of the CCMA are subject to review rather than appeal by way of application to the Labour Court. Labour Court decisions can be appealed to the Labour Appeal Court which has the final say in Labour Matters. A matter can be referred to the Constitutional Court should a party wish to raise a constitutional challenge. The spirit of the LRA was one of avoiding an adversarial approach. Hence the judicial review. The study will assess whether judicial review of CCMA decisions has worked and in the interest of justice. In doing so the study will examine whether appeals would have resulted in different outcomes. The Supreme Court Appeal in the *Herholdt v Nedbank Ltd*[19] case set out the matter crisply and is the position examined in this study.

1.2 PROBLEM STATEMENT

Employees do not have the same resources as employers. The lack of resources often retards access to legal protection employees have through the legislation. This is inconsistent with the current constitutional era that argues for a broader balancing of competing rights and principles; and in particular, the right to fair labour practices. The contemporary legal era has not exhausted attempts to balance the interests of employer and employee to include systems that protect employees' rights. As such, employees in general and many vulnerable employees remain at the mercy of the "Master" in South Africa. This study argues that the legal framework has not gone far enough in balancing the interests of the employer and employee in decisions based on dismissal for misconduct. The study argues that dismissals for misconduct are often not fair, reasonable and just as required by labour legislation.

The study considers the role of fairness, reasonableness, freedom from bias in the dismissal decision. The researcher will submit that these principles are often missed when determining the dismissal decision and in so doing violating a constitutional right. The Master-Servant mentality that has prevailed for centuries continues to invade the

[19] (2013) 34 ILJ 2795 (SCA).

mind of decision makers notwithstanding the constitutional imperative and case law to the contrary. The rationale for a decision that is reasonable is grounded in the Constitution as a fundamental right and is contained within the section termed as Bill of Rights.

The study strives to argue that the common law has been developed through the Constitution, Promotion of Administrative Justice Act,[20] LRA, BCEA and EEA to balance the interests of employer and employee. In fact, in *Murray v Minister of Defence*[21] the SCA held that this must be "Developed as it must be to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held to impose on all employers a duty of fair dealing at all times with their employees."

Fair labour practice is a substantive right of the employee. This dictates fairness. Yet the Code makes reference to substantive and procedural fairness and makes provision for dismissal when there is substantive fairness without there always being procedural fairness. This study seeks to assess whether this division of fairness in its application for the dismissal decision injures the principles of the constitution which guarantee "fair labour practice" to "everyone". By the same token, this study seeks not only to unravel the inconsistency in the manner in which fairness is interpreted but to build a case for consistent application of the concept of fairness to be in a position to guarantee the rights enshrined in the constitution.

This study argues that the values underlying the principle of fairness are inextricably linked to the fundamental rights guarded by the constitution, and this right has been viewed by some commentators as a constitutional entitlement flowing from the joint effect of the Constitution and Administrative Law provisions as contained in PAJA.

1.3 AIMS AND OBJECTIVES OF THE STUDY

The underlying theme for this study is that employees have the right not to be unfairly dismissed or subjected to unfair labour practice. The primary aim of the study is to

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20 Act 3 of 2000 (PAJA) as amended.

21 [2008] 6 BLR 513 (SCA).

critically investigate and analyse whether the current legislative framework balances the interests of employer and employee in dismissal for misconduct. The balance and burden of proof in dispute for misconduct will also be analysed to find out whether the burden of proof (beyond reasonable doubt) used in criminal law should be used for certain category of misconduct or offences at the disciplinary hearing, CCMA or Bargaining council and Labour courts. The treatise also aims to analyse and discuss the legal framework relating to protection against unfair dismissal in South Africa as well as the ILO standards and Conventions. In doing so, an in-depth understanding of the ILO position on dismissal and how this is translated in a South African context will be investigated.

1.4 RESEARCH QUESTIONS

1) Does the current law relating to dismissal really protect venerable employees against unfair, unreasonable and unjust dismissal from the workplace?
2) Is the current test used in determining dismissal as an appropriate sanction really “appropriate”?
3) Does the current law comply with the ILO standards on dismissal?
4) When the basis for dismissal is theft as a misconduct or any other similar criminal-like allegations against the employee, shouldn’t the law raise the level of proof from the normal balance of probabilities to something closer to the criminal level of proof beyond reasonable doubt?
5) What can be done at a legislative level to reduce the ever-increasing review referrals to the Labour Court?

1.5 HYPOTHESIS

In accordance with the problems identified above, this study puts forward a hypothesis that not all dismissal decisions for misconduct are in accordance with the principles enshrined in the Constitution and applied consistently. This study seeks to provide evidence using cases from the South African jurisdiction to test this hypothesis. A confirmation of this hypothesis would be a confirmation of the violation of the South African Constitution’s prescriptions in relation to fair labour practice.

1.6 RESEARCH METHODOLOGY

The research encompasses an extensive review of qualitative literature which hence constitutes the basis for this research. Both primary and secondary sources will be used. A collection of data in the form of legislation both national and international, cases both reported and unreported, ILO reports, journal articles, textbooks, existing data bases, policies, codes, the world-wide web, task-team reports, law-commission reports, conference speeches and presentations on strike notices have been gathered. The collected data for the research will be analysed to achieve the anticipated outcome of the research. The analysis, data collection and process will take place simultaneously throughout the research to avoid the risk of data overloading, as well as to allow the researcher to approach the data analytically. The findings, recommendations and suggestions for improvements will be addressed throughout the research.

1.7 OUTLINE OF THE RESEARCH

This study is divided into five chapters, which are organised as follows: Chapter one provides an overview of the study and its grounding is based on the historical relationship of employer and employee. The chapter also highlights challenges faced by employees with regards to achieving the constitutional imperative of fair labour practices in the dismissal decision. The chapter also delineates the objectives of the study, the hypotheses framed as well as the methodological approach taken to address the research objectives.

Chapter Two commences with an exploration of the different legislative provisions that police the employer employee relationship in general and for dismissal in particular. The Chapter will examine provisions from the ILO, Constitution, PAJA, LRA, BCEA and the EEA. The study then focuses on the specific developments in the dispute resolution framework in South Africa.

Chapter three surveys the literature with regards to the principles of fairness and dismissal as an appropriate sanction for misconduct. Also discussed was the concept of reasonableness, and onus and standard of proof in the context of the impact on the decision to dismiss for misconduct.

Chapter four deals with the review function of the Labour Court in relations to arbitration awards issued by arbitrators regarding dismissal for misconduct.

Chapter five presents the conclusion and recommendations of the main findings of the research undertaken. The findings for each research objective and hypotheses are discussed drawing from both the literature reviewed and chapter four. Implications of the research and recommendations to policy makers are also presented. Finally, chapter five looks into the limitations of the study and implications for further research.

CHAPTER 2: THE REGULATION OF UNFAIR DISMISSALS IN SOUTH AFRICA AND THE INTERNATIONAL LABOUR ORGANISATION (ILO) POSITION

2.1 INTRODUCTION

In order to provide a clear exposition of balancing the interests of employer and employee in dismissal for misconduct, it is important to look into the International Labour Organization (ILO) Standards regulating unfair dismissal as well the legislation governing dismissal in South Africa. For that reason, this chapter commences by looking at dismissal provisions under the ILO convention, the relevant provisions of Constitution 1996,[22] and how the Labour Relations Act[23] gives effect to those constitutional provisions.

2.2 INTERNATIONAL LABOUR ORGANIZATION STANDARDS ON REGULATION OF UNFAIR DISMISSAL

One burning issue in the modern day labour and employment relations is the security of tenure of employees. The termination of an employment relationship is likely to be a traumatic experience for an employee. The loss of income that accompanies this termination has a direct impact on his or her family's well-being. Worldwide, as more countries seek employment flexibility and globalization destabilizes traditional employment patterns, more employees are likely to face involuntary termination of employment at some point in their professional lifetime. At the same time, the flexibility to reduce staff and to dismiss unsatisfactory employees is a necessary measure for employers to keep enterprises productive. How this balance is struck remains a contentious issue.

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22 The Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as "the Constitution").

23 The Labour Relations Act 66 of 1995. (as amended) hereinafter referred to as "the LRA".

The ILO was established after the end of the First World War as part of the Peace Treaty of Versailles.[24] As pointed out by Van Niekerk *et al*,[25] the ILO constitution states that it seeks to assist in the establishment of fair competition between countries through the establishment of standard-setting protective values and to establish social peace through equal working conditions. The ILO represents a specialized organization of the United Nations that has a special place in shaping labour in general internationally. South Africa became a member state to the ILO in 1919 but withdrew in 1966 due to the impact of the apartheid regime at the time. Subsequently, following the democratic dispensation in 1994, South Africa resumed its membership.[26] Because South Africa is a member state of the ILO, it is important to test the provisions of the LRA against the principles developed by the ILO's bodies. In fact, one of the primary reasons why the LRA was enacted is to give effect to the obligations incurred by the Republic as a member state of the ILO.[27] Similarly, section 39 of the Constitution makes it peremptory for a court to take international laws into account and the way courts in other countries have decided on similar cases. A very good example of how the international labour standards have played a pivotal role in shaping our labour laws was in the case of *National Union of Metalworkers and Others v Baderbop*.[28]

The ILO standards on termination of employment seek to find a balance between maintaining the employer's right to dismiss employees for valid reasons and ensuring that such dismissals are fair and are used as a last resort, and that they do not have a disproportionate negative impact on the employee. The primary goal of the ILO under its Constitution is "social justice", which is to take precedence over other economic goals.[29] It is imperative to point out that the ILO Constitution that provides for social

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24 ILO "Origins and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed 2017-07-21). The ILO was founded in 1919, in the wake of a destructive war, to pursue a vision based on the premise that universal, lasting peace can be established only if it is based on social justice. The ILO became the first specialized agency of the UN in 1946.

25 Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2015) 19–26.

26 Budeli *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* (LLD Thesis, University of Cape Town 2007) 256.

27 S 1 (b) of the LRA.

28 [2003] 2 BLLR 103 (CC). See also Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 5ed (2009) 267; Chicktay "Democracy, Minority Unions and the Right to Strike: A Critical Analysis *Numsa v Bader Bop (Pty) Ltd* (2003) 2 *BCLR* (CC)" 2007 28 *Obiter* 159.

29 See Preamble to Part XIII of the Treaty of Versailles 1919 and Declaration of Philadelphia 1944, Article II (c).

justice involves the improvement of conditions of work and the ability of workers to participate in making the decisions which affect their working lives, either by means of collective bargaining or tripartite (Government, employer and worker representatives) consultation.
This next section provides an in-depth discussion on the ILO perspective.

2.2.1 TERMINATION OF EMPLOYMENT CONVENTION, 1982 (NO. 158)

In its efforts to set standards of practice in the work place particularly relating to security of tenure of employment, the ILO fashioned out Convention on Termination Employment and recommendations[30] concerning termination of employment. The instruments set out principles and a framework where the employment of an employee should not be terminated unless there is a valid reason for such termination. In other words, the thrust of the Convention is to ensure both substantive and procedural fairness before dismissal or termination of employment at the will of the employer. Thus, the employer is required to give a valid reason for dismissal or termination. In terms of this Convention, a reason is valid if and only if it is connected with the employee's capacity or conduct or based on the operational requirements of the undertaking, establishment or service. This makes it clear that the ILO only recognises three broad categories of permissible grounds upon which a worker's services may be terminated.

A closer look at Article 2 of the foregoing Convention depicts that "the Convention applies to all branches of economic activities and to all employed persons". The phrase "all employed persons" depicts any person who is engaged in a gainful employment of any category. By the above provision of article 2, the provisions of the Convention apply to employees in purely master-servant relationship as it applies to employees whose contract of employment is backed by statutes without any discrimination.

Further, Article 8 (1) provides that "a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an

[30] ILO Recommendation 119 Concerning Termination of Employment at the Initiative of the Employer, 1963.

impartial body such as a court, labour tribunal, arbitration committee or arbitrator at the place where termination occurred". Emphasis is placed in Article 9(1) that "The bodies referred to in Article 8 of the Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified. In doing so, Article 9 (2) provides that the body, forum or institution will then shift the burden of proving the reasons and fairness of termination to the employer.[31] The court is mandated to consider the evidence submitted by parties and procedures provided by national laws. The body shall then decide whether the reasons adduced for the termination was sufficient valid reasons recognized by Article 4 of the Convention.

Article 5 of the Convention lists a number of grounds that would not be regarded as to constitute valid reasons for termination of employment. These grounds include:

a) union membership or participation in union activities outside working hours or, with the consent of the employer within working hours;
b) seeking office as or acting or having acted in the capacity of a workers' representative;
c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and
e) absence from work during maternity leave.

The suggestion of the above is that any determination of contract of employment in any manner based on these reasons amounts to unfair dismissal. This means that any exercise of power of termination of employment or dismissal of an employee contrary to the provisions of the above convention is unfair. If an individual employee is dismissed, he or she shall have the right to defend him or herself against any allegations. In cases of collective dismissals, governments should aim at encouraging employers to consult workers' representatives and to develop alternatives to mass lay-

31 Article 9(2) (b) of the Termination Employment Convention.

offs (such as hiring freezes or working time reductions). Still on invalid reasons for determination of contract of employment, Article 6 of the Convention provides that temporary absence from work because of illness or injury shall not constitute a valid reason for termination. What this entails is that when the illness is protracted and in such a nature that it affects the capacity of the employee to carry out the object of the contractual relationship, it may well justify termination of the contract of employment.

Similarly, Article 7 of the Convention provides that the employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer would not be reasonably expected to provide this opportunity. It is however important to note for purposes of this study that South Africa, has not ratified Convention C158. However, ratification concerns remain beyond the scope of this study. Suffice to say that the South African government should seriously consider ratifying this Convention.

2.2.2 RECOMMENDATION NO. 166 CONCERNING TERMINATION OF EMPLOYMENT

Recommendation No. 166 further supplements Article 7 by identifying additional procedures that may be followed prior to, or at the time of, termination. The Recommendation provides, inter alia, that the employer should notify a worker in writing of a decision to terminate his employment,[32] and that the worker should be entitled to receive a written statement from his employer of the reason or reasons for termination on request.[33] Furthermore, the Recommendation envisages the possibility of employers consulting workers' representatives before a final decision is taken on individual cases of termination of employment,[34] and makes provision for the worker to be assisted by another person when defending himself, in accordance with Article 7, against allegations regarding his conduct or performance liable to result in the termination of employment.[35]

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32 Termination of Employment Recommendation, 1982 (No. 166) (hereinafter "R166") par 12.

33 R166 par 13.

34 R166 par 11.

35 R166 par 9.

In respect of termination on grounds of unsatisfactory performance, the Recommendation provides that "the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed".[36]

2.3 SOUTH AFRICAN LEGISLATIVE FRAMEWORK CONCERNING DISMISSALS

As alluded in Chapter one above, the historical development of South African labour law reflects the socio-political history of the country. Industrial conflict, especially after the Rand Revolt of 1922, led to the promulgation of the Industrial Conciliation Act of 1924. In 1978 the National Party government appointed the Wiehahn Commission to investigate the labour relations system in South Africa. The Wiehahn Commission recommended the introduction of the concept of "unfair labour practice" into the South African labour law and the establishment of the Industrial Court. Since its establishment in 1980 this institution has played a significant role in the development of modern labour law in South Africa particularly the enforcement against unfair labour practices. To date the concept of unfair labour practice cut through all the labour legislations in pursuit to giving effect to section 23 of the Constitution. The next section discusses the relevant provisions of the Constitution in relation to employment relations.

2.3.1 THE CONSTITUTION

As mentioned earlier, the advent of democracy in South Africa brought with it the introduction of the Constitution,[37] the supreme law of the land. Chapter 2 of the Constitution, which enshrines certain fundamental rights, contains several provisions of relevance to employment and labour law. Of particular importance to this study is section 23 (1) of the Constitution which deals specifically with labour relations and in

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36 R166 par 8.

37 The Constitution of the Republic of South Africa, 108.

relation to employment and labour law. The provision provides that "everyone has the right to fair labour practices" amongst others. Grogan opines that the entrenchment of labour rights in general terms raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court which may have a far-reaching effect on the way the contract of employment and the employment relationship are approached in future.[38] A similar view shared by Cheadle who with reference to the Constitutional court decisions observes that "the Court has claimed jurisdiction over the interpretation and application of the constitutional right to fair labour practices in so far as that right has been given effect in the LRA. Because the determination of fairness is always a matter of interpretation and application of the constitutional right, the Constitutional Court may have opened its portals to every labour practice, including dismissal, in which the fairness of the practice or dismissal is in dispute."[39]

In addition, section 33 of the Constitution stipulates that every person is entitled to administrative action that is lawful, reasonable and fair in procedure.

2.3.2 THE LABOUR RELATIONS ACT 66 OF 1995

The LRA heralded a new era in workplace relations and gives effect to section 23 rights which employees struggled for prior to 1994. ILO experts assisted in the drafting of the LRA and international standards had an influential role on the current provisions of the Act. The purpose of the LRA is to advance economic development, social justice and the democratisation of the workplace by:

- giving effect to section 27 of the Constitution of 1996.
- giving effect to the obligations conferred on member states of the ILO.
- providing a framework for determination of wages, policy and matters of mutual interest between employees and their representatives and employers and their representatives.

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38 Grogan *Workplace Law* 8ed (2014).

39 Cheadle *Labour Law and the Constitution: Current Labour Law* (2003) 91. See also *NEHAWU v UCT* (2003) *BCLR* 154 (CC) and *NUMSA v Bader Bop* (Pty) Ltd (2003) 24 *ILJ* 305 (CC).

- promoting orderly collective bargaining, employee participation and effective dispute resolution.

The Act remains the cornerstone of the transformation process. The Act gives effect to the section 23 (1) right and provides, amongst other things, that an employee has the right not to be unfairly dismissed.[40] In *National Education, Health and Allied Workers' Union v University of Cape Town and others* ("*the Nehawu judgment*"), the Court articulated this right in the following terms:

> "Security of employment is a core value of the LRA and is dealt with in Chapter VIII. The Chapter is headed 'Unfair dismissals'. The opening section, section 185, provides that 'every employee has the right not to be unfairly dismissed'. This right is essential to the constitutional right to fair labour practices. As pointed out above, it seeks to ensure the continuation of the relationship between the worker and the employer that are fair to both. Section 185 is a foundation upon which the ensuing sections are erected.[41]"

Section 188 (1) of the LRA provides that

> [a] dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or based on the employer's operational requirements; and (iii) that the dismissal was effected in accordance with a fair procedure.

Misconduct is one of the grounds recognised by the law that may give reason for the dismissal of an employee. The law promotes the principle of progressive discipline. This means there should be efforts by the employer to correct employee's behaviour by means of disciplinary action. An example will be the issuing of advice and correction of minor problems on the part of an employee, and written warning for consistent misconduct followed by a final written warning for persistent misconduct. Dismissal should be considered as a last resort when enforcing workplace discipline.

Employers should also set out clear disciplinary rules that stipulate how employees should behave at work. All employees should be informed about these rules, through induction, notice boards, meetings etc. The Code of Good Practice on dismissal sets out guiding principles when instituting fair and reasonable procedures. Item 2(1) of

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40 S 185 of the LRA.

41 (2003) 3 *SA* 1 (CC) par 42. See also *Nkomo v Administrator, Natal* (1991)12 *ILJ* 521 (N).

Schedule 8 of the LRA, emphasis on this point by holding that a dismissal is unfair if it is not effected for a fair reason.

Section 188 applies to all workers, irrespective of their length of service or whether they are still on probation. Van Eck argues that the implementation of the LRA and its accompanying Code of Good Practice: Dismissal (the Code of Good Practice) was an initiative by policymakers to attempt to move away from the over-proceduralism of disciplinary enquiries developed by the Industrial Court.[42] Similarly, section 185 read together with the remaining provisions of Chapter VIII of the LRA deal comprehensively with fair and unfair dismissals;[43] distinguishes between a fair reason and a fair procedure; provides a process for the purposes of claiming relief in the event of an unfair dismissal and specifies what remedies, if any, are available to a dismissed employee.

2.3.2.1 ITEM 4(1) OF SCHEDULE 8 OF THE LRA CODE OF GOOD PRACTICE

Under the common law, the only requirement was that a dismissal had to be lawful and this requirement was met if the employer gave an employee notice of the termination of employment. There was no requirement for the dismissal to be fair. The LRA, on the other hand, requires that a dismissal must be effected for a fair reason and a fair procedure must be followed.

2.3.3 FAIR PROCEDURE

In determining a fair reason for dismissal, as a guideline, item 4 of the Code highlights a number of procedures that the employer should follow when dismissing an employee. This is because dismissal as a sanction is the most severe penalty. Therefore, it should be resorted to as a last measure and should be imposed in respect of serious misconduct which may not require progressive discipline. Schedule 8 deals predominantly with the procedural elements of a disciplinary hearing. Procedural fairness in general terms refers to a disciplinary hearing that has to be held to afford the employee to state his or her defence. What is clear from Item 4 (1) is that ordinarily, the employer should conduct

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42 Van Eck "Latest Developments Regarding Disciplinary Enquiries" 2002 26 *South African Journal of Labour Relations* 26.

43 Ss 187 and 188 of the LRA.

an investigation informally to determine whether there are grounds for dismissal.[44] This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations.[45] The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.[46] After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision. As long as these requirements have been complied with, the employer would be deemed to have applied a fair procedure. Informal disciplinary procedures in the workplace also balance the interests of employees and employers, as required by the Constitution and the applicable ILO convention.

This is the standard commissioners are required to apply when they judge the procedural fairness of dismissals, unless the parties have agreed to more rigorous procedures or, perhaps where administrative law applies. The code does not substitute employers' own procedures and if the employer has its own disciplinary code of conduct, it should adhere to the principles set out therein. Employers who do not have their own disciplinary rules must adhere to the principles set out in schedule 8 and should be mindful of the requirement of consistent discipline. It should at least ensure that it applies the requirements of schedule 8 in a consistent manner to all employees suspected of misconduct. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA*[47] the Labour Court emphasized that arbitrators must not apply a test for procedural fairness that is more stringent than that required by the Code of Good Practice: Dismissals. The code guides employers to adopt a simple procedure in their disciplinary proceedings and not the criminal justice model. *Avril case* signalled a clear break with the court like procedures laid down by the former Industrial Court in *Mahlangu v CIM Deltak*.[48]

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44 *Malelane Toyota v CCMA* [1999] 6 *BLLR* 555 (LC).

45 *National Union of Mineworkers and others v Durban Roodepoort Deep Ltd* (1987) 8 *ILJ* 156 *(IC) at 164-5.*

46 *POPCRU v Minister of Correctional Services and Others* (1999) 20 ILJ 2416 (LC); *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T)

47 (2006) 27 *ILJ* 1644 (LC). See also *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and another.*

48 (1986) 7 *ILJ* 346 (IC).

In *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others*, the Labour Court held that procedural fairness requires compliance with natural justice, the *audi alteram partem*[49] rule and company policies and procedures.[50] In the context of administrative decision making Hoexter explains, which is equally applicable to workplace decision making, the value of procedural fairness, in the following terms:

> "Procedural fairness in the form of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that only signals respect for the dignity and worth of the participants but is also likely to improve the quality and rationality of ..... decision making and to enhance its legitimacy.[51]"

In the end, because the LRA and the Code of Good Practice do not establish a right to an internal appeal hearing at the workplace, depending on the nature of the dispute, a dismissed employee does have the right to refer a dispute to an independent dispute resolution institution such as the CCMA, a bargaining council, or the Labour Court.[52] In fact item 4 (3) of the Code of Good Practice provides that "the employee should be reminded after a ruling has been made against him or her of any rights to refer the matter to the CCMA or a bargaining council with jurisdiction or to any dispute resolution procedures established in terms of a collective agreement."

2.3.4 SUBSTANTIVE REASON/ FAIRNESS

Furthermore, besides fair procedure, the LRA stipulates that any person considering whether or not the reason for dismissal is a fair reason must take into account schedule 8 of the Code of Good Practice. This requirement was also emphasised by the Labour Court in *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others*.[53] Substantive requirements dictate that the employer must have *prima facie* proof of the misconduct. In essence, an enquiry into the substantive fairness of a dismissal is in fact an enquiry as to whether there is a valid and fair reason for the dismissal. The

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49 *Audi alteram partem* is a Latin phrase meaning "listen to the other side" or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

50 [2014] ZALCD 74.

51 Hoexter *Administrative Law in South Africa* (2007) 326–327.

52 S 191 of the LRA.

53 [2014] ZALCD 76.

question of what constitute is a fair reason (for a dismissal) remains a contentious issue. But in general terms

> "in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship .... Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case including the action with which the employee is charged are considered."[54]

This approach to the question of "fairness" is consistent with the Constitutional Court's approach in the *Nehawu case* where the court held that "what is fair depends upon the circumstances of a particular case and essentially involves a value judgment"[55] Further in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[56] the Constitutional Court unanimously set aside the decision of the court a quo and held that on a plain reading of all the relevant provisions of the LRA, it is clear that a commissioner or arbitrator must determine whether the dismissal was fair as an impartial adjudicator and that the commissioner's sense of fairness must prevail and not the employer's view.[57] The Constitutional Court indicated that a determination of the fairness of a dismissal requires a consideration of the following:

- the totality of the circumstances of the matter;
- whether what the employer did was fair;
- the importance of the rule that the employee breached;
- the reason the employer imposed the sanction of dismissal;
- the basis of the employee's challenge to the dismissal;
- the harm caused by the employee's conduct;
- whether additional training and instruction may result in the employee not repeating the misconduct;
- the effect of dismissal on the employee;
- the long service record of the employee.[58]

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54 Cameron, Cheadle and Thompson*The New Labour Relations Act: The Law after the 1988 Amendments* 144–145. See also *National Union of Mineworkers and others v Free State Consolidated Gold Mines (Operations) Ltd* 1996 (1) *SA* 422 (A) 446.

55 Par 33 of the Nehawu judgment.

56 (2007) 28 ILJ 2405 (CC).

57 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others supra* 75.

58 Par 78–79 of the Sidumo judgment.

According to this judgment, read together with the Code, this is not an exhaustive list and none of the above factors will be determinative, and all of these factors must be weighed in determining what is fair in the circumstances. The facts of a particular case and the appropriateness of dismissal as a sanction in the context of such facts, constitute the basis upon which a determination as to whether or not a fair reason exists,[59] must be made. Therefore, if a rule has been broken at a workplace, it is paramount to apply the rule test to determine whether: there is a rule that was broken? is the rule valid and fair? is the rule consistently applied? does the employee know about the rule or can the employer reasonably expect the employee to know about the rule? And if dismissal appropriate for breaking the rule?[60] In addition, an important principle of the Code is that it endorses the concept of corrective or progressive discipline and as such, when dealing with the question of appropriate sanction, efforts should be made to correct and rectify behaviour through a system of graduated disciplinary measures (i.e. counselling and warnings). The Code further indicates that the sanction of dismissal should be reserved for cases of serious misconduct and of such gravity that it makes the continued employment relationship intolerable. It further suggests that when deciding whether or not to impose the sanction of dismissal, the employer should consider factors such as the employee's circumstances, the nature of the job the employee in question holds and the circumstances of the infringement itself.

In terms of workplace rules or standards, item 3(1) of the Code encourages employers to adopt disciplinary rules that establish the standard of conduct required of their employees. These rules are generally set by the employer and may vary according to the size and nature of a business. Such rules however need to be reasonable and valid, and must create certainty and consistency and as such should be made available (i.e. communicated) to employees. It is understood however, that some rules may be so well established and known that it is not necessary to communicate them.

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59 Item 2(1) of the Code.

60 Other rules will depend on all the circumstances surrounding the alleged misconduct as held in *Hoechst (Pty) Ltd v CWIU and Another* (1993) 14 *ILJ* 1449 (LAC*)* 1459.

In all circumstances, the employer must provide proof of the misconduct based on the test of "balance of probabilities".[61] In *De Beers Consolidated Mines Ltd v CCMA and Others* the Labour Appeal Court held that the employer had to prove the facts on which it relied to establish the fairness of the dismissal, and it is then for the arbitrator to make a determination as to the fairness of the dismissal.[62] It must be pointed out however that the prevalence of a "rule" is however not the only basis for a fair dismissal. In *Hoechst v Chemical Workers Industrial Union*[63] the Court held that employees may, in appropriate circumstances, be dismissed for conduct that occurred outside the confines of the workplace and which falls beyond the purview of any disciplinary code. On the same breath, conduct which occurs outside of the workplace or falls beyond the employment relationship, but impacts negatively on the employment relationship, may justify dismissal.[64] Lastly, whilst the Code is not intended to be a substitute for an employer's disciplinary code and procedures, it can be used as a guideline by employers who don't have their own disciplinary code and also used by employers to assess the fairness of their codes already in place. It is important to note that the Code highlights, that each case of misconduct is unique and accordingly departures from the norms established by it may be justified in appropriate circumstances.

2.5 CONCLUSION

In the employment context employers may view certain conduct/behaviour committed by an employee or a group of employees to be repugnant and unacceptable resulting in the disciplinary action that may lead to a dismissal sanction taken against such employee or employees.

In the workplace, misconduct may be defined as behaviour, conduct or action which is contrary to rules and standards set by an employer for his employees. These rules and standards must be very clear and known to the employee. They must also be lawful and reasonable and should be applied consistently. Whenever they are contravened, the employer as the custodian of the rules needs to institute disciplinary remedial

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61 S 192(1) of the LRA.

62 (2000) 21 ILJ 1051 (LAC).

63 *Supra*.

64 *Malan v Bulbring NO and others* [2004] 10 *BLLR* 1010 1017.

action. Employers have a right to discipline their employees to ensure employees uphold codes of conduct that is set. Be that as it may, the right to discipline is not unlimited. It must be based on the principle of fairness and comply with the statutory provisions of the LRA, BCEA and any existing collective agreements. Therefore, before an employer can fairly dismiss an employee for an alleged misconduct, it is generally accepted that an employer must be able to prove on a balance of probabilities that the employee actually committed the offence he is being charged with. Otherwise the employer may be found wanting should the dismissed employee approach the CCMA or relevant bargaining council.

The LRA and Schedule 8 of the Code of Good Practice deals with the aspects of dismissals related to conduct amongst other grounds. However, each case is unique and it has to be approached on its own merits. Schedule 8(3) and court judgments discussed above hold firmly that formal procedures in disciplinary measures do not have to be invoked every time a rule is broken or a standard is not met. It is therefore necessary that there should be a disciplinary code which guides the workers and the employers, it must be clear and be understood by all the parties.

The disciplinary code of conduct serves as the foundation of good discipline because everybody knows the consequences of his/her contravention of those guidelines enumerated in the Code of Conduct. The Code of Good Practice under Schedule 8(3), states that while employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees, so a very good relationship between the two parties is most important if there is to be stability and industrial peace in the workplace.

It was highlighted in this chapter that International labour standards represent international consensus on how a particular labour problem could be tackled at the global level and reflect knowledge and experience from all corners of the world. Governments, employers' and workers' organizations can benefit from the standards by incorporating them in their labour policies. Therefore, as noted above, South Africa has not ratified ILO Convention 158 on Termination of Employment and should perhaps consider ratifying this convention.

The final piece of the legislative termination framework relating to an act of misconduct by an employee pertains to the dispute procedure. Section 191 of LRA provides that if an employee has a dispute about the fairness of a dismissal relating to the employee's conduct, that the employee may refer the dispute in writing to a bargaining council (if applicable) or CCMA, within 30 days of the date of dismissal. A commissioner from the CCMA must first conciliate, after which if the dispute still remains unresolved, will then arbitrate the dispute, and make an award on the matter, which is binding on both parties. A party to the dispute may not appeal an arbitration award and may only apply to the Labour Court to review such award.

For this reason, the next chapter considers the review functions of the court in dismissal matters. Amongst others, the test of fairness and the reasonable decision-maker test as developed by the court will be considered.

CHAPTER 3: THE PRINCIPLE OF FAIRNESS AND DISMISSAL AS AN APPROPRIATE SANCTION FOR MISCONDUCT

3.1 INTRODUCTION

The LRA acknowledges three reasons on which a termination of employment will be considered to be legitimate. These include incapacity, the operational requirements of the employer's business and misconduct.[65] This chapter deals with the last mentioned. The CCMA guidelines for commissioners regarding misconduct arbitrations, explains how an arbitrator should conduct arbitration proceedings, assess the procedural fairness of a dismissal, assess the substantive fairness of a dismissal and determine a fair remedy for an unfair dismissal. The guidelines supplement the provisions of the Code of Good Practice: Dismissal. The aim is to promote consistent decision-making in arbitrations relating to dismissals for misconduct.

Every employee in South Africa has a right not to be unfairly dismissed.[66] This is the case even if the dismissal complies with any notice period in a contract of employment or in legislation governing employment.[67] It was pointed out briefly in chapter two above that whilst it is true that an employee may not be unfairly dismissed, the Act does indicate that an employer may however dismiss an employee for a fair reason related to either, his/her conduct. This chapter seek to discuss both aforementioned grounds. The chapter considers how courts have developed the presence of both procedural and substantive fairness requirement in dismissal for misconduct. The crux of the discussion is to evaluate the principle of fairness and dismissal as an appropriate sanction for misconduct as well as the courts application of the latter.

3.2 THE PRINCIPLE OF FAIRNESS

65 Schedule 8 2(2) of the LRA.

66 S 185 of the LRA.

67 188 of the LRA and sec 2(1) of the Code of Good Practice, Schedule 8 of the LRA.

Besides giving effect to the Constitution, South African labour law is concerned with the attainment of fairness for both the employer and the employee.[68] Under the common law, the only requirement was that a dismissal had to be lawful and this requirement was met if the employer gave an employee notice of the termination of employment. There was no requirement for the dismissal to be fair. It should be noted that the courts have emphasised that "fairness" is a double-edged sword.[69] It does not only serve to benefit and protect one of the parties to the employment relationship. This approach cannot be faulted in a "mutual" contract. In *Branford v Metrorail Services*[70] it was held that

> [t]he concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

In weighing up the interests of the respective parties it is of paramount importance to ensure that a delicate balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity.[71] In fact in *NUMSA v Vetsak Cooperative Ltd* the court emphasised that "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances."[72]

According to Du Toit "fairness is at the heart of section 23 of the Constitution and is by its nature an expansive concept, which is premised on the circumstances of a particular case as well as the conflicting and evolving rights and interests of employers and employees collectively."[73] Although the LRA does not define "fairness" the Constitutional Court stated in *NEHAWU v University of Cape Town*[74] that since "fair labour practice" involves a value judgment based on specific circumstances it is neither

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68 S 23(1) Constitution of the Republic of South Africa, 1996 provides that everyone has the right to fair labour practices.

69 *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1097 (CC).

70 *Branford v Metrorail Services (Durban) and others* [2004] full citation reqd

71 Vettori "The Role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals" 2012 15 *PER / PELJ* 1.

72 (1996) 4 SA 577 (A) 589C–D.

73 Du Toit *et al*

74 *Supra*.

necessary nor desirable to define this concept. The determination of the fairness of a labour practice in the LRA affords discretion to the CCMA and labour courts to determine the fairness of a labour practice. The LRA identifies the different labour practices but the determination of fairness thereof is left to the discretion of the aforesaid institutions. Examples of these practices include dismissals for misconduct. The courts and the CCMA must then give content to the practices in order to interpret and apply the LRA. In applying the discretion regard must be had to the constitution and any other relevant labour legislation, previously decided case law and international instruments.

3.3 ONUS OF PROOF IN DISMISSAL FOR MISCONDUCT

In a dismissal dispute each party bears partly the burden of proof in relation to separate issues. On the one hand, the onus of proof rest with an employee regarding the fact of dismissal and on the other hand, the employer in relations to the fairness of the dismissal.[75] In other word, the LRA casts the onus of proving that there was a dismissal on the employee, and the employer carries the onus of proving the fairness of a dismissal and it follows that it is for the employer to place evidence before the commissioner that will enable the latter to properly judge the fairness of his actions.[76] It is trite that in dismissal cases the burden to prove that the employee was guilty of misconduct rests with the employer and failure to discharge it, renders the dismissal unfair.

The employer must also prove that the trust relationship has irretrievably broken down due to the conduct of the employee in order to substantiate a sanction of dismissal.[77] In addition if misconduct was proven the employer still has to prove that the dismissal was substantively fair and it was, *inter alia*, the appropriate sanction for the conduct in question. The latter will be explained below. The test is whether, in the event of conflicting evidence on a particular point, one version is more probable than the other.

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75 S192 of the LRA. See also *NEHAWU obo Motsoagae / SARS* (2010) 19 CCMA 7.1.6. Grogan *Workplace Law* 7ed (2009) 168, Oelchig *Evidence and Labour Law* (2005) 14; NUM *v CCMA* [2010] 6 BLLR 681 (LC) where the court held that it is trite that in a dismissal case the employer bears the onus of showing that the dismissal was fair.

76 *NEHAWU obo Motsoagae / SARS* (2010) 19 CCMA 7.1.6

77 *Westonaria Local Municipality v SALGBC and others* [2010] 3 BLLR 342 (LC) 16.

That is to say, a decision is arrived at on the balance of probabilities. By requiring the employer only to show that there were reasonable grounds for believing that the offence was committed (rather than proving that, on a balance of probabilities, the offence was actually committed) the court significantly reduced the evidentiary burden on employers.

In *Janda v First National Bank*[78] the Labour Court held that in the context of automatically unfair dismissal "the employee must prove" or a "shifting" of the onus or a duty "to establish a prima facie case that the reason for the dismissal was an automatically unfair one". The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a more likely reason than that of the employer. The court further stated that the essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it. Likewise, in *Kroukam v SA Airlink (Pty) Ltd*[79] *the court held* that "section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, which is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

3.4 FAIR REASON (SUBSTANTIVE) IN TERMS OF THE CODE

It is likely that every employer is required to take disciplinary action against an employee, at least at some stage. Such disciplinary action might lead to the dismissal of a particular employee. It remains imperative to comply with the provisions as set out in the LRA to ensure that the dismissal is fair. The most important principle set out in Schedule 8 – The Code of Good Practice: Dismissal is that both the employer and employee should treat one another with respect. Employers have the right to expect a

78 [2006] 12 BLLR 1156 (LC).

79 (2005) 12 BLLR 1172 (LAC) 28.

certain standard of work and conduct from an employee and in turn, an employee should be protected from arbitrary action.

With reference to dismissal for misconduct, it is important that the misconduct for which the employee is charged is of such a nature that it warrants a dismissal on first offence. In order to assist the employer in determining whether a dismissal is the appropriate sanction for the misconduct, item 3(4) of the Code of Good Practice provides a guideline on what the disciplinary sanction should be. In fact, arbitrators are required to take the Code of Good Practice: Dismissal into account in determining the fairness of a dismissal for reasons relating to conduct. Item 7 of the Code provides guidelines for such dismissals. In *Sidumo and others v Rustenburg Platinum Mines Ltd and others*, the Constitutional Court reaffirmed that these guidelines impose constraints on the power of an arbitrator to determine fairness.[80] The consideration of each of the issues outlined in item 7 involves discrete factual enquiries that the arbitrator must ensure are conducted. These factual enquiries themselves can often be broken down into more detailed factual enquiries. Sometimes they are interlinked. The purpose of these guidelines is to separate out the different factual enquiries normally found in a misconduct case and to order them so that they provide a checklist for the narrowing of issues before a hearing, the receipt of evidence in a hearing, and a template for organising and assessing the evidence in an award.

Accordingly, it is important to consider these guidelines in form of factual enquiries as set out in Item 7 of the Code in determining the substantive fairness in dismissal for misconduct.[81]

3.4.1 FACTUAL ENQUIRIES INTO ITEM 7 OF THE CODE OF GOOD PRACTICE: DISMISSAL

The Code states generally that, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a

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80 *Sidumo and others v Rustenburg Platinum Mines Ltd and others* (CC) *supra* 175.

81 *NUM v CCMA supra*.

continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its own merits, are gross dishonesty or wilful damage to the property of the employer, wilfully endangering the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

For quite some time the courts have held that the substantive fairness requirement for dismissal for misconduct was met if the employer could demonstrate compliance with certain factors. Item 7 of the Code provides, as a guideline, five questions that need to be asked by any person attempting to determine whether the reason for a dismissal for misconduct is fair or unfair.[82]

Item 7 of the Code of Good Practice reads:

> Any person who is determining whether a dismissal for misconduct is unfair should consider:
> a) Whether or not the employee contravened the rule or standard regulating conduct in, 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;
> ii. the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
> iii. the rule or standard has been consistently applied by the employer; and
> iv. dismissal was appropriate sanction for the contravention of the rule or standard.

Consideration of the guideline above remain important in determining the fairness of a dismissal for misconduct as held by the Labour Court in *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others*.[83] For that reason, the next section considers these guidelines in detail.

a) the employee contravened a rule or standard in the workplace

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82 *Motswenyane v Rockface Promotions* (1997) 1 CCMA 7.4.6; *CWIU obo Flepu v Johnson and Johnson* (2000) 9 CCMA 8.8.1.

83 [2014] ZALCD 79.

The first requirement in every case concerning the fairness of a dismissal for misconduct is that the employer must prove that the employee contravened a rule applicable to the workplace. The most common source of legal rules is the employer's disciplinary code. This document typically outlines the various offences for which employees may be subjected to discipline, and the sanctions that may be imposed for commission of these offences. It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited.[84] Court and Commissioners only interfere with sanctions if the sanction imposed is unreasonableness and unfairness.[85] The Code stipulates that the commissioner must conduct an inquiry into whether there had been a workplace rule in existence and whether the employees had breached the rule.[86] Therefore, at the outset it is necessary to prove whether or not there was, in fact, an existing rule or standard in the particular workplace which the employee in question is alleged to have contravened. Should the existence of a rule be disputed, then the arbitrator may decide that dispute either based on the evidence presented, based on the credibility of the opposing witnesses, or the balance of probabilities. The arbitrator may also determine this issue by means of *judicial notice*. This means to accept something which is clearly well known or indisputable as a proven fact. A rule at the workplace forbidding theft or assault, for example, is clearly something which the arbitrator may automatically accept as proven, by means of judicial notice, without having to require the employer to specifically prove same.

However, if a rule is not specifically contained in a disciplinary code, but is also not specifically excluded as a ground for discipline, the Guidelines nevertheless permit an arbitrator to rely on such rule or standard provided that:

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84 Myburgh "Determining and Reviewing Sanction after Sidumo" 2010 31 *ILJ* 13.

85 *County Fair Foods (Pty) Ltd v CCMA* (1999) 20 ILJ 1701 (LAC).

86 *Dolo v CCMA and Others* (LC) par 19–21, citing *Hoechst (Pty) Ltd v CWIU and Another* (LAC) *supra*. Misconduct committed outside the workplace may justify dismissal if it has the consequence of destroying or seriously damaging the relationship between employer and employee, or placing the employee's trustworthiness in doubt.

- it is either proved by the employer, or conceded by the employee, that the employee knew or ought to reasonably have known that the rule or standard was applicable; or
- the arbitrator is able to infer that the rule or standard was applicable from the disciplinary code, contract, legislation or an established practice in the sector or particular establishment.

The determination and the assessment of fairness is normally not restricted to what occurred at the internal disciplinary hearing. This means that the CCMA arbitration proceeding constitutes a hearing *de novo.* In *County Fair Foods (Pty) Ltd v CCMA*[87] the court held that the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing *de novo*.

b) if a rule or standard was contravened, whether or the rule was a valid or reasonable rule or standard;

Before an employee can be dismissed for contravening a rule, it must be established that the rule itself was valid i.e. lawful and reasonable. If a rule is unlawful, either because it compels an employee to perform an unlawful act or because the rule itself is prohibited by statute, the employee is free to disregard it. Similarly, if the rule is unreasonable because it enjoins employees to perform work or actions that they cannot reasonably be expected to perform, a breach of the rule or instruction cannot be treated as a disciplinary infraction. Some employees may also argue that they were not bound by the rule because it was unlawful or unreasonable. Schmidt and Rademeyer are of the view that the court's judgment as to whether something is reasonable is strictly speaking, also not capable of resolution by invoking a burden of proof. It would not be correct to say that one of the parties has to prove that a regulation is reasonable. That is a matter for the court to decide in the light of the facts set before it. But, of course, the facts influencing the court's decision could be placed in issue,

87 *Supra*. See also Sidumo *case* par 18 where the court confirmed that "An arbitration under the auspices of the CCMA is a hearing *de novo*".

and in that respect the burden of proof could become operative."[88] Generally, a rule is deemed unreasonable if it is not relevant to the workplace or to the employee's work, if the rule requires an employee to perform tasks that are morally repugnant or which employees cannot reasonably be expected to do given their skill levels or status. A rule is accepted as legitimate and valid if it is lawful and can be justified.

c) is the rule or standard a valid or reasonable rule or standard?

In terms of the Code, it is not the arbitrator's role to "second-guess" the rules and standards set by the employer in the workplace. The determination of the rules themselves is the employer's prerogative and the intention is not that the arbitrator should interfere with this. Instead, in the process of enquiring into the fairness of the dismissal, the arbitrator should simply determine whether the particular rule is valid and reasonable. The determination of validity entails considering whether the rule or standard is unlawful, or contrary to public policy. It would, for example, not be lawful (and thus invalid) to instruct an employee to do work clearly outside the agreed scope of his or her duties. The implication is that the "contravention" of an invalid or unlawful rule would be justifiable, such as when an employee refuses to comply with an unlawful instruction.

An arbitrator is also required to decide whether a particular rule is reasonable. This is, unfortunately, something of a subjective determination, and should thus be tempered by an acceptance that it is the employer's prerogative to determine rules for the workplace. The test for reasonableness must be distinguished from the test for fairness – the latter test only becomes applicable later in the analysis, in order to determine the fairness of dismissal as a sanction. The Guidelines do not elaborate much on how reasonableness should be determined, except to state that it may involve a comparison with sectoral norms. An employer would thus have to justify a departure from the generally accepted standard of conduct expected from employees in his or her sector.

d) was the employee aware, or could reasonably be aware of the rule or standard;

88 Schmidt and Rademeyer *Law of Evidence* (2009) 2–3.

In discharging its burden, the employer has to show that the employee breached an existing rule which he or she knows about or could reasonably be expected to have known of its existence. The employee who commits misconduct can be held accountable for his or her actions.[89] However, it is generally accepted that employees may be disciplined for contravening rules only if they knew, or ought to have known, of the existence of the rules. This follows logically from the requirement that employees cannot be seen to have committed misconduct if they did not know, or could not reasonably have known beforehand that the employer regarded his or her actions as misconduct. Within limits, employment law does not recognise the principle "ignorance of the law is no excuse". Nor does the law permit an employee to shelter behind the instruction or consent of a superior if the employee knows that the instruction was unlawful, or the superior was aware that the employee's action was wrong. Employers are permitted to introduce rules to cope with changing demands and circumstances. Publication of rules is a general principle of fairness and good labour relations. However, when they do this, they must ensure that the new rules are brought to the attention of employees.

e) Was the employee aware of the rule?

Item 3(1) of the Code requires that "[a]n employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood". Accordingly, should the employee dispute his or her knowledge of the particular rule, the employer will in turn have to refute this in order to prove the requirement that the employee was in fact aware of the existing rule.

In *Transvaal Mattress and Furnishing Company Ltd v CCMA and others*,[90] involved an employee who had been dismissed for unauthorised use of a company vehicle. The commissioner found that the dismissal was unfair and reinstated the employee. On review the LAC held that the commissioner was correct when he concluded that the

89 *Cholata v Trek Engineering (Pty) Ltd* (1992) 13 ILJ 219 (IC) p 223.

90 (1999) 8 LAC 56.

employer had not properly communicated the consequences of non-compliance with the rule against unauthorised use of company vehicles, to its employees.[91] Employees must be made aware of the rules that the employer regards as severe, unless this is obvious.

If there is no disciplinary code in the particular workplace, then the provisions of the Code of Good Practice need to be complied with.[92] It must then be determined whether the employee could reasonably be expected to have known of the rule or standard. The Guidelines stipulate that this question may be addressed either in terms of the evidence presented, or based on the expertise of the arbitrator. It is important to note that item 3(1) of the Code also determines that "some rules or standards may be so well established and known that it is not necessary to communicate them". This means that an employee is expected to at least be aware of the basic and self-evident rules of the workplace.

f) Is the rule or standard consistently applied by the employer?

The requirement that employees must be aware of the rules of the workplace gives rise to the further principle that employers must apply their rules consistently. Preferably, the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration. Disciplinary codes specify particular sanctions for certain types of misconduct. However, they are not inflexible documents and are regarded as guidelines and are directive in nature.[93] Generally, employers must follow the sanctions stipulated in their disciplinary code. Should an employer want to impose a harsher sanction for particular misconduct in the future, then this must be brought to the attention to all employees up front. The employer may not unilaterally decide to amend the code.

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91 (1999) 8 LAC 6.

92 Grogan *Dismissal* (2010) 143

93 *SAISAIWU and de Beer v ASEA Electric SA (Pty) Ltd* (1987) 1 ICJ 39. See also *Changula v Bell Equipment* (1992) 13 ILJ 101 (LAC); *Minister of Correctional Services v Mthembu NO* (2006) 27 ILJ 2114 (LC)

Generally speaking, it is unfair in itself to treat people who have committed similar misconduct differently. The Code requires an employer to act consistently when applying discipline especially in cases involving dismissal.[94] The employer must apply the same sanction to employees as it has done in the past for commission of the same offence (historical consistency) as well as between a number of employees who are involved in the commission of the same or similar offence at more or less the same time (contemporaneous consistency).[95] According to Du Toit Consistency is premised on treating "like cases alike" this is a requirement of fairness.[96]

g) Was dismissal an appropriate sanction?

The determination of an appropriate sanction for misconduct is one of the most problematic areas of our labour law jurisprudence.[97] This question continues to arouse debates in the field of labour law. The critical question has always been; how does a presiding officer determine and conclude that dismissal is fair and thus an appropriate sanction for misconduct? The reason for the on-going debate appears to be linked to the Code of Good Practice: Dismissal. This Code states that one of the requirements of a fair dismissal for misconduct is that the dismissal must be an "appropriate" remedy. The appropriateness of a sanction is dependent on the seriousness of the infraction and its impact on the trust relationship.[98] Grogan opines that the use of the word "appropriate" indicates that it is impossible to lay down rigid rules in this regard. Accordingly, each case must be decided on its own merits.[99] This means a Chairperson in internal disciplinary inquiries is required to exercise his or her discretion in respect of sanction reasonably, honestly and with due regard to the general principles of fairness.

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94 Item 3(6) of Schedule 8, Code of Good Practice: Dismissal.

95 Grogan *Dismissal* 150–151. See also *SRV Mills Services (Pty) Ltd v CCMA and others* .

96 Du Toit *et al*. *Labour Relations Law: A Comprehensive Guide* 4ed (2003) 384.

97 Grogan *Dismissal* 155.

98 Item 3(4) of the Code of Good Practice: Dismissal. See also Van Niekerk *Unfair Dismissal* (2002) 46.

99 Grogan *Dismissal* 155. See *Westonaria Local Municipality v SALGBC and others supra* 18.

3.5 THE COURT DEVELOPMENT AND THE CURRENT TEST IN DETERMINING WHETHER DISMISSAL IS AN APPROPRIATE SANCTION

When determining whether dismissal is an appropriate sanction, an arbitrator is essentially making a value judgment over which reasonable people may disagree.[100] As Grogan observes, the central question remains as to how you establish that a dismissal is so unreasonable and unfair that no reasonable person would agree that it was an appropriate sanction. One needs to take into consideration that we are dealing with a value judgment which is informed by an individual's upbringing, life experiences and cultural beliefs. Accordingly, there is no absolute test for determining whether dismissal is an appropriate sanction. This is problematic in itself. In *Consani Engineering (Pty) Ltd v CCMA and others*,[101] the court stated the following with respect to the determination of a fair sanction:

> "As has been stated in various cases, a commissioner should appreciate that the question of sanction for misconduct is one on which reasonable people can readily differ. There is a range of possible sanctions on which one person might take a view different from another without either of them being castigated as unreasonable. If the sanction falls within a range of reasonable options a commissioner should generally uphold the sanction, even if the sanction is not one that the commissioner herself would have imposed."[102]

In practice however, arbitrators are guided by the codes of good practice, the employer's disciplinary code, principles established by the courts and the context of the misconduct. The Constitutional Court has stated that employees are a vulnerable group in society and thus deserving of protection.[103] In making an enquiry as to whether dismissal for misconduct was an appropriate sanction, the question the court will seek to address is; was the "misconduct" of such gravity to make a continued employment relationship intolerable? This may be indicated by showing that the "misconduct" has resulted in the trust relationship being breached.

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100 Henman *Determining a Fair Sanction for Misconduct* (Unpublished Master's thesis, University of KwaZulu-Natal 2014) 26. See Grogan *Dismissal* 155.

101 (2004) 13 LC 1.11.13

102 (2004) 13 LC 17.

103 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others supra*. See also Le Roux and Mischke "The Disciplinary Sanction: When is Dismissal Appropriate?" 2006 *Contemporary Labour Law* 91 and Le Roux and Young "The Role of Reasonableness in Dismissal: The Constitutional Court looks at who has the final say" 2007 *Contemporary Labour Law* 21.

3.5.1 *ANGLO AMERICAN FARMS T/A BOSCHENDAL RESTAURANT V KOMJWAYO*[104]

In this case, the LAC stated that the employment relationship can only be healthy if the employer can be confident that it can trust the employee not to steal from it. The court further held that one must consider whether or not employee's actions had the effect of rendering the continuation of the relationship of employer and employee intolerable. The court added that if that confidence is destroyed or substantially diminished due to misconduct then the continuation of their relationship can be expected to become intolerable, at least for the employer. Subsequently he will, as it were, have to be continually looking over his shoulder to see whether this employee is being honest.

3.5.2 *DE BEERS CONSOLIDATED MINES V CCMA*[105]

The court held that:

> "Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended".

The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*[106] finally brought some clarity in respect of determining the appropriateness of sanction. One of the issues that the court had to decide was whether it was sufficient for an employer to prove that the sanction of dismissal was a fair sanction as opposed to the only fair sanction.

The Constitutional Court held that:

> "It is a practical reality that, in the first place, it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are, therefore, no competing 'discretions'. Employers and commissioners each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer

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104 (1992) LAC.

105 (2000) LAC. See also *Department of Health, Eastern Province v PHWSBC and others* [2009] 2 BLLR 131 (LC).

106 *Supra*.

> but the determination of its fairness does not. Ultimately the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third-party determination on whether or not a dismissal was fair is likely to promote labour peace."[107]

In terms of the *Sidumo case*, the test for determining the appropriateness of sanction for misconduct is based on fairness and the misconduct must be sufficiently serious to justify dismissal. Whether dismissal is fair will depend on whether the misconduct itself rendered the employment relationship intolerable or whether cumulatively with past transgressions it had done so. Accordingly, a commissioner or arbitrator needs to decide the issue with his or her own sense of fairness based on the facts before him or her. A value judgment is made when assessing the fairness of the employer's decision to dismiss, taking all relevant circumstances into account. A commissioner must not determine afresh what the appropriate sanction is, but must determine whether the employer's decision to dismiss is fair.[108]

3.5.3 *TOYOTA SOUTH AFRICA MOTORS V RADEBE*[109]

In this case, the court accepted theft and fraud have "always constituted grounds for dismissal of employees" because of the breach in the trust relationship" however there "is no invariable rule that offences including dishonesty should incur the supreme penalty of dismissal.

3.5.4 *EDCON LTD V PILLEMER NO*[110]

In this case, the question was raised as to when dishonesty warrants a dismissal. The issue that arises in cases of dishonesty is whether a future employment relationship would be intolerable. The SCA noted that Pillemer, the commissioner in this matter had ample material before her showing that the trust relationship between it and Reddy had been destroyed by Reddy's misconduct and lack of candour. This, it was submitted, showed that the decision to dismiss her was justified. The determinant issue in the appeal must therefore be whether the trust relationship had been shown in the

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107 *Sidumo and others v Rustenburg Platinum Mines and others* (CC) *supra* 75.

108 CCMA Guidelines for Misconduct Arbitrations 92–93.

109 (2000) LAC.

110 [2010] 1 BLLR 1 and also 2009 30 ILJ 2642 (SCA).

arbitration to have been destroyed. This calls for an examination of Pillemer's reasons for her conclusion and the material that was available to her in arriving at it.

The SCA then concluded that Pillemer was entitled and in fact expected, in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed.[111] She could find no evidence suggestive of the alleged breakdown and specifically mentioned this as one of her reasons for concluding that Reddy's dismissal was inappropriate.

What the *Edcon case* has emphasised is that if there should be a dismissal dispute the employer must lead convincing evidence regarding the appropriateness of the dismissal as sanction.[112] The outcome in Edcon is clearly significant as it emphasises the importance of leading evidence when proving the appropriateness of a dismissal based on dishonesty. However, since *Edcon case*, the Court has repeatedly indicated that where an employee is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ. In *Council for Scientific and Industrial Research v Fijen*[113] the court held that any conduct on the part of an employee that is incompatible with the trust and confidence, necessary for the continuation of the employment relations will entitle the employer to bring the relationship to an end.

3.5.5 *WESTONARIA LOCAL MUNICIPALITY V SALGBC*[114]

111 In *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* the LAC stated that the employment relationship can only be healthy if the employer can be confident that it can trust the employee not to steal from it.

112 Myburgh 2010 31 *ILJ* 13.

113 (1996) 17 ILJ 18 (AD) 26E–G

114 (2010) LC.

Employer bears the onus to show that the employee was guilty of the offence, and that the dismissal was fair, and that the trust relationship between it and the employee has broken down due to the employee's conduct.

3.5.6 *MUTUAL CONSTRUCTION CO TVL V NTOMBELA*[115]

Where an employee has committed a serious fraud, one might reasonably conclude that the relationship of trust between him and the employer has been destroyed.
Totality of circumstances must be taken into consideration – where employee was placed in a position of trust and responsibility, this role constituted a crucial and fundamental "operational requirement" in the employer's business.

3.5.7 *EASI ACCESS RENTAL (PTY) LTD V COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION AND OTHER*[116]

The essence of this case was that the nature and seriousness of misconduct can be enough to infer the breakdown of the trust relationship without evidence being led to prove the breakdown. In *Easi Access* case, the employee was dismissed by the applicant after being found guilty on five charges of misconduct, including, *inter alia*, dishonesty and gross negligence. The employee, a payroll officer, had allegedly disclosed all of the employer's payroll information to a fellow employee.

The employee referred an unfair dismissal dispute to the CCMA) and the commissioner relying on *Edcon Ltd v Pillemer NO and Others*[117] found that the dismissal was unfair on two grounds –

- firstly, that he did not find the employee guilty of all the charges against him; and;
- secondly that there was no evidence produced by the employer to show that the trust relationship had broken down between the parties.

115 (2010) LC.
116 2015 8 BLLR 783 (LC).
117 *Supra*.

The Supreme Court of Appeal, in the *Edcon* matter found the dismissal of an employee was inappropriate where an employer alleged that the employee was dismissed because the trust relationship had broken down and then failed to lead evidence to confirm or support this allegation.[118] In the *Easi Access* matter, the judge found that in cases where direct evidence of the breakdown has not been led, the inquiry into the fairness of the dismissal by the commissioner should include a determination of whether or not the breakdown can or cannot be inferred from the nature of the offence.

In support of this position, the court in the *Department of Home Affairs and Another v Ndlovu and Others*[119] held that the employer has an obligation to lead evidence to justify a dismissal, unless of course the conclusion of a broken relationship is apparent from the nature of the offence and/or circumstances of the dismissal.

Accordingly, so the reasoning goes, in determining the fairness of the sanction, the nature of the offence, the seriousness of the misconduct and the circumstances of the case had to be considered. This decision supports the point that even though evidence relating to the breakdown in the trust relationship between the parties in a dismissal case is of critical importance in the assessment of the fairness or otherwise of the dismissal, where no such evidence has been led, the commissioner still has to determine whether the breakdown in the trust relationship cannot be inferred from the nature and extent of the misconduct and the surrounding circumstances as a whole.

In *Absa Bank Limited v Naidu and others*, it was stated that "there are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts on whether a decision to dismiss an offending employee is a reasonable one. Generally, however, a sanction of dismissal is justifiable and, indeed, warranted where dishonesty involved is of a gross nature." This signifies that the nature of the misconduct may well determine the fairness of the sanction. It must therefore be

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118 See also *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and others and Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine*) *v De Beer and others* .

119 [2014] 9 BLLR 851 (LAC). See also *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC).

implied from the gravity of the misconduct that the trust relationship had broken down and that dismissal is the appropriate sanction.[120]

In *Rainbow Farms (Pty) Ltd v CCMA*,[121] the court held that an employee who had removed "free issue" milk without authority (there was a strict rule prohibiting this conduct) had destroyed the trust relationship and therefore dismissal was an appropriate sanction.

3.6 OTHER FACTORS CONSIDERED RELEVANT IN DETERMINING WHETHER DISMISSAL IS AN APPROPRIATE SANCTION

Grogan argues that when a chairperson of a disciplinary enquiry makes a decision in respect of whether or not an employee has committed misconduct, a two-stage inquiry need to be undertaken.[122] First of all, the guilt of the employee must be established in terms of the evidence presented. And secondly an enquiry into the determination of an appropriate sanction.[123] This is done with reference to the severity of the misconduct committed and the impact that it has had on the employment relationship. The Chair person is required to consider circumstances in aggravation and mitigation before deciding to recommend a dismissal as appropriate sanction. In substantiating his decision to dismiss, the employer will have to lead evidence in the disciplinary hearing that due to the misconduct committed, the trust relationship that existed between the parties deteriorated beyond repair or that the employee made continued employment intolerable.

When deciding whether or not to impose the penalty of dismissal, the chairperson of a disciplinary inquiry can no longer "deal with the issue of sanction on a cursory basis."[124]

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120 *Ehrke v Standard Bank of SA and Others* (2010) ILJ 1397(LC) and *Timothy v Nampak Corrugated Containers (Pty) Ltd* (2010) 8 BLLR 830 (LAC) as well as *Westonaria Local Municipality v SALGBC and others supra*.

121 (2011) 11 BLLR 451 (LAC).

122 Grogan *Dismissal* 245.

123 Grogan *Dismissal* 245.

124 Le Roux "Proving the Fairness of the Dismissal: The Need to Present Evidence" 2010 *Contemporary Labour Law* 57 59.

The presiding officer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances, including:[125]

a) length of service,
b) previous disciplinary record,
c) personal circumstances,
d) the nature of the job and
e) the circumstances of the infringement itself.

An employee may decide to challenge his or her dismissal externally at the CCMA. Should this happen, the CCMA in assessing the reasonableness and fairness of the decision to dismiss may interfere with the employer's decision. However, the CCMA may only do so if that decision is found to be unreasonable and unfair when assessed against an independent standard. This means that the employer's decision to dismiss must stand unless the CCMA is satisfied (and can demonstrate) that the employer's decision to dismiss is so unreasonable that no reasonable person would have taken such a decision in the circumstances.

3.6.1 WHETHER THE SANCTION WAS IN ACCORDANCE WITH THE EMPLOYER'S DISCIPLINARY CODE

In practice, disciplinary codes are commonly regarded as guidelines. Accordingly, the sanctions prescribed therein for a specific disciplinary offence is generally regarded as the primary determinant of the appropriateness of the sanction. The nature and content of the disciplinary codes differ according to the size and type of business in question.[126]

3.6.2 WHETHER A LESSER SANCTION WOULD HAVE SERVED THE PURPOSE

125 Item 3(5) of Schedule 8, Code of Good Practice: Dismissal.
126 Du Toit *et al Labour Relations Law: A Comprehensive Guide.*

A theme expressed in many judgments and awards, echoed in the Code of Good Practice: Dismissal, is that dismissal is the "ultimate sanction" in the employment context. It should therefore not be imposed if a lesser penalty would serve the purpose. Employers have only a limited range of penalties that may be lawfully imposed. These are, basically, warnings, demotion, suspension and dismissal.

3.6.3 WHETHER THE EMPLOYER COULD REASONABLY HAVE BEEN EXPECTED TO CONTINUE WITH THE EMPLOYMENT RELATIONSHIP

Another "test" frequently used by courts when they assess the appropriateness of dismissals is the effect that the employee's misconduct would have on the employment relationship. The courts may say that the "trust" upon which the employment relationship was founded was destroyed. Or they may say that the employment relationship has been rendered "intolerable". These tests are simply ways of establishing whether the employer can reasonably be expected to continue with the contractual relationship with the employee concerned. An employer relying on irreparable damage to the employment relationship to justify a dismissal should lead evidence in that regard, unless the conclusion that the trust relationship has been broken is apparent from the nature of the offence and/or the circumstances of the dismissal.

3.6.4 THE GRAVITY OF THE OFFENCE

The more serious the offence, the more likely it is that the employer will consider dismissal appropriate. The Code of Good Practice: Dismissal, gives as examples of offences that may justify dismissal at first instance gross dishonesty, wilful damage to the employer's property, physical assault on the employer, a colleague or a customer and gross insubordination.[127] The courts have made it clear that an employer should at least allow the employee to plead in mitigation, and that the employer should at least consider the possibility of a lesser sanction.[128] The list is however not exhaustive and is subject to the requirement that each case must be judged on its own merits. Courts

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127 Item 3(4) of the Code of Good Practice: Dismissal.

128 Grogan *Dismissal* 168.

have found other grave misconduct such as racial abuse, sexual harassment, unauthorised possession of company property and conflict of interests to warrant dismissal as an appropriate sanction.[129]

3.6.7 THE EMPLOYEE'S DISCIPLINARY RECORD

An employee's disciplinary record may be taken into account when considering whether the employee should be dismissed for a particular offence. An employee on a final warning for the same offence will normally be regarded as irredeemable, and dismissal will be justified if the employee commits a similar offence during the currency of the warning. The general principles relating to the use of past warnings are that the offence for which the employee is dismissed should be similar to the offences for which the employee received the previous warnings, and that the warnings should be relatively fresh and valid. Most disciplinary codes state the period for which warnings will remain current. Where a code does so, it is generally accepted that when that period expires, a warning lapses and the employee is considered to have a "clean" disciplinary record.

3.6.8 THE EMPLOYEE'S LENGTH OF SERVICE

It is widely accepted that, the longer the period of service with the employer, the more seriously the employer should consider mitigating factors. In *Toyota SA Motors (Pty) Ltd v Radebe*[130] the LAC reaffirmed the view that theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract." In this case the employee was involved in a collision. Rather than reporting the collision in accordance with company policy, he abandoned the vehicle with the keys and told his employer that the vehicle had been

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129 *Miyambo v CCMA and Others* (2010) 31 ILJ 2031 (LAC); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v KAPP* (2002) 6 BLLR 493(LAC) 215. See also *Reddy v University of Natal* (1998) 19 ILJ 49 (LAC) 216, *Rainbow Farms (Pty) Ltd v CCMA supra* 217 and *Lubbers v Santech Engineering* [1994] 10 BLLR 124 (IC). The LAC has taken a very strict approach to dishonest conduct and has found that dishonest conduct will generally have the "effect of rendering the relationship of the employer and employee intolerable," and will thus justify dismissal regardless of the length of service or previous clean disciplinary record of the employee (see: *Anglo American Farms Boschendal Restaurants v Komjwayo* (1992) 13 ILJ 573 (LAC); *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 3 BLLR 243 (LAC) and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industries and Others* (2008) 3 BLLR 241 (LC).

130 *Supra*. See also *Rustenburg Platinum Mines Ltd v National Union of Mineworkers .*

hijacked. He had a length service of 13 years. He was dismissed. The LAC accepted the dismissal as fair, stating that although a long period of service of any employee will usually be a mitigation factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal.

PROCEDURAL FAIRNESS

Briefly, not only should the dismissal be effected in accordance with a fair reason, it should also be follow a fair procedure. Section 188(1)(b) of the LRA requires that a dismissal for misconduct must be effected in accordance with a fair procedure. Procedural fairness is measured by evaluating the procedures followed during a disciplinary enquiry. It is trite law that the employer may take disciplinary action against any of its employees who, amongst others, conduct themselves in a manner which contravenes the codes of good practice of the employer. But in establishing whether or not the employee has indeed contravened the code of good practice, the employer must conduct certain investigations to ensure that misconduct has occurred. This does not need to be a formal inquiry.

Also, the employer should notify the employee of the allegations using a form of language that the employee can reasonably understand. In addition, the *audi alteram partem* rule has to be applied. Each party should be afforded the opportunity to state its case before a finding is made and should no procedure be followed or should the procedure that was followed be flawed, a finding determining that the dismissal was procedurally unfair will likely be made. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or a fellow employee. After the inquiry, they should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

The Labour Courts place a high premium on procedural fairness. The Courts are willing to award compensation and in some instances even order reinstatement if a fair and correct procedure was not followed prior to the dismissal, despite an alleged valid

reason for a dismissal. Once again guidance can be sought in the Code of Good Practice (item 4(1)) which sets out requirements for a procedure before a dismissal takes place.

The substantive requirements of a disciplinary hearing and the standard of proof required were decided on in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others*[131] The employer dismissed the employee after finding that she was implicated in theft. She referred a dispute to the CCMA and at the arbitration. In the proceeding, the employer relied on a videotape which revealed another employee stealing a plastic bag containing a pair of boots in the respondent employee's presence. The employer argued that the only inference to be drawn from the videotape was that the respondent employee was also involved in the theft because she was seen facing the thief at the time and talking to her and that her "body language" indicated involvement. The commissioner did not accept this evidence as proof of her involvement and ordered the applicant to reinstate the employee. The Labour Court held that, when determining whether an employee is guilty of misconduct, the proper test is proof on a balance of "probabilities" not that of "beyond reasonable doubt", which is the burden of proof as it applies in our criminal law system. The Court confirmed that while the LRA is silent on the contents of the notion of procedural fairness, the nature and extent of that right is spelled out in the Code of Good Practice: Dismissal in Schedule 8. The court found that "The code specifically states that the investigation preceding a dismissal "need not be a formal inquiry." The Code requires no more than that before dismissing an employee the employer should conduct an investigation, give the employee or his/her representative an opportunity to respond to the allegation after a reasonable period, take a decision and give the employee notice of that decision. This approach represents a significant change from what may be termed the "criminal justice" model developed by the erstwhile industrial court under the 1956 LRA.

3.7 DISPUTES RESOLUTION FRAMEWORK FOR DISPUTES RELATING TO DISMISSAL FOR MISCONDUCT

131 *Supra*.

The 1995 LRA incorporate useful structural pathways or procedures through which each category of labour disputes must follow.[132] These statutory procedures are designed to deal only with labour and employment disputes. In other words, only those arising from and, for most part, during the existence of an employment or collective bargaining relationship between the parties in dispute.[133]

If the internal mechanism proves unsuccessful, the CCMA emphasises that parties should take the necessary steps immediately by approaching the CCMA.[134] Section 191 of the LRA regulates procedure that needs to be followed in challenging alleged unfair dismissals. The referral must be timeous in terms of the statutory time limits. In the case of an unfair dismissal dispute, a party or parties have only 30 days from the date on which the dispute arose within which to refer the dispute.[135] The applicant may make use of the CCMA's pro forma affidavits when applying for condonation. The Rule 31 of the CCMA Rules regulates the manner in which condonation must be applied for.[136] However, since the LRA places primacy on the speedy resolution of labour disputes, condonation for late referral of disputes for conciliation is not automatically or lightly granted.[137] CCMA Rule 9 (3) requires that an application for condonation must set out the grounds for seeking condonation and must include the following factors which the Commissioner may considers when deciding whether or not to grant condonation:

- the degree of lateness of the referral;[138]
- the reason for the lateness;[139]

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132 See Schedule 4 of the 1995 LRA (as amended in 2015) *Dispute Resolution: Flow Diagrams* 261.

133 Grogan *Labour Litigation and Dispute Resolution* (2010) 4.

134 http://www.ccma.org.za.

135 S 191(1)(b)(i) of the LRA 66 of 1995. Should an employee appeal against the employer's decision, the date for the referral would be the date of the decision of the appeal. See *SACCAWU and another v Shakoane and others* (2000) 10 *BLLR* 1123 (LAC) and *Halgang Properties CC v Western Cape Workers Association* (2002) 10 *BLLR* 919 (LAC).

136 The Bargaining Councils have adopted similar Rules.

137 Grogan *Labour Litigation and Dispute Resolution* 107.

138 See *NUM v West Holdings Gold Mining* (1994) 15 ILJ 610 (LAC).

139 See *Motloi v SA Local Government Association* (2006) 3 *BLLR* (LAC) and *Mghobozi v Naidoo NO and Others* (2006) 3 *BLLR* (LAC).

- the referring party's prospects of success on the merits;[140]
- any prejudice to both parties which includes the importance of the matter to each party; and
- any other relevant factors;[141]

An employee may only refer a dismissal dispute after he or she has been dismissed or given notice of dismissal.[142] The CCMA or bargaining council may arbitrate a dispute if it remains unresolved (after conciliation) and falls within its jurisdiction and was also timeously referred. The CCMA or bargaining council must attempt to resolve the dispute within 30 days of referral or any longer period agreed between the parties. Failing which the commissioner must certify the dispute as unresolved by issuing a certificate to that effect.[143] According to Grogan, conciliation is a consensus seeking process in which the commissioner attempts to assist the parties to settle the dispute amicably.[144] If conciliation fails an employee may refer the matter to arbitration or adjudication at the labour court depending on the true nature of the dispute.[145] A dismissal dispute may be arbitrated if it relates to an employee's conduct, capacity is constructive in nature or the employee does not know the reason for the dismissal.[146] All other dismissals are referred to the labour court unless the parties consent to arbitration.[147] The true reason for the dismissal will determine the correct forum for referring the dispute, as opposed to the employee's determination thereof.[148] This prevents "forum shopping". Dismissal disputes must be referred to arbitration or the labour court within 90 days from certification of non-resolution. Arbitrations usually take place sometime after the failed conciliation unless the dispute resolution procedure is a "Con-arb" where the arbitration happens immediately after conciliation.[149] In terms of section 138 of the LRA an appointed commissioners must conduct the arbitration "in a

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140 See *Total Facilities Management v CCMA and Others* (2008) 1 *BLLR* 73 (LC) and *NUM v Council for Mineral Technology* (2002) 23 *ILJ* 1229 (LAC) 1231.

141 *Coates Brothers (SA) Ltd v Shanker and others* (2003)12 *BLLR* 1189 (LAC).

142 S 191(2A) of the LRA.

143 Grogan Dismissal 172.

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

147 *Ibid.*

148 *Wardlaw v Supreme Moulding (Pty) Ltd* (2007) 28 ILJ 1042 (LAC).

149 Section 193(1) of the LRA.

manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly" and that they need "to deal with the substantive merits of the dispute with the minimum of legal formalities" The CCMA guidelines for misconduct arbitrations deals with the conduct of arbitration proceedings and assessing evidence, as well as determining the appropriate sanction for misconduct. It is commonly accepted that the arbitration process is not merely a review of the disciplinary proceedings but is a hearing *de novo*. An arbitration award issued by the arbitrator is binding and only subject to review by the Labour Court.

3.8 REMEDIES

Briefly, section 193 of the LRA sets out the remedies for an unfair dismissal. It reads as follows:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may–
> 1. order the employer to reinstate the employee from any date not earlier than the date of dismissal;
> 2. order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
> 3. order the employer to pay compensation to the employee."

Having to reinstate, re-employ or compensate an employee that made himself guilty of grave misconduct will not be desirable to say the least. If a dismissal was not substantively and procedurally fair, regardless of the fact that the process to reach such fairness might seem time consuming, costly and tiring, it will prove to be beneficial.

3.9 CONCLUSION

Arbitrators are obliged to take the Guidelines provided in the LRA into account and, accordingly, parties are advised to be mindful of the Guidelines in relation to the manner in which an arbitrator assesses substantive fairness during the course of an arbitration relating to misconduct. The determination of substantive fairness in accordance with item 7 of the Code, read with the Guidelines, clearly requires a comprehensive factual analysis, consisting of the various inter-related factual enquiries discussed above. With this in mind, the Guidelines serve as an essential and practical

yardstick against which to measure the assessment and determination of substantive fairness by arbitrators.

Having said that, however, the complex issues discussed above perhaps provide little assistance to employers who want to know when they are entitled to dismiss and if they do dismiss for misconduct when is it likely that the decision will be interfered with by the CCMA. Notably, subsequent to the *Sidumo case*, even if an employer satisfies all the requirements of Item 7 of the Code of Good Practice: Dismissal, there will still be a possibility that the CCMA or court may find that dismissal is an inappropriate sanction and therefore unfair. This conundrum leaves employers in a precarious position of trying to second guess what a commissioner or arbitrator or court may decide if they go ahead and dismiss an employee for misconduct.

This chapter has alluded that fairness is an elusive concept. It nevertheless plays an instrumental role in determining an appropriate sanction for misconduct. In fact, it is not an absolute concept and reasonable people may readily disagree on what is fair or not, in particular circumstances. It is clear that our law has changed significantly from the common law position of lawfulness to the present position of fairness in so far as determining an appropriate sanction for misconduct is concerned. This is evident from judicial and legislative intervention which emphasises that fairness now forms part of our dismissal and misconduct dispensation. What is also clear now is that dismissals need to be both lawful and fair. However, there is no precise answer to determine an appropriate sanction for misconduct. Whether it is impractical to have an exact formula for determining which types of misconducts call for which types of sanctions remains to be seen. At the moment, each case is judged on its own merits with due regard to the parity principle. Added to the mix are the personal circumstances of the employee who transgressed, the nature of the job, the circumstances in which the misconduct occurred as well as other relevant factors that need to be taken into consideration.

At the workplace, employers are not compelled but guided by the LRA, the Code as well as judicial precedent and other relevant policies and procedures. The Code encourages the concept of corrective and progressive discipline and recognises that generally it is not appropriate to dismiss an employee for a first offence unless the misconduct is serious and of such gravity that it makes the continued employment

relationship intolerable. However, the law of evidence still plays an important role. In determining a fair sanction for misconduct, and besides the severity of the misconduct, all relevant factors need to be taken into account that may be taken into account in determining whether the misconduct has breached the trust relationship as analysed by the courts. This calls for a value judgment (something that reasonable people may disagree over differs) on the part of a commissioner considering the fairness of a dismissal. Whether this subjective value judgment balances the interests of employees and employers remain questionable and subjected to the Labour court scrutiny. On the whole, the question will always be whether the dismissal was a fair sanction in a given case. The decision must be reasonable and the commissioner is compelled to apply his or her mind to the issues in respect to the case. In the end, it seems the determination of an appropriate sanction for misconduct is about common sense and fairness, after considering all the relevant information. In fact, it remains a rational value judgment as stated in *NEHAWU v University of Cape Town.*[150]

For this reason, the next chapter tries to highlight some helpful recommendations to address these complex issues.

150 *Supra*.

CHAPTER 4: THE REVIEW FUNCTION OF THE LABOUR COURT IN DISMISSAL FOR MISCONDUCT

4.1 INTRODUCTION

As it was noted in Chapter 2 that much debate concerning dismissal relates to an inquiry as to whether the employer's action to dismiss was both procedurally and substantively fair. In other words, section 188 of the LRA provides that, to be fair, a dismissal that is not automatically unfair must be for a fair reason and in accordance with a fair procedure. The Act maintains that dismissal must be an action of last resort and would be unnecessary to dismiss an employee where if given a reasonable opportunity and reasonable assistance, the employee can meet the required standard. Likewise, the Code of Good Practice: Unfair Dismissal notes that whether or not a reason for dismissal is a fair reason is determined by the facts of each case and the appropriateness of dismissal as a penalty. It is the latter enquiry that has proven particularly problematic. With that in mind, this chapter seeks to take a look at the scope of the review functions of the Labour Court in dismissal for misconduct emanating from irregularities in the CCMA's arbitration awards issued by an arbitrator. Particular attention will be given to reviews of arbitration awards in terms of sections 145 and 158 (1) (g) of the Labour Relations Act,[151] relevant provisions of the Promotion of Administrative and Justice Act,[152] review of private arbitration awards and the reasonableness test for reviewing arbitration awards. Through leading case law, the chapter endeavour to trace the thread and the development of the review functions of the Labour Court up to the current legal position.

It is common in practise that parties question the decision of a lower court or tribunal. In such case parties make use of two avenues provided by the law to place a ruling before a higher court.[153] Parties may appeal[154] or review the decision. This chapter focuses on the latter. Although section 143(1) of the LRA says "an arbitration award is

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151 Hereinafter referred to as "the LRA".

152 3 of 2000. Hereinafter referred to as "PAJA".

153 Grogan *Labour Litigation and Dispute Resolution* 39.

154 In *Johannesburg Consolidated Investment Company v Johannesburg Town Council* (1903) TS 111 the court held that an appeal involves a re-hearing on the merits and is limited to the evidence or information before the lower tribunal.

final and binding," either party can take the arbitrator's conduct on review to the Labour Court if they can prove that the arbitrator, in making his/her award, has materially broken a rule, thereby committing misconduct.

In *Tikly v Johannes*[155] the court held that review involves a limited re-hearing of the decision and the question is normally whether the procedure adopted was formally correct. In other words one has to show that a grave irregularity occurred following the lower court's decision.[156] Worth noting from the onset is that the courts have previously held that the Labour Courts have no inherent common law powers of review unlike the High Courts.[157] Having said that however, the Labour Court has exclusive jurisdiction to review arbitration awards issued by the Commission for Conciliation Mediation and Arbitration,[158] Bargaining Council, private arbitration awards, actions of officials responsible for performing functions under Labour Legislation and actions of State in its capacity as the employer.[159]

4.2 REVIEWS AND TIMEFRAME IN TERMS OF SECTION 145 AND 158 (1) (G) OF THE LRA

Provisions of section 145[160] of the LRA and the grounds set therein provide a pivotal starting point for statutory review powers of the Labour Court. This section affords any

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155 (1963) 2 SA 588 (T) 590. See also *S v Mohamed* 1977 (2) SA 531 (A) 538 where the court defined a review as a limited re-hearing, with or without additional information, to determine, not whether the magistrate's decision was right or wrong, but whether he exercised his powers and discretion honestly and properly.

156 *Durbsinvest (Pty) v Town and Regional Planning Commission, Kwazulu-Natal* (2001) 4 SA 103 (N).

157 *Stock Civil Engineering v RIP* (2002) 23 *ILJ* 358 (LAC).

158 Hereinafter referred to as "the CCMA".

159 Grogan *Labour Litigation and Dispute Resolution* 277. See also Van der Walt, Le Roux and Govindjee *Labour Law in Context* 239.

160 (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award- (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption. (1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1) (2) A defect referred to in subsection (1), means- (a) that the commissioner-(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers; or (b) that an award has been improperly obtained. (3) The Labour Court may stay the enforcement of the award pending its decision. (4) If the award is set aside, the Labour Court

party to a dispute who alleges a defect[161] in any arbitration proceedings, a right to apply to the Labour Court to have the arbitration award reviewed.

Understandably, review in terms of section 145 is limited both insofar as time and grounds of review are concerned.[162] The section specifies a six weeks' time period within which the application must be brought unless the alleged defect involves corruption; or if the alleged defect involves corruption, within six weeks of the date when such corruption was discovered.[163] In *Queenstown Fuel Distributor v Labuschagne,*[164] the court held that condonation may be granted if convincing reasons exist and if it is clear from the facts that failure to condone would lead to a miscarriage of law. However, unlike section 145, section 158 (1) (g) prescribes no time limit within which review must be initiated. Nonetheless, in *CWIU v Ran*[165] it was emphasised that such a review must be filed within a reasonable time which according to the Labour Court is six weeks. In *Lebowa Mineral Trust v Lebowa Granite*[166] a time period of 7 years was considered unreasonable.

4.3 *PRIOR TO CAREPHONE V MARCUS*[167]

4.3.1 CONFLICTING JUDGMENTS ON THE APPLICATION: SECTION 145 OR SECTION 158(1) (G) OF THE LRA

may- (a) determine the dispute in the manner it considers appropriate; or (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

161 See footnote 9 above for the definition of "defect".

162 It is submitted that in terms of s 145 the LC has the power to, *inter alia*, refer the matter back to the CCMA or to make another award, should it deem it appropriate. Mullins, at 16, suggests that if additional evidence has been brought to the attention of the LC or the arbitrator has erred on a material question of law, the LC may consider it appropriate to determine the dispute itself without referring it back to the CCMA.

163 S 145 (1) (a) and (b) of the LRA. The time limits prescribed by the Arbitration Act (*and consequently by the LRA)* are of importance as arbitration is designed to be expeditious and final.

164 (1999) 8 LAC.

165 (2001) 3 BLLR 337 (LC). Hereinafter referred to as "the *Cerephone case".*

166 (2002) 3 SA 20 (T).

167 (1998) 19 *ILJ* 1425 (LAC). Hereinafter referred to as "the *Cerephone* case". See also Commentary on *Cerephone* by Whitear-Nel (1999) 20 *ILJ* 1483; Willies "Has the Labour Court wide or narrow powers to review awards of the CCMA?" 8 5 *LLN.*

The application of these two provisions has on numerous occasions aroused different conflicting opinions. In terms of section 158 (1) (g) the Labour Court may review any act in terms of the LRA on "any grounds that are permissible in law.[168] As noted in *Johannesburg Consolidated Investment Hira v Booysen,*[169] these grounds are normally common law grounds amplified by the principles spelt out in the *Carephone* case discussed below. Similarly, the court held in *National Bargaining Council for the Clothing Manufacturing Industry v J 'n B Sportswear*[170] that such grounds includes a material error of law, for instance where an arbitrator misconstrues the true nature of the dispute hence depriving the parties of a fair trial of the issues. This is also consistent with the approach adopted in *Wanenburg v Motor Industry Bargaining Council,*[171] where the court held that except for arbitration awards, all rulings, decisions and conduct of the CCMA and Bargaining Councils are reviewable in terms of section 158 (1)(g).

Subsequent to its amendment, section 158 (1) (g) provided that:

> "The Labour Court may, *despite* section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law."

Afterwards, the above provision was amended and the word "despite" was replaced with "subject to".[172] It is now generally accepted that proceedings for the review of arbitration awards must be instituted in terms of section 145 of the LRA. In fact, since the amendment took effect it is the interpretation and application of section 145 that has become the topic of much debate. As a result, the question to be asked is now whether the decision arrived at by the arbitrator was one that no reasonable arbitrator could have come to and if yes, the decision must be set aside.[173]

Despite the amendment of section 158(1) (g), the wording of this section still continues to ensue debates as to whether or not the broader grounds of review provided for in

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168 For commentary see Land and Van Niekerk Revision service 2, 1999 A–39.

169 (1992) 4 SA 69 (A).

170 (2011) 32 ILJ 1950 (LC). See also *Solidarity and another v Public Health and Welfare Sectoral Bargaining Council and others* (2013) 34 ILJ 1503 (LAC).

171 (2001) 22 *ILJ* 242 (LC): See also *Portnet v La Grange* (1999) 20 *ILJ* 916 (LC).

172 Substituted by s 36(b) of Act 12 of 2002.

173 This was the test clearly explained in the *Sidumo* case below.

this section had the effect of nullifying the narrower grounds of review applicable to arbitration awards in terms of section 145(2). Notably, in *Edgars Stores v Director CCMA*[174] the applicant sought to persuade the court that a commissioner's ruling that the employer had unfairly dismissed an employee for taking leave without authorization was unreasonable and hence reviewable. The court held that the review of arbitration awards of the CCMA should be on the narrow grounds provided for in section 145(2) of the LRA and that section 158(1) (g) was not applicable.[175] Likewise, the court was faced with a similar challenge in *Kynoch Feeds v CCMA*[176] although this time against a decision of a commissioner that the retrenchment of an employee was unfair. The court conceded that the *Edgars case* was wrongly decided for the simple reason that arbitration awards can be reviewed on the wider grounds for review contained in section 158(1) (g).[177] Then *Ntshangane v Speciality Metals*[178] followed and here the court again endorsed the formulation of section 158(1)(g) and held that "the correct interpretation of section 158(1)(g) should be that in addition to the court's review power of the CCMA arbitration awards, the court is also empowered to review anything else performed in terms of the Act."[179]

Conversely, in other decisions, the Labour Court took the view that the words "despite" in section 158(1)(g) do not limit the review of CCMA arbitration awards to section 145 thus allowing reviews in terms of section 158(1)(g). In *Standard Bank v CCMA,*[180] for example, the court reviewed and set aside the commissioner's award in terms of section 158(1) (g). The court emphasized that where a commissioner misconstrues oral or documentary evidence or has ignored or misapplied relevant legal principles in an arbitration to an extent that it is inappropriate or unreasonable, the commissioner had failed in the task assigned under the LRA. For this reason, the court added, an aggrieved party alleging an unjustifiable award would not be without a remedy,

174 (1998) 1 BLLR 34 (LC).

175 41G–H.

176 (1998) 4 *BLLR* 384 (LC).

177 Par 46. ee also *Deutsch v Pinto* 1013 D–F, where Landman AJ held that "[i]t seems that having regard to the right in s 33 of the Constitution … to lawful and fair administrative action that the wider grounds may be relied upon."

178 1998 3 BLLR 305 (LC).

179 Par 41.

180 (1998) 19 *ILJ* 903 (LC) 907 B–C.

notwithstanding the narrower ambit of the grounds contained in section 145.[181] Under those circumstances, the court emphasized that this remedy was a review and the ambit of the review must necessarily be correspondingly broad. The court found that this was precisely what section 158(1) (g) contemplated when reviewing awards of the CCMA.[182] Equally, a similar approach was adopted in *Shoprite v CCMA*[183] and *Rustenburg Platinum Mines v CCMA*, where the court found that review of a CCMA arbitration award may be founded on the provisions of s 158(1)(g) and that the words "despite" section 158 means "notwithstanding the provisions of s 145."[184]

4.4 *POST CAREPHONE V MARCUS*

The debate discussed above was settled in the *Carephone* case and also gathered enormous support in *Shoprite Checkers v Ramdaw.*[185] In the *Carephone* case, the court formulated a clearer test as to when either sections 145 or 158(1) (g) applies to reviews of CCMA arbitration awards. The issue in this case was that the CCMA had arbitrated a claim for unfair dismissal by nine employees. The Employer applied for a postponement as the attorney who was to deal with the arbitration was not available. The application was denied because there was no explanation as to why alternate arrangements had not been made for legal representation.

4.4.1 SUMMARY OF FACTS

Due to the importance of this landmark case on review of arbitration awards, it is wise to set a cursory look at the facts in order to see how the court reached its decision. The employer was ordered to pay compensation to the employees after arbitration at the CCMA. The employer's counsel brought an application for the employer to be legally represented at the arbitration and for a postponement of the arbitration. Legal representation was granted, but not a postponement, except to the extent that the commissioner allowed the matter to stand down until the next day. An associate from

181 (1998) 19 *ILJ* 903 (LC) 907 H–I.

182 (1998) 19 *ILJ* 903 (LC) 905 F.

183 (1998) 19 ILJ 892 (LC).

184 898 D–E.

185 (2001) 22 *ILJ* 1575 (LAC). The question in this case was whether the *carephone*-test was correct.

the employer's attorneys appeared the next day as counsel was not available. An application for legal representation for the rest of the arbitration proceedings was granted, but a further application for a postponement was refused. To assist the employer, the commissioner let the matter stand down till 13:00 on 19 June 1997. On that day, a professional assistant from the firm of attorneys appeared, once again requesting a postponement. It was refused. The commissioner warned the legal representative and Mr Isaacs, the employer's chief executive officer, that the proceedings would continue in their absence if they left. They nevertheless did, Isaacs proceeded to a medical appointment made for that afternoon. Before leaving, the professional assistant allegedly informed the commissioner that Isaacs reserved his right to return after his medical appointment and that the employer intended launching interdict proceedings to prevent the continuation of proceedings in Isaacs's absence. Despite this the commissioner proceeded and finalised proceedings at 22:00 that evening by making an arbitration award in the employees' favour. The award was taken on review on the grounds that the Commissioner's refusal to grant a postponement.

4.4.2 COURT DECISION

The court noted that two of the provisions deal with the review of specific kinds of functions that is section 145 with arbitration under the auspices of the commission and s 158(1)(h) with the review of actions of the state as employer. The court emphasised that in terms of s 34 of the Constitution everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. The LRA created both the CCMA and the Labour Court to resolve labour disputes, but made the nature and extent of their respective competencies quite different.

Further, the court held that, although the CCMA is an independent body with jurisdiction in all the provinces, it was not created as a court of law. It thus has no judicial authority in constitutional terms. It is, nevertheless, a public institution created by statute. When it conducts arbitration, this involves the exercise of a public power and function, because it resolves disputes between parties in terms of the LRA without needing the consent of the parties. This makes the commission an organ of state in terms of the Constitution. The court held that the CCMA is not part of the judicial

system, but performs an administrative action. As a result, the Constitution prescribes that;

> "the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons for the award must be given publicly and in writing; that the award must be justifiable in terms of those reasons; and that it must be consistent with the fundamental right to fair labour practices".

The labour court on the other hand is a court of law with judicial authority and it may review the exercise of functions by the commission.

Where a commissioner exceeds the constitutional limitations on his or her powers on arbitration, this can be reviewed by the Labour Court under s 145. The court then held that the word "despite" in s 158(1)(g) should be read as "subject to". The extended scope of review of administrative action includes a requirement that administrative action must be justifiable in relation to the reasons given for it. When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness. In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" of the matter in some way or another. Therefore as

> "long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order".

In this case, the court held that the granting of a postponement is not a matter of right. The Commissioner exercises his discretion and this must be done in a judicial manner on a reasonable explanation for the need to postpone. The Commissioner's rejection of the stated need for a postponement as being inadequate, because there was no explanation of the steps taken from 12–17 June 1997 to obtain other legal representation, was well founded. The decision not to postpone and to continue the proceedings are rationally justifiable in terms of the reasons given for the decision by the commissioner. The court also found that the question to be asked should be

whether there is "a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at".[186]

As a result, the ruling of the Commissioner was not reviewable and the appeal was dismissed with costs. The labour court held that the facts did not disclose proper grounds for review.

4.5 PRIVATE ARBITRATION

4.1.1 SECTION 145 OF THE LRA AND SECTION 33 OF THE ARBITRATION ACT[187] APPLICATION

Generally, the application of the grounds set in the Arbitration Act is limited. The Constitutional Court has held that reviews of the outcome of compulsory awards may not be reviewed and set aside unless the award is one that a reasonable arbitrator could not have made.[188]

4.1.2 *NUM V GROGAN*[189]

In *NUM v Grogan,* the parties had agreed to arbitrate the dispute by private arbitration in terms of the Arbitration Act following the dismissal of 35 employees. The LAC found that only the grounds referred to in section 33 of the Arbitration Act[190] were applicable. Further, the court held that the review test formulated in *Sidumo* does not apply to private arbitration awards. At the arbitration, the arbitrator, John Grogan found that the terminations of employment were both procedurally and substantively fair. The matter was then taken on review to the Labour Court but subsequently was turned down.

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186 Par 1435 E. See also Grogan "'Justifiability' is the key" 1999 14 *Employment Law* 4. See Practice in Labour Courts A–30 1999.

187 Act 42 of 1965.

188 See the test formulated in the *Sidumo v Rustenburg Platinum Mines* 119 below.

189 [2010] ZALAC 3.

190 "(a)Where any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or(b) Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings; or (c) Where any arbitration tribunal has exceeded its powers; and (d) Where an award has been improperly obtained."

In the LAC, it was maintained that arbitration awards delivered pursuant to private arbitrations in cases of labour disputes may only be reviewed by the Labour Court in the exercise of its powers and grounds laid down in section 33 of the Arbitration Act. The LAC held further that if parties were to be allowed to specify what the grounds of review should be since;

> "it would amount to a dictation to the reviewing court (the Labour Court) to exercise powers of review not granted to it by statute, especially because the Labour Court has no common law powers of review".

The LAC consulted the leading cases on the grounds of review of CCMA awards particularly as expressed in the *Cerephone* case above regarding the irrationality of the award as endorsed in the *Shoprite Checkers* and that of the unreasonableness of CCMA awards under section 145 of the LRA by the Court in *Sidumo.* The LAC concluded that it would not matter whether one used the standard of review applicable to CCMA awards as stipulated in section 145 of the LRA or one used the standard of review contained in section 33 of the Arbitration Act since the result would be the same. However, the court emphasized that since this was a review of a private arbitration award, it can only be reviewed on the grounds set out in sec 33 of the Arbitration Act and not in terms of the grounds set out in section 145 of the LRA as extended by the Court in *Carephone*, *Shoprite Checkers* and in *Sidumo*. The court added that the case would have been different if there was a provision of the LRA which conferred upon the Labour Court the power to review such an award on any grounds upon which the parties to a dispute may agree. The LAC finally found that the award established no gross irregularity and that no misconduct on the part of the arbitrator had been shown.[191]

4.2.3 *JOHN JOHANNES BUYS V COMMISSIONER JOHN MYBURGH*[192]

Again, in this case, a review of private arbitration award in terms of Section 33 of the Arbitration Act was referred. The Applicant was charged and later dismissed following

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191 Para (41).

192 JR 815/12 not reportable (30 July 2013)

allegations of misconduct relating to contravention of various clauses of the employment contract. The dispute was referred to private arbitration.

On review, the Applicant contended that the Arbitrator committed gross misconduct in the execution of his duties as an arbitrator in that he misconstrued the issues in finding that it was probable and that the Arbitrator committed an irregularity in that he found a breakdown of the trust relationship where no evidence was placed before him of such a breakdown. As it was highlighted in *NUM v Grogan NO* above, the Arbitration Act identifies four grounds on which an arbitration award may be set aside.[193] According to the court, these grounds must be construed in the context of the provisions of section 28 which provide that an arbitrator's award is final and is not subject to appeal to the Court.[194] Accordingly, the Court found in relation to the ground of review raised that there was no merit and hence the applicant's argument was dismissed.

4.6 REVIEW IN TERMS OF *SIDUMO V RUSTENBURG PLATINUM MINES*[195] AND PAJA

Close to 10 years after *Carephone* in the influential decision of *Sidumo,* the Supreme Court of Appeal revised the test employed in *Carephone* in accordance with s 33 of the Constitution.[196] It was held that: "…section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star.*[197] Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?"[198] Thus the focus was largely on the outcome of the decision, as opposed to the manner in which the arbitrator arrived at the outcome.[199]

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193 S 33(1) of the Arbitration Act. See footnote 4 above.

194 S 28 of the Arbitration Act provides: Unless the arbitration agreement provides otherwise an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.

195 (2008) 2 SA (CC).

196 Which provides for the right to just administrative action which is lawful, reasonable and procedurally fair; s 33 of the Constitution of the Republic of South Africa 1996.

197 (2004) 7 BCLR 687 (CC).

198 *Sidumo* par 110. See also Le Roux and Young "The Role of Reasonableness in Dismissal: The Constitutional Court looks at Who has the Final Say" 2007 17(3) *Contemporary Labour Law* 21, who submit that reasonableness is an over-arching standard of review, rather than an independent ground for review; Le Roux and Young 30.

199 This approach presupposes that arbitration awards based on defective reasoning by an arbitrator will still pass the muster required in reviews, provided that the result is one that a reasonable arbitrator could have reached (own emphasis).

Both the meaning of the reasonableness standard and its proper application remain unclear and courts have frequently offered inconsistent interpretations thereof. The principal area of controversy is the relationship between reasonableness and the section 145 grounds of review.[200] In terms of *Sidumo*, section 145 of the LRA has been suffused by the standard of reasonableness, consistently with the right to just administrative action found in section 33 of the Constitution.[201] The verdict in this case re-emphasized that the decision to dismiss employees lies primarily with the employer. Commissioners must exercise caution when determining whether a workplace penalty imposed by an employer is fair. In determining whether a dismissal is fair, a commissioner need not be persuaded that dismissal was the only fair penalty. The statute requires only that the employer establish that it was a fair penalty. The fact that the commissioner may think that a different penalty would also be fair does not justify setting aside the penalty.

Mr Sidumo who worked as a security officer was dismissed from his job. His dismissal was based on the ground that he had neglected to conduct a proper search of fellow employees when entering and leaving the mine. He successfully challenged his dismissal in terms of the LRA at the commission. The commissioner found the dismissal to be procedurally fair, but substantively unfair. He reinstated Sidumo with three months' compensation, subject to a written warning valid for six months.

At the CCMA, the commissioner found that the penalty of dismissal to be inappropriate based on the following reasons: that the appellant had suffered no losses, the violation of the rule was unintentional or a mistake, as argued by the employee, the level of honesty of the employee was not considered and the type of offence committed by the employee did not go to the heart of the employment relationship, which is trust. Unsatisfied with the commissioner's decision, the appellant took the matter on review to the Labour Court. He contended before the Labour Court that the award was not justifiable in relation to the reasons given for it, in that no rational link existed between the evidence before the commissioner and the factual conclusions that were crucial to

200 Myburgh "*Sidumo v Rustplats*: How have the courts dealt with it?" 2009 30 *ILJ* 1; Myburgh 2010 31 *ILJ* 1; Myburgh "Reviewing the Review Test: Recent Judgments and Developments" (2011) 32 *ILJ* 1497 and the judgments cited in each.

201 The Constitution of the Republic of South Africa, 1996.

the award. The appellant also argued that the finding that the misconduct did not go to the heart of the relationship was irrational. The Labour Court declined the appellant's review application, labelling the conduct of Sidumo as poor performance rather than misconduct. At best for the appellant, there had been poor performance or laziness, which was not the type of misconduct which justifies dismissal without prior warning for a first offence after 15 years of service.

Subsequently, the dispute was referred to the Labour Appeal Court.[202] At this point, the LAC was more critical of the commissioner's finding, expressly rejecting three of the four grounds on which the finding was based. Despite finding at least three of the commissioner's grounds for reinstating Sidumo wanting, the court nonetheless declined to intervene. It held that had these three reasons been the sole basis of the award, it would have been unjustifiable. However, there were other reasons; the commissioner also relied on the Code of Good Practice annexed to the LRA, which provides that it is inappropriate to dismiss an employee for a first offence unless the misconduct is serious and of such gravity as to make a continued employment relationship intolerable. The court noted that when the LRA came into operation,[203] the interim Constitution[204] guaranteed every person to "administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened".[205]

Turning then to PAJA, this Act significantly expanded the ground of review contained in section 145 of the LRA. In particular, PAJA empowers a court to review an administrative action[206] if the action itself is not rationally connected to "the information before the administrator or the reasons given for it by the administrator."[207] It has been noted that many a times PAJA and the LRA intersect. On the one hand, PAJA regulates the administrative actions particularly the conduct of statutory organs. On the other

202 Hereinafter referred to as "the LAC".

203 The LRA came into operation in November 11 1996.

204 Act 200 of 1993.

205 S 24 provides for the fundamental right to administrative justice.

206 Under s 1 of PAJA, an "administrative action" is defined in PAJA as "any decision taken or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution or provincial constitution or exercising public powers or function it terms of any legislation".

207 S 6(2)(f)(ii) of the PAJA.

hand, the LRA regulates the actions of the State in its capacity as the employer and as such many decisions taken by the State in the latter role constitute administrative action. Similarly, in *PSA obo Hascke v MEC for Agriculture*[208] the court highlighted that the most drastic difference between PAJA and the LRA lies in the different standards of review required by the two acts; the grounds of review under section 145 are misconduct by the commissioner, commission of a gross irregularity, acting *ultra vires* and improper obtaining of an award.

Bearing in mind the applicability of the PAJA, the Supreme Court of Appeal found that a commissioner's arbitral decision undoubtedly constitutes administrative action. In the court's view, the codification purpose of Section 6[209] incorporated the grounds of review in Section 145 of the LRA. Importantly, the court was of the opinion that the constitutional purpose of the PAJA must be taken to override Section 145's more constrictive formulation pertaining to the review of arbitration awards by the commission.

Applying the test of review in *Carephone v Marcus* above, the Supreme Court of Appeal noted that the LAC had not applied the correct test; nor had it referred to the decision in *Carephone* or to the PAJA. Instead, the Supreme Court of Appeal noted that the LAC had asked whether considerations existed that were capable of supporting his ruling. The LAC's approach in this matter had been more like an appeal

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208 [2004] 8 BLLR 822 (LC).

209 Grounds for review are set out in s 6(2) of PAJA. It provides: "(2) A court or tribunal has the power to judicially review an administrative action if— (*a*) the administrator who took it— (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias; (*b*) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (*c*) the action was procedurally unfair; (*d*) the action was materially influenced by an error of law; (*e*) the action was taken— (i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or (vi) arbitrarily or capriciously; (f) the action itself— (i) contravenes a law or is not authorised by the empowering provision; or (ii) is not rationally connected to— (*aa*) the purpose for which it was taken; (*bb*) the purpose of the empowering provision; (*cc*) the information before the administrator; or (*dd*) the reasons given for it by the administrator; (*g*) the action concerned consists of a failure to take a decision; (*h*) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or (*i*) the action is otherwise unconstitutional or unlawful."

as opposed to a review. Further, the Supreme Court of Appeal emphasized that the question on review was not whether the record revealed relevant considerations that were capable of justifying the outcome. That test applies when a court hears an appeal. In a review, the question is whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and the way in which the decision-maker came to the challenged conclusion.

Under the PAJA, the merits always intrude to some extent, since the court must examine the connection between the decision and the reason the decision-maker gives for it, and determine whether the connection is rational. This task can never be performed without taking some account of the substantive merits of the decision. On this approach, the Supreme Court of Appeal held that the commissioner's decision was not rationally connected to the reasons as a whole and, accordingly, could not provide a rational connection to a sustainable outcome. Therefore, the commissioner's decision ought to have been reviewed and set aside.

Turning to the question of penalties, the Supreme Court of Appeal held that commissioners are not vested with the discretion to impose a penalty in the case of a workplace incapacity or misconduct. The discretion belongs in the first instance to the employer. Commissioners enjoy no discretion in relation to penalties, but have the duty to determine whether the employer's penalty was fair.

The Constitutional Court was called upon to establish whether the SCA was correct in finding that CCMA arbitrations in terms of the LRA constitutes administrative action under the PAJA, having the effect that its decisions are subject to the PAJA standard of review, including being reviewable if not rationally connected to the information before the commissioner and the reasons for it.[210] The Constitutional Court unanimously agreed with the Supreme Court of Appeal's finding that CCMA commissioners exercise administrative action in conducting arbitration proceedings under the LRA.[211] Further, the court held that the CCMA is not a court of law, and should not be treated as one because commissioners are empowered in terms of

210 Par 1.

211 Par 88.

section 138(1) of the LRA to conduct arbitrations in any manner they consider appropriate to determine the disputes fairly and quickly, with the minimum legal formalities. However, the court reasoned that the PAJA is not the exclusive legislative basis for review hence section 145 of the LRA constitutes national legislation in respect of administrative action within the specialised labour law sphere[212]

The Constitutional Court consequently found that, although PAJA codified the common law grounds of review of administrative action, PAJA could not be regarded as the exclusive statutory basis for administrative review. The court found it important in this regard that section 145 of the LRA was purposefully designed, as was the entire dispute resolution framework of the LRA. The legislature, in the court's view, clearly intended (in particular when enacting section 157(1) of the LRA that the Labour Court should, subject to the Constitution, have exclusive jurisdiction in respect of labour matters. The court determined that if PAJA were to apply to the review of CCMA decisions, section 6 of PAJA would not allow for the intended exclusivity of the Labour Court, thus enabling the High Courts to review CCMA arbitrations – in the process providing litigants with an unacceptable platform for forum-shopping. The court's reasoning meant that the narrower review grounds contained in section 145 of the LRA had to take precedence over the *prima facie* wider grounds contained in PAJA; especially because of section 210 the LRA requires that:

> "If any conflict, relating to the matters dealt with in this Act, arise between this Act and the provisions of any other law save the Constitution or any Act *expressly* amending this Act, the provisions of this Act will prevail."

The court therefore concluded that whilst the PAJA provided for the review of all administrative action, Navsa AJ (writing for the majority of the court) found its provisions inapplicable to CCMA arbitration awards. He added that section 145 of the LRA had been purposefully designed to promote the expeditious resolution of labour disputes, and providing for review in terms of the PAJA would run contrary to this

212 Par 89–90.

purpose.[213] Instead, Navsa AJ held that "the reasonableness standard should now suffuse section 145 of the LRA.[214]

4.7 *HERHOLDT V NEDBANK*[215]

At the heart of the debate was the question of to what extent the Labour Court should be able to overturn CCMA awards and rulings. The LAC had to consider whether the review by the Labour Court was correct when it set aside an arbitration award after finding that a latent process linked irregularity which had prevented a fair trial of the issues. Herholdt was employed as a financial broker by Nedbank. He was appointed as a beneficiary in his dying client's will. He failed to disclose this to his employer Nedbank, despite a duty to do so in terms of Nedbank's conflict of interest policy. As a consequence, Herholdt was dismissed as his conduct was considered dishonesty. Then, Herholdt referred the matter to the CCMA for an unfair dismissal which found him not guilty of the charge and was reinstated. Nedbank applied for a review of the process to the Labour Court arguing that the arbitrator misconstrued evidence and hence the decision reached was such that a reasonable decision maker could not have reached. The Labour Court dismissed the review application finding that Herholdt's dismissal was fair.

However, Herholdt appealed this decision to the LAC. The LAC concurred with the Labour Court's decision and the appeal was dismissed. The LAC emphasized that a commissioner has a duty to take into account all relevant and material facts and issues and a failure to do so would be a breach of his/her mandate and hence it will constitute a gross irregularity in the conduct of the arbitration proceedings. Further, the commissioner would have unreasonably prevented the aggrieved party from having its case fully and fairly determined.[216] A party in such a case is therefore likely to be

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213 *Sidumo* par 94. In O'Regan J's view: "As the Labour Relations Act already provides for the scrutiny on review of decisions of the CCMA by the Labour Court, no further delay will be caused by that scrutiny being on the basis of the Constitutional standards established in section 33." See also *Sidumo* par 140.

214 *Sidumo* par 106.

215 *Supra*.

216 *Herholdt v Nedbank Limited* (2012) 23 *ILJ* 1789 (LAC). See also Naidoo "'Grossly irregular' to reduce the Sidumo test" 2013 *De Rebus* 59. See also Myburgh "The Test for Review of CCMA Arbitration Awards: An Update" 2013 23 *Contemporary Labour Law* 31 32.

prejudiced and that decision should be set aside. This reasoning was also endorsed by the court in the *Southern Sun Hotels Interest v CCMA.*[217]

With regards to the issue of unreasonableness, the court highlighted that two types of unreasonableness in the context of a reviewable award exist. These are dialectical or process related unreasonableness and substantive unreasonableness. According to Myburgh substantive unreasonableness is "an unreasonable result"[218] that may be put to the test formulated in the *Sidumo* case[219] as that which may fall within a range of reasonableness. When mention is made of process related unreasonableness, this is where a Commissioner fails to have regard to material facts which will constitute a gross irregularity in the conduct of the arbitration proceedings.[220] This is also consonant with what the court held in *Gaga v Anglo Platinum.*[221] The matter went on appeal to the Supreme Court of Appeal.[222] The question before the SCA was whether the LAC had unduly relaxed the standard and test of CCMA awards on review by introducing "latent irregularities"[223] and "dialectical unreasonableness" as alternative and/or further considerations when reviewing awards, as compared to the test held by the Constitutional Court in *Sidumo.* Essentially, the SCA found that indeed the LAC had erred in doing the above. After the SCA considered the test articulated in the *Sidumo* case, it found that a court on review is tasked with deciding whether or not the decision of the arbitrator is one that a reasonable decision maker could not have

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217 (2009) 11 BLLR 1128. Also see *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 *ILJ* 1381 (LAC); [2012] 7 BLLR 649 (LAC); and *Gaga v Anglo Platinum Ltd and Others* (2012) 33 *ILJ* 329 (LAC). In each case aforementioned, the LAC either set aside or confirmed the setting aside of the award on review predominantly on the basis of process-related grounds of review.

218 Myburgh 2013 23 *Contemporary Labour Law* 33. See also *Herholdt v Nedbank Ltd supra* par 39.

219 The test for review is whether the decision is one that a reasonable decision maker could not reach as well as the factors outlined in s 145. See also *Ehrke v Standard Bank of SA and Others supra* par 19 B,C–D; See also *Fidelity Cash Management Service v CCMA and Others* (2008) 29 *ILJ* 964 (LAC); also reported at [2008] 3 *BLLR* 197 (LAC).

220 Myburgh 2013 23 *Contemporary Labour Law* 31 32.in other words, it is an unreasonableness stemming from the process of reasoning of the arbitrator. See also Adv Nel on Employment Law "RESTATEMENT OF THE TEST IN REVIEWING ARBITRATION AWARDS" 2013-09-06 in Uncategorized: dialectal*, Herhold v Nedbank*, irregularity, latent defect, Nedbank, review, s 145, *Sidumo*. http://ajnel.wordpress.com/2013/09/06/restatement-of-the-test-in-reviewing-arbitration-awards/(accessed 2017-07-15).

221 [2012] 3 BLLR 285 (LAC).

222 Hereinafter referred to as "the SCA".

223 Myburgh in "*Herhold v Nedbank*" Is Sidumo test in Decline? (SASLAW GAUTENG CHAPTER SEMINAR 2012) 5 argues that latent irregularity is a process-related irregularity. See also *Abdul v Cloete* (1998) 3 BLLR 264 (CC).

reached, given the evidence before him or her.[224] According to the SCA, this test concentrate on the reasonableness of a decision arrived at as opposed to how the decision was reached.

In the same way, the court held in *Afrox Healthcare v CCMA*[225] that while the reasons for the arbitrator's findings must be examined when adopting this test, a mistake in the arbitrator's reasoning in arriving at a conclusion, is not in itself sufficient to set aside the award.[226] Besides an arbitrator's questionable line of reasoning, a reviewing court must still examine whether or not the conclusion reached by the arbitrator is not one a reasonable decision-maker could reach.[227] In this manner the Constitutional Court, in giving meaning to the purpose of the LRA,[228] chose not to distinguish between an appeal and review instead furthered the narrow scope in which to set aside awards on review. In fact, after the *Sidumo* decision, it was clear that applications to review awards could only be considered on the basis of the reasonable decision-maker test, read together with the limited grounds spelt out in section 145(2)(*a*) and (*b*) of the LRA.[229]

In examining the provisions of s 145(2)(*a*), the SCA stressed that the general rule is that a "gross irregularity" relates to the conduct of the proceedings rather than the merits of the decision. Myburgh concurs and adds that a qualification to that rule is that a "gross irregularity" is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their duties in conducting the enquiry.[230] It follows then that where the arbitrator's mandate is conferred by statute, then subject to any limitations imposed by the statute, they exercise exclusive jurisdiction over questions of fact and law."[231]

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224 Endorsed also in *Edcon Ltd v Pillemer NO and Others* (2009) 30 *ILJ* 2642 (SCA) and *Ehrke v Standard Bank of SA and Another supra* par 19 F–H.

225 (2012) 33 ILJ 1381 (LAC).

226 Par 20.

227 Par 22.

228 That is the function is to adopt a speedy and inexpensive dispute resolution system.

229 See footnote 10 above.

230 Myburgh in "*Herhold v Nedbank*" Is Sidumo test in Decline? 15.

231 "Employment Law Update" 2013 58 *De Rebus* 228.

Turning to the findings of the LAC, the SCA found that the court *a quo*'s views were in support of a *dictum* held by the minority of court in the *Sidumo* case and hence contrary to the binding views upheld by the majority on two grounds. Firstly, the LAC prescribed a lower threshold for which to interfere with an award on review, hence contrary to the reasonable decision-maker test. Secondly, the legal concept of the "reasonableness of the decision", expressed in the *Sidumo* case, was no longer a considering factor in that the existence of potential prejudice to a party, brought about by an arbitrator's reasoning was, according to the LAC, sufficient to set aside an award without further asking the question whether the decision under review nevertheless fell within a band of reasonableness.[232]

In conclusion, the SCA maintained that the position regarding the review of CCMA awards is permissible if the alleged irregularity in the proceedings falls within one of the grounds set in section 145(2)(*a*) of the LRA. As pointed out earlier, for a defect in the conduct of proceedings to amount to a gross irregularity envisioned in section 145(2)(*a*)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result.[233] Similarly, a result will only be unreasonable if it is one that a reasonable arbitrator could not reach given all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts are not in themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[234] In applying the *Sidumo* test, the SCA dismissed the appeal on grounds that the arbitrator arrived at a substantively unreasonable decision given the evidence before her.

4.8 *GOLDFIELDS MINING SOUTH AFRICA V CCMA*[235]

Subsequent to the *Herholdt* case, the reviewing of the CCMA awards and rulings of arbitrators was again tested, this time in *Goldfields Mining South Africa v CCMA.* The employee had been dismissed for allegations of misconduct. Although the arbitrator had found that the employee was in fact guilty of poor performance, the arbitrator

232 Laubscher "Employment Law Update: Employment Law" 2013 536 *De Rebus* 58–59.

233 Myburgh 2013 23 *Contemporary Labour Law*.

234 Naidoo 2013 *De Rebus* 59. See also Myburgh *Contemporary Labour Law* 36.

235 (2013) ZALAC 28.

warned that the sanction for dismissal was too harsh and ordered that the employee be reinstated.

The key question in this case was to what extent the Labour Court should be able to overturn CCMA awards and rulings. The court indicated that the approach our courts should adopt was finally decided in the *Sidumo* which largely focused on the outcome of the decision, instead of the manner in which the arbitrator arrived at the outcome.[236] Applying this test, the LAC found that the arbitrator had misconceived the nature of the enquiry, which had been to determine whether the dismissal of the employee, based on grounds of misconduct, was fair. The arbitrator committed a gross irregularity in that he incorrectly categorised the employee's conduct as poor performance, which required a different enquiry than in cases involving misconduct. Recognising that the process-related grounds of review provided for in section 145(2)(a) still refers, the LAC added that, once the procedural defect is established, the reviewing court must go a step further and satisfy itself that the defect resulted in the award being one that a reasonable arbitrator could not have reached.

The LAC held that;

> "What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated or independent of the Sidumo test. That being the case it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review."[237]

Further, the LAC reaffirmed the purpose of an arbitrator, as set out in section 138 of the LRA, to deal with the substantial merits of the dispute between parties with the minimum of legal formalities and to do so expeditiously and fairly. The relevant enquiries to make in review applications, said the LAC are the following:

> "(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate…? (iii) Did the arbitrator understand the

236 Refer to footnote 50 above.

237 (2013) ZALAC 28 par 14.

> nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) Is the arbitrator's decision one that another decision – maker could reasonably have arrived at based on the evidence?"[238]

In this regard, the LAC stated that:

> "…the arbitrator committed a gross irregularity in the conduct of the proceedings in that the conclusion arrived at was influenced by the wrong categorisation of the case. According to the court, this was not sufficient ground for the award to be reviewed and set aside. The question needs to be asked: had the categorisation of the case against the employee been misconduct as opposed to poor performance, is the arbitrator's award nonetheless one that could be arrived at by a reasonable decision maker? In my view, it is clearly not. The employee committed a serious act of misconduct…the decision arrived at by the arbitrator is not one which a reasonable – maker could reach."

The court concluded that, where an arbitrator commits misconduct in relation to his/her duties or there is a gross process-related irregularity in the arbitration, this is not in itself a sufficient ground to warrant interference by our courts on review. The irregularity must be of such a nature that it renders the decision reached unreasonable in the circumstances.

4.9 *SOUTH AFRICAN MUNICIPAL WORKERS UNION AND ANOTHER V GOVAN MBEKI LOCAL MUNICIPALITY*[239]

The crux of the matter was that the municipality contended that Ms Mdlankomo was guilty of misconduct in that she, in breach of the municipality's supply chain management policy, placed herself under a financial obligation and acted dishonestly by accepting a gift and/or favour from Live Selinge Civil Construction, a service provider of the municipality. Aggrieved by the outcome of the disciplinary enquiry, Ms Mdlankomo referred a dispute to the bargaining council contending that her dismissal was substantively unfair. Conciliation failed and the matter proceeded to arbitration. She sought to have the decision reviewed and set aside in terms of section 158(1) (g) of the LRA. She contends that the decision reached by the Commissioner is one that no reasonable decision-maker could reach. In support of the aforesaid contention, she contends *inter alia* that the "[The Commissioner's] ruling reflects that he gave

238 (2013) ZALAC 28 par 20.

239 [2013] ZALCJHB 220.

insufficient weighting to…" There is no ruling by the Commissioner, but only the award. The court took this to be an error and proceeded accordingly.

On review, the court alluded that the proper approach to be adopted by this Court in dealing with arbitration reviews is trite. It has been clearly set out in a number of decided cases, chief amongst which is the *Sidumo test.* In the final analysis, the Labour Court found that the Commissioner's decision is not one which a reasonable decision-maker could not arrive at. The Commissioner applied his mind to the evidence properly before him and he did not misconstrue evidence or take into account irrelevant evidence or fail to take into account relevant evidence. The court found no basis on which the review application was formulated. Consequently, the court set aside the award.

4.10 *RESTIN PASKA PANDA V GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC)*[240]

An application was referred in terms of Section 145 of the LRA to review and set aside an arbitration award of an arbitrator of the GPSSBC. The matter referred concerned an unfair dismissal dispute. The Labour Court reiterated the test for review in *Sidumo* and posed a question as to whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach? The court also reaffirmed the case *CUSA v Tao Ying Metal Industries*,[241] and held that:

> "…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice."

The first issue the court had to consider was whether the applicant's complaints with regard to the fact that the arbitrator preferred the evidence and case of the respondent over that of the applicant. After looking at the record, the Labour Court found that nothing could be ascertained from the record which could serve as a basis to interfere with the arbitrator having preferred any evidence by the respondent over that of the applicant. And on that ground, the court concluded that on the substantive merits of

240 (2014) JR 3273/2009 Reportable (LC) 17.

241 (2008) 29 ILJ 2461 (CC) par 134.

the matter and ultimate determination that the applicant's dismissal was substantively fair and therefore it cannot be an irregularity.

4.11 SO WHAT IS THE CURRENT LEGAL POSITION?

Overall, it is no longer good enough for employers or employees wishing to review an award based on one of the procedural defects provided for in section 145(2) (a), to only establish the existence of the defect, i.e. misconduct by an arbitrator in relation to his/her duties, a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings or the arbitrator exceeding his powers. More importantly, now is to also show in addition that the defect caused the final result of the award to be unreasonable. Thus, the two-stage test adopted by the LAC in such instances is firstly to ask; was there a section 145(2) (a) defect? And secondly if so, can the defect be said to be such that resulted in the decision reached being unreasonable (in the sense that it was one that a reasonable arbitrator could not have reached)?

4.12 CONCLUSION

While the application of section 145 and 158 of the LRA continue to raise debates, it can be expected that as time passes and review proceedings are initiated, questions will be identified that may not have been addressed herein. The wish can only be expressed that in time judicial precedent will be able to give more specific content to the broad concept of reasonableness within the context of the LRA's review provisions to such an extent that it will become trite. It has been established that parties to a dispute may review awards in dismissal disputes in terms of the narrowly defined grounds for review provided for in section 145 of the LRA. The reviewability of these awards depends much on whether the arbitration proceedings or the commissioner's process of reasoning can be described as defective in one or more of the ways contemplated by section 145(2) of the LRA set out above.

The making of arbitration awards however also constitutes administrative action that are subject to the constitutional imperatives of the right to just administrative action as contained in the 1996 Constitution and reasonableness in particular. This does however not mean that applicant on review can rely directly on section 33(1) of the

1996 Constitution or, to the extent that the PAJA has been enacted to give effect thereto, on the broader grounds of section 6(2) of PAJA to review CCMA arbitration awards on the basis of unreasonableness. On this interpretation, reasonableness as decided in *Sidumo* is a standard against which the reviewability of a decision is to be tested and it entails the Labour Court posing the question whether the decision, alleged to have been made by the commissioner as a result of the occurrence of one or more of the section 145 grounds for review, is one that a reasonable decision-maker could not reach. The focus is normally on the manner in which the commissioner came to the decision and whether the erroneous reasons are materially relevant thereto. The question will accordingly not be whether or not the reason is satisfactory or correct but whether it serves as evidence of a reviewable ground that will alone or in conjunction with other considerations be sufficiently compelling to justify an inference that the decision is unreasonable. It is not the outcome *per se* that is attacked on review and the court should not consider the record merely for the purpose of identifying reasons that are capable of sustaining the conclusions reached.

Section 33 of the Arbitration Act is virtually identical to section 145 of the LRA. By replicating section 33 in section 145, it seemed at first glance that the legislature intended the Labour Court to adopt the same strict approach when it came to reviewing arbitration awards. In the case of private arbitration awards, this Act provides for its review on grounds specified in section 33(1). Like the section 145(2) grounds for review, these grounds are also narrowly interpreted but not regarded as unconstitutional; neither is such an arbitration regarded as a specie of administrative action. The consensual nature of private arbitration serves as justification for the restraint upon interference and is the reason why the reasonable standard is not applicable to its review. Review applications must accordingly be considered only in terms of section 33 of the Arbitration Act. In considering the applicability of the PAJA, the SCA held that a commissioner's arbitral decision undoubtedly constitutes administrative action. In the court’s view, the codification purpose of Section 6 subsumed the grounds of review in section 145 of the LRA. Importantly, the court was of the opinion that the constitutional purpose of the PAJA must be taken to override section 145’s more constrictive formulation pertaining to the review of arbitration awards by the commission.

CHAPTER 5: CONCLUSION AND RECOMMENDATION

A primary aim of this study was to investigate whether the current legal position balances the interests of employer and employee in dismissal for misconduct through literature review and analysis of relevant case law. In doing so, the study was divided into five chapters. Chapter one provided an overview of the study and its grounding based on the historical relationship of employer and employee. The chapter highlighted challenges faced by employees with regards to achieving the constitutional imperative of fair labour practices in the dismissal decision. The chapter also delineated the objectives of the study, the hypotheses framed as well as the methodological approach taken to address the research objectives.

Chapter two commenced with an in-depth exploration of the ILO Conventions and provisions dealing with the right of an employee not to be unfairly dismissed. The chapter then examined provisions from the Constitution, PAJA and the LRA in particular lifting the principles that needed to obtain to satisfy the constitutional imperative. Chapter three surveyed the literature with regards to the principles of fairness and dismissal as an appropriate sanction for misconduct. Also discussed was the concept of reasonableness, and onus and standard of proof in the context of the impact on the decision to dismiss for misconduct. Thereafter, chapter three focused on the review functions of the labour court and specific developments in review. It also dealt with seminal judgments in the domain of review of dismissal for misconduct. Chapter five presents the analysis, conclusion and recommendations of the main findings of the research undertaken. The findings for the study and hypothesis are discussed drawing from all the chapters. Implications of the research and recommendations to policy makers are also presented.

Important to remember is that following the transition to the new political dispensation and the dawn of democracy in South Africa several remarkable legislations were enacted. Key amongst them was the Constitution which jealously safeguards employees against acts of unfair labour practises by the employer. The LRA which gives effect to the Constitution and to the numerous obligations acquired by South Africa by virtue of its membership of the ILO also protects this right. The advent of the Constitution also marked a shift from the old labour-relations dispensation where

employee's rights particularly right not to be unfairly dismissed was seriously limited. Arguably the current LRA depicts one of the remarkable legal transformations in the post-apartheid South Africa. It is structured in a way which brings about a wholesome change in South Africa's statutory industrial-labour system. These in turn help to level the playing field by empowering employees with numerous rights, including the right not to be unfairly dismissed.

A number of observations have been drawn from this study. Pertinent questions still linger and problems still evident even post democratic South Africa. Key amongst them is the consistent application of the principles enshrined in the Constitution. This study has noted that the current dispute resolution system does not provide enough assurance to the right to fair labour practice as provided for in the South African Constitution and PAJA. Driven by the spirit of the Constitution, the study considered the role of fairness, reasonableness and freedom from bias in the dismissal decision. The study demonstrated that these principles are often missed when determining the dismissal decision and in so doing employees constitutional rights get violated.

Another problem illuminated in this study relates to the burden of proof required in disputes relating to misconduct. The current legal position is that the employer must prove that the trust relationship has irretrievably broken down due to the conduct of the employee in order to substantiate a sanction of dismissal. Additionally, if misconduct was proven the employer still has to prove that the dismissal was procedurally and substantively fair and that dismissal was the appropriate sanction for the conduct in question. This means that the test is whether, in the event of conflicting evidence on a particular point, one version is more probable than the other. That is to say, a decision is arrived at on the balance of probabilities. Therefore, the court only requires the employer to show that there were reasonable grounds for believing that the offence was committed (rather than proving that, on a balance of probabilities, the offence was actually committed). In doing so the court significantly reduces the evidentiary burden on employers.

In fact, in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* the Labour Court held that, when determining whether an employee is guilty of misconduct, the proper test is proof on a "balance of probabilities" not that of "beyond reasonable

doubt", which is the burden of proof as it applies in our criminal law system. This study wishes to differ with this judgment by holding that the test of balance of probabilities is tipped in favour of the employer. The best way to demonstrate is by considering theft and fraud at the workplace as misconduct which results in dismissal.

That when the basis for dismissal is theft or similar criminal-like allegations against the employee, the law should raise the level of proof from the normal balance of probabilities to something closer to the criminal level of proof beyond reasonable doubt. This is simply because theft is a criminal offence and one of the most serious forms of dishonesty. Therefore, whether instituted at the CCMA Arbitration or Labour court or criminal court the employer should be called to prove beyond reasonable doubt at the disciplinary hearing. The employer should lead clear, cogent and compelling evidence, and the court is to vigorously assess the evidence to ensure qualitative certainty of the alleged theft. The employer must prove a clear (and not probabilities or likelihood) intention to steal on the part of the employee. There is a distinct possibility that for the same set of facts when heard in a criminal trial the outcome could be acquittal or not guilty because of the test being one of beyond reasonable doubt. Therefore, this study recommends that while many industries may opt not to prosecute internal theft, a criminal investigation into the theft should at least be considered. Labour institutions should shun away from this double standard of proof in application of the law for the same offence. This will in return reduce significantly the high number of reviews experienced by the Labour Court. Also, this study noted that the test of review of CCMA decisions as opposed to appeal gives undue deference to the subjective decision of the Commissioner in terms of what is considered as reasonable. In so far as dismissal is concerned the subjectivity of what is considered reasonable or unreasonable weighs against the employee. An appeal would allow for a determination of what is right or wrong rather than what is reasonable.

It was also highlighted in this study that the Master and Servant mentality that has prevailed pre-1994 continues to invade the mind of decision makers notwithstanding the constitutional imperative and case law to the contrary like *Sidumo* where the reasonable employer test was replaced by the reasonable decision maker test. The rationale for a decision that is reasonable is grounded in the Constitution as a fundamental right and is contained in the Bill of Rights. But this study has established

for instance that it seems the determination of an appropriate sanction for misconduct still remains about the application of common sense by presiding officers and a rational value judgment test. This study recommends a move from the latter and argues that a proper framework should be put in place to ensure that a delicate balance is achieved by the presiding officer in determining appropriate sanction for misconduct. This will also give credence not only to commercial reality but also to a respect for human dignity.

Further it was shown in this study that the common law has been developed through the Constitution, PAJA and the LRA to balance the interests of employer and employee. It is common understanding that fair labour practice is a substantive right of the employee. This dictates fairness in all decision making. Yet the Code makes reference to Substantive and Procedural fairness and makes provision for dismissal when there is substantive fairness without there always being procedural fairness. This study assessed whether this division of fairness in its application for the dismissal decision injures the principles of the constitution which guarantee “fair labour practice” to “everyone”. This study unravelled the inconsistency in the manner in which fairness is interpreted with a view to build a case for consistent application of the concept of fairness to be in a position to guarantee the rights enshrined in the constitution. It argues that the values underlying the principle of fairness are inextricably linked to the fundamental rights guarded by the constitution, and this right is a constitutional entitlement flowing from the joint effect of the Constitution and Administrative Law provisions as contained in PAJA.

Altogether this study submits that the primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. It is hoped that the recommendations and suggestions made herein will provide insight that will lead policy changes. At the same time, they may shape a way forward and further strengthen labour relationships between employers and rights of employees. It is further hoped that the recommendations provided in this research will stimulate and further raise awareness with the policy makers and assist them with knowledge that is helpful in improving the labour laws in the country.

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