

**THE JURIDICAL BASIS OF THE STATUTORY CLAIM FOR COMPENSATION IN  
UNFAIR DISMISSAL CASES**

**by**

**HENDRIK JOHANNES TJAART VENTER**

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**PROMOTOR: PROF BPS VAN ECK**

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## SUMMARY

A highly efficient, mass dispute resolution system has been established in South Africa with the implementation of the Labour Relations Act 66 of 1995 (hereafter “the LRA 1995”) two decades ago. The remedies of reinstatement, re-employment and compensation lie at the heart of this system. The compensation claim in terms of the LRA 1995, on which this study focuses, is related to a history of preceding common-law and statutory legal development, including the development of labour law in comparable foreign jurisdictions.

However, according to sections 193(1) and 194(1) of the LRA 1995, the determination of compensation is left to the blanket discretion of CCMA arbitrators who have to determine compensation for substantively and procedurally unfair dismissals on the basis of what they perceive to be “just and equitable in all the circumstances” of the individual case. Significantly, there are no further standards or frameworks to be found in the statute and it is not strange that questions are being asked, both in academic quarters and from the bench, about the consistency and accuracy of compensatory awards.

This dissertation comprises an analysis of the common-law action for breach of contract in unlawful dismissal cases, the statutory claim for compensation for unfair dismissal in terms of the Labour Relations Act 28 of 1956, the statutory claim for compensation for unfair dismissal in terms of the LRA 1995 and similar common-law and statutory remedies in the labour law of the United Kingdom. The objective is to form an understanding of the nature of these remedies and how it relates to the process of determining compensation. On the basis of the preceding analysis, the need for legislative review of the compensation claim in terms of the LRA 1995 is then demonstrated. Pursuant to recent case law, the jurisdictional overlap between the statutory claim and the common-law action for breach of the employment contract in unfair dismissal cases is also addressed.



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## **CHAPTER 1**

### **INTRODUCTION**

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## **1.1 Background**

It is a basic function of the law to provide a legal remedy for loss or the infringement of a right. But what is the relevance of the true juridical nature of a particular remedy in a labour law context? The answer is of vital importance because it is assumed in this study that, only when one correctly identifies the nature of the action, can the compensation payable in terms of such remedy can be determined more accurately on the basis of justifiable considerations and methods of calculation. Moreover, there are also other legal aspects such as contributory fault, causation, foreseeability and mitigation of damages which depend on the legal basis of a particular legal remedy.

For the purposes of this study, the main focus will be on compensation fixed in terms of the statutory remedy provided in sections 193(1)(c) and 194(1) of the Labour Relations Act 66 of 1995<sup>1</sup> which vests every CCMA<sup>2</sup> arbitrator or Labour Court judge with the discretion to order employers to pay compensation to employees<sup>3</sup> in cases of unfair dismissals. This remedy is an alternative to an order of reinstatement<sup>4</sup> or re-employment<sup>5</sup> and which are the preferred remedies for unfair dismissal.<sup>6</sup>

Section 194(1) of the LRA 1995 sets out the measure of compensation:

The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the

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<sup>1</sup> Hereafter "the LRA 1995".

<sup>2</sup> "CCMA" is an abbreviation for the Commission for Conciliation, Mediation and Arbitration. The reference to the CCMA evidently includes a reference to bargaining councils.

<sup>3</sup> S 158(1)(a)(v) provides that the Court may "award compensation in any circumstances contemplated in this Act."

<sup>4</sup> S 193(1)(a) of the LRA 1995.

<sup>5</sup> S 193(1)(b) of the LRA 1995.

<sup>6</sup> S 193(2) of the LRA 1995.

circumstances, but may not be more than the equivalent of 12 months<sup>7</sup> remuneration calculated at the employee's rate of remuneration on the date of dismissal.

It is significant that section 194(1) confers a blanket discretion on the arbitrator/judge without any framework or measures except the vague “fairness standard”. The section then merely lays down a maximum of twelve months’ remuneration limitation.

It is understandable that the drafters of the LRA 1995 may have considered that statutory over-prescriptiveness could obstruct the development of responsive adjudication under these statutory provisions and that arbitrators/judges should be afforded a fair opportunity to develop our law on compensation in a dynamic and practical manner. But is this motivation still appropriate 20 years onwards where the CCMA and the Labour Court have become institutionalised and a substantial body of case law has already been developed?

Generally, the subject of compensation in unfair dismissal cases enjoys very little attention in case law and academic writing. Moreover, it is pointed out by writers and the courts that compensation is often awarded in CCMA arbitrations without any explanation as to how it is calculated and also that compensation awards show little consistency.<sup>8</sup> Similarly, it is not clear what the nature of the action is on which the employee’s claim for compensation is based.

## 1.2 Research objective

The statutory compensation claim for unfair dismissal in sections 193(1) and 194(1) of the LRA 1995 is a product of preceding common-law and statutory legal development (including the labour legislation of the United Kingdom).<sup>9</sup> The research objective is therefore to examine the common-law action for unlawful dismissal, the statutory claim for unfair dismissal in terms of the Labour Relations Act 28 of 1956<sup>10</sup>, the statutory claim for unfair dismissal in terms of the LRA 1995 and similar common-law and statutory remedies in the labour law of the UK, in order to reveal more about the nature of these remedies and the determination of compensation. Secondly, the need for the legislative reform of the statutory claim in terms of the

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<sup>7</sup> In the case of so-called “automatic unfair dismissals” (s 187 of the LRA 1995) the limit is 24 months’ remuneration.

<sup>8</sup> See Chapter 4.

<sup>9</sup> Hereafter “the UK”.

<sup>10</sup> Hereafter the “LRA 1956”.

LRA 1995 will be shown, especially with a view to devising appropriate frameworks which may contribute to greater consistency and precision in the quantification of compensation.

### **1.3 Significance of the research**

A massive number of disputes are referred annually to the CCMA<sup>11</sup> and the Labour Court. Legal certainty and consistency are fundamental to the integrity and efficient functioning of the dispute resolution system implemented by the LRA 1995. This calls for a scientifically justifiable basis for the calculation of compensatory awards to ensure fairness to unfairly dismissed employees. Critical studies and innovative law reform proposals are most relevant to any future review of this dispute resolution system.

### **1.4 Research methodology**

The research issue will be addressed by means of a critical literature study. The sources are textbooks, academic writing, case law and legislation. The research entails the review and analysis of legal material on the law of compensation in cases of unlawful dismissals according to the common-law and unfair dismissals in terms of the statutory dispute resolution system created by the LRA 1956 and its successor, the LRA 1995. The research will further include legal comparison and for which purpose the labour law of the UK<sup>12</sup> has been selected because of its close historical connection to the development of our own labour law and because it offers different compensatory models which are highly relevant to any future review and improvement of the LRA 1995.

### **1.5 Structure of chapters**

The research commences in Chapter 2 with a discussion of our common law with reference to the essential features of the common-law contract of employment and the common-law action for breach of contract. This is followed by a discussion whether, in view of the Supreme Court of Appeal's judgement in *SA Maritime Safety*

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<sup>11</sup> The CCMA's case load in the 2014 year amounted to 171 854 cases (<http://www.ccma.org.za/UploadedMedia/CCMA%20Annual%20Performance%20Plan%202015-2016%20Signed.pdf> accessed on 22 Nov 2015).

<sup>12</sup> The reference to "UK law" actually means the law as applicable to England and Wales.



*Authority v McKenzie*,<sup>13</sup> an aggrieved employee could still avail himself/herself of either the statutory claim in terms of the LRA 1995 or the common-law action.

Chapter 3 concerns the statutory action in terms of the LRA 1956, the immediate precursor of the LRA 1995. The manner in which the dispute resolution system functioned in terms of the LRA 1956 is explained. Four possible juridical bases of the statutory claim are discussed namely contract, delict, a unique statutory action and punitive damages. The important cases referred to include *Ferodo v De Ruiter*.<sup>14</sup>

Chapter 4 is devoted to the statutory claim under the LRA 1995. The functioning of its dispute resolution system is explained. The possible juridical bases of this statutory claim is examined. Reference is made to the factors to be considered in awarding compensation, the differences between the statutory claim and the common-law action and the overlapping of jurisdiction with reference to sections 77(3) and 77A(e) of the Basic Conditions of Employment Act 75 of 1997 and section 157(2) of the LRA 1995.

In Chapter 5 the attention shifts to the labour law of the UK. There is an overview of the common law case law including the often quoted *Johnson v Unisys Ltd*<sup>15</sup> and which reveals similarities with our own law. Compensation in terms of the UK statutory law claim for unfair dismissal is then studied. Important differences between the UK law and the LRA 1995 on the structuring of compensation will also emerge.

The final chapter comprises a synopsis of the research findings and recommendations are then made for the review and improvement of the provisions in the LRA 1995 for the compensation claim in dismissal cases with a view to devise an advanced, scientific model that could improve legal certainty and greater consistency and accuracy in the framing of compensatory awards.

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<sup>13</sup> (2010) 31 *ILJ* 529 (SCA).

<sup>14</sup> (1993) 14 *ILJ* 974 (LAC).

<sup>15</sup> [2001] 2 All ER 801 (HL).

## CHAPTER 2

### THE COMMON-LAW CONTRACT OF EMPLOYMENT

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#### **2.1 Introduction**

The action for breach of contract is the appropriate common law starting point when studying the statutory claim for compensation under the Labour Relations Act 66 of 1995.<sup>16</sup> Moreover, the common law is still the “default” source of law<sup>17</sup> where statutory law or collective agreements do not exhaustively govern any particular aspect of employment law.<sup>18</sup> This is reinforced by the presumption of statutory interpretation that the legislature is deemed not to have intended to interfere with the common law. In order to properly understand the common law and the contract of employment, this chapter will explain the features of the employment contract, the action for breach of contract and conclude with the question whether this contractual

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<sup>16</sup> Hereafter “the LRA 1995”.

<sup>17</sup> As in every other field of law, the sources of labour law are international law, constitutional law, the common law and statutory law.

<sup>18</sup> Le Roux *Ph D Thesis 2*; Vettori (2011) *Stell L R* 177.

action has been abrogated by the statutory claim in terms of the LRA<sup>19</sup> in dismissal cases.

## 2.2 Origin of the common-law contract of employment

The historical development of the contract of employment can be traced back to Roman law contract of *locatio conductio operis*<sup>20</sup> a contract pertaining to the rendering of services to another person.<sup>21</sup> In Roman Dutch Law, the rights and obligations of the parties were determined largely by statutory instruments.<sup>22</sup> The position was very similar under English master and servant law. Consequently, employees derived their rights from their unequal legal “status” rather than being equal contractual parties.<sup>23</sup>

The pendulum however swung towards freedom of contract as primary principle<sup>24</sup> under the influence of the *laissez faire* economic doctrine of the late nineteenth century. But the contracting parties still did not have equal bargaining power<sup>25</sup> because the employment relationship is a relationship of authority.<sup>26</sup> The famous remark of Otto Kahn-Freund that “(t)he main object of labour law has always been ... to be a countervailing force to counteract the inequality of bargaining power which is inherent ... in the employment relationship” must be understood in this context.<sup>27</sup> The direct consequence was the proliferation of statutory law and collective agreements in English labour law and South African labour law to protect employees. It follows that in modern labour law, not much has remained for the parties to negotiate about.<sup>28</sup>

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<sup>19</sup> Ss 193 and 194 of the LRA 1995.

<sup>20</sup> Rycroft & Jordaan (1992) 22; Du Toit *et al* (2015) 104.

<sup>21</sup> Contrary to the contract known as *locatio conductio operandum* which emphasized the product created through the services of another.

<sup>22</sup> These were called *placaaten* and ordinances (Rycroft & Jordaan (1992) 23).

<sup>23</sup> Du Toit *et al* (2015) 104.

<sup>24</sup> *Ibid.*

<sup>25</sup> Le Roux *Ph D Thesis* 252; Rycroft & Jordaan (1992) 13-14.

<sup>26</sup> Rycroft & Jordaan (1992) 18.

<sup>27</sup> Davis & Freedland (1983) 18. Benjamin (2012) 22 does not attach the same weight to the assumption that the employment relationship is inherently unequal.

<sup>28</sup> According to s 199 of the LRA 1995, a contracting party may not disregard or waive any provision of a collective agreement in a contract. The parties can usually only deviate from the provisions of statutory law and collective agreements if the employment contract provides for more favourable terms.

## 2.3 The contract of employment

### 2.3.1 Definition

A reasonably standard definition of the employment contract is that it is a reciprocal agreement whereby an employee puts his/her services at the disposal of an employer against payment of a consideration, the employer being entitled to control the employee and supervise the rendering of the employee's services.<sup>29</sup> The most distinctive feature of the employment contract, however, is probably that in the employment relationship, "the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done."<sup>30</sup>

### 2.3.2 Period of contract

If no period is stipulated by the parties, the contract continues on a permanent basis until terminated by reasonable notice (this is the so-called "indefinite appointment").<sup>31</sup> Usually any contract for an indefinite period can be terminated by notice as stipulated in the contract and, in the absence of specific contractual provisions, by reasonable notice.<sup>32</sup> "Reasonable notice" depends on the circumstances of every case, especially the periodicity of salary payments. However, section 37 of the BCEA now overrides the common law, setting out various specific periods of notice depending on the employee's length of service.

In the case of "fixed-term" contracts (i.e. contracts that automatically terminate upon the expiry of a pre-determined length of time, the completion of the specific project or the occurrence of a certain event), the rule is that they normally cannot be cancelled by notice before such expiration, completion or occurrence.<sup>33</sup> Finally, there is an

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<sup>29</sup> Van Jaarsveld & Coetzee (1977) 10. This definition resembles the definition of "employee" in s 213 of the LRA 1995. It also encapsulates the *essentialia* of the contract of employment i.e. "(a) a contract; (b) in terms of which services are rendered; (c) under the authority of the employer; (d) for remuneration; and (e) for a fixed term" (Van Jaarsveld *et al* (2015) par 106).

<sup>30</sup> *Colonial Mutual Life Associations Society v McDonald* 1931 AD 412 at 435. See generally Grogan (2014) par 12. It is a necessary consequence of the employment relationship that the employee is compelled to be obedient to the instructions of the employer (Van Jaarsveld & Coetzee (1977) 12; Davis & Freedland (1983) 18).

<sup>31</sup> Van Jaarsveld & Coetzee (1977) 13 citing De Groot 3. 19.8 and Voet 19.2.10.

<sup>32</sup> Grogan (2014) par 11.2; Rycroft & Jordaan (1992) 70.

<sup>33</sup> Rycroft & Jordaan (1992) 69 and 72; Van Jaarsveld *et al* (2015) par 119. It is important to note that a 2014 amendment to the LRA 1995 drastically amended the legal position: The new section 198B provides that a

*obiter dictum* in *Key Delta v Marriner*<sup>34</sup> that, in the case of an *unlawful* breach of contract by the employer, even the indefinitely appointed employee can claim for the full period that remains in terms of the employment contract. This opinion is supported by Cohen and certain case law<sup>35</sup> but is not in accordance with general practice. Finally, one should also not lose sight of the limiting effect of the mitigation rule on any claim.

### 2.3.3 Terms of contract

The general principle is that the parties cannot vary terms prescribed by legislation<sup>36</sup> or agree to terms that are less beneficial. Moreover, an employer cannot amend contractual terms unilaterally.<sup>37</sup>

Implied terms<sup>38</sup> are often of significant relevance in cases pertaining to disputes concerning the interpretation of employment contracts. This could be either a term implied by law<sup>39</sup> or a tacit term i.e. the unexpressed intention of the parties.<sup>40</sup> The essential implied terms applicable to employees are (a) a duty of obedience to the employer's lawful instructions; (b) a duty of fidelity; (c) a duty of care; and (d) a duty of reasonable efficiency or competence. On the employer's side there is (a) a duty

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person employed beyond a period of three months automatically becomes an indefinitely appointed employee unless certain exemptions apply or a justifiable reason can be provided by the employer (Grogan (2014) par 11.1). This change in employment status can, however, have unexpected negative consequences for the former fixed-term employee (turned indefinitely appointed employee) and which could be explained as follows: It is clear that the common law, as it stands, favours the claims for damages of fixed-term employees rather than the claims of indefinitely appointed employees. For instance, when a contract of indefinite employment is tacit on the period of notice, only a maximum amount equal to four notice weeks' salary may be claimed according to section 37(1)(c)(i) of the BCEA. Contrast this to the claim of an employee appointed on a five year fixed-term contract and who is unlawfully dismissed in his/her third month of employment. Such employee could, as fixed-term employee, literally claim nearly 56 months' salary. He/she will, however, be limited to only four weeks' salary because the said section 198B of the LRA 1995 changed his/her appointment status to an indefinite appointment at the end of the third month. This effect of section 198B may be an unintended consequence for fixed-term employees who would otherwise probably be more than happy with becoming indefinitely appointed after only three months of employment.

<sup>34</sup> [1998] 6 BLLR 647 (E) 650.

<sup>35</sup> Cohen (2007) 19 SA Merc LJ 39-40 and the cases cited there. Cohen expresses the opinion that "it is conceivable that this compensation could be based on remuneration that would have been earned *until his retirement date*" (*idem* 40 n 55). (Italics added.)

<sup>36</sup> See for example s 49 of the BCEA and s 7 of the LRA 1995.

<sup>37</sup> Grogan (2014) par 10.

<sup>38</sup> See generally Van Jaarsveld *et al* (2015) par 110A; Grogan (2014) par 7.

<sup>39</sup> Such as employment terms and conditions laid down by the BCEA.

<sup>40</sup> *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531 – 532.

to receive the employee into service; (b) the duty to provide reasonably safe working conditions; and (c) the duty to remunerate the employee.<sup>41</sup>

## 2.4 Breach of contract

An employment contract can be terminated in terms of the contract itself (e.g. one of the parties gives notice in terms of the notice provisions of the contract) or by consent, operation of law, supervening impossibility of performance or cancellation for a material breach.<sup>42</sup> Breach of contract is usually the consequence of the repudiation of the contract as a result of one of the parties indicating a positive refusal to comply with his/her obligations<sup>43</sup> and which leads to the normal contractual remedies.

Provided that an employer gives proper notice,<sup>44</sup> he/she could lawfully dismiss an employee according to the common law *for any reason or for no reason at all*.<sup>45</sup> In a number of remarkable judgements of the Supreme Court of Appeal,<sup>46</sup> the possibility was considered whether the common law had in fact been extended so as to include, for the first time, a standard of fairness in employment contracts. Thus the majority of the SCA held in *Fedlife Assurance Ltd v Wolfaardt*<sup>47</sup> that section 23(1) of the Constitution (the right to fair labour practices) has in effect imported an implied contractual term into employment contracts to the effect that every employee now has a right not to be unfairly dismissed.<sup>48</sup> The judges also held that the LRA 1995<sup>49</sup> did not expressly nor by necessary implication abrogate the employee's common-law

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<sup>41</sup> Rycroft & Jordaan (1992) 34. According to the writers at 39, the employee's entitlement to remuneration arises from the availability of his/her services and not necessarily from the actual rendering of services.

<sup>42</sup> *Idem* 68; Grogan (2014) par 14 - 15.

<sup>43</sup> De Wet & Van Wyk (1992) 169 - 170.

<sup>44</sup> As mentioned before, these periods are now prescribed by s 37(1) of the BCEA.

<sup>45</sup> Rycroft & Jordaan (1992) 69 and 76. The common law also did not recognise a right to due process prior to termination of the contract (Van Niekerk & Smit (2015) 97). Furthermore, the employer can even summarily dismiss an employee without notice on certain justifiable grounds, having regard to the nature of the misconduct, prejudice to the employer and the employee's state of mind. (S 37(1) of the BCEA (s 37(6) of the BCEA provides that the common law position relating to the dismissal of an employee guilty of a material breach of his/her employment contract is not affected by the notice periods. See also Rycroft & Jordaan (1992) 69; 78.)

<sup>46</sup> Hereafter "the SCA".

<sup>47</sup> (2001) 22 *ILJ* 2407 (SCA).

<sup>48</sup> *Idem* 2414.

<sup>49</sup> See the discussion of the statutory claim for compensation in unfair dismissal cases in terms of ss 193 and 194 of the LRA 1995 in Chapter 4.

right to enforce contractual rights and that the presumption that the legislature did not intend to interfere with existing law must be kept in mind.<sup>50</sup>

A similar construction was applied in *Old Mutual Life Assurance Co SA Ltd v Gumbi*,<sup>51</sup> *Boxer Superstores Mthatha v Mbenya*<sup>52</sup> and *Murray v Minister of Defence*.<sup>53</sup> Here the SCA also asserted that the common law had indeed been extended by “a right to fairness” / “a right to a fair hearing prior to dismissal” / “a duty of fair dealing” / “a right to dignity” all of which were perceived to have had their origin in section 23(1) of the Constitution.

In *SA Maritime Safety Authority v McKenzie*<sup>54</sup> the SCA came to the opposite conclusion. Wallace AJA (as he then was) who wrote for the majority, held that it was not necessary to extend the common-law so as to include an implied or tacit term granting employees a right that they will not be unfairly dismissed (and which includes a right to a pre-dismissal hearing). The Court’s approach was that the LRA 1995 had abrogated the common law because it had been enacted to give effect to the constitutional right to fair labour practices and for which purpose a comprehensive legislative scheme was framed to resolve disputes in unfair dismissal cases.<sup>55</sup> However, the Court indicated that its decision did not otherwise deprive the civil courts of its common-law jurisdiction in contractual disputes.<sup>56</sup>

## 2.5 Remedies of employees

### 2.5.1 General remedies

In the law of contract, the innocent party always had the right to resile from the contract if the breach was material or if the contract itself made special provision for cancellation,<sup>57</sup> except in the case of an employment contract. Thus it was held in

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<sup>50</sup> *Idem* 2415.

<sup>51</sup> (2007) 28 *ILJ* 1499 (SCA).

<sup>52</sup> (2007) 28 *ILJ* 2209 (SCA).

<sup>53</sup> (2008) 29 *ILJ* 1369 (SCA).

<sup>54</sup> (2010) 31 *ILJ* 529 (SCA). See also *President of SA & others v Reinecke* (2014) 35 *ILJ* 1485 (SCA).

<sup>55</sup> At 540 – 541; 553. This approach is in line with s 8(3)(a) of the Constitution and also echoes the Constitutional Court judgements in *Gcaba v Minister of Safety & Security & others* (2009) 30 *ILJ* 2623 (CC) and *Chirwa v Transnet Ltd & others* (2008) 29 *ILJ* 73 (CC). Wallis AJA also referred in *McKenzie* at 544 – 546 to a similar approach adopted in the United Kingdom in the often quoted House of Lords judgment in *Johnson v Unisys Ltd* [2001] 2 All ER 801 (HL). See also Du Toit (2008) *SALJ* 95ff; Du Toit (2010) *ILJ* 211ff.

<sup>56</sup> See further par 4.5.2 below.

<sup>57</sup> Known as a *lex commissoria* (Hutchinson & Pretorius (2012) 340 ff).

*Schierhout v Minister of Justice*<sup>58</sup> that it would be improper to compel an employer to employ someone which the employer does not trust in a position which requires a close relationship. The legal position, however, fundamentally changed in more recent cases such as *Stewart Wrightson (Pty) Ltd v Thorpe*<sup>59</sup> and *National Union of Textile Workers and Others v Stag Packings (Pty) Ltd*.<sup>60</sup> Rycroft & Jordaan<sup>61</sup> however points out that in labour law, the order for specific performance will normally not entail the physical reinstatement but an order directing the employer to pay the employee's wages for the remainder of the contract period.

## 2.5.2 Damages

The normal rules pertaining to the recovery of damages for breach of contract also apply in labour law.<sup>62</sup> It entails a comparison between the patrimonial position of the plaintiff, had the contract been performed, and the position that exists by reason of the breach<sup>63</sup> (the so-called "positive *interesse*"<sup>64</sup>). The damages generally consist of salary but which is limited to the notice period of indefinitely appointed employees and the balance of the contract period of fixed-term appointed employees.

The defendant is liable if the damages are not too "remote" in respect of the direct (natural and probable) consequences of his/her act. These damages are also referred to as "general damages" in contrast to "special damages" which are regarded as too remote unless there are extraordinary circumstances.<sup>65</sup> General damages could also be said to be the foreseeable damages i.e. those damages that the law presumes have been contemplated by the parties as probable damages in the case of a breach of the contract in question.<sup>66</sup>

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<sup>58</sup> 1926 AD 99. See also *Brassey* (1981) *ILJ* 58.

<sup>59</sup> 1977 (2) SA 943 (A) 952.

<sup>60</sup> 1982 (4) SA 151 (T). See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (K).

<sup>61</sup> At 83 n 590. See also *Lubbe & Murray* (1988) 543.

<sup>62</sup> *Rycroft & Jordaan* (1992) 83.

<sup>63</sup> *Idem* 83 n 598.

<sup>64</sup> *Lubbe & Murray* (1988) 604 – 605 and 630. See also *Van der Merwe et al* (2012) 362; *Rycroft & Jordaan* (1992) 84; *Christie & McFarlane* (2006) 542; *Hutchinson et al* (2012) 347 – 358.

<sup>65</sup> *Hutchison et al* (2012) 355.

<sup>66</sup> *Ibid.* See also *Lubbe & Murray* (1988) 175ff and 624.



The plaintiff cannot recover damages that could have been prevented by reasonable preventive action.<sup>67</sup> The onus is on the employer to prove that the employee could have obtained other comparable employment and the availability of the other employment will not merely be assumed.<sup>68</sup> The final onus of proving the exact amount of the loss, had reasonable steps been taken, is on the plaintiff.<sup>69</sup>

Although the concurrence of contractual and statutory actions<sup>70</sup> and constitutional actions may be relevant to the position of the plaintiff in a labour dispute, special reference must be made here to the concurrence of common-law contractual and delictual actions.<sup>71</sup> Only pecuniary damages may be claimed for breach of contract although damages for impairment of dignity or injured feelings may be recovered by way of delictual action.<sup>72</sup> However, the wrongful dismissal is not itself an *iniuria* and the employee will have to prove facts, over and above the dismissal, to prove the impairment of dignity.<sup>73</sup> Burchell<sup>74</sup> states that the denial of procedural fairness during the termination of employment as such may constitute an impairment of dignity.

## 2.6 Conclusion

It has been mentioned that the common law remains relevant as a “catch-all” source of law where statutory law and even collective agreements are tacit on a specific legal issue. Furthermore, the presumption of statutory interpretation that the legislator did not intend to alter the common law more than necessary, lends further significance to the common law.

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<sup>67</sup> Potgieter, Steynberg & Visser (2012) 293; Christie & McFarlane (2006) 552. This is the duty of mitigation. “There can be no doubt that respondent, having sued for damages, was in duty bound to mitigate its loss, but this duty, according to law, went no further than to require it to act reasonably in all the circumstances” (*De Pinto v Rensea Investments* 1977 (2) SA 1000 (A) 1007 as corrected by 1977 (2) 529 (A)). The question whether other compensating advantages which accrue to the plaintiff on account of the breach of contract must be taken into consideration is a complex matter (Lubbe & Murray (1988) 605 ff).

<sup>68</sup> Rycroft & Jordaan (1992) 85 n 601; *Hunt v Eastern Province Boating Co* (1884) 3 EDC 12 24; Hutchison & Pretorius (2012) 358; Lubbe & Murray (1988) 628ff.

<sup>69</sup> *Jayber (Pty) Ltd v Miller and Others* 1980 (4) SA 280 (W) 286.

<sup>70</sup> Ngcukaitobi (2004) ILJ 20; Du Toit *et al* (2015) 530; s 77 BCEA.

<sup>71</sup> *Media 24 v Grobler* (2005) ILJ 2007 (SCA); Potgieter, Steynberg & Visser (2012) 400; Van Niekerk & Smit (2015) 94.

<sup>72</sup> Burchell (1988) SAJHR 15 -18.

<sup>73</sup> *Ndamse v University College of Rehabilitation of Offenders* 1966 (4) SA 137 (E) 139F – H. See also *Jackson v SA National Institute for Crime Prevention and Rehabilitation of Offenders* 1976 (3) SA 1 (A).

<sup>74</sup> At 17 quoting Dworkin (1979) 8 *Philosophical Papers* 1.

However, the common-law action for unlawful dismissal has been largely abrogated by the LRA 1995 pursuant to the SCA judgement in *McKenzie*<sup>75</sup>. Basically this left the civil courts with only those dismissal cases where the employer acted in unlawful breach of the employment contract although he/she did not act unfairly.<sup>76</sup> *Denel (Edms) Bpk v Vorster*<sup>77</sup> provides an example: The employee successfully claimed damages for breach of contract since the employer had not applied its own disciplinary code which was included as a term of the contract of employment. This was despite the fact that the employer had acted fairly.

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<sup>75</sup> The direction adopted by the SCA in *McKenzie* was recently confirmed by that Court in *Motor Industry Staff Association v Macun NO & Others* (2016) 37 ILJ 625 (SCA).

<sup>76</sup> See Chapter 4.

<sup>77</sup> (2004) 25 ILJ 659 (SCA).

## CHAPTER 3

### THE CLAIM FOR COMPENSATION FOR UNFAIR DISMISSAL UNDER THE LABOUR RELATIONS ACT 1956

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### **3.1 Introduction**

It was explained in Chapter 2 that the common law, although it, in principle, conferred the freedom of contract on both parties, did not adequately protect the position of the employee. Despite the contractual freedom of employees, employers could still dismiss them arbitrarily.<sup>78</sup> Labour law therefore developed counterweights to the unequally balanced power of the employer<sup>79</sup> through statutory intervention and the proliferation of collective agreements.

A study of the Labour Relations Act 28 of 1956<sup>80</sup> is fundamentally important to the understanding of the statutory action in sections 193 and 194 of the current Labour

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<sup>78</sup> See Brassey *et al* (1987) 3 and 5.

<sup>79</sup> Grogan *Workplace Law* (2014) 3; Van Niekerk & Smit (2015) 9.

<sup>80</sup> Formerly called "Industrial Conciliation Act". Hereafter "the LRA 1956".

Relations Act 66 of 1995.<sup>81</sup> This is because the LRA 1956 for the first time created a statutory claim in South Africa for the recovery of compensation in cases of a so-called “unfair labour practices” which included, for our purposes, unfair dismissals. At the time of its promulgation, the LRA 1956 constituted the most comprehensive law in South Africa on labour matters.<sup>82</sup>

In this chapter, the important concept “unfair labour practice” will firstly be explained. Secondly, the focus shifts to the dispute resolution mechanisms provided for in the LRA 1956. Thirdly, the main remedies available under the LRA 1956 in cases of unfair dismissals are discussed including the case law on the different possible juridical bases of the claim for compensation in terms of section 49(6) of the LRA 1956.

## 3.2 Dispute resolution system

### 3.2.1 Unfair labour practices

The concept “unfair labour practice” is central to the understanding of the labour law dispensation proposed by the Wiehahn Commission of Inquiry into Labour Legislation in 1979.<sup>83</sup> In the 1979 Amendment Act,<sup>84</sup> this concept was defined as “any labour practice which in the opinion of the Industrial Court is an unfair labour practice.” Evidently the intention was that the Industrial Court should develop the substance of the concept on a case by case basis.<sup>85</sup> The definition was amended by Act 95 of 1980, Act 83 of 1988 and finally by Act 9 of 1991. Section 1 of the latter Act redefined “unfair labour practice” with reference to one of four possible consequences that may manifest from a specific act of the employer.

An employee prejudiced by an unfair labour practice was (in sequence) entitled to the legal remedies of urgent relief, an interim *status quo* order and a determination that a specific act was an unfair labour practice. Once such determination was made, the Industrial Court could order the reinstatement of the employee or the payment of compensation. These remedies are discussed below.

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<sup>81</sup> Hereafter “the LRA 1995”.

<sup>82</sup> It was *inter alia* preceded by the Transvaal Industrial Disputes Prevention Act 20 of 1909, the Industrial Conciliation Act 11 of 1924 and the Industrial Conciliation Act 36 of 1937.

<sup>83</sup> Wiehahn Report (1982).

<sup>84</sup> See s 1 of the Industrial Conciliation Amendment Act 94 of 1979.

<sup>85</sup> Rycroft & Jordaan (1992) 120.

During the development of Industrial Court case law, unfair labour practices often manifested in the context of the dismissal of employees.<sup>86</sup> The basic object of the doctrine of unfair dismissal was to protect employees from being dismissed without substantive grounds or due process.<sup>87</sup> The main principles underlying unfair dismissals which developed through the application of international law<sup>88</sup> by the Industrial Court, were that substantive fairness<sup>89</sup> and procedural fairness<sup>90</sup> had to be accorded to employees.

### 3.2.2 Dispute resolution mechanisms

Disputes could be referred to the relevant Industrial Council<sup>91</sup> within 180 days after the conduct in question of the employer occurred.<sup>92</sup> If the Council did settle the dispute<sup>93</sup> it could refer the dispute for voluntary arbitration<sup>94</sup> or mediation.<sup>95</sup> If the conduct amounted to an unfair labour practice, anyone of the parties could also refer it within 90 days to the Industrial Court for a determination.<sup>96</sup>

The Industrial Court and Industrial Appeal Court were quasi-judicial bodies<sup>97</sup> (administrative tribunals) and not courts of law.<sup>98</sup> They were restructured pursuant to

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<sup>86</sup> Brassey *et al* (1987) 357 mentions the following examples: A failure to hold a disciplinary enquiry before a dismissal, unfounded differentiation between employees dismissed, selective re-employment of ex-employees, dismissal for participation in a legal strike, failure to renew employment contracts where there was a reasonable expectation of renewal and victimization.

<sup>87</sup> Van Jaarsveld & Van Eck (1992) 270. The doctrine emanated from the International Labour Organisation ILO "Termination of Employment Recommendation" 1963 (No. 119) "[http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100\\_INSTRUMENT\\_ID:312457](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_INSTRUMENT_ID:312457) (see especially Part 2) of which several aspects became part of our law (*Ibid*). See also Brassey *et al* (1987) 309.

<sup>88</sup> See the previous footnote and also the discussion of the US Labour Law on unfair labour practises in Reichman & Mureinik (1980) *ILJ* 1ff and Brassey *et al* (1987) 367.

<sup>89</sup> This includes that the reason must have been valid: see *Kompecha v Bite My Sausage CC* (1988) 9 *ILJ* 1077 (IC).

<sup>90</sup> Van Jaarsveld & Van Eck (1992) 271; Brassey *et al* (1987) 380; *Mahlangu v CIM Deltak*, *Gallant v CIM Deltak* (1986) 7 *ILJ* 346 (IC).

<sup>91</sup> These are formations consisting of employers/groups of employers/employers' organisations, on the one hand, and trade unions, on the other hand. In any area of industry where no industrial council had jurisdiction, a conciliation board could be established upon application to an inspector of the then Department of Manpower (S 35(1) of the LRA 1956).

<sup>92</sup> S 27A of the LRA 1956. The decision of the Council could only apply to the parties if they had prior to the decision consented to it in writing (S 27(7)).

<sup>93</sup> If settled, the instrument embodying the settlement of a dispute (referred to as an "industrial agreement") could be approved and published by the then Minister of Manpower (ss 23(1), 31 and 48 of the LRA 1956).

<sup>94</sup> S 45(1) of the LRA 1956.

<sup>95</sup> S 44(1) of the LRA 1956.

<sup>96</sup> S 46(9)(b) of the LRA 1956.

<sup>97</sup> Brassey *et al* (1987) 353.

<sup>98</sup> *Idem* 315ff. The Court was also a creature of statute with only specified statutory powers (Van Jaarsveld & Van Eck (1992) 322 – 324).

the recommendations of the Wiehahn Commission.<sup>99</sup> The substantial influence that the Court exercised on labour law was due to its power to arbitrate disputes by determining conduct by an employer as “unfair labour practices” and then to grant appropriate remedies.<sup>100</sup> The Industrial Appeal Court could review<sup>101</sup> the proceedings of the Industrial Court or conduct a full rehearing as an appeal in the wide sense.<sup>102</sup>

### 3.3 Remedies for unfair dismissal

The remedies which could be granted by the Industrial Court to employees dismissed on account of alleged misconduct included (a) urgent interim relief pending a *status quo* order,<sup>103</sup> (b) interim orders, referred to as *status quo* orders, pending the final adjudication of a dispute<sup>104</sup> and (c) determinations and compensation in terms of section 46(9)(c) of the LRA 1956. It provided that:

- (9)(c) The industrial court shall as soon as possible after receipt of the reference in terms of paragraph (b), determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation.

The determination was a process of adjudication (though not completely synonymous with an arbitration award)<sup>105</sup> of the dispute in order to establish whether the subject of the dispute was in fact an unfair labour practice.<sup>106</sup> Reinstatement was the preferred remedy.<sup>107</sup> The Court was reluctant to order reinstatement where the relationship of trust between employer and employee was irreparably broken, especially in the case of senior employees.<sup>108</sup> The Court would then order the employer to pay such compensation as the Court “may deem reasonable.” Section

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<sup>99</sup> Wiehahn Report (1982) 1.4.26; Rycroft & Jordaan (1992) 190. Some of the main reasons for a specialist tribunal were the complexity of labour law issues, the high costs of litigation, the inflexibility of the procedural and evidence rules of the civil courts and the need for specialised skills (Wiehahn Report (1982) 1.4.4.6).

<sup>100</sup> Van Jaarsveld & Van Eck (1992) 323. Its orders were, however, not enforceable until they were made an order of the then Supreme Court (s 17 of the LRA 1956).

<sup>101</sup> S 17B of the LRA 1956. Orders of the Industrial Court could also be reviewed by the then Supreme Court (Brassey *et al* (1987) 352).

<sup>102</sup> Van Jaarsveld & Van Eck (1992) 338.

<sup>103</sup> S 17(11)(a) of the LRA 1956.

<sup>104</sup> S 43(4) of the LRA 1956. The main object was evidently to restore the position between the employer and employee in order that the parties may negotiate on an equal footing with a view to reconciliation. The Court’s order was therefore effectively a temporary reinstatement.

<sup>105</sup> *Steel, Engineering & Allied Workers Union of SA & Others v Trident Steel (Pty) Ltd* (1986) 7 ILJ 418 (IC) 437C; Brassey *et al* (1987) 352, 355.

<sup>106</sup> Brassey *et al* (1987) 332; Rycroft & Jordaan (1992) 130; Reichman & Mureinik (1980) 22. The members of the Industrial Court exercised a wide, unfettered statutory discretion (Brassey *et al* (1987) 353).

<sup>107</sup> *Sentraal-Wes (Koöperatief) Bpk v Food & Allied Workers Union & others* (1990) 11 ILJ 977 (LAC).

<sup>108</sup> Brassey *et al* (1987) 98ff, 359.

46(9)(c) clearly did not provide “guidelines or criteria as to the determination of the amount of compensation.”<sup>109</sup> It is assumed that the intention was that the Industrial Court, as an administrative tribunal, should develop its own “equity jurisprudence” and for which purpose the Court had to be permitted flexibility.

### **3.4 Different bases of the statutory claim for compensation**

#### **3.4.1 Contract**

It was explained in Chapter 2 that at common law, the plaintiff may sue for his/her positive *interesse* in a breach of contract matter, namely that he/she be placed in position he/she would have occupied had contract been performed. However, Landman categorically states that a section 46(9) claim for compensation pursuant to the determination of an unfair labour practice was not a claim for breach of contract.<sup>110</sup> It was also pertinently affirmed in *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*<sup>111</sup> that “(t)he Industrial Court does not have jurisdiction to grant damages for breach of contract.” However, the Industrial Court did apply contractual rules to the calculation of compensation where a fixed term contract was prematurely terminated. Thus it was held in *United African Motor and Allied Workers Union & Others v Fodens (SA) (Pty) Ltd*<sup>112</sup> that the court could order compensation for the period calculated from the date of dismissal to the date of expiry of the contract.

#### **3.4.2 Delict**

In Chapter 2 it was pointed out that delictual damages endeavour to place the claimant in monetary terms in the position in which he/she would have been had the unfair labour practice not been committed. This approach (known as negative *interesse*) has a prominent place in the Industrial Court’s case law on compensation claims in terms of section 46(9)(c).

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<sup>109</sup> Du Plessis *et al* (1994) 278. In *Amalgamated Beverages Industries (Pty) v Jonker* (1993) 14 ILJ 1232 (LAC) 1255G and *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) 981H-I the LAC rejected an earlier decision of that Court in *Hooggenoeg Andolusite (Pty) Ltd v National Union of Mineworkers & Others (1)* (1992) 13 ILJ 87 (LAC) that the effect of s 49(3)(b) and (c) of the LRA 1956 was to limit compensation orders to a maximum of six months’ salary of the employee. In fact, there was clearly no limitation on the compensation which could be awarded (Landman (1990) LLB 14).

<sup>110</sup> (1990) LLB 10. Contrast Grogan *Dismissal* (2014) 624 – 625: “The courts operating under that Act (the LRA 1956) equated compensation with ‘damages’, as that expression is used in the law of contract and delict, i.e. the sum necessary to compensate employees for patrimonial loss suffered as a result of their dismissals.”

<sup>111</sup> (1997) 18 ILJ 361 (LAC) 364G.

<sup>112</sup> (1983) 4 ILJ 212 (IC) 235F.

In *Alert Employment Personnel (Pty) Ltd v Leech*<sup>113</sup> McCall J held that the measure of compensation for unfair dismissal need not be the same as in cases of breach of contract.<sup>114</sup> Compensation claims are more analogous to delictual claims.<sup>115</sup> The Court opined that it would be appropriate to compensate an employee for patrimonial loss as a result of an unfair dismissal although the award should not be unfair or be calculated to punish the employer.<sup>116</sup>

In *Ferodo (Pty) Ltd v De Ruiter*<sup>117</sup> the Court adopted the approach followed in English Law i.e. to strictly compensate the employee only for the *financial loss* caused by the dismissal. The Court then enumerated certain typical delictual principles which were later often quoted in other judgements (even in compensation cases under the LRA 1995) as guidelines. These included that the financial loss of the employee must be backed up by evidence and that the loss must have been caused by the unfair labour practice in dispute and have been foreseeable (i.e. not too remote).

The guidelines explicitly included negative *interesse* as the basis of compensation in the sense that the employee must be placed, in monetary terms, in the position which he/she would have been had the unfair labour practice not been committed. The courts also had to be guided by what would be reasonable and fair in the circumstances. There was also a duty on the employee to mitigate his/her damages by taking all reasonable steps to acquire alternative employment.<sup>118</sup> Finally, any benefit which the applicant received also had to be taken into account.

In *Ferodo's* case the employee was awarded an amount equal to the employee's monthly remuneration at the time of dismissal multiplied by the number of months it would have taken him in alternative employment to have reached his former level of

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<sup>113</sup> (1993) 14 ILJ 655 (LAC).

<sup>114</sup> *Idem* 661A-C.

<sup>115</sup> *Ibid* 661C. See also Le Roux (2011) ILJ 1521-1524; Le Roux & Van Niekerk (1994) 336; Grogan *Workplace Law* (2014) 204; Du Plessis *et al* (1994) 278; Landman (1990) LLB 10, 14. Landman at 12-13 also indicates that typical delictual rules that apply during the assessment of damage (e.g. the "once and for all" rule, mitigation rule, the rule that benefits received by the employee from other sources had to be taken into account as well as the employee's contribution to the commission of the unfair labour practice in question) would affect the amount of compensation. See also Landman (1992) CLL 21) and Landman (1993) CLL 76.

<sup>116</sup> *Idem* 661F. Contrast *Foodpiper CC t/a Kentucky Fried Chicken v Shezi* (1993) 14 ILJ 126 (LAC) 135H.

<sup>117</sup> (1993) 14 ILJ 974 (LAC) 981B-G.

<sup>118</sup> See also *Foodpiper CC t/a Kentucky Fried Chicken v Shezi*.



income.<sup>119</sup> The Court then deducted a contingency of 20% having regard to the employee's willingness to accept a position with the employer at a lower salary and also that the management was not satisfied with his work performance.<sup>120</sup>

The delictual approach was also followed in *Camdons Realty (Pty) Ltd & another v Hart*<sup>121</sup> where the LAC repeated the (typical delictual) concept of actual financial loss.<sup>122</sup> Citing *Ferodo's* case, Nugent AJ (as he then was) stated that compensation must be compensation *properly so called*<sup>123</sup> and that the primary enquiry must accordingly be to determine what the loss is.<sup>124</sup>

The learned judge then added that, over and above direct financial loss (loss of salary), a loss could take various forms such as the blemish on the employment record of the employee. It followed that the Court, based on the evidence, could put a value on such loss and include it in the assessment.<sup>125</sup> However, despite the assessment the employee could not necessarily recover the full amount of his/her loss since the final amount of the compensation must be determined in a reasonable manner having regard to the circumstances of the case and the interests of the employer.<sup>126</sup> The Court also took into consideration a justifiable expectation on the part of the employee that the position with the employer would further his career.<sup>127</sup>

In *Robecor v Durant*<sup>128</sup> it was held that once it is determined that the employee would not receive further income for the rest of his/her working life, it is appropriate to calculate his/her future loss through an actuary. Where that is not established, his/her loss should be limited to the salary he/she would have earned during the period reasonably necessary to secure satisfactory alternative employment and which loss could be mathematically calculated by the employee and employer, their representatives and the court.<sup>129</sup> Ultimately it was held that twelve months' salary should be reasonable less a 20% contingency factor having regard to the employer's

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<sup>119</sup> At 982B-C.

<sup>120</sup> *Idem* 982D-F.

<sup>121</sup> (1993) 14 *ILJ* 1008 (LAC).

<sup>122</sup> This refers to both past and future loss (Landman (1993) *CLL* 76).

<sup>123</sup> Emphasis added.

<sup>124</sup> *Camdons Realty (Pty) Ltd & another v Hart* 1018G-H.

<sup>125</sup> *Ibid* 1018J-1019A.

<sup>126</sup> *Ibid* 1019A-D citing *Alert Employment Personnel (Pty) Ltd v Leech*.

<sup>127</sup> *Ibid* 1020H; Le Roux & Van Niekerk (1994) 341.

<sup>128</sup> (1995) 16 *ILJ* 1519 (LAC).

<sup>129</sup> *Idem* 1523F-H.

difficult financial position<sup>130</sup> and the possibility that the employee would have been retrenched in any event.<sup>131</sup>

The LAC deviated from the requirement of patrimonial loss in *Harmony Furnishers (Pty) Ltd v Prinsloo*.<sup>132</sup> It was held that the humiliating manner in which the employee was treated by persons on behalf of the employer constituted an *iniuria* and that such treatment amounted to an unfair labour practice for which the Industrial Court could make an appropriate award.<sup>133</sup> The Court's approach to the concept of compensation in this case is clearly similar to that of a claim for a *solatium* in delict. The Court was supported by the prior decision in *Ellerine Holdings Ltd v Du Randt*<sup>134</sup> where the employer's "high-handed and grossly insensitive" conduct towards the employee during his retrenchment entitled the employee to two month's extra salary as part of his retrenchment package.<sup>135</sup>

It was conceded by Landman that where the courts did award compensation in cases of *procedurally* unfair dismissals, such compensation is nothing else than sentimental damages.<sup>136</sup> In *Foodpiper CC t/a Kentucky Fried Chicken v Shezi*<sup>137</sup> three months' compensation was awarded for the failure of the employer to hold a disciplinary hearing and in *Kompecha v Bite My Sausage CC*<sup>138</sup> compensation was limited in a similar case to three weeks' wages only.

### 3.4.3 Punitive damages

The weight of authority indicates that punishment was not regarded as a valid basis for compensatory orders.<sup>139</sup> However, in *Foodpiper CC t/a Kentucky Fried Chicken v Shezi*<sup>140</sup> it was said that "it may be that the Industrial Court could, in determining an

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<sup>130</sup> *Idem* 1525D-E. This factor was also stressed in *Kompecha v Bite My Sausage CC* 1083G.

<sup>131</sup> *Idem* 1525D-E.

<sup>132</sup> (1993) 14 *ILJ* 1466 (LAC).

<sup>133</sup> *Idem* 1472H-I. Van Niekerk (1993) *CLL* 36 points out that the Court indicated that intent must be proven in claims for sentimental damages.

<sup>134</sup> (1992) 13 *ILJ* 611 (LAC). Combrinck J clearly held the opposite view of sentimental damages in *Ferodo (Pty) Ltd v De Ruiter* at 980B-E.

<sup>135</sup> *Ellerine Holdings Ltd v Du Randt* 617B-D.

<sup>136</sup> Landman (1990) *LLB* 11.

<sup>137</sup> At 136D.

<sup>138</sup> At 1084E.

<sup>139</sup> *Harmony Furnishers (Pty) Ltd v Prinsloo* 1468H, 1469F; Landman (1990) *LLB* 11; Landman (1992) *CLL* 19; Van Niekerk (1993) *CLL* 35.

<sup>140</sup> At 135H.

unfair labour practice, elect to punish the perpetrator of the unfair labour practice in some way.”

#### 3.4.4 Unique statutory action

Finally, attention must be drawn to case law that does not necessarily reflect typical contractual or delictual concepts or methods of computation of damages, but that lean more towards an interpretation of section 46(9)(c) of the LRA 1956 itself as a unique statutory measure. In *Jones v KPMG Aiken & Peat Management Services (Pty) Ltd*<sup>141</sup> the central issue was the determination of the period for which the employee could claim compensation. The employee’s actuary had based the period of calculation as commencing from the date of dismissal (the employee was then 59) up to the date on which the employee would have retired at the age of 65. According to Myburgh J, this amounted to confusing “a claim for future loss of earnings in delict and a claim for compensation in terms of section 46(9).”<sup>142</sup> It follows that mere actuarially calculated periods were not considered appropriate. The compensation should have been based on a claim for general damages meaning the employee’s monthly salary “multiplied by the number of months *which the court finds reasonable in the circumstances*.”<sup>143</sup> Similarly, the LAC held in *Intertech Systems (Pty) Ltd v Sowter*<sup>144</sup> that although proof of actual loss is usually required “not every compensation case has to derive from an actuarially calculable loss ... that calculation cannot be mechanical.” It appears that the following statement of Landman does make sense: “Although there are similarities between damages and compensation, ... compensation has a *sui generis* nature and ... it is wrong to equate it with damages at common law.”<sup>145</sup>

### 3.5 Conclusion

The positive benefits gained from the unfair labour practice jurisdiction implemented pursuant to the Wiehahn Report cannot be underestimated. This jurisdiction of the Industrial Court made it possible to import the concept of fairness in employment

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<sup>141</sup> [1996] 5 BLLR 539 (LAC).

<sup>142</sup> The judge’s view was that if necessary the employment contract itself could have been cancelled for a valid reason and by following a fair procedure (*idem* 542). The learned judge said there is no “job for life” (*ibid*).

<sup>143</sup> *Ibid* (emphasis added).

<sup>144</sup> (1997) 18 ILJ 689 (LAC) 705A-B. The Court awarded 12 months’ salary as just, fair and reasonable compensation for constructive dismissal linked to sexual harassment.

<sup>145</sup> (1992) CLL 20.

relationships and it could for the first time override unfair and rigid employment contractual terms and balance the unequal, superior position of the employer in the common-law contractual relationship.<sup>146</sup> Most of the cases referred to above are even quoted in compensation cases under the LRA 1995 up to this point in time.

However, some significant problems could be identified in respect of the unfair labour practice jurisdiction under the LRA 1956. The first related to the blanket discretion conferred upon the Court by the omission of any guidelines, criteria or limitations from section 46(9)(c). The case law of the Industrial Court was not considered a showcase of consistency. The fact that no limitation was placed on the amount of compensation that could be ordered in terms of that section, led to the proceedings being exploited for enormous claims by affluent senior employees<sup>147</sup> and this resulted in protracted hearings because of quantum evidence led by experts. A further problem with section 46(9)(c) was that the wording and translation of the text appeared problematic. Landman<sup>148</sup> pointed to inconsistent use of terms e.g. “damages” in section 43 and “compensation” in section 46(9)(c).<sup>149</sup>

Section 46(9)(c) did not exclude a simultaneous common-law action for breach of contract and the phenomenon of “forum shopping” meant that employees could at will choose between the jurisdiction of the civil courts and that of the Industrial Court.<sup>150</sup> In *W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*, Froneman J quoted the following passage from Thompson & Benjamin:<sup>151</sup>

The tension between nineteenth-century common law and twentieth-century statute law is reflected in the often contrasting judgements of ordinary courts and more specialized labour

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<sup>146</sup> Van Niekerk & Smit (2015) 12. In *SADWU v The Master Diamond Cutters Association of S A* (1982) 3 *ILJ* 87 (IC) 139C Parsons P remarked as follows: “Therefore it might be argued that in making a determination in regard to such practice this court need not necessarily follow the common law.”

<sup>147</sup> Ministerial Legal Task Team (1995) *ILJ* 316: “In the absence of statutory guidelines or caps on compensation, which are the norm in other countries, the courts have used tests applied in personal injury claims to assess losses. Awards have become open-ended and, in the case of the dismissal of executives, sometimes amount to hundreds of thousands of rands.” Grogan *Workplace Law* (2014) 203 in fact mentions “millions of rands”.

<sup>148</sup> (1990) *LLB* 9.

<sup>149</sup> Both concepts were translated as “skadevergoeding” in the Afrikaans text. Van Eck *LL D Thesis* 576 argues that the term “damages” would be more appropriate.

<sup>150</sup> See Van Jaarsveld & Van Eck (1992) 328 n 48 and the authority cited there. In *Raad van Mynvakbonde v Kamer van Mynwese* (1984) 5 *ILJ* 344 (C) 362H the Court remarked: “Die onbillike arbeidspraktyk jurisdiksie kan myns insiens nie die gemenerereg wysig of verander nie.” The reality of the double jurisdiction problem is also illustrated by the inconsistent court orders granted to a trade union, on the one hand, and to the employer, on the other hand, in the *Marievale* cases decided in the Industrial Court and Supreme Court, respectively (Van Eck (1991) *De Jure* 136 ff).

<sup>151</sup> *S A Labour Law* | A1-3.

courts on employment matters. Unhappily, the lawgiver has accorded the ordinary courts and the labour courts overlapping jurisdictions in certain areas. Coherence in the labour jurisprudence has suffered as a result and further reform of the law in this regard (is) keenly awaited.<sup>152</sup>

Although compensation under section 46(9)(c) was a statutory remedy, the Court often merely treated compensation as an extension of the concept of delictual damages.<sup>153</sup> Still the exact jurisprudential basis of the statutory claim under section 46(9)(c) was critically important. Moreover, the relevance of legal aspects such as causation, foreseeability,<sup>154</sup> mitigation of damages and calculation of damages depends on the question as to what legal basis is most appropriate. Although probably with good intentions, the concept of reasonableness in section 46(9)(c) provided no magical answer to complex compensation issues.

The refusal in the *Ferodo* decision of compensation for an *iniuria* was probably due to a wrong interpretation of the vague section 46(9)(c). Combrinck J followed English Law in refusing an award for an *iniuria*. Van Niekerk<sup>155</sup> on the other hand felt that “(t)he *Harmony Furnishers* approach (correctly) recognises ... the inequities which might result should compensation be awarded only in circumstances where patrimonial loss is proved.” Giles & Du Toit<sup>156</sup> commented that in the *Harmony Furnishers* case, the LAC correctly agreed with the Industrial Court’s views in *Jonker v Amalgamated Beverages Industries*<sup>157</sup> on the inclusion of amounts for non-patrimonial loss in awards. They point out that the perception in the *Ferodo* case that English Law granted compensation only in cases of proven financial loss, was wrong and that this rule was in any event overturned in English Law in favour of the approach that any type of loss could be compensated which is “just and equitable.”

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<sup>152</sup> (1997) 18 *ILJ* 361 (LAC) 365C-F.

<sup>153</sup> Landman (1990) *LLB* 10 and (1992) *CLL* 20 holds the view that compensation is not a synonym for damages recoverable for breach of contract or delict (although there is a strong resemblance with the latter), but that it was created for a distinct (*sui generis*) purpose viz that of compensating a loss pursuant to the commission of an unfair labour practice.

<sup>154</sup> Landman (1993) *CLL* 80 suggested that, as in the case of delict, compensation must be limited to that which was reasonably foreseeable.

<sup>155</sup> (1993) *CLL* 36.

<sup>156</sup> (2002) *LDD* 126 – 127.

<sup>157</sup> (1993) 14 *ILJ* 199 (IC).

## CHAPTER 4

### THE CLAIM FOR COMPENSATION FOR UNFAIR DISMISSAL UNDER THE LABOUR RELATIONS ACT 1995

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#### **4.1 Introduction**

This chapter aims to analyse the structure and the nature of the statutory claim for unfair dismissal in the Labour Relations Act 66 of 1995<sup>158</sup> the successor to the Labour Relations Act (formerly called “Industrial Conciliation Act”) 28 of 1956.<sup>159</sup> As in the case of the labour legislation of the United Kingdom on which the LRA 1995 is partly based,<sup>160</sup> the statutory action revolves around the principles of substantial and procedural fairness and the goal of implementing a speedy, efficient and cheap mass dispute resolution system. The specific focus in this chapter will be on the statutory remedy provided in sections 193(1)(c) and 194(1) of the LRA 1995 which vests

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<sup>158</sup> Hereafter the “LRA 1995”.

<sup>159</sup> Hereafter the “LRA 1956”.

<sup>160</sup> See Chapter 5.

CCMA<sup>161</sup> commissioners and Labour Court<sup>162</sup> judges, as the case may be, with a discretion to order the employer to pay compensation<sup>163</sup> to the employee as an alternative to an order of reinstatement<sup>164</sup> or re-employment<sup>165</sup> and which are the preferred remedies for unfair dismissal.<sup>166</sup>

The chapter starts with a brief summary of the dispute resolution system created by the LRA 1995 which was intended to substantially improve upon the “unfair labour practice” jurisdiction of the Industrial Court era. This is followed by a discussion of the text of sections 193(1)(c) and 194(1) of the LRA 1995 with specific reference to the nature of the discretion of commissioners and LC judges and the specific factors that are of relevance in determining compensation. Contractual claims, delictual claims, claims where a punitive objective plays a role and claims which are in fact unique statutory remedies, are then examined in order to determine whether parallels could be drawn from these claims as comparative models for the statutory claim for unfair dismissal. The chapter concludes with a discussion of the jurisdictional overlap problem. Firstly, the differences between the statutory claim and the common-law action are outlined and secondly certain implications of *SA Maritime Safety Authority v McKenzie*<sup>167</sup> for sections 77(3) and 77A(e) of the BCEA and section 157(2) of the LRA 1995 are indicated.

## 4.2 Dispute resolution system

According to the Explanatory Memorandum of the LRA 1995, the Act was intended to provide the legal framework for a “speedy, cheap and non-legalistic procedure for the adjudication of unfair dismissal cases”<sup>168</sup> that offers compensation for the loss of employment. The main features of the dispute resolution system in terms of the LRA 1995<sup>169</sup> are found in Chapter VIII of the LRA 1995. The starting point is section 185

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<sup>161</sup> “CCMA” is an abbreviation for the Commission for Conciliation, Mediation and Arbitration. The reference to the CCMA includes a reference to bargaining councils.

<sup>162</sup> Hereafter “the LC”.

<sup>163</sup> S 158(1)(a)(v) provides that the Court may “award compensation in any circumstances contemplated in this Act.”

<sup>164</sup> S 193(1)(a) of the LRA 1995.

<sup>165</sup> S 193(1)(b) of the LRA 1995.

<sup>166</sup> S 193(2) of the LRA 1995.

<sup>167</sup> (2010) 31 *ILJ* 529 (SCA). See discussion in Chapter 2.

<sup>168</sup> Ministerial Legal Task Team (1995) *ILJ* 285.

<sup>169</sup> The discussion in this paragraph is limited to disputes relating to dismissals for misconduct. See generally Van Niekerk & Smit (2015) 444 – 447 about other types of employment disputes.

which affirms every employee's right not to be unfairly dismissed or subjected to an unfair labour practice.<sup>170</sup>

Subsection (1) of section 186 then sets out various forms of dismissal, e.g. dismissal in the sense of the termination of employment with or without notice, the failure to renew a fixed-term contract in circumstances where the employee had a reasonable expectation of renewal, and dismissal in the sense of constructive dismissal. The LRA 1995 also defines the concept "automatically unfair dismissals" in section 187(1) as a more serious form of dismissal and which includes dismissal for participation in a lawful strike or on account of the employee's pregnancy or other unfair discrimination.

Next section 188(1) provides that a dismissal is unfair for lack of a fair reason relating to the employee's conduct or capacity or based on the employer's operational requirements, or that it was effected in accordance with an unfair procedure. Section 191 sets out the basic procedure viz that an employee who feels that he/she had been unfairly dismissed may within 30 days of the dismissal refer a dispute to the CCMA and which must attempt to resolve the dispute through conciliation.<sup>171</sup> If this is unsuccessful, the CCMA commissioner must immediately proceed to arbitrate the dispute<sup>172</sup> unless any party objects, in which case the dispute must be referred to arbitration within 90 days. The remedies available to dismissed employees are dealt with below.

Any party dissatisfied with an arbitration award may within six weeks apply to the LC.<sup>173</sup> According to section 145, the review must be based on a "defect" in the arbitration proceedings in that the arbitrator committed misconduct or a gross irregularity or exceeded his/her powers or that an award was improperly obtained.

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<sup>170</sup> The concept "unfair labour practices" is defined in subsection (2) of s 186 of the LRA 1995. Other than in the case of the LRA 1956, this definition does not have a bearing on dismissals. Van Jaarsveld *et al* (2015) par 705 however argues that the definition in s 1 of the Labour Relations Amendment Act 9 of 1991 must still be read into the meaning intended by the phrase "fair labour practices" in s 23(1) of the Constitution of the Republic of South Africa 1996. See also par 3.2.1 above.

<sup>171</sup> See also s 135 of the LRA 1995.

<sup>172</sup> See also ss 136 - 144 of the LRA 1995.

<sup>173</sup> Hereafter "the LC".



Chapter VII of the LRA 1995 establishes the LC<sup>174</sup> and Labour Appeal Court<sup>175</sup> as superior courts of law<sup>176</sup> and equity<sup>177</sup> with specialist jurisdiction over labour matters. The judges of these Courts are appointed by the President on the advice of NEDLAC and the Judicial Service Commission and must have expertise in labour matters.<sup>178</sup>

Section 157(1) of the LRA 1995 provides that the LC has exclusive jurisdiction over matters which are to be determined by it in terms of the LRA 1995 or other laws. The LRA 1995 also confers concurrent jurisdiction on the LC with the High Court over violations of fundamental rights arising from employment.<sup>179</sup> Similar concurrent jurisdiction with all civil courts is vested in the LC in terms of the Basic Conditions of Employment Act 75 of 1997<sup>180</sup> in matters concerning contracts of employment.<sup>181</sup> Sections 158(1) and 193(1) of the LRA 1995 empowers the LC to make appropriate orders and awards of compensation or of damages.<sup>182</sup> It may also frame awards of compensation or damages and order specific performance under section 77A of the BCEA.

A recent constitutional amendment<sup>183</sup> has restored the LAC as the court of final instance in labour matters and a further appeal to the Supreme Court of Appeal<sup>184</sup> is precluded.<sup>185</sup> It establishes the Constitutional Court<sup>186</sup> as the apex court in all matters, not only constitutional matters. The CC can now hear appeals on any matter if it “raises an arguable point of law of general public importance”<sup>187</sup> and which may evidently include labour matters. It therefore follows that the CC can now also hear appeals in labour matters that do not directly involve a constitutional matter (if this is at all possible).

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<sup>174</sup> According to Steenkamp (2014) *ILJ* 2686 the LC handed down 233 judgements in 2013.

<sup>175</sup> Hereafter “the LAC”.

<sup>176</sup> The LC thus differs from Industrial Court which functioned under the LRA 1956 as a tribunal.

<sup>177</sup> Ss 151(1) and 167(1) of the LRA 1995.

<sup>178</sup> Ss 153 and 169 of the LRA 1995.

<sup>179</sup> S 157(2) of the LRA 1995. See the discussion in par 4.5 below.

<sup>180</sup> Hereafter the “BCEA”.

<sup>181</sup> S 77(3) of the BCEA. See the discussion in par 4.5 below.

<sup>182</sup> Subparagraphs (v) and (vi) respectively of s 158(1)(a).

<sup>183</sup> The Constitution Seventeenth Amendment Act of 2012.

<sup>184</sup> Hereafter “the SCA”.

<sup>185</sup> See ss 167(2) and 173(1) of the LRA 1995 and s 4 of the Constitution Seventeenth Amendment Act, 2012 which amends s 168(3) of the Constitution; Steenkamp (2014) *ILJ* 1; Van Eck & Mathiba (2014) *ILJ* 863ff.

<sup>186</sup> Hereafter “the CC”.

<sup>187</sup> See s 3 of the Constitution Seventeenth Amendment Act which amends s 167(3) of the Constitution.

### 4.3 Remedies for unfair dismissal

The remedies available to dismissed employees are set out in sections 193 and 194 of the LRA 1995. These are reinstatement, re-employment and compensation. For the purposes of this discussion, the relevant sections of section 193 are quoted below:

193. (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-
- (a) order the employer to reinstate<sup>188</sup> the employee from any date not earlier than the date of dismissal;
  - (b) 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
  - (c) order the employer to pay compensation to the employee.

194. (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.<sup>189</sup>

It is an interesting feature of these provisions that a blanket discretion<sup>190</sup> is conferred upon the arbitrator/judge. No framework, guidelines, standards or criteria are provided for determining an appropriate amount of compensation. No minimum amount is laid down but a maximum equal to 12 months' remuneration. The phrase "just and equitable in all the circumstances"<sup>191</sup> in section 194(1) was clearly intended to create a flexible discretion but cannot ensure consistency in decision-making.

Whilst compensation is an important function of the law, the question as to what compensation and the calculation thereof in unfair dismissal cases really entails in its very essence, enjoys scant attention. It seems that compensation is often awarded arbitrarily in unfair dismissal cases without any motivation or explanation as to how it is calculated.<sup>192</sup> This concern has indeed been voiced in academic literature and our

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<sup>188</sup> S 193(2) stipulates that reinstatement or re-employment must be ordered as the primary remedy if the dismissal was found to be unfair except in certain defined cases.

<sup>189</sup> Ss 193(1) and 194(1) are evidently subject to the same principles of statutory interpretation as the rest of the LRA 1995. According to Van Jaarsveld *et al* (2015) par 87 the LRA 1995 must always be interpreted so as to give effect to the main objects of the Act.

<sup>190</sup> The conferring of blanket discretion by Parliament is, in the absence of good reason, contrary to the "Rule of Law" notion (s 1(c) of the Constitution 1996) and amounts to an abdication of power.

<sup>191</sup> Vettori (2011) *Stell L R* 174 explains that "the purpose of labour law is to achieve fairness, especially with regard to dismissals. In the context of the employment relationship this has been taken to mean a balancing of the interests of employer and employee." See also *Fourie v Capitec Bank* (2005) 1 BALR 29 (CCMA).

<sup>192</sup> Van Niekerk & Smit (2015) 246 n 114.

case law. Mishcke<sup>193</sup> e g states that “it is clear from the awards and judgements that there has been very little attempt to formulate principles as to how the compensation to be paid should be determined.” He continues:<sup>194</sup>

Section 194 is silent, however, on how compensation must be calculated – it confers on the Labour Court, commissioners and arbitrators an extremely wide discretion by simply saying that the compensation must be “just and equitable.” The question that arises is what constitutes just and equitable compensation and where do the limits of just and equitable compensation lie?<sup>195</sup>

In *Alert Employment Personnel (Pty) Ltd v Leech*<sup>196</sup> the Court warned as follows in connection with awards under section 49(6) of the LRA 1956:<sup>197</sup> “Awards of compensation by the Industrial Court should not be made in such a way as to appear arbitrary and unmotivated. That is a sure recipe for undermining employers' confidence in the Industrial Court as a forum for resolving disputes.” Nugent AJA (as he then was) referred in *Fedlife Assurance Ltd v Wolfaardt*<sup>198</sup> to “the limited and entirely arbitrary compensation yielded by the application of the formula in section 194 of the 1995 Act.”

Van Niekerk & Smit<sup>199</sup> points out that the phrase “just and equitable” in section 194(1) of the LRA 1995 is undefined and that:

This broad qualification to determining the amount of compensation to be awarded has given rise to inconsistency both in the amount awarded as well as the factors that are considered relevant in arriving at the appropriate amount. The Labour Court has provided limited guidance in this regard.

Le Roux<sup>200</sup> also maintains that “(t)he LC’s approach to the awarding of damages and compensation under the employment legislation exhibit(s) very little consistency.” Of similar concern is that section 194(1) does not disclose the nature of the action on

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<sup>193</sup> (2005) 15 *CLL* 21.

<sup>194</sup> *Idem* 23.

<sup>195</sup> Mischke mentions at 25 that his research of 2004-2005 arbitration awards revealed that “in most cases, there is no reasoning or no consideration of the issues at all and the number of months’ remuneration comprising the compensation award seems taken from thin air.” He points out that even when the factors taken into account are enumerated “no indication is given as to the relevant weight or importance of these factors” (*idem* 26).

<sup>196</sup> (1993) 14 *ILJ* 655 (LAC) 661A.

<sup>197</sup> S 46(9)(c) of the LRA 1956 was also framed in very general terms as in the case of ss 193(1) and 194(1) of the LRA 1995. See par 3.2 above.

<sup>198</sup> (2001) 22 *ILJ* 2407 (SCA) 2416.

<sup>199</sup> At 246.

<sup>200</sup> (2011) *ILJ* 1520.

which the employee's claim for compensation is based.<sup>201</sup> Is it contractual or delictual<sup>202</sup> by nature or is it a unique statutory claim which directs the arbitrator/judge to determine a discretionary amount of compensation as an expression of the arbitrator/judge's view of the level of unfairness that accompanied the dismissal? Clarity about the nature of the action is highly desirable for the purposes of legal certainty (predictability), the determination of the *facta probanda* in actions for unfair dismissal, the interpretation of sections 193(1)(c) and 194 of the LRA 1995, the application of compensation as a remedy and the determination of the applicable principles of the law of damages and of an appropriate amount of compensation.

A further complicating factor is that in review cases the courts seem to confuse the test that applies in determining whether compensation is the correct remedy (section 193(1)) and the test that should apply in determining the appropriate level of compensation (section 194). Thus the LAC stated in *Kukard v GKD Delkor (Pty) Ltd.*<sup>203</sup>

It is important to recognise that the Sidumo (reasonableness) test does not apply to a review of a compensation award made by a commissioner in terms of section 193(1)(c) of the LRA. This is a mistake commonly made by counsel and judges alike. What the reviewing court is required to do is to evaluate all the facts and circumstances that the arbitrator had before him or her, and then decide based on the underlying fairness to both the employer and employee whether the decision was judicially a correct one.

In *Kemp t/a Centralmed v Rawlings*<sup>204</sup> the following was said in respect of section 194:

When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach.

In commenting on the requirement in section 194(1) that the level of compensation must be just and equitable, Cohen<sup>205</sup> emphasises that the "awarding of

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<sup>201</sup> Le Roux states that "the section (a reference to section 194) tells us very little about how to determine the amount of compensation" (*idem* 1521).

<sup>202</sup> Unless if one regards the compensation as a *solatium*.

<sup>203</sup> [2015] 1 *BLLR* 63 (LAC) 72-73.

<sup>204</sup> (2009) 30 *ILJ* 2677 (LAC) 2696 – 2697.

<sup>205</sup> (2003) *ILJ* 737. See also Mischke (2005) 15 *CLL* 30 who explains: "Calculating compensation will never be an exact science ... While it may be possible, in principle, to obtain a sense of the appropriate compensation in the context of procedural unfairness (the extent and scope of the employer's deviation from the principles and standards of procedural fairness), determining the extent to which an employer has deviated from the

compensation on the basis of fairness is not an exact science.”<sup>206</sup> Consequently, the CCMA and courts should be provided with guidance for the purposes of exercising the discretion in section 194(1) and which could improve consistency and certainty.

The CCMA has indeed recently published a policy document known as “*Guidelines on Misconduct Arbitrations*”.<sup>207</sup> Based on these guidelines and on further comments by academic writers, a framework is emerging which eventually may be of considerable assistance to arbitrators and LC judges.

Amongst the most important guidelines applicable to substantively unfair dismissals is that the arbitrator should consider the employee's financial position<sup>208</sup> in terms of remuneration at the time of dismissal, payments received by the employee from the employer in consequence of the dismissal,<sup>209</sup> the employee's prospects of future employment,<sup>210</sup> whether the employee has secured alternative employment<sup>211</sup> and the level of his/her remuneration with a new employer. The arbitrator must also consider the extent of the financial loss suffered by the employee. There must also be a sufficient nexus between the conduct of the employer and the employee's loss.

Because fairness of the employer's conduct is, according to section 194(1) of the LRA 1995, the central standard in dismissal cases, the extent of the unfairness of the dismissal is evidently important. The amount of the compensation might be affected

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principles of substantive fairness is, by its very nature, a more complicated matter. Obviously, it is not possible to refer to a rigid grid of criteria of substantive fairness to inform an equally rigid calculation of compensation – there is, and can be, no table of factors or matrix of unfairness that makes possible an objective, mathematically determined award.”

<sup>206</sup> According to Mischke's research, six months' compensation seemed to be the average award (Mischke (2005) 15 *CLL* 28). Mischke's views were formed after researching two years of arbitration awards (2004-2005).

<sup>207</sup> CCMA (2012) *ILJ* 43.

<sup>208</sup> In *Plasticwrap - A Division of CTP Ltd v Statutory Council for the Printing, Newspaper & Packaging Industry & others* (2012) 33 *ILJ* 2668 (LC) the Court felt that the arbitrator should not have taken cognisance of the bond on the employee's house, the health condition of one of his children and the need for him to pay maintenance for that child. See also *Northern Province Local Government Association v CCMA & Others* [2001] 5 *BLLR* 539 (LC).

<sup>209</sup> According to s 195 of the LRA 1995, the compensatory award can be granted in addition to “any other amount to which the employee is entitled in terms of any law, collective agreement or agreement.” According to Van Niekerk & Smit (2015) 247 (see also *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) 2416) this may mean that the employee may claim both compensation in terms of section 194(1) and contractual damages for the same unlawful dismissal although an amount awarded in respect of the one may be taken into account in respect of the other.

<sup>210</sup> See also Mischke (2005) 15 *CLL* 26.

<sup>211</sup> Mischke (2005) 15 *CLL* 30.

if the employee also committed misconduct.<sup>212</sup> Cognisance is also taken of the fact that the employee may have unreasonably refused attempts by the employer to make substantial redress for the unfair dismissal e.g. an offer of reinstatement.<sup>213</sup>

The above are not the only determinative factors because account must also be taken of the employer's financial position. The courts have held that the purpose of compensation is generally not to punish employers and an appropriate amount of compensation must be determined with reference to the situation of both the employer and the employee.<sup>214</sup>

According to academic literature, other factors in considering the termination of compensation for a substantially unfair dismissal include the employee's length of service<sup>215</sup> and that the compensation must give expression to the purpose of the LRA 1995 namely to extend protection against unfair dismissal and at the same time to advance economic development and effectively resolve labour disputes.<sup>216</sup>

As regards guidelines and factors to be taken into account in respect of procedural unfairness, the CCMA suggests that the first question is whether the compensation is appropriate in the light of the severity of the procedural unfairness. This will necessitate an investigation into the employer's conduct<sup>217</sup> and the anxiety or hurt experienced by the employee.<sup>218</sup> The compensation must therefore express the degree of deviation from whatever would have been procedurally fair in the circumstances.<sup>219</sup> The nature of the compensation also differs from compensation for the fairness of the dismissal because in procedural unfairness cases, the courts have determined that compensation is a *solatium*<sup>220</sup> for the loss of the right to a fair pre-dismissal procedure.<sup>221</sup> As an injury to the personality<sup>222</sup> as in defamation cases, this means that loss needs not be proved and there is no investigation into

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<sup>212</sup> CCMA (2012) *ILJ* 72. See also *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (2012) 33 *ILJ* 453 (LC).

<sup>213</sup> *Scribante v Avgold Ltd: Hartebeesfontein Division* [2000] 11 *BLLR* 1342 (LC); Van Niekerk & Smit (2015) 246.

<sup>214</sup> CCMA (2012) *ILJ* 73.

<sup>215</sup> Mischke (2005) 15 *CLL* 26.

<sup>216</sup> Cohen (2003) *ILJ* 737 - 738.

<sup>217</sup> Matters such as whether the chairperson acted with bias is considered under procedural fairness.

<sup>218</sup> CCMA (2012) *ILJ* 73; Van Niekerk & Smit (2015) 246.

<sup>219</sup> *FAWU & others v SA Breweries Ltd* [2004] 11 *BLLR* 1093 (LC).

<sup>220</sup> See par 4.4.2 below.

<sup>221</sup> "(A) loss that may be difficult to quantify" (Cohen (2003) *ILJ* 738).

<sup>222</sup> See generally, Neethling, Potgieter & Visser (2006) 221ff.

the question as to whether the employee has found alternative employment or mitigated his/her losses. The CCMA also considers this compensation as punitive.<sup>223</sup>

Mischke<sup>224</sup> asks the very valid question as to whether the same factors that play a role in determining whether the dismissal was the appropriate sanction or not should also be applied in determining the appropriate compensation to be awarded to the employee?<sup>225</sup> Furthermore, one could indeed ask what factors require that more compensation be awarded and what factors require that less be awarded?

#### **4.4 Different bases of the statutory claim for compensation**

##### **4.4.1 Contract**

It has been explained in Chapters 2 and 3 that the employee may, according to the common law, recover his his/her positive *interesse* which is determined by a comparison between the patrimonial position of the employee, had contract been performed, and the position in which he/she finds himself/herself after the breach. Similar to the trends in case law under the LRA 1956, the courts did not use the positive *interesse* as a measure of determining statutory compensation in claims under the LRA 1995. It was pointed out in Chapter 3 that the courts did, in cases under the LRA 1956 where the applicant was a fixed-term employee, order compensation for the period calculated from the date of dismissal to the date of expiry of the contract, but this is hardly possible under the LRA 1995 given the limitation of 12 months' remuneration provided for in section 194(1).

##### **4.4.2 Delict**

Cohen<sup>226</sup> points out that the ordinary meaning of compensation is to “make amends for a wrong that has been inflicted.”<sup>227</sup> She asserts that, consequently,

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<sup>223</sup> CCMA (2012) *ILJ* 73; Van Niekerk & Smit (2015) 246.

<sup>224</sup> Mischke (2005) 15 *CLL* 29.

<sup>225</sup> Mischke writes at 29: “For both employees and employers, compensation remains unpredictable and uncertain, depending on an open-ended list of factors, individual views, approaches and points of view.”

<sup>226</sup> (2003) *ILJ* 737.

<sup>227</sup> Mischke (2005) 15 *CLL* 24 states that “in the case of substantively unfair dismissal the compensation also flows from the something lost i e (the right to) substantive fairness.”

compensation has traditionally been regarded as being “more akin to a delictual claim than a claim based on breach of contract.”<sup>228</sup>

As we saw in Chapter 3, the guidelines for the calculation of compensation in the famous case of *Ferodo v De Ruiter*<sup>229</sup> focussed on typical delictual measures of determining damages. Basically, it requires that the employee must have suffered and proved<sup>230</sup> actual financial loss and claim his/her negative *interesse* viz to be placed in the position in which he/she would have been had the unfair labour practice not been committed.

Although *Ferodo v De Ruiter* was decided under the LRA 1956, it is still often quoted and applied in compensation claims under the LRA 1995 where the dismissal was substantively unfair. Thus in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & others*<sup>231</sup> the Labour Appeal Court<sup>232</sup> restated the *Ferodo* approach as follows:

The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss ... See ... *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC).<sup>233</sup>

In the case of compensation for procedural unfairness, the type of damages awarded is typically delictual in the nature of a *solatium* for an *iniuria*. In these cases it was asserted that the right infringed is the employee's right to a fair hearing. Thus in '*Kylie*' v CCMA<sup>234</sup> the LAC said that: “By contrast, monetary compensation for a procedurally unfair dismissal has been treated as a *solatium* for the loss by an employee of her right to a fair procedure.”<sup>235</sup> It was also stated in *FAWU & others v SA Breweries Ltd*<sup>236</sup> that:

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<sup>228</sup> *Ibid.*

<sup>229</sup> (1993) 14 ILJ 974 (LAC).

<sup>230</sup> Moodley & Whitear-Nel (2015) ILJ 912; *Mangope v SA Football Association* (2013) 34 ILJ 311 (LAC).

<sup>231</sup> (2007) 28 ILJ 2238 (LAC) 2246.

<sup>232</sup> Hereafter “the LAC”.

<sup>233</sup> Grogan *Workplace Law* (2014) writes: “The restoration of the discretion to determine compensation according to 'justice and equity' revives the principles adopted by the courts under the 1956 Act. Those courts generally regarded claims for unfair dismissals as akin to claims for delictual damages, and held that the object of compensation was to compensate unfairly dismissed employees for the actual losses occasioned by their dismissals. The factors taken into account in assessing the quantum of compensation were set out as follows in *Ferodo (Pty) Ltd v De Ruiter*”. See also Grobler (2011) *Comments* 22.

<sup>234</sup> (2010) 31 ILJ 1600 (LAC).

<sup>235</sup> Cf also Mischke (2005) 15 CLL 23: “The “something lost” is not necessarily actual loss. The loss is non-patrimonial and in the nature of a *solatium*.” In the case of *Johnson & Johnson (Pty) Ltd v Chemical Workers*





An award for compensation under the amended section 194(1) still encompasses the *solatium* occasioned by a procedural defect (see *Fouldien's case (supra)* at 1182 paragraph 18). That *solatium* was described by Conradie JA in *Lorentzen v Sanachem (Pty) Ltd* [2000] 7 BLLR 763 (LAC) at 766, as requiring an evaluation of the magnitude of the employer's transgression together with the anxiety and "hurt" suffered by the affected employee. ... In the circumstances, I consider that compensation of nine months' remuneration would be fair and reasonable in relation to the applicants whose dismissals have been found to be procedurally unfair.

Although the case law provides clear links between delictual damages and statutory compensation for unfair dismissal, it must follow from the statutory cap that full delictual damages cannot nearly be awarded in most cases. According to section 194(1) of the LRA 1995, compensation is limited to only 12 months' remuneration.<sup>237</sup>

#### 4.4.3 Punitive damages

The notion that the compensatory award could have a punitive objective can be easily discerned in automatically unfair dismissal cases such as *CEPPWAWU & Another v Glass & Aluminium 2000 CC*<sup>238</sup> where the Court stated that the compensation must reflect a punitive element and serve as warning to other employers. The punitive element can be clearly identified in subsection (3) of section 194 of the LRA 1995 which increases the limit of compensation from 12 months to 24 months in the case of automatically unfair dismissals.<sup>239</sup> In *De Beer v SA Export Connection CC t/a Global Paws*<sup>240</sup> (a pregnancy dismissal case) the Court accordingly found that the treatment of the employee had been degrading and deeply offensive and that a dismissal such as this one was frowned upon and had to be prevented. Although the applicant had only been unemployed for six months after her dismissal, the court found it just and equitable to award her compensation equivalent to 20 months' remuneration. As mentioned in the previous paragraph, the award for *procedural unfairness* may also include a punitive element.

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*Industrial Union* (1999) 20 ILJ 89 (LAC) Froneman DJP stated at par 41: "The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss."

<sup>236</sup> [2004] 11 BLLR 1093 (LC) 1144 – 1145.

<sup>237</sup> This is extended to 24 months in the case of automatically unfair dismissals (s 194(3) of the LRA 1995).

<sup>238</sup> [2002] 5 BLLR 399 (LAC).

<sup>239</sup> S 187 of the LRA 1995.

<sup>240</sup> (2008) 29 ILJ 347 (LC).



#### 4.4.4 Unique statutory action

Mischke<sup>241</sup> is one of the proponents of the approach that the statutory claim for unfair dismissal is at best a creation of statute rather than a contractual or delictual type claim which requires proof of patrimonial loss. At most the compensation that could be imposed in terms of this claim (which has its origin in the LRA 1956), may resemble damages but is rather a solace payment for loss of a right.<sup>242</sup>

In *Chothia v Hall Longmore & Co (Pty) Ltd*<sup>243</sup> it was held that

(t)here is no indication in the provisions contained in s 194(1) and (2) of the LRA 1995 that 'compensation' should not be given its ordinary meaning ... that is, an award ... for the payment of 'the value, estimated in money, of something lost', the value which the claimant must prove.

This view was supported in *Baatjies v Dekro Paints (Pty) Ltd*:<sup>244</sup> “Ek volg dus die benadering ... in *Chothia v Hall Longmore & Co (Pty) Ltd* ... waar beslis is dat met kompensasie, in art 194 van die Wet, bedoel word, betaling vir dit wat verloor is.”

If this approach was correct, it would mean that the statutory claim indeed resembled a claim in a civil action as in the case of breach of contract or delict as discussed with reference to cases such as *Ferodo v De Ruiter*. However, in so far as section 194(1) is concerned, the correctness of this approach has been criticised because the section expressly provides that the compensation awarded must be “just and fair in all the circumstances.”<sup>245</sup> This is indeed the quintessential standard – not that a specific loss must be precisely compensated. Thus it was held in *Tshishonga v Minister of Justice & Constitutional Development & Another*<sup>246</sup> that compensation can be awarded even if the employee did not suffer any loss.<sup>247</sup> The effect of this approach is that it would be more correct to view the claim in terms of sections 193(1) and 194(1) as a unique statutory action which must be viewed as such and which is not merely a remedy which is akin to a civil action.

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<sup>241</sup> (2005) 15 *CLL* 24.

<sup>242</sup> *Idem* 30: “Compensation is a statutory remedy for unfair dismissal, it is a *solatium*. Its core remains the dismissal and the unfairness of the dismissal, the circumstances of the dismissal and the fact that the employee’s right not to be unfairly dismissed has been infringed by the employer.”

<sup>243</sup> (1997) 18 *ILJ* 1090 (LC) 1096.

<sup>244</sup> (1999) 20 *ILJ* 112 (LC) 117 - 118.

<sup>245</sup> *Grogan Labour Litigation* (2014) 308.

<sup>246</sup> (2007) 28 *ILJ* 195 (LC).

<sup>247</sup> However, the amount must be “just and equitable” and the arbitrator must give reasons for his/her award (CCMA (2012) *ILJ* par 109). See also *Lorentzen v Sanachem (Pty) Ltd* [1999] 8 *BLLR* 814 (LC); *Scribante v Avgold Ltd: Hartebeesfontein Division* [2000] 11 *BLLR* 1342 (LC); *Solidarity obo Kern v Mudau & others* [2007] 6 *BLLR* 566 (LC).

## 4.5 Jurisdictional overlap

### 4.5.1 Differences between common-law action and statutory claim

There are substantial differences between the common-law action for breach of contract, on the one hand, and the statutory claim for compensation, on the other hand. These differences are evidently of decisive importance to litigants in electing an appropriate remedy in a dismissal case.<sup>248</sup>

According to section 191(1)(b) of the LRA 1995, a dismissal dispute must be referred to the CCMA within 30 days of the date of dismissal. In contrast thereto, breach of contract actions (as do other contractual and delictual actions), only prescribe three years later.<sup>249</sup>

A statutory claim filed in the CCMA is usually a speedy remedy with simplified procedures and minimal technical requirements. It was explained in the Explanatory Memorandum of the LRA 1995<sup>250</sup> that speed is of importance because it is problematic to order reinstatement (the preferred remedy) when a long period of time passes between the dismissal of the employee and the moment when reinstatement is finally ordered. The same consideration therefore does not apply to a case where compensation is awarded instead of reinstatement, although one will often not know in advance which of the remedies the arbitrator/judge will actually decide upon before he/she has finally delivered his/her award/judgement.

In civil cases, such as an action for breach of contract, time-consuming, detailed proof of actual loss<sup>251</sup> is of decisive importance. This is not strictly appropriate compensation proceedings in terms of in sections 193(1) and 194(1), because the determination of compensation is to be mainly guided by that amount which is considered to be “just and equitable in all the circumstances.”<sup>252</sup>

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<sup>248</sup> See also par 4.5.2 in connection with the narrowing down of the common-law action after the SCA judgement in *SA Maritime Safety Authority v McKenzie* to only those dismissal cases where the employer acted in unlawful breach of the employment contract although not acting unfairly.

<sup>249</sup> S 11(d) of the Prescription Act 68 of 1969; Pretorius & Myburgh (2007) *ILJ* 2175.

<sup>250</sup> Ministerial Legal Task Team (1995) *ILJ* 316.

<sup>251</sup> Van Niekerk & Smit (2015) 97.

<sup>252</sup> See s 194(1) of the LRA 1995 quoted above.

CCMA arbitral awards are limited to a right of review in the LC. In contrast, an order of a civil court in an action based on breach of the employment contract may also be appealed against in the High Court.<sup>253</sup>

The LRA 1995 permits only a limited right to a legal representative at the arbitration stage in the CCMA. In the civil courts, the employee will enjoy the full right to legal representation as in all other civil cases.<sup>254</sup>

Section 191(1)(b) of the LRA 1995 provides that in proceedings under sections 193(1) and 194(1), the employee merely needs to establish the fact of being dismissed. The employer then bears the onus to prove that the dismissal was fair. In civil cases the employee will throughout bear the onus to prove the unlawful breach of contract by the employer.<sup>255</sup>

In the case of the statutory claim compensation is payable because of the infringement of the right of the employee not to be unfairly dismissed.<sup>256</sup> The fairness/unfairness<sup>257</sup> of the dismissal is therefore the basic issue. Fairness plays no role in the common-law action where the basic issue is still whether the defendant has unlawfully breached the very terms of the employment contract. Since the cause of action of the two remedies differ, it possible to even challenge the same act of dismissal in terms of both remedies in both the CCMA/LC and the civil courts.<sup>258</sup>

Perhaps the most important difference, from the dismissed employee's point of view, is the difference in the extent of compensation that could be awarded under each remedy. Section 194(1) of the LRA 1995 limits a claim to 12 month's remuneration. We have seen that, in the case of the common-law action for breaching the contract of an indefinitely appointed employee, damages are limited to the applicable notice period in accordance with s 37(1) of the BCEA, and which would usually amount to only four weeks' remuneration. Pursuing the statutory claim could therefore often make more sense than the common-law action. However, fixed-term employees could sue under the common-law action for damages equal to their remuneration for

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<sup>253</sup> Pretorius & Myburgh (2007) *ILJ* 2175.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> S 185 of the LRA 1995.

<sup>257</sup> S 191(1) of the LRA 1995.

<sup>258</sup> See note 209; Pretorius & Myburgh (2007) *ILJ* 2175 but subject to the limiting effect of the SCA's judgement in *SA Maritime Safety Authority v McKenzie* as discussed in Chapter 2.

the remainder of the term of their employment contracts. The mitigation rule could evidently have a limiting effect in all cases except where the statutory claim relates to a *solatium* such as in the case of procedurally unfair dismissals.

#### 4.5.2 Jurisdictional overlap after *McKenzie*

According to section 157(1) of the LRA 1995, the LC has exclusive jurisdiction in all matters to be determined by the LC in terms of the LRA 1995 and any other law. S 157(2) further extends the jurisdiction of the LC to cases which involve the violation of a fundamental right in the context of employment or labour relations.<sup>259</sup> The section indeed provides that the LC has concurrent jurisdiction with the High Court in such cases.

The jurisdiction of the LC is further extended by section 77(3) of the BCEA. It confers jurisdiction on that Court concurrent with the jurisdiction of the civil courts in “any matter concerning a contract of employment.”<sup>260</sup> Section 77A(e) of the same Act empowers the LC to grant the common-law remedies of specific performance, damages or compensation in such cases.<sup>261</sup> The cumulative effect of these provisions is to perpetuate the application of the common law in dismissal cases.

However, sections 77(3) and 77A(e) of the BCEA raise the question whether a dismissed employee could, despite the *McKenzie* judgement, still pursue a common-law action for breach of contract and with a view to claiming typical common-law damages although this time around in the LC. The answer should probably be in the negative because the effect of *McKenzie*<sup>262</sup> is that any common-law claim based on a cause of action in respect of which the “legislative scheme”<sup>263</sup> of the LRA 1995 already granted a remedy, could now be decisively met by a plea to the effect that the claim is not founded on a good cause of action.<sup>264</sup> It is significant that Wallis AJA includes, in so many words, the very remedy for unfair dismissal provided by

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<sup>259</sup> Such fundamental right could evidently refer to any right listed in the Bill of Rights including the right to fair labour practices in s 23(1) of the Constitution with its wide scope. This means that almost every labour dispute will fall within the ambit of s 157(2) of the LRA 1995.

<sup>260</sup> This is evidently a wide-ranging expression.

<sup>261</sup> It is interesting that these remedies are not subject to any cap.

<sup>262</sup> Apparently applying *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC) and *Gcaba v Minister of Safety & Security & others* (2009) 30 ILJ 2623 (CC).

<sup>263</sup> *SA Maritime Safety Authority v McKenzie* at 541 where the different provisions of the LRA 1995 that constitute the “legislative scheme” are listed.

<sup>264</sup> *SA Maritime Safety Authority v McKenzie* at 553 – 554.

sections 193(1) and 194(1) of the LRA 1995 as part and parcel of this “scheme”. Thus, in so far as unfair dismissal cases are concerned, it may be argued on the basis of *McKenzie* that the common-law action for breach of contract has been abrogated. It follows therefore that, since the jurisdiction of the civil courts in respect of common-law based actions for dismissal has been eroded by the *McKenzie* judgement, there could equally be no further substance in the parallel jurisdiction that section 77(3) of the BCEA purported to confer upon the LC.

But this conclusion is not necessarily supported by post *McKenzie* case law. In *Mangope v SA Football Association*<sup>265</sup> that the LC and LAC continued with the application of the common law where actions for breach of contract were pursued in those courts on the basis of section 77(3) of the BCEA. It was also stated in *Goussard v Impala Platinum Limited*<sup>266</sup> that “(t)o the extent that the BCEA confers jurisdiction on the Labour Court, the powers of the court are strictly limited to determining rights arising from *the common law of contract*.”<sup>267</sup> Van Jaarsveld<sup>268</sup> came to a slightly different but substantially similar conclusion namely that s 77(3) of the BCEA has created

’n derde aksieproses, naamlik ’n *semi-statutêre proses ingevolge waarvan kontraktuele eise*,<sup>269</sup> op artikel 77(3) van die Wet op Basiese Diensvoorwaardes 75 van 1997, gebaseer, in die Arbeidshof aangehoor kan word en waar onder ander spesifieke nakoming, skadevergoeding of kompensasie verhaal kan word (artikel 77A(e) van WBV).

In reverting to section 157(2) of the LRA 1995, the question should be asked whether the “erosive effect” of the *McKenzie* judgement on the common law should also apply to the High Court’s jurisdiction over dismissal disputes related to a fundamental right. Similarly, could this judgement affect the LC’s jurisdiction in terms of that section to apply constitutional law? Certain dicta of Ngcobo J in *Chirwa v Transnet Ltd & others*<sup>270</sup> may be relevant to these questions e g his remark that the purpose of the LRA 1995 was to create a “one stop shop” with specialized dispute resolution structures and remedies and that litigants should not be allowed to bypass the conciliation and dispute resolution machinery created by the LRA 1995. In

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<sup>265</sup> (2013) 34 *ILJ* 311 (LAC).

<sup>266</sup> (2012) 33 *ILJ* 2898 (LC) 2908.

<sup>267</sup> Emphasis added.

<sup>268</sup> (2012) *Obiter* 655.

<sup>269</sup> Emphasis added.

<sup>270</sup> At 98ff.

*Gcaba v Minister of Safety & Security & others*<sup>271</sup> Van der Westhuizen J also echoed these considerations but added<sup>272</sup> that:

Furthermore, the LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour and employment related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.

In view of this discussion, the conclusion is inescapable that the full consequences of the *McKenzie* decision for the abrogation of the common-law action for breach of contract in dismissal cases have probably not yet been properly assessed from all angles. It follows that sections 77(3) and 77A(e) of the BCEA and section 157(2) of the LRA 1995 require, six years after the *McKenzie* decision, a thorough review and possibly corrective measures.

#### 4.6 Conclusion

Judging by the mere statistics, the CCMA and Labour Court have in fact given momentum to the establishment of an efficient, cheap and effective statutory dispute resolution system under the LRA 1995. The emphasis during CCMA procedures on simplified dispute reference procedures and hearings has improved the “user-friendliness” and popularity of the system from the viewpoint of employees.

It is indeed understandable that, given the experience of labour lawyers in the Industrial Court under the LRA 1956, an informal, smooth functioning equity based adjudication system which is not hamstrung by over-prescriptive measures, would have been the best starting point in getting the system established. However, it has been pointed out with reference to academic and judicial opinions that, in practice, the assessment of compensation in dismissal cases leaves much to be desired. This is apparently due to the (almost blanket) discretion in section 194(1) of the LRA 1995 to frame awards and which do not promote consistency and accuracy in the quantification of compensation.

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<sup>271</sup> At 2640.

<sup>272</sup> *Ibid.*

Twenty years after the commencement of the LRA 1995 one could indeed ask whether the time hasn't arrived for the review and re-assessment of the compensation system and for comprehensive practical research as to what patterns have emerged in the course of CCMA arbitral awards. One cannot deny that measures such as the new "*Guidelines on Misconduct Arbitrations*" of the CCMA is a step in the right direction although they are still in very basic format and not full-scale enforceable prescripts. It hoped that, in due course, the landscape in which the arbitrators' discretions are exercised will be better charted with a view to improving the quality, consistency and accuracy of arbitral awards. In this respect the differentiated, double-pronged statutory claim system of the United Kingdom<sup>273</sup> could provide an excellent comparative model.

The suggested research would hopefully also provide us with new approaches to the true nature of the respective awards for substantively and procedurally unfair dismissals. It has been shown that there are at least two schools of thought in respect of awards for substantially unfair dismissals at present, the one advocating the *Ferodo* approach with its emphasis on proven loss and the other being the unique statutory action approach with emphasis on the "just and equitable" standard of fairness in section 194(1) of the LRA 1995. In principle, the latter is perhaps the more correct approach from a statutory interpretation point of view. In the meanwhile, there is clearly no unanimity on the true juridical basis of the statutory action. As regards procedurally fair dismissals, it appears that there is wide agreement that the relevant award is in the nature of a *solatium*. Nevertheless, one feels that the understanding of the substantive and procedural dimensions of the statutory action and the calculation of appropriate awards could be enhanced if the statute were to be amended to disclose more about the nature and objectives of each award.

As mentioned above, the issues for further research should definitely include the question whether the same factors that play a role in determining whether the dismissal was the appropriate sanction or not should also be applied in determining the appropriate compensation to be awarded to the employee. Furthermore, what factors require that more compensation be awarded and what factors require that

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<sup>273</sup> See Chapter 5.





less be awarded? New theory and policies could lay the basis for statutory review and scientifically justifiable awards.

As regards the jurisdictional overlap issue, it has been shown that our law of dismissal must be thoroughly reviewed as a consequence of the *McKenzie* decision. Although this judgement had a pervasive effect on the continued applicability of the common law in dismissal cases, it appears that there is not yet uniform appreciation of the consequences of the judgement for our law, especially in respect of sections 77(3) and 77A(e) of the BCEA and section 157(2) of the LRA 1995.

## CHAPTER 5

### INTERNATIONAL COMPARISON: THE COMMON-LAW ACTION AND STATUTORY CLAIM FOR DISMISSAL IN THE UNITED KINGDOM

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#### **5.1 Introduction**

A comparative study on compensation payable to employees for dismissal is not merely of academic importance. For labour law purposes, foreign law became even more relevant by virtue of section 39(1)(c) of the Constitution<sup>274</sup> which stipulates in so many words that the courts may consider foreign law in the interpretation of the Bill of Rights.

The study of the labour law of the United Kingdom<sup>275</sup> is of great significance for understanding our own labour law system.<sup>276</sup> It was expressly stated in the

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<sup>274</sup> Constitution of the Republic of South Africa 1996.

<sup>275</sup> Hereafter "the UK".

<sup>276</sup> See Smit *Ph D Thesis* 60.

Explanatory Memorandum on the Labour Relations Bill<sup>277</sup> that “our law of unfair dismissal was developed entirely by the courts, drawing on ... *English law*”.<sup>278</sup>

This Chapter will firstly deal with English common law, more particularly the concept of “wrongful dismissal” and the extent of damages that may be recovered by means of the action for breach of contract. Certain high-water mark cases, such as the well-known decision in *Johnson v Unisys Ltd*,<sup>279</sup> will be discussed. The focus then shifts to an analysis of the statutory action for unfair dismissal, the different role-players in the dispute resolution system and the types of awards.

## 5.2 The common-law action for wrongful dismissal

Where an employee elects to base his/her claim against an employer on the common-law action for wrongful dismissal, the claim must be enforced in the County Court or the High Court<sup>280</sup> (civil courts). Litigants may appeal to the Court of Appeal, whereafter a further appeal lies to the Supreme Court with an ultimate appeal to the European Court of Justice.<sup>281</sup> Common-law claims for breach of the employment contract could also be brought before the Employment Tribunal but then subject to certain caps.<sup>282</sup>

The action for wrongful dismissal is a common-law remedy for breach of the employment contract by dismissal without adequate notice.<sup>283</sup> Although the common law does not require that any reason be given for dismissal,<sup>284</sup> the contractual relationship cannot be terminated without the employer giving reasonable notice according to the prescribed notice periods.<sup>285</sup>

The purpose of the common-law claim for damages is to place the employee in the position he/she would have been had the contract been performed. His/her claim is

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<sup>277</sup> Ministerial Legal Task Team (1995) *ILJ* 315.

<sup>278</sup> Italics added.

<sup>279</sup> [2001] 2 All ER 801 (HL).

<sup>280</sup> If the amount involved exceeds £ 15 000,00.

<sup>281</sup> The UK joined the Common Market (precursor of the EU) in 1973 and the UK is therefore subject to EU law and the jurisdiction of the European Court of Justice.

<sup>282</sup> See the discussion below.

<sup>283</sup> *Cook et al* (2014) 163; *Hardy* (2011) 179; *Lewis et al* (2011) 219 (the writers indicate that dismissals in breach of agreed contractual dismissal procedures are also included).

<sup>284</sup> *Hardy* (2011) 178.

<sup>285</sup> S 86(1) of the Employment Rights Act 1996 (hereafter the “ERA (1996)).

therefore for his/her positive *interesse*.<sup>286</sup> According to Collins “damages ... for wrongful dismissal follows a contractual expectation measure”<sup>287</sup> and a person wrongfully dismissed can be compensated for loss that arises naturally from the breach and for any loss which was reasonably foreseeable by the parties.<sup>288</sup> As regards pay, only the loss of pay<sup>289</sup> can be recovered that pertains to the period between the date of the wrongful dismissal and the date when the contract could have been lawfully terminated by notice.<sup>290</sup> A claim based on a fixed-term contract, however, spans the whole remaining period of the contract.<sup>291</sup>

Employees also have a duty to mitigate their losses.<sup>292</sup> Amounts earned from other employment must be deducted from the claim as well as other amounts payable to the employee as a result of the dismissal.<sup>293</sup> The compensatory award under the statutory claim for unfair dismissal is taken into account in fixing common-law damages but excluding the amount of the basic award.<sup>294</sup>

Specific performance (reinstatement) is usually not ordered in UK Law.<sup>295</sup> The employment relationship is seen as a personal contract and it is considered to be inappropriate to force the parties to continue the contract.<sup>296</sup>

Although all<sup>297</sup> foreseeable damages related to the loss of remuneration, other benefits and even pension rights of wrongfully dismissed employees may be recovered, the issue remained controversial whether common-law damages can be claimed for the manner of dismissal or for injured feelings. In the leading case of

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<sup>286</sup> Cook *et al* (2014) 173; Phillips & Scott (2010) 56; Selwyn (2006) 387.

<sup>287</sup> (2012) 41 (*ILJ*) (*UK*) 208. See also Davies (2009) 171; Lamb (1998) 325.

<sup>288</sup> Collins (2012) *ILJ* (*UK*) 215; Phillips & Scott (2010) 56; Lewis *et al* (2011) 220.

<sup>289</sup> Cook *et al* (2014) 171 who mentions that even discretionary annual increases and bonuses could be recovered if the employer acted in a manner “which no reasonable employer would have done.” “Pay” includes pension (Lewis *et al* (2011) 220. “Damages” however, does not include *iniuria* (Lewis *et al* (2011) 220; Hardy (2011) 179) (see discussion of the case law below).

<sup>290</sup> Lewis *et al* (2011) 219-220; Collins (2012) 1 *ILJ* (*UK*) 208. A claim can also be added for the period required for proper disciplinary procedures if such were not followed before the dismissal (Painter & Holmes (2008) 426).

<sup>291</sup> Painter & Holmes (2008) 426.

<sup>292</sup> Lewis *et al* (2011) 220; Collins (2012) *ILJ* (*UK*) 215; Phillips & Scott (2010) 60. The employee is only under a duty to accept reasonable offers of re-employment by the employer (Phillips & Scott (2010) 60).

<sup>293</sup> Cook *et al* (2014) 175.

<sup>294</sup> Deakin & Morris (2012) 426.

<sup>295</sup> Cook *et al* (2014) 165; Hardy (2011) 180.

<sup>296</sup> Lockton (2011) 202; Hardy (2011) 180.

<sup>297</sup> The amount of the recoverable damages is, in principle, unlimited.

*Addis v Gramophone Co Ltd*<sup>298</sup> the Court held that damages for wrongful dismissal does not include compensation for the manner of dismissal or injured feelings.

In *Malik v Bank of Credit and Commerce International SA (in liquidation) Mahmud v Bank of Credit and Commerce International SA (in liquidation)*<sup>299</sup> the House of Lords subscribed to the existence of an implied term of mutual trust and confidence in all contracts of employment. The Court also deviated from the clear principles of the *Addis* decision. It held that a claim for “stigma damages” in the form of direct economic loss resulting from the unlawful dismissal was indeed possible.<sup>300</sup>

In *Johnson v Unisys Ltd*<sup>301</sup> the House of Lords held that the common law should not be developed in directions that could circumvent limitations applicable to the compensation recoverable by the statutory claim for unfair dismissal.<sup>302</sup> The Court declined a claim based on the breach of the implied term of mutual trust and confidence<sup>303</sup> as a basis for a common-law action that could surpass the said statutory limitations. Thus Lord Millet stated:<sup>304</sup>

But the creation of the statutory right has made any such development of the common law both unnecessary and undesirable. In the great majority of cases the new common-law right would merely replicate the statutory right ... And, even more importantly, the coexistence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost.

The consequence of the *Johnson* case was to exclude the common-law claim in three instances: Firstly, the “exclusion zone” applied to claims based on the implied term of mutual trust and confidence that were in reality claims about the manner of dismissal;<sup>305</sup> secondly, it applied to claims regarding psychiatric loss or “stigma damages”, either in tort or contract, caused by the manner of dismissal and thirdly it possibly applied to any claims that could circumvent the said statutory limitations.<sup>306</sup>

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<sup>298</sup> [1909] AC 488.

<sup>299</sup> [1997] 3 All ER 1 (HL).

<sup>300</sup> E.g. where potential future employers refuse to employ job applicants because their employment record shows a preceding dismissal.

<sup>301</sup> [2001] 2 All ER 801 (HL). See also Collins’ discussion (2012) *ILJ (UK)* 210. The case was based on a failure by the employer to comply with procedural requirements.

<sup>302</sup> See the discussion of this claim in the next paragraph.

<sup>303</sup> The Court held in *Johnson* (at 825) that the implied term of mutual trust and confidence is “an inherent feature of the relationship of employer and employee which does not survive the ending of the relationship.”

<sup>304</sup> *Idem* 826.

<sup>305</sup> It is possible to claim for “manner of dismissal” under the statutory claim for a compensatory award (see par 5.3.4.2 below).

<sup>306</sup> The exact scope of the *Johnson* exclusion zone remains contested.

The *Johnson* case was followed by *Eastwood and another v Magnox Electric PLC, McCabe v Cornwall County Council and others*.<sup>307</sup> In this case Lord Nicholls pointed out that one must discern between the manner of dismissal which fell within the “*Johnson* exclusion zone” and is therefore not actionable, and the situation where an employee had, before the dismissal, acquired a cause of action against the employer for breach of contract by breaching the term of trust and confidence or otherwise, and which lay outside the “exclusion zone”.<sup>308</sup>

In *Edwards v Chesterfield Royal Hospital NHS Foundation Trust, Botham v Ministry of Defence*<sup>309</sup> employees brought common-law actions for wrongful dismissal on the basis of non-compliance with disciplinary procedures in their employment contracts. They alleged that they had suffered loss of reputation as a result of the employers’ actions. The court found that the “*Johnson* exclusion zone” applied since the employees’ claims originated in the conduct of the employer in the course of the dismissal process and which was not independent of the dismissal. The effect of the *Edwards* case was therefore to deny damages for breach of a contractual disciplinary procedure.

### 5.3 The statutory claim for unfair dismissal

#### 5.3.1 Introduction

Today,<sup>310</sup> the most important labour law statutes in England and Wales are the Trade Union and Labour Relations (Consolidation) Act 1992,<sup>311</sup> Employment Rights Act 1996,<sup>312</sup> Employment Tribunals Act 1996 and Employment Act 2002.<sup>313</sup> Various other regulations and codes of practice issued by ministers or a statutory bodies e.g the Advisory Conciliation and Arbitration Service are of further relevance to labour matters.<sup>314</sup>

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<sup>307</sup> [2004] 3 All ER 991 (HL).

<sup>308</sup> See also *Collins (2012) (ILJ (UK) 210; Cook et al (2014) 170-171*.

<sup>309</sup> [2012] 2 All ER 278 (HL).

<sup>310</sup> The Health and Morals of Apprentices Act 1802 and the Master and Servant Act 1823 were the first examples of modern legislation regulating labour relations in the UK.

<sup>311</sup> Hereafter “TULRCA 1992”.

<sup>312</sup> Hereafter the “ERA 1996”.

<sup>313</sup> Hereafter the “EA 2002”.

<sup>314</sup> *Lewis et al (2011) 3*. The Employment Tribunal may increase an award against an employer by up to 25% if the failure to observe the Code was unreasonable (s 207A of the TULRCA 1992).

The limited scope of the common-law action for breach of contract was the reason for the introduction of a modern statutory action for unfair dismissal.<sup>315</sup> The purpose of a statutory action was also to establish substantial fairness and compliance with procedural fairness as basic standards for dismissals and to implement a speedier,<sup>316</sup> more efficient and cheaper tribunal dispute resolution system.<sup>317</sup>

### 5.3.2 Dispute resolution system<sup>318</sup>

The disciplinary procedures to be followed by employers in dismissing employees is set out in Schedule 2 to the EA.<sup>319</sup> It provides that the employer must first set out the employee's alleged misconduct in writing and serve same upon the employee with an invitation to attend a meeting to discuss the matter.<sup>320</sup> After the meeting the employee must be informed of the employer's decision as well as his/her right to an internal appeal.<sup>321</sup>

The Advisory Conciliation and Arbitration Service<sup>322</sup> consists of up to 15 members appointed by Secretary of State from nominations by trade unions and employers organisations whilst one-third of the members is independent.<sup>323</sup> The proceedings before ACAS commences when a complaint is submitted<sup>324</sup> by an employee to an Employment Tribunal. A copy of the complaint is referred to an ACAS conciliation

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<sup>315</sup> Deakin & Morris (2012) 426. According to Collins (2012) *ICJ (UK)* 209 "(t)he Industrial Relations Act 1971 which first enacted the law of unfair dismissal, aimed to improve upon the level of compensation available under the common law of wrongful dismissal (breach of contract)."

<sup>316</sup> Hardy (2011) 70.

<sup>317</sup> Smit *Ph D Thesis* 62-63. Corby & Latreille (2012) 41 *ILJ (UK)* 387ff complains that Employment Tribunals are losing their informality of procedures and have over the years become more and more court-like.

<sup>318</sup> Smit *Ph D Thesis* 62 opines that the UK dispute resolution system complies with article 8 of the International Labour Organisation's Convention 158 (the "Convention on the Termination of Employment at the Initiative of the Employer").

<sup>319</sup> The Code of Practice on Disciplinary and Grievance Procedures 2009, issued under s 199 of the TULCRA 1992, must also be applied to the preparation for a disciplinary hearing and the hearing itself. This Code has some important aspects in common with Schedule 8 to the LRA 1995 e.g. as regards the appropriateness of sanctions.

<sup>320</sup> The failure by the employer to provide a statement of reasons when requested by the employee at this stage, can lead to a complaint before an Employment Tribunal. The employer could also be penalised by an award of two weeks' pay in favour of the employee.

<sup>321</sup> According to Phillips & Scott (2010) 118, internal appeals are often no more than reviews. However, only a full appeal could cure the procedural defects of the original hearing.

<sup>322</sup> Hereafter "ACAS". This body was constituted under Statutory Instrument 1988 No. 14 ("the Employment Protection Code of Practice (Disciplinary Practice and Procedures) Order").

<sup>323</sup> ACAS may advise employers, employer organisations, employees and trade unions on any labour related matter (s 213 of the TULCRA 1992; Lewis *et al* (2011) 8-9).

<sup>324</sup> S 48 of ERA 1996. Complaints must be submitted within three months of the date of dismissal.

officer to attempt conciliation.<sup>325</sup> If conciliation is not successful, a full hearing takes place before an Employment Tribunal.<sup>326</sup>

An Employment Tribunal<sup>327</sup> is composed of a legally qualified person appointed by the Lord Chancellor as chairperson and two lay persons appointed by Secretary of State (in both cases from amongst nominations made by employer and employee organisations). The hearings are informal and lawyer or trade union representation is allowed.<sup>328</sup> The Tribunal may order reinstatement or re-engagement under section 113 of the ERA 1996 or award compensation for unfair dismissal.<sup>329</sup> All Employment Tribunal cases can be taken on review or appeal to the Employment Appeal Tribunal.<sup>330</sup> This Tribunal is presided over by a High Court judge nominated by the Lord Chancellor and two or four lay persons recommended by the Lord Chancellor and Secretary of State and nominated by employer and employee organisations.<sup>331</sup> The appellant may, if unsuccessful, appeal to the Court of Appeal, whereafter a further appeal lies to the Supreme Court with an ultimate appeal to the European Court of Justice.

### 5.3.3 Remedies for unfair dismissal

Section 94(1) of the ERA 1996 provides that an employee<sup>332</sup> has a right not to be unfairly dismissed by his/her employer. The fairness or unfairness of the dismissal depends on whether the employer can show a reason for the dismissal.<sup>333</sup> Section 98(4) of the ERA 1996 further provides that the reasonableness of the dismissal must be decided with reference to equity and the merits of the case.<sup>334</sup> If the

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<sup>325</sup> Lewis *et al* (2011) 10 and S 212 of the. From 6 April 2014, before lodging a claim to the Tribunal all claimants must notify ACAS first, whereafter conciliation is offered. If conciliation is unsuccessful within the set period the claimant can proceed to lodge a tribunal claim.

<sup>326</sup> S 212A of the TULRCA 1992.

<sup>327</sup> It was constituted under the Employment Tribunals Act 1996 (Tribunal Composition).

<sup>328</sup> Lewis *et al* (2011) 7-8.

<sup>329</sup> S 112 of the ERA 1996.

<sup>330</sup> This must occur within 42 days after extended written reasons for the decision or the order of the Employment Tribunal was forwarded to the appellant (r 3 of the Employment Appeal Tribunal Rules 1993 S1 No. 2854.)

<sup>331</sup> Lewis *et al* (2011) 8-9.

<sup>332</sup> Employees employed with the employer for less than two years are excluded (s 108(1) of the ERA 1996; Ewing & Hendy (2012) *ILJ (UK)* 115ff; Mangan (2013) *ILJ (UK)* 409ff; Hepple (2013) *ILJ (UK)* 203ff) unless the dismissal falls within one of the grounds of automatic unfairness (ss 99 to 104B of the ERA 1996).

<sup>333</sup> S 98 of the ERA 1996.

<sup>334</sup> Even though a decision to dismiss was substantially fair, an unfair procedure may render the dismissal unfair. This is the case even where procedural compliance would not have affected the result of the dismissal



decision of the employer to dismiss fell within the band of reasonable responses which a reasonable employer could have adopted, the dismissal is regarded as fair.<sup>335</sup> In *Polkey v A E Dayton Services Ltd*<sup>336</sup> the House of Lords overturned the decision of the Court of Appeal because of its “confusion between unreasonable conduct in reaching the conclusion to dismiss, which is a necessary ingredient of an unfair dismissal, and injustice to the employee, which is not a necessary ingredient of an unfair dismissal.”<sup>337</sup>

According to section 113 of the ERA 1996, the Employment Tribunal may order the reinstatement or re-engagement of an employee unfairly dismissed. The Tribunal must also consider whether it is practicable for the employer to take the employee back.<sup>338</sup> Reinstatement is the preferred remedy<sup>339</sup> which restores the *status quo ante*.

The award of statutory compensation for an unfair dismissal consists of a basic award and a compensatory award.<sup>340</sup> The basic award is calculated by multiplying a flat rate factor, known as “an appropriate amount,” with the total number of years (not exceeding 20)<sup>341</sup> of continuous employment with the particular employer. Section 119(2) of the ERA 1996 defines “an appropriate amount” as one and a half weeks’ salary for each year of employment in which the employee was 41 years or older; one weeks’ salary for each year of employment in which the employee was between the ages of 22 years and 40 years; and a half a week’s salary for each year of employment in which the employee was below 22 years.

The Employment Tribunal must reduce the amount of the basic award with a just and equitable amount if<sup>342</sup> the employee unreasonably refuses an offer of reinstatement

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(Phillips & Scott (2010) 112). Most of the procedural aspects of disciplinary hearings are to be found in the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

<sup>335</sup> Lockton (2011) 249.

<sup>336</sup> [1987] 3 All ER 974 (HL).

<sup>337</sup> Reference is often made in textbooks to the so-called “*Polkey*” principle and the “*Polkey*” reduction. The first-mentioned refers to the principle that, if an unfair procedure was followed, the resulting dismissal would usually be unfair. The reduction refers to the discretion of the Employment Tribunal to deduct an amount from an award in favour of an employee where it was found that the employee would have been fairly dismissed had a fair procedure been followed (Hardy (2011) 187).

<sup>338</sup> *Ibid.*

<sup>339</sup> Pitt (2009) 298. Re-employment is not ordered against the wishes of the employee (*idem* 299).

<sup>340</sup> S 118(1) of the ERA 1996.

<sup>341</sup> S 119(3) of the ERA.

<sup>342</sup> S 122(1) of the ERA 1996.

by the employer. Further grounds for reduction are (a) the conduct of the employee before the dismissal,<sup>343</sup> (b) failure by the employee to avail himself/herself of internal appeal procedures before approaching the Tribunal and (c) failure to mitigate his/her loss.<sup>344</sup> The loss that can be recovered by the employee is evidently limited by the expected remaining period of employment.<sup>345</sup>

The compensatory award<sup>346</sup> is based on an amount that the Tribunal considers just and equitable<sup>347</sup> in all the circumstances having regard to the loss sustained by the complainant which is attributable to the action of dismissal taken by the employer.<sup>348</sup> The limit on the amount of the compensatory award for unfair dismissal was raised to £ 78 335 with effect from 6 April 2015.<sup>349</sup>

In cases such as *Norton Tool Co Ltd v Tewson*<sup>350</sup> certain “heads of compensation” were developed in respect of compensatory awards. They include (a) the loss of salary between the date of dismissal and the date of the hearing before the Employment Tribunal; (b) future loss of salary in respect of which contingencies must be taken into account;<sup>351</sup> (c) the loss of accrued rights; (d) the manner of dismissal;<sup>352</sup> and (e) the loss of pension rights.

### 5.3.4 Different bases of the statutory claim for compensation

This paragraph is devoted to the discussion of different bases of the basic and compensatory statutory award. The four possible bases discussed are contract,

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<sup>343</sup> S 122(2) of the ERA 1996. This includes “contributory fault” (*Cook et al* (2014) par 817 and 821). In the *Polkey* case it was held that where the employee’s misconduct was serious, but the dismissal was unfair as a result of the employer’s failure to follow a fair procedure, it may be appropriate to reduce the compensation to zero on the ground of the employee’s contributory fault. (See also *Collins* (2012) (*ILJ*) (UK) 220 and s 123(6) of the ERA 1996. Pitt (2009) 300 mentions that “(i)t is not wholly uncommon for 100 per cent reductions to be made.” The same percentage deduction is applied to both the basic and the compensatory awards (*Painter & Holmes* (2008) 530)).

<sup>344</sup> Ss 123(4) and 127(A) of the ERA 1996; *Cook et al* (2014) par 822; *Phillips & Scott* (2010) 132-133.

<sup>345</sup> *Cook et al* (2014) par 818; *Dunnachie v Kingston upon Hull City Council* [2004] 3 All ER 1011 (HL).

<sup>346</sup> S 123(1) of the ERA 1996.

<sup>347</sup> *Cook et al* (2014) par 818 maintains that the starting point is not the degree of unfairness involved in the dismissal but rather the extent of the actual financial loss.

<sup>348</sup> S 123(2) of the ERA 1996. The “loss” includes related expenses or the loss of any forfeited benefits.

<sup>349</sup> See s 124 of the ERA 1996 and The Employment Rights (Increase of Limits) Order 2015.

<sup>350</sup> [1973] 1 All ER 183 187-189 (HL). See also *Cook et al* (2014) par 819.

<sup>351</sup> The correct approach would be to ask how long it would likely take for the employee to obtain similar employment (*ibid*).

<sup>352</sup> Distress suffered as a result of the dismissal cannot found a claim unless the employee finds it more difficult to find new employment because if his/her dismissal (*Cook et al* (2014) par 819).

delict, punitive damages and statutory action. The identification of the correct basis is of cardinal importance in understanding the nature of these two awards.

#### 5.3.4.1 Contract

An action for breach of contract aims to put the employee in the position in which he/she would have been had the contract been fulfilled. This does not apply to the basic award which, as discussed in par 5.3.4.2, involves a calculation based on a strict formula. In par 5.3.4.4 it is shown that the statutory compensatory award resembles the manner of calculation of delictual damages. Consequently, neither of these awards follow the model of contractual damages.

#### 5.3.4.2 Delict

The compensatory award aims to put the employee in the position in which he/she would have been had the unfair dismissal not occurred.<sup>353</sup> Collins states that this “tort-like” claim<sup>354</sup> covers the full spectrum of the actual economic loss<sup>355</sup> that the employee suffered<sup>356</sup> and could prove.<sup>357</sup> It is limited only by a generous cap of £78 335. Having regard to the lower cost of the proceedings in the Employment Tribunal, unfairly dismissed employees prefer this remedy to a common-law claim in the civil courts.

However, in the *Norton* case<sup>358</sup> the House of Lords<sup>359</sup> expressed itself in favour of the compensatory claim as a unique statutory claim rather than a delictual claim.<sup>360</sup>

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<sup>353</sup> It is in essence a claim similar to the common-law claim for the employee’s negative *interesse*.

<sup>354</sup> Collins (2012) (*ILJ*) (UK) 220.

<sup>355</sup> See also Cook *et al* (2014) par 818. Selwyn (2006) 448 maintains that even expenses incurred by the dismissed employee in setting up an own business after his/her dismissal are not too remote. In *Dunnachie v Kingston upon Hull City Council* 1022 the House of Lords held that “loss” has a plain meaning limited to economic loss and that does not permit the recovery of non-economic loss. This was confirmed in *Eastwood and another v Magnox Electric PLC/McCabe v Cornwall County Council and others*.

<sup>356</sup> Collins (2012) (*ILJ*) (UK) 220.

<sup>357</sup> Holland & Burnett (2013) 281. It follows that if an employee cannot prove loss, no compensatory order will be made (Painter & Holmes (2008) 524).

<sup>358</sup> At 183.

<sup>359</sup> In commenting on the direct statutory predecessor of the ERA 1996.

<sup>360</sup> “In our judgment, the common-law rules and authorities on wrongful dismissal are irrelevant. That cause of action is quite unaffected by the 1971 Act which has created an entirely new cause of action, namely the ‘unfair industrial practice’ of unfair dismissal. The measure of compensation for that statutory wrong is itself the creature of statute and is to be found in the 1971 Act and nowhere else. But we do not consider that Parliament intended the court or tribunal to dispense compensation arbitrarily. On the other hand, the amount has a discretionary element and is not to be assessed by adopting the approach of a conscientious and skilled cost accountant or actuary. Nevertheless, that discretion is to be exercised judicially and on the basis of principle.” (at 186).

The justices opined that the principles that emerge from the statutory provision are.<sup>361</sup>

- (a) The purpose of the statutory provision is to compensate fully;
- (b) The amount to be awarded should be an amount that is 'just and equitable'. The court's discretion should be directed towards the circumstances of the case and the extent of the loss of the employee. The concept "loss" is to be given its ordinary meaning; and
- (c) The amount payable as compensation is in the discretion of the court and the starting point is the words '*having regard to the loss*.'<sup>362</sup> It follows that 'the amount of the compensation is not precisely and arithmetically related to proved loss.' The employee does bear the burden of proof. However, this burden is not on the same level as in civil cases as the court must have regard to 'the requirement for informality of procedure and the undesirability of burdening the parties with the expense of adducing evidence of an elaboration which is disproportionate to the sums in issue.'<sup>363</sup>

### 5.3.4.3 Punitive damages<sup>364</sup>

Since the purpose of the basic award is to provide a minimum level of compensation based on a redundancy payment type formula,<sup>365</sup> this award has nothing in common with punitive damages. The same holds true in the case of the compensatory award. Since the concept of "loss" is central to the compensatory award, it should not be used to penalise an employer and should not exceed loss actually suffered.<sup>366</sup>

There are, however, two examples of punitive type statutory provisions in UK labour law: Firstly, section 12A of the Employment Tribunals Act 1996 has recently been amended to provide that the Tribunal may order employers who lost cases before the Tribunal, to pay a financial penalty to the Secretary of State of between £100 and £5,000. The penalty may be imposed where the employer has breached any of the worker's rights and the breach has one or more aggravating features. Secondly, the failure by an employer to adhere to the provisions of a Code<sup>367</sup> may lead to an increase of up to 25% in the award if the failure to observe the Code was unreasonable.<sup>368</sup>

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<sup>361</sup> At 186-187.

<sup>362</sup> Italics added.

<sup>363</sup> At 187.

<sup>364</sup> <http://www.acas.org.uk/index.aspx?articleid=5186> accessed on 4 Oct 2015.

<sup>365</sup> See par 5.3.4.4 below.

<sup>366</sup> Cook *et al* (2014) par 818.

<sup>367</sup> Lewis *et al* (2011) 3.

<sup>368</sup> S 207A of the TULRCA 1992.



#### 5.3.4.4 Unique statutory action

Since the award for basic compensation for unfair dismissal is solely calculated on the basis of the length of service and age of the employee, no discretion is involved in respect of other factors e g the unfairness of the dismissal. The purpose of the basic award could only have been to guarantee dismissed employees a minimum level of compensation<sup>369</sup> for the loss of continuity of employment<sup>370</sup> despite the degree of the unfairness of the dismissal. Evidently the calculation of the basic compensation has no relationship with the common-law principles of damages. It would therefore be correct to regard the claim for basic compensation as a unique statutory claim that should be understood and applied according to the principles of statutory interpretation. Deakin & Morris<sup>371</sup> point out that the formula for calculating the basic award indeed derives from the Industrial Relations Act 1971 under which the courts included damages for redundancy rights. The basic award is therefore calculated in the same way as a statutory redundancy payment.

It has been mentioned that the statutory compensatory award resembles a delictual claim.<sup>372</sup> This is mainly the case because the essence of the compensatory award is still that the loss of the employee is central to the award. This is similar to delictual claims for damages where the concept of loss has always been central.

#### 5.3.5 Jurisdictional overlap

Similar to the position in SA, there is a double jurisdiction “problem” in the UK in dismissal cases.<sup>373</sup> The employee can choose whether to institute proceedings based on a common-law action in the civil courts or on the basis of the statutory

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<sup>369</sup> Lockton (2011) 277. The amount of compensation under this claim is quite limited compared to the compensation that could be awarded under section 194(1) of our LRA 1995. Thus in the case of highly paid employees, an employee aged 41 or over who was dismissed after more than 20 years of continuous employment, can only claim only £ 12 000 being 30 weeks’ (approximately seven months’) pay at a maximum rate of £ 430 per week (s 227(1) of the ERA 1996). An employee aged between the ages 22 and 40 and with four years’ continuous service, can only claim £ 1 600 being four weeks’ pay at that maximum weekly rate.

<sup>370</sup> Deakin & Morris (2012) 551.

<sup>371</sup> *Idem* 551-552.

<sup>372</sup> This is also the opinion of, amongst others, Prof Hugh Collins, an eminent labour law academic.

<sup>373</sup> Cook *et al* (2014) 163-164.

claim in the Employment Tribunal.<sup>374</sup> The common-law claim can also be pursued in the Tribunal although there is a £ 25 000 limitation on contractual claims.

Although the employee can make this election, and even institute both actions, it was held in *Soteriou v Ultrachem Ltd*<sup>375</sup> that the findings of the Employment Tribunal in proceedings for unfair dismissal in which the claimant expressly reserved the right to file a claim for wrongful dismissal arising out of the same facts, constitute issue estoppel or *res judicata* for the purpose of later proceedings in the High Court. The filing of both a common-law claim and of a statutory claim in the Tribunal on the same facts, will result in the merging of the claims subject to the said maximum limit.<sup>376</sup>

On appeal it was held in the *Fraser* case<sup>377</sup> that:

In future claimants and their legal advisers would be well advised to confine claims in employment tribunal proceedings to unfair dismissal, unless they are sure that the claimant is willing to limit the total damages claimed for wrongful dismissal to £25,000 or less. If the claimant wishes to recover over £25,000, the wrongful dismissal claim should only be made in ordinary civil proceedings. The findings of the employment tribunal in its judgment on the unfair dismissal claim will assist, as they will give rise to an issue estoppel in any subsequent civil proceedings for wrongful dismissal, but there will be no merger of causes of action and the claimant will not be prevented by success in the employment tribunal claim for unfair dismissal from pursuing an action for wrongful dismissal.

According to *Cook et al*<sup>378</sup> it is not clear whether damages in a common-law claim must be deducted from the compensatory award for the same dismissal. *Hardy*<sup>379</sup> is of the opinion that damages awarded in a common-law action for loss of earnings will be deducted in a subsequent compensatory award for unfair dismissal. Moreover, if a tribunal made a compensatory award for unfair dismissal it will include loss of pay in respect of the relevant notice period. There will consequently be no loss left for the purposes of a subsequent claim for common-law damages.

The common-law claim remains a viable option for those who do not qualify for statutory protection in unfair dismissal cases. The same applies to employees who did not file their complaint against an unfair dismissal within the required three

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<sup>374</sup> Common-law actions for wrongful dismissal are concerned only with the termination of the employment contract without adequate notice (Holland & Burnett (2013) 288). Unfair dismissal claims, on the other hand, are concerned with the fairness of the reason why and the manner in which the employee was dismissed.

<sup>375</sup> [2004] IRLR 870.

<sup>376</sup> *Fraser v HLMAD* [2006] EWCA Civ 738 par 55.

<sup>377</sup> *Fraser v HLMAD Ltd* [2007] 1 All ER 383 [par 31].

<sup>378</sup> *Cook et al* (2014) par 819.

<sup>379</sup> *Hardy* (2011) 195.

months' period. Another possibility is to pursue both claims in cases where the amount of the common-law claim exceeds the maximum statutory compensation.<sup>380</sup>

#### 5.4 Conclusion

The question now remains as to what could be identified as useful in terms of the UK common law and the compensatory system of the ERA 1996 for the purposes of improving our own labour law. Firstly, the relevant common-law principles relating to the employment contract, breach of contract and calculation of damages are virtually the same.

Secondly, it is clear that a judicial policy choice was made by the UK courts since the days of the *Addis* case not to grant common-law damages for injured feelings resulting from the dismissal. This was later referred to as the “*Johnson* exclusion zone”. Although some attempt was made in the *Eastwood* case at eroding this principle, the position was firmly maintained in the *Edwards* case. The *Johnson* case has indeed contributed to the view that, where Parliament has given a remedy, no common-law extension should take place into that area.

As regards statutory law, it appears that there is substantial common ground pertaining to the manner in which SA and UK law regulates unfair dismissals, especially in terms of the underlying legal policies, the structure of the relevant UK statutory provisions and remedies. However, some of the prominent features of the UK legislation clearly differ from our Labour Relations Act 66 of 1995<sup>381</sup> and BCEA 1997. There is, for example, a qualifying period in UK law before a dismissed employee is entitled to the protection of the statutory compensation system. The motivation for this exemption is to be found in economic growth policies.<sup>382</sup> However, employees may still avail themselves of the common-law action for damages unless the *Johnson* case applies.<sup>383</sup>

Moreover, the two-pronged structure of the statutory award for unfair dismissal in terms of the ERA 1996 differs from the unitary award in terms of our LRA 1995.<sup>384</sup> The latter award is of course based on compensation that is just and equitable in view of

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<sup>380</sup> *O'Laoire v Jackel International Limited (No 2)* [1991] 1 ICR 718.

<sup>381</sup> Hereafter “the LRA 1995”.

<sup>382</sup> Particularly the stimulation of growth policy in respect of small-to-medium-sized businesses.

<sup>383</sup> See par 5.2.

<sup>384</sup> See discussion in Chapter 4.



the measure of unfairness<sup>385</sup> that accompanied the employee's dismissal. This amount is expressed according to a period of remuneration in the discretion of the arbitrator but which may not exceed 12 months' ordinary remuneration.<sup>386</sup> As explained above, the compensatory system of the ERA 1996 is completely different. Thus the award for basic compensation merely requires the application of a fixed formula in which the employee's length of service and age are the important variables. This award is unrelated to the extent of the damages suffered by the unfairly dismissed employee.<sup>387</sup> The obvious benefit of this very basic award is that it at least guarantees the employee some measure of monetary success in referring a dismissal dispute where the employee finds it difficult to prove loss. This award and its simplistic formula of calculation should deserve the future attention of the SA legislature.

The compensatory award under the ERA 1996 is indeed a comprehensive substitute for the common-law claim for breach of contract which facilitates just compensation for the economic losses of the dismissed employee. Moreover, the Employment Tribunal applies flexibility in regard to the technicalities of the evidentiary proof to be rendered by the employee and strict compliance with procedural formalities. There is no doubt that unfairly dismissed employees would prefer this remedy to filing a common-law claim in the civil courts. It is submitted that the compensatory award system under the ERA 1996 with its double dimension is indeed an advanced one which could, in a more structured and accurate manner, determine compensation for unfair dismissals than the remedy presently provided for in sections 193 and 194 of the LRA 1995 where the employee's claim is too dependent on the manner in which the particular arbitrator exercises his/her wide discretion to determine compensation.

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<sup>385</sup> Either in respect of the reason of dismissal or the procedure followed by the employer prior to the dismissal.

<sup>386</sup> S 194 of the LRA 1995.

<sup>387</sup> It is also strictly limited and strongly resembles a *solatium* payment for a redundancy.



## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

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#### 6.1 Conclusions

It was stated in Chapter 1 that the basic research issue of this study project was to analyse statutory and common-law legal remedies, with specific reference to the statutory claim for compensation for unfair dismissal, in order to determine the juridical nature of that claim. The basic assumption was that one could improve the appropriateness and accuracy of determining compensation when one better understands the legal nature of a particular remedy. Reference was made to the blanket discretion of arbitrators and the absence of frameworks in section 194(1) of the Labour Relations Act 66 of 1995<sup>388</sup> which did not promote consistency in the fixing of compensation. But what has the research revealed?

Chapter 2 dealt with the relevance of the common-law contract and the common-law action for breach of contract. The damages that could be recovered by means of this action is the positive *interesse* of the employee, denoting loss of past and future salary. The extent of the damages that may be awarded will purely depend on whether the employee was a fixed term or indefinitely appointed person. However, the Supreme Court of Appeal found in *SA Maritime Safety Authority v McKenzie*<sup>389</sup> that the common-law action for unlawful dismissal has been abrogated by the LRA 1995 and that because of the comprehensive legislative scheme for a dispute resolution system created in that Act, it is not necessary to protect the rights of employees by extending the common law. If *McKenzie* is consistently applied it would mean that the civil courts are left with only those dismissal cases where the employer acted in unlawful breach of the employment contract although he/she did not act unfairly.

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<sup>388</sup> Hereafter “the LRA 1995”.

<sup>389</sup> (2010) 31 *ILJ* 529 (SCA).

Chapter 3 was devoted to the Labour Relations Act 28 of 1956<sup>390</sup> which was the direct predecessor of the LRA 1995. Specific attention was paid to section 46(9)(c) of the LRA 1956 which conferred sweeping powers upon the Industrial Court framing discretionary and unlimited compensatory awards. The leading case from the LRA 1956 era is *Ferodo (Pty) Ltd v De Ruiter*<sup>391</sup> in which the Labour Appeal Court approached the employee's claim strictly on the basis of a typical delictual claim for negative *interesse* and in terms of which proof of loss was required. The phenomenon of forum shopping also occurred during this era as there was nothing that prevented litigants from proceeding either in the Industrial Court or in the civil courts. Another feature of this period was the fact that the absence of limitations to the claim possibly contributed to the proliferation of claims for massive amounts pursued before Industrial Court by affluent corporate officials.

In Chapter 4 the statutory claim for compensation in terms of sections 193(1) and 194(1) of the LRA 1995 was the focus of in-depth analysis. These statutory powers are also characterized by the wide discretion that it confers on arbitrators/judges and which makes awards unpredictable. Other than in the case of the statutory remedy under the LRA 1956, a maximum limitation equal to 12 months' remuneration pertains both to substantively and procedurally unfair dismissals. There is concern, both amongst the courts and academic writers, that arbitral awards do not always reflect consistency. Although the CCMA has recently published a memorandum known as the "*Guidelines on Misconduct Arbitrations*"<sup>392</sup> containing a list of factors to be taken into account in determining awards, these are perhaps more of a starting point rather than comprehensive and enforceable practical measures.

Perhaps the most important finding for the purposes of this study is that there are contradicting opinions in our case law and academic literature as to whether delictual principles should be applied to the statutory claim (in so far as it relates to the substantial unfairness of a dismissal as such), or whether the claim is rather to be considered as a unique statutory action. The latter approach may be more correct in view of the specific wording of section 194(1) of the LRA which seems to place the standard of compensation ("just and equitable") at the heart of the statutory award.

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<sup>390</sup> Hereafter "the LRA 1956".

<sup>391</sup> (1993) 14 *ILJ* 974 (LAC).

<sup>392</sup> CCMA (2012) *ILJ* 43.

However, as far as procedural unfairness is concerned, it seems that the weight of authority points to compensation based on the *solatium* concept of the law of delict. It is clear that the time has arrived for a re-thinking of the kind of compensation that we have in mind in respect of dismissal cases.

Important differences between the common-law remedy and the statutory remedy were also pointed out in Chapter 4. In some cases it would seem to be more beneficial to employees to elect the common-law route above the CCMA route and the question is whether any benefits could somehow be preserved should the policy objective be to phase out the common-law action. This objective has, as mentioned above, clearly been endorsed in the *McKenzie* case although it is surprising that the full effect of this judgement does not clearly manifest in our recent case law pertaining to section 157(2) of the LRA 1995 and sections 77(3) and 77A(e) of the Basic Conditions of Employment Act.<sup>393</sup> Ironically, the impression is created that the common-law action is still alive although being incorporated in a statutory construction and provided that the Labour Court is chosen as forum.

By way of international comparison the subject of study in Chapter 5 involved the common-law action for wrongful dismissal and the statutory claim for unfair dismissal of the United Kingdom. It was apparent that the English common law in the area of dismissals basically accords with our own common law. The action for wrongful dismissal is indeed an action for breach of contract and which evidently means that damages are claimed for the positive *interesse*. Nevertheless, it is especially the statutory claim for unfair dismissal in terms of the Employment Rights Act 1996<sup>394</sup> which should be of great value for any future review of our LRA 1995. The ERA 1996 created a sophisticated two-tier compensation award system. Firstly, there is a unique statutory remedy known as the basic award which is calculated on the basis of simplified variables such as the employee's age and years of service. This guarantees every employee in a dismissal dispute at least a minimum level of compensation without having to render proof of loss. Secondly, an employee's loss of remuneration and benefits are addressed by the compensatory award which is delictual in nature and whereby the employee's negative *interesse* could be compensated. This award is subject to a very generous maximum limitation.

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<sup>393</sup> Hereafter "the BCEA".

<sup>394</sup> Hereafter "the ERA 1996".

## 6.2 Recommendations

The research has pointed to the need for a new model for the quantification of compensation in unfair dismissal claims in order to improve consistency and accuracy. Such a model should preferably clarify the true juristic nature of the statutory remedy and improve legal certainty both in terms of the way in which the law is to be understood and applied and in which compensation is to be calculated. It is assumed that flexibility was required at the time of the enactment of the LRA 1995 in order to establish and popularise a new dispute resolution system. However, the current rudimentary model, whereby an unfettered discretion is exercised by arbitrators who evidently quantify compensation in terms of their subjective interpretation of whatever they consider to be “just and equitable” in individual cases, cannot take us much further.

From a socio-economic policy point of view, other factors that led to inconsistency in awards e.g. the fact that awards that would normally be appropriate are being adjusted depending on the amount that the employer can afford, also have to be thoroughly reviewed. Here the possibility of a national fund to which all employers contribute and from which compensation could be paid could be considered. Other policy issues to be considered include that of possible exemptions from the LRA 1995 for e.g. there has been a long-standing, although not uncontroversial, small and medium enterprise sector development policy in the United Kingdom to only extend the protection of the ERA 1996 to employees after a “qualifying period” with the employer.

It is evidently necessary that, before a new compensatory model is devised, all role-players agree to the principles, procedures, formulae and methods of calculation, limitations, outcomes and objectives of the model. It is submitted that comparative compensation legislation in other jurisdictions should be researched with a view to the reform of all relevant provisions regarding dismissals in the LRA 1995. It is also believed that the double tier basic award and compensatory award model that has been tried and tested in the United Kingdom under the ERA 1996, could contribute to formulating and advanced compensation model for South Africa.

For the purposes of this study it has been accepted that the *McKenzie* judgment, which also stands solidly on preceding Constitutional Court case law, is in principle

correct as regards (a) the precedence of legislation enacted to give effect to the Constitution and (b) the abrogating effect that the LRA 1995, with its comprehensive legislative scheme on dispute resolution and compensation, had on the common law. For the sake of legal certainty, two systems cannot be allowed. In-depth study is necessary to specifically chart the effects of the *McKenzie* judgement and even to review its consequences for statutory provisions which somehow “incorporates” the common law e g sections 157(2) of the LRA 1995 and sections 77(3) and 77A(e) of the BCEA.

In the course of statutory reform care should be taken that substantial rights which employees currently enjoy in terms of the civil action are not summarily lost, at least not without a transition phase. Examples of such rights are (a) the generous period of three years allowed for filing claims; (b) the fact that fixed-term employees can claim remuneration for the whole remainder of the employment contract and (c) legal representation in difficult cases. This also applies to claims that employees enjoy in terms of other actions and legislation e g the Employment Equity Act 55 of 1998. An alternative approach could be to permit litigants to elect between the LRA 1995 statutory claim and the common-law action for breach of contract but that, for the sake of legal certainty, such election should only be available once.



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