

**PREGNANCY IN THE WORKPLACE: A
CONSIDERATION OF SECTION 187(1)(e) OF THE
LABOUR RELATIONS ACT**

by

MALUMBO KUMWENDA

209525567

This dissertation is submitted in partial fulfillment of the
regulations for the LLM Degree

at the

University of KwaZulu-Natal

Supervised By: Nicci Whitear-Nel

Date: 19 February 2016

ACKNOWLEDGEMENTS

I wish to express my humbled gratitude to my parents for their continuous support and unceasing encouragement to persevere throughout the dissertation process. This accomplishment is more theirs than mine. I am truly thankful and humbled by the sacrifices they have made to provide me with this opportunity to further my education.

DECLARATION

I Malumbo Kumwenda, do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfillment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the 07 day of December 2016.

Signature:

ABSTRACT

Prior the Republic of South Africa's Constitution Act 108 of 1996, standards regarding fairness and equality of women in the labour market left much to be desired. Additionally, section 187(1)(e) of the Labour Relations Act 66 of 1995('LRA'), has become one of the fundamental provisions addressing the lack of equality between men and women in the labour force, by classifying a dismissal based on pregnancy as an automatic unfair dismissal. The importance of this section is to signify to employers that pregnancy is a natural biological process that should be embraced within society and not a justifiable reason for dismissal. The overall discussion of the paper illustrates the effectiveness and the limitations of S187(1)(e) in providing protection to pregnant employees. It will begin by interpreting the wording of the section to explain the extent of protection provided to pregnant employees. Thereafter, a detailed study of case law will demonstrate the courts' approach dismissal based on pregnancy. The paper will then explain the limitations of S187(1)(e) in that it does not provide absolute protection from dismissal, and then briefly discuss the remedies available for unfairly dismissed pregnant employees. The conclusion of the paper will summarize the overall impact of S187(1)(e) in addressing discrimination against pregnant employees.

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CHAPTER 1

INTRODUCTION

All societies throughout history, to a greater or lesser degree, have faced inequality and prejudice on the basis of gender. Thus every society, in the interests of gender equity, has a moral imperative and a practical need for legislation to combat this injustice, and move towards equality and freedom of choice. Over the last two centuries, the roles of women in society have drastically shifted to become more varied and assertive, from a primarily domestic life of full time child care and chores, to one in which women make up a significant part of the labour market. This shift in the workforce has led to a multitude of new issues which demand urgent attention from policy makers. By no means the only important example, but a central one, and the one the topic of this thesis is pregnancy in the workplace¹.

As women are the natural carriers of unborn children, and as more women enter the workforce, the need to accommodate the specific and unique medical reality of pregnancy in a fair-minded way becomes more and more pressing. As part of the larger project of pursuing gender equality, the need to protect women from pregnancy related discrimination is a growing concern and has been recognized by the Constitution of the Republic of South Africa 1996².

Prior the Republic of South Africa's Constitution Act 108 of 1996 (*hereafter the '1996 Constitution'*) there was little or no protection given to the pregnant employee. A woman that had fallen pregnant was only allowed to work for four weeks prior her delivery date, and was not allowed to work for any other employer eight weeks after the birth of the child.³

The most flagrant example of this type of discrimination is when a pregnant woman is simply dismissed for absenteeism when they take the medically necessary time to give birth and care for their newborn child. The previous Labour Relations Act 28 of 1956 did require that the

¹ JBanks, H Russell 'Pregnancy and Employment: A Literature Review' (2011) *ESRI* 3.

² Section 9 (3) and 23 (1) of the 1996 Constitution provide for protection against discrimination of pregnant employees.

³ Section 17 (6) of the Basic Conditions of the Employment Act 3 of 1983.

employer justify the reasons for their dismissal of the employee,⁴ but without concrete guidelines on which reasons were justifiable, this was not fully effective in protecting against abuse of this kind. Despite its shortcomings, this Act was a step forward in protecting pregnant working employees, as it obliged employers to justify their dismissals.

Prior the 1996 Constitution, legislation was influenced by the notion of apartheid within society, and thus it is little surprise that the laws regarding female discrimination had been lacking fundamental values of equality and fairness. When the 1996 Constitution came into effect, it became apparent that existing labour laws did not value the rights to dignity, equality and fairness, and that South African laws regarding fairness and equality had not been on par with international jurisprudence⁵.

The 1996 Constitution validates the democratic value of “equality” and stipulates in section 9(3) and 9(4) of the Bill of Rights that neither the state nor an individual may “*unfairly discriminate, whether directly or indirectly against any one on one or more grounds*” such as “*race, disability, religion, age, culture, language and birth,*” but more specifically and relevant to the applicable study, on the basis of pregnancy it states “*no person may unfairly discriminate, directly or indirectly, against an employee on the grounds of pregnancy*”. (It should be noted that discrimination on grounds listed within section 9 of the 1996 Constitution is deemed unfair unless it is proven to be justified.)⁶

Other legislation such as section 6 of the Employment Equity Act 55 of 1998 (*hereafter the ‘EEA’*), upholds this notion. Another provision of interest is s12 of the 1996 Constitution, which states that all persons have the right to “*bodily and psychological integrity*”, which includes the right “*to make decisions concerning reproduction*” and the right “*to security in, and control over, their body*”⁷. In addition, s 22 and 23 further states that women have the right not to be

⁴*Randall v Progress Knitting Textiles Ltd* (1992) 13 ILJ 200 (IC) (the employer allowed for the pregnant employee to take maternity leave and did not replace the employee. Thus acknowledging the woman’s right to fair labour practices).

⁵ Such as those countries that had signed with the International Labor Organization Convention 158 at the time (USA, UK, France and Belgium).

⁶Section 36 of the 1996 Constitution provides for the limitation of rights.

⁷Section 12 (2)(a)-(b) of the 1996 Constitution.

discriminated against because of their pregnancy within the labour market.⁸ It is submitted that if the 1996 Constitution had failed to promote such fundamental rights for women, that the Bill of Rights would have utterly failed in its underlying purpose.

The LRA in s187(1)(e) aims to promote the Bill of Rights in the workplace.⁹ The courts have used this section to specify that the basic human rights located in the 1996 Constitution are to be highly protected and that the categories against which one may not discriminate, shall not be used as valid reasons for an employer to dismiss an employee.¹⁰ Section 187(1)(e) provides that a dismissal is automatically unfair if there as on for the dismissal is the “*employee’s pregnancy*”, “*intended pregnancy*” , “*or any reason related to her pregnancy*”. This principle can be demonstrated in the case of *De Beer v SA Export Connection CCt/a Global Paws*¹¹ This case is significant because even though the dismissal was related to her maternity leave, the court acknowledged that maternity leave fell under the umbrella concept of pregnancy in regards to S187(1)(e). It is also important to note that breastfeeding falls within the stipulations of S187(1)(e). A further discussion of this matter is provided later in the study.

With the adoption of the 1996 Constitution, South Africa came line with international laws that promote equity and fairness with woman at the work place.¹² The South African laws regarding the dismissal due to pregnancy are on par with the International Labour Organization Convention 158 of 1982 (*hereafterthe*“ILO”) and the International Bill of Rights 1948. Both treaties aim to promote equality and fairness in the work place and provide guidelines for doing so.

This study is centered on one form of discrimination in which a female employee is dismissed due to her pregnancy. Given that pregnancy is a natural part of womanhood, discrimination on the basis of pregnancy is also discrimination on the basis of sex. This study will critically examine S187(1)(e) of the LRA, which asserts that a pregnancy based dismissal is unfair.

⁸ Section 22 of the 1996 Constitution stipulates that “*every citizen has the right to choose a trade, occupation or profession freely*”, section 23 of the 1996 Constitution states “*that everyone has the right to fair labour practices*”.

⁹ JGrogan *WorkplaceLaw* 10thed (2011)

¹⁰*Mnguni v Gumbi* (2004) 25 ILJ 715 (LC); *Sheridan v The Original Mary Anne’sat the Colony (Pty) Ltd* (1999)20ILJ 2952(LC); *Lukie v Rural Alliance cct/a Rural Development Specialists* (2004) 25 ILJ 1445 (LC).

¹¹ (2008) 29 ILJ 347 (LC)

¹²International Labour Organization Convention 158 of 1982.

The main method of the study is the compilation and analytical review of literature and case law relating to pregnancy in the workplace to illustrate how the rights of pregnant women are protected. In addition to the 1996 Constitution, other relevant legislation will be examined. The study also uses a descriptive method in examining how S187(1)(e) has been interpreted and applied to in cases of pregnancy dismissals. A number of websites were used to obtain examples and applicable information on such dismissals.

The purpose of this study is to explore the key issues regarding dismissal due to pregnancy in light of S187(1)(e) and how the section has been interpreted and applied in relevant case law. It will examine the various reasons given for dismissing pregnant employees, and how the courts have ruled on the fairness of such dismissals.

Chapter 2 will explain the purpose of S187(1)(e), and examine its wording and interpretation of S187(1)(e) so as to give the reader a clear background and understanding its significance of the section in matters of pregnant employees. The phrases “*intended pregnancy*” and “*any reason related to her pregnancy*” will be interpreted and discussed along with relevant case law.

Chapter 3, will show how the courts have applied and interpreted S187(1)(e), using the following case law: *Mnguni v Gumbi* (2004)25ILJ715(LC); *Wallace v Du Toit* (2006) 8 BCLR 757 (LC) *Lukie v Rural Alliance cct/a Rural Development Specialists* (2004) 25 ILJ 1445 (LC) and *Sheridan v The Original Mary Anne’s at the Colony (Pty)Ltd* (1999) 20 ILJ 2952 (LC).

In Chapter 4, the liability of the employer with regard to S187 (1)(e) shall be discussed, and further explain the onus placed on both the employer and employee when a pregnant employee has been dismissed. The chapter will also discuss case law to show how the courts have used their discretion in matters of misconduct of the employee, pregnancy as the ancillary reason for dismissal and operational requirements of the employer.

Chapter 5, will focus on the remedies available under S187(1)(e). It will examine case law to show how the courts have approached the issue of damages and compensation and when granted, whether the amount awarded should be punitive or merely compensatory.

And finally, Chapter 6 will conclude and summarize the discussion on the topic, to illustrate whether or not the law has been adequate and effective in assisting unfairly dismissed pregnant employees.

CHAPTER 2

SECTION 187(1)(e) OF THE LABOUR RELATIONS ACT

2.1 Introduction

This chapter aims to give the reader a full understanding of the objectives and purpose of section 187(1)(e) of the LRA. Moreover, it will explain what an automatically unfair dismissal is in light of S187. It will then provide an in-depth discussion of the wording and interpretation of the section, and the phrases “*intended pregnancy*” and “*any reason related to her pregnancy*” in light of the 1996 Constitution, the LRA, international law and case law.

2.2 Automatically unfair dismissal

The LRA aims at preventing and protecting employees from unfair dismissal. Section 186(1)(c) defines that a dismissal takes place when “*an employer terminated a contract of employment with or without notice.*” A dismissal can occur both fairly and unfairly.¹³ When there is a clear indication that the employee had been dismissed fairly the employer is protected by the LRA, in that there are no costs that the employer has to endure. However, if the employer is unsuccessful in proving that the substantive and procedural requirements of dismissing an employee had been followed then that dismissal will be deemed unfair.¹⁴

Section 187 provides for automatically unfair dismissals. These are dismissals which will be regarded as substantively unfair if they are for one of the protected reasons. Section 187 lists these protected reasons as unfair discrimination on the basis of race, gender, sex, culture, religion, disability and any forms of discrimination that would impair the employee’s dignity, social standing and rights protected in the 1996 Constitution.¹⁵ The courts have shown that they will not tolerate dismissals on these bases in a multitude of cases:

¹³ See schedule 8 of the LRA.

¹⁴ Chapter 4 will explain in full detail the onus regarding the employee and employer in unfair dismissal.

¹⁵ BD Workman ‘Automatically Unfair Dismissals – Does What You Believe Matter?’ 2009 *Without Prejudice* 54.

- In *Department of Correctional Services and another v Police and Civil Rights Union (POPCRU) and others*,¹⁶ the Supreme Court of Appeal (SCA) addressed dismissal on the basis of religious and cultural grounds.¹⁷ The employer prohibited dreadlocks in the work place within its dress code, and the respondents did not comply with that code.¹⁸ The employer requested the respondents cut their hair to comply with the department’s dresscode, and stated that failing to do so would lead to disciplinary action.¹⁹ The employees refused to cut their hair, and argued that dreadlocks were part of either their Rastafarian religion, or Xhosa culture.²⁰ The employees were charged with breaching the department’s dress code and insubordination due to failure to carry out direct orders without a valid reason.²¹ The SCA determined that the employees had been automatically unfairly dismissed under S187(1)(f) on the grounds of religious and cultural discrimination.²²
- In *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* case²³ the court held that the employee, aged 64, was automatically unfairly dismissed under.²⁴ This was due to the employer’s lack of evidence in proving that the employee “reached the normal or agreed retirement age for persons employed in that capacity”.²⁵
- In *Atkins v Datacentrix (Pty) Ltd*,²⁶ the applicant was employed as an IT technician.²⁷ The employee announced, shortly after being hired, that he would be undergoing gender re-assignment.²⁸ The employer proceeded to cancel the employment as he contended the failure to announce the gender re-assignment prior to hiring “was a serious case of misrepresentation which is dishonesty. It considered his actions to be a repudiation of the

¹⁶(107/12) [2013] ZASCA 40.

¹⁷Ibid, 2.

¹⁸ Note 17 above, 2.

¹⁹ Note 17 above, 4.

²⁰ Note 17 above, 5.

²¹ Note 17 above, 6.

²² Note 17 above, 53.

²³ D775/10 (LC).

²⁴ Ibid, 25.

²⁵ Note 24 above, 30.

²⁶(2009) 18 LC 8.29.3 and [2010] 4 BLLR 351 (LC).

²⁷Ibid, 3.

²⁸ Note 27 above, 3.

*employment contract, which repudiation it accepted and no longer required his services.*²⁹

The applicant claimed he had been discriminated against on the ground of his sexual orientation and consequently the dismissal constituted as an automatic unfair dismissal.³⁰

The court held in favor of the applicant in that the dismissal had fallen in the provisions of S187(1)(f) of the LRA hence the dismissal was automatically unfair.³¹

Section 187 of the LRA requires the applicant to produce evidence which is sufficient to raise a credible possibility that they have been automatically unfairly dismissed by their employer. When sufficient evidence has been provided by the employee, the employer then bear the onus to show that the dismissal did not fall within the ambit of S187 and did not constitute an automatically unfair dismissal. In the cases below, the employees had failed to show credible evidence to find the employer liable under S187:

- In *Equity Aviation Services (Pty) Ltd v SATAWU & Others*,³² the Court had to determine whether the dismissal of non-union members were automatically unfair. A number of employees had taken an unauthorized leave of absence to join a protected strike; however, the employees in question did not belong to the majority trade union that would have authorized them to have a protected strike. It was evident that separate trade unions were required to bring their own action and follow the formal procedures. The employees did not follow any of the requirements to qualify for a protected strike, hence their involvement in the protected strike of another trade union was deemed to be unlawful, and dismissal was held not to be automatically unfair.
- In the case of *Beaurain and Leslie Martin N.O v Public Health and Social Development Sectoral Bargaining Council and others*,³³ the applicant was an employee at Groote Schur Hospital, where poor maintenance had resulted in foul smells emanating from the toilets. The applicant then proceeded to post pictures on Facebook³⁴ of the toilets and made

²⁹ Note 27 above, 1.

³⁰ Note 27 above, 4.

³¹ Note 27 above, 24.

³² (2012) 3 BLLR 245 (SCA)

³³ (C16/2012).

³⁴ "Facebook" – a social network website.

comments claiming that the poor maintenance of these toilets would result in ‘dirty air’ in the Hospital, placing both the patients and employees’ at risk. The employee had been given two written warnings not to place such photographs and comments on Facebook, but the employee neglected the warnings and continued to do so. The employee was dismissed on the grounds of gross insubordination. The employee argued that the dismissal was automatically unfair based on S187(1)(h). However, the court held that the employee had been dismissed fairly due to the employee failing to follow the correct procedures of the protected disclosures Act, hence it was not an automatically unfair dismissal.

The above cases illustrate that a claim for automatically unfair dismissal will not always succeed if the employee does not provide sufficient evidence that the dismissal falls within the unfair discrimination category. The employer has the burden to prove that the dismissal does not fall within S187.³⁵ For the purposes of this discussion, the main focus will be how automatically unfair dismissals regarding pregnancy in S187(1)(e) have been dealt with and what conductor action justified the dismissals under the section.

2.3 Protection given in section 187 (1)(e)

Section 187 was added in to the LRA to further implement the aims of the 1996 Constitution in fighting against discrimination in the workplace. Its main objective is to protect employees from unfair discrimination. This section, read along side the 1996 Constitution³⁶ and the EEA³⁷ identifies a large number of matters in which employers may not discriminate against employees. This enforces the policy in which any form of discrimination or infringement on an employee’s protected Constitutional and Labour rights by an employer is not tolerated and thus the employer will be held liable by law to carry out a specific remedy.³⁸ The remedies given by the courts are dependant on specific facts and circumstances of each particular case and as such the remedy in each case may vary.

³⁵ See section 192(2) of the LRA, and *Lukie v Rural Alliance cct/a Rural Development Specialists* (2004) 25 ILJ 1445 (LC)

³⁶ Section 9 and 23 of the 1996 Constitution (grounds of discrimination and right to fair labour practices).

³⁷ Section 6 of the EEA (grounds of discrimination).

³⁸ Remedies are provided for in section 193 of the LRA, they include either paying out damages, compensation or to reinstate the employee.

Section 187(1)(e) specifically applies to the protection against unfair discrimination based on pregnancy.³⁹ The purpose of the protection provided is to allow for women to keep their employment while pregnant or on maternity leave. To allow that women should be discriminated against based on their biological purpose and function of child birth would diminish the goal of providing an equal footing for men and women within the labour market. Equality in the workplace should be measured by comparing the social standing and biological function of women to that of men.⁴⁰ In addition the protection provided in S187(1)(e) is a tool for pregnant women and those on maternity leave to retain their employment.⁴¹ It employs a social recognition of pregnant women within the workforce, and assures them job security, and holding employers responsible for unfair labour practices that would force women to unfairly choose between family and career.

The protection provided in S187(1)(e) is not an absolute defense against legitimate dismissals. The protection only protects against discriminatory, pregnancy related dismissals, but is not an absolute shield against dismissals for legitimate reasons. A pregnant employee or applicant can be dismissed or refused a job position for any of the legitimate reasons of misconduct or operational requirements that apply to non-pregnant persons.

In *Woolworths v Whitehead (Pty) Ltd*,⁴² the Court held that the reason for Ms.Whitehead not being hired was due to the availability of another individual that was better suited to carry out the operational requirements of the employer. Therefore there was no causal link between her pregnancy and not being chosen for the job.⁴³ The majority of the judges further held that though her pregnancy was taken into account when determining if she would fit the job description, her pregnancy status worked against her. The employee presented no evidence to illustrate that if her pregnancy status had not been taken into account, she would necessarily have been appointed; therefore it was not the primary reason for the hiring decision.⁴⁴

³⁹ It should be noted that the wording of this section allows for a wider interpretation to be given to the word “pregnancy” (a further discussion on the wording and interpretation will be discussed below in 2.3 and 2.4).

⁴⁰ LJ Ledwaba ‘*Dismissal due to pregnancy*’ for the degree of *Magister Legum* in the Faculty of Law at the Nelson Mandela Metropolitan University 2006 at 26.

⁴¹ *DeBeer sv SA Golden Paws* (2008) 29 ILJ 347 (LC).

⁴² *Ibid*, 43.

⁴³ Note 43 above, 48.

⁴⁴ Note 43 above, 62.

2.4 Wording of section 187(1)(e)

Section 187(1)(e) states that:

Automatically unfair dismissals

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is- ...”

(e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;

The section expressly categorizes discrimination based on pregnancy as automatically unfair dismissal. The importance of the wording of this section is that it allows for a wider interpretation, by using the phrases “*intended pregnancy*” and “*any reason related to her pregnancy.*” This allows for the protection provided within the section to encompass women that are on maternity leave.

It is common knowledge that pregnant women suffer from a variety of common natural symptoms of pregnancy such as morning sickness, tiredness, bloating and fatigue; even though the symptoms do not affect all women in the same manner, these natural symptoms will have a negative effect on average on the way in which an employee performs their daily tasks. Consequently the closer the pregnancy is to the due date of the delivery the less energetic the woman will become.⁴⁵ It is submitted that the natural biological response to pregnancy was taken into consideration when S187 was drafted as it is clear by the phrase “*any reason related*” warrants that these natural negative impacts or any other illness caused by pregnancy should be taken into account when examining whether the dismissal of a pregnant employee is fair.⁴⁶

The wording of this section in addition, intentionally expands the protection to women after they have delivered their child.⁴⁷ This extends the protection provided within S187(1)(e) to a period

⁴⁵ *Mnguni v Gumbi* (2004) 25 ILJ 715 (LC).

⁴⁶ *De Beers v SA Golden Paws* (2008) 29 ILJ 347 (LC), *Mashava v Cuzen & Woods* (2000) 6 BLLR 691 (LC).

⁴⁷ *Masondo v Crossway* 1998 19 ILJ (CCMA).

after delivery of the child, called maternity leave.⁴⁸ It is further submitted that the legislature was well aware of the crucial need for a newly born child and the employee, a new mother, to create an intimate maternal bond, for active full time neo-natal care, and for the employee to recover from the tremendous physical stress of delivering the child. The wording of this section is vital to safeguarding the interests and wellbeing and of the mother and child, and applies to a reasonable time period both before and after birth. The application and interpretation of this wording will be discussed below.⁴⁹

2.5 Interpretation of section 187(1)(e)

In interpreting S187(1)(e) we must refer to the purpose and objective of the statute as fundamental guidelines, as set out in s 3 of the Act. In this way we ensure that the outcome in the law will remain true to the spirit of its drafting. The guidelines provided on interpreting this provision are found in s 1 and 3 of the LRA. Section 1 of the LRA sets out the purpose of the Act as follows:

“1. Purpose of this Act

The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization;”

Section 1 clearly states the main objectives of the statute is to provide a fair and just labour market within the Republic, by upholding the rights provided in section 27 of the 1996 Constitution and the binding international obligations specified in section 3 of the ILO. Section 27 of the 1996 Constitution sets out the social-economic and cultural rights that are provided for, such as access: to adequate housing, health care, sufficient food and water, social security and labour relations. It has been argued that social economical rights are not justiciable or enforceable due to the budgetary implications involved and that the realities of enforcement are heavily dependent on the

⁴⁸ The Basic Conditions of Employment Act 75 of 1997 (*hereafter the ‘BCEA’*), allows for the employee to take four consecutive months of maternity leave either one month before the due date or a date agreed on with the employer. In addition, the employee is entitled to have 6 weeks without returning to work.

⁴⁹ JC. Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 1 ed (2004) 119.

availability of resources; hence these rights are to be dealt with by the legislative and executive body of government and not the judiciary.⁵⁰ However it is submitted that the judiciary is the platform where the public can determine or monitor whether the government has maintained or reached its goals to provide adequate assistance or protection of the social- economical rights.⁵¹ In essence allowing the judiciary to preside over these matters does not violate the separation of powers doctrine.⁵² Therefore it is submitted that the judiciary should tread carefully within its final judgment by not dwelling on the budget allocation of any social-economical dispute between the state and individual; and focus merely on the principle of the rights that are owed to the public.⁵³ It is further submitted that before the 1996 Constitution, there was a lack of even distribution of social-economical rights; therefore it is highly imperative that the implementation of these rights be subject to the judiciary body, to address and enforce the “*progressive realization*” of these rights.⁵⁴

The ILO works as an agency of the United Nations (UN) to promote opportunities for men and women in obtaining decent and productive work that is characterized by conditions of freedom, equity, security and dignity.⁵⁵ The Republic signed with the ILO in 1995 in order to amend and address the lack of fair labour practices of the pre-1994 era. This agreement bound SA to the labour law standards of the ILO, and made enforceable the ILO obligations, rules and regulations, which became the frame-work on which the republic founded its labour law.⁵⁶ These binding obligations include upholding the rights to freedom of association, for employees and employers to engage in collective bargaining and equality within the work environment. It is imperative that all labour laws fall within the binding guidelines of the ILO.⁵⁷

Section 3 of the LRA states:

3. Interpretation of this Act

⁵⁰ JC. Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 1 ed (2004) 119.

⁵¹ *Soobramoney v Minister of Health, Kwa Zulu-Natal* 1998 (1) SA 756 (CC).

⁵² Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996.

⁵³ Note 53, above.

⁵⁴ *Minister of Health & others v Treatment Action Campaign and others* 2002 (5) SA 703 (CC).

⁵⁵ The Origins and History of the International Labour Organization available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 16 June 2014.

⁵⁶ AJ. Mbilinyi *Protection Against Unfair Dismissal of Employees Living with HIV/AIDS In The Workplace: A Comparative Study*, Dissertation submitted in the part fulfillment of the requirements for *MasterLegum* at the University of South Africa 2008, 44.

⁵⁷ Due to the binding effect with the Convention.

Any person applying this Act must interpret its provisions-

(a) To give effect to its primary objectives;

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(b) In compliance with the Constitution; and

(c) In compliance with the public international law obligations of the Republic.

Section 3 of the LRA as stated above clearly refers to the primary objectives of the Act, and instructs that these objectives guide interpretation of the act. The primary objectives of the Act are as follows:

- *To give effect to and regulate the fundamental rights conferred by section 27 of the constitution, including the right to fair labour practices, to form and join trade unions and employer organizations to organize and bargain collectively, and to strike and lockout.*
- *To provide a framework for regulating the relationships between employees and their trade unions on the one hand and employers and their organizations on the other hand. At the same time also encourages employers and employees to regulate relations between themselves.*
- *To promote orderly collective bargaining, collective bargaining at sectorial level, employee participation in decision-making in the work place and the effective resolution of labour disputes.⁵⁸*

As seen in these objectives, the focus of the action regulating the employer and employee relationship, to encourage and allow for employees to form and join trade unions and employers to join employer organizations, participation in workplace decision-making, and for there to be regulations on strikes and collective bargaining.

The next aspect of s 3 of the LRA, is that the interpretation of the Act should be in line with the 1996 Constitution. Section 23 of the 1996 Constitution clearly states that “*everyone has the right to fair labour practices.*” The word “*everyone*” in this provision may be slightly unclear as to who the provision refers to, but it is submitted that the word “*everyone*” encompasses the employer and

⁵⁸ ‘Summary: LabourRelationsAct available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2000/appendieces/000229LRASummary.htm> February 25, 2000, accessed on 13 March 2015.

employee, as well as any employer and employee organizations or trade unions.⁵⁹ The word ‘everyone’ within the provision additionally implies that section 9 and 7 of the 1996 Constitution should be read along with the provisions, thereby broadening the provisions.

The final aspect of section 3 is that the Act must be interpreted in compliance with the public international law obligations of the Republic. As stated above South Africa is bound to the ILO to provide fair labour practices, which entails that the laws and regulations of the Republic must be interpreted to adhere to international standards.

Any interpretation of the LRA must be done in a manner that is consistent with the 1996 Constitution,⁶⁰ international labour obligations,⁶¹ and the objectives of s 1 and 3 of the LRA.⁶² Any such proper interpretation must therefore preserve the rights of, and treat fairly, pregnant employees. Any interpretation that fails to do so is in violation of s 3 and is an unjustifiable interpretation.

2.6 “Intended Pregnancy”

The phrase “*intended pregnancy*” in S187(1)(e) is most likely meant to guard against the situation where an employee has expressed the desire to become pregnant, and is then treated prejudicially on this basis by the employer. Interpretation of this phrase has at times caused difficulties in determining the true cause of the dismissal.⁶³ For instance in the case of *Uys v Imperial Car Rental (PTY) Ltd*⁶⁴ the employee, three days after being appointed to a managerial position, informed her immediate superior that she was pregnant.⁶⁵ The superior became very angry and instructed the applicant to sign her letter of employment.⁶⁶ Approximately two weeks later, the applicant was summoned to a disciplinary inquiry and accused of gross negligence for “*losing a couple of debtor’s files, inflating the salary figure she claimed to have earned from her previous employer, and unsatisfactory work performance.*”⁶⁷ The applicant was found guilty of the formal charges

⁵⁹ JC. Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 1 ed (2004) 123.

⁶⁰ Section 1, 9 and 23 of the 1996 Constitution.

⁶¹ ILO Convention 158 and 1982.

⁶² Section 1 and 3 of the LRA.

⁶³ Grogan *J Workplace Law* 7th ed (2000) 137.

⁶⁴ (2007) 3 BLLR 270 (LC)

⁶⁵ *Ibid*, 2.

⁶⁶ Note 66 above, 9.

⁶⁷ Note 66 above, 10.

against her and was dismissed.⁶⁸ The applicant claimed she was dismissed on account of her pregnancy.⁶⁹ The court however rejected the applicant's argument that she had been dismissed because of her pregnancy and also dismissed the employer's allegations that the applicant had misplaced debtors files.⁷⁰ The court held the reason for dismissal was due to her inflating her salary, hence the applicant was not granted a ruling of automatic unfair dismissal.⁷¹ However the court did acknowledge that the dismissal was harsh and awarded the applicant 6 months compensation.⁷²

It is imperative that women that are, or intend to become pregnant and inform their employers are still able to retain their employment and not to be discriminated against by their employers based on the employee's decision concerning reproduction; and the implications of that choice on work attendance or performance.⁷³

2.7 “Any reason related to her pregnancy”

The words “any reason related to her pregnancy” have been given a wide definition to protect pregnant and post-pregnant employees. In the case of *De Beers v Golden Paws*,⁷⁴ the applicant took one month maternity leave by agreement with the employer to nurse her newly born twins. The applicant's twins became ill soon after the one-month maternity leave was over and the employee applied for another month of leave. The employer only allowed the employee two more weeks and when she failed to appear for work after that time, was dismissed. The employee took the matter to court and argued that she had been automatically unfairly dismissed by her employer under S187(1)(e) as this was a matter related to her pregnancy. The employer argued however that maternity leave did not qualify as a reason related to her pregnancy. The court rejected the argument of the employer and pointed out that “reasons related to pregnancy” refers not only to the mother herself but also the new born babies. The BCEA provides that pregnant employees are provided with up-to four months maternity leave after birth, therefore the agreement for the

⁶⁸ Note 66 above, 11.

⁶⁹ Note 66 above, 12.

⁷⁰ Note 66 above, 57.

⁷¹ Note 66 above, 80.

⁷² Note 66 above, 80.

⁷³ *Wallace v DuToit* (2006)8 BLLR 757 (LC).

⁷⁴ (2008) 29 ILJ 347 (LC).

employee to return after a month was null and void.⁷⁵ The court held that the employee had been automatically dismissed unfairly. It is important to note the phrase “*reasons related to her pregnancy*” should be read together with the BCEA to protect women after pregnancy. The court further submitted that:

“Difficulties experienced by employees in keeping a woman’s job open while she is on maternity leave is the price that must be paid for recognizing the equal status of women in the work place. The law protects women, not only while pregnant, but also while they are attending to the consequences of pregnancies”.

It is submitted that the intention of the legislature regarding the phrase “*any reason related to her pregnancy*” was to make sure that the biological interests of women and new borns are protected. Otherwise women would be legally dismissed on the ground of pregnancy without any consequence to the employer.

⁷⁵ Section 25 of the BCEA.

CHAPTER 3

APPLICATION OF SECTION 187(1)(e)

3.1 Introduction

This chapter will discuss how the courts have interpreted and applied S187(1)(e) of the LRA in the following cases: *Mnguni v Gumbi* (2004) 25 ILJ 715 (LC); *Wallace v Du Toit* (2006) 8 BLLR 757 (LC); *Lukie v Rural Alliance cct/a Rural Development Specialists* (2004) 25 ILJ 1445 (LC) and *Sheridan v The Original Mary Anne's at the Colony (Pty) Ltd* (1999) 20 ILJ 2952 (LC). These cases will give an overview of how South African courts have ruled on matters relating to fair treatment of pregnant employees.

3.2 *Wallace v Du Toit* (2006) 8 BLLR 757 (LC)

In this case the respondent employed the applicant as an *au pair* for his children. After two years, the applicant became pregnant, and her employment was terminated. The employer offered to keep her on for 3 months when he could not find a replacement, and she took the offer in hopes that the employer would change his mind. But the employer dismissed her after finding a replacement worker.⁷⁶ The applicant did not immediately file for unfair dismissal as she was unaware of the protection granted to her by S187(1)(e).⁷⁷ When the applicant found out that she had a cause of action, she took the matter to the CCMA and sought compensation under the LRA for being automatically unfairly dismissed and damages under the EEA.

The respondent claimed that he expressed at the pre-employment stage that he was opposed to the *au pair* having children, believing that “*if the employee had her own children it would inevitably affect the devotion she would provide to his children.*” He explained his attitude saying that such a person “*would not be able to put his children first and would not be as flexible as a person without parenting responsibilities.*”⁷⁸ In addition the respondent argued “*that there had been no dismissal but rather a consensual termination.*” He argued that the “*contract provided a mechanism for its own termination and that had simply occurred.*”⁷⁹ This, he claimed, meant that by becoming

⁷⁶ Note 75 above, 4.

⁷⁷ Note 75 above, 5.

⁷⁸ Note 75 above, 10.

⁷⁹ Note 75 above, 4.

pregnant, she had agreed to the termination of employment as she was aware of the respondent's position. However, the applicant claimed that while they had discussed marital status before hiring, she denied being told that remaining childless was a condition of employment. The applicant claimed that she had merely informed the respondent of her lack of intention to have children at the time, and that it was not a condition for termination of the contract.⁸⁰

The court noted that the employment agreement was very loose, with no actual written terms that stipulated a termination of employment in the event of pregnancy. The respondent alleged that childlessness was an operational requirement of the job.⁸¹ In addition the court noted that the respondent was an attorney and ought to have taken steps to avoid the situation by having a clear and valid employment contract.⁸² The court further held that the employer's personal values prohibiting his *au pair* from having children were inconsistent with the 1996 Constitution and *contra bonos mores* and thus enforceable. The court determined that while the applicant had accepted the consequences of becoming pregnant she had not consented to the termination of employment.⁸³

The court found that the employee had been dismissed under 187(1)(e) and emphasized that the respondent's claimed "*inherent requirement of the job even if it was sustainable, cannot in law provide a legal justification*".⁸⁴ In other words if the reason for dismissal is related to the pregnancy of an employee, it will be considered as automatic unfair and unjustifiable by law, irrespective of the employer's claims of operational requirements.⁸⁵ The court, seeking to accommodate personal values, took into account the respondent's wish for a childless employee when setting the amount of compensation.⁸⁶

On the matter of the respondent's claim of operational requirements and personal values, the court stated that "*it was evidently clear by the facts that there had been unfair discrimination in terms of*

⁸⁰ Note 75 above, 10.

⁸¹ Note 75 above, 14.

⁸² Note 75 above, 7.

⁸³ Note 75 above, 10.

⁸⁴ Note 75 above, 17.

⁸⁵ Note 75 above, 17.

⁸⁶ Note 75 above, 18.

*section 6(1) of the EEA since it certainly cannot be said that the inherent requirement of the job required that the employee must not be pregnant nor aparent”.*⁸⁷

This case illustrates that if the values of an individual are not in accordance with the 1996 Constitution, they do not provide a justification for dismissal, but maybe a mitigating factor in determining damages.

3.3 Mnguni v Gumbi (2004) 25 ILJ 715 (LC)

In this case, the applicant was 8 months pregnant and employed as a receptionist in a private medical practice. On the day in question (17th March, 2002) she complained of tiredness and her employer became angry, physically ejected her from the office and said not to return to the office until he telephoned.⁸⁸ After a week with no word, the applicant came to her workplace and found another woman occupying her position. The employer informed her that he was not content with her work performance and had found a replacement receptionist. The applicant attempted to discuss severance pay but the respondent brushed her off. The applicant took the matter to court seeking an automatically unfair dismissal finding.

The applicant argued that her employer had dismissed her on the basis of her pregnancy and had replaced her following the incident. The employer argued that he merely told her to go home and that he had sent her a letter (26th March, 2002) instructing her to return to work and posted it to her address, however the employee claimed that she had never received the letter in question.

The court held in this matter that the employer had ample opportunity to ask the employee to return to work, and rejected his claim regarding the letter. The court further held that replacing the employee without giving her any notice of termination indicated an unfair dismissal, and unambiguously condemned his behavior:

“When the applicant told the respondent that she was tired and needed a rest, the respondent did not consult with her as to what the cause of tiredness was. He knew that she was pregnant and was due for maternity leave the following week. Despite knowing the cause of her tiredness he bursted into anger,

⁸⁷ Note 75 above, 20.

⁸⁸ Note 47 above, 5.

*physically pushed her out of the workplace, threw her bag out at her and told her to go home and not to come to work. This kind of the treatment of an employee is outrageous and no longer has a place in this country”.*⁸⁹ Also that “*Employers are prohibited from dismissing employees for any reason related to pregnancy (section 187(1)(e)). The phrase ‘any reason related to pregnancy’ which the legislature has made use of in Section 187 (1)(e) is, in my view, wide enough to cover the dismissal of the applicant in this case”.*⁹⁰

The Labour Court found that the employee had been automatically unfairly dismissed in violation of S187(1)(e) for the following reasons:

- The employer replaced the employee with a new receptionist the day following the incident, indicating that she had been dismissed on the spot.⁹¹
- The employer failed to contact the employee to return to work, nor was there any evidence to support the claim to have sent a letter.⁹²
- The employer refused to discuss severance pay.⁹³

The employee was awarded 24 months remuneration in compensation.⁹⁴ This case emphasizes that employers must be conscientious of the biological effects of pregnancy such as tiredness, and that a dismissal on such a basis, falls under the protection of the phrase “*any reason related to pregnancy*” in S187(1)(e). Consequently a dismissal based on biological effects of pregnancy is unlawful.

3.4 *Lukie v Rural Alliance CC T/ARural Developments Specialists (2004) 25 ILJ 1445 (LC)*

In the case of *Lukie v Rural Alliance cc*⁹⁵ the applicant was employed as an account clerk and receptionist. She informed her manager that she would need maternity leave and he initially agreed, but rescinded his agreement and instructed the applicant not to return to work after the

⁸⁹ Note 47 above, 17.

⁹⁰ Note 47 above, 17.

⁹¹ Note 47 above, 18 (thus she could not be reinstated).

⁹² Note 47 above, 20.

⁹³ Note 47 above, 16.

⁹⁴ Note 47 above, 23.

⁹⁵ (2004) 25 ILJ 1445 (LC), 2.

birth of her child.⁹⁶ The employee took the matter to court and argued that she has been dismissed based on her pregnancy.⁹⁷ The manager argued that the reason for her dismissal was poor performance, and that she had been informed of this in a meeting. He testified that he had discussed the operational requirements with the employee, and that therefore she was not unfairly dismissed.⁹⁸

The court held that the manager's version of the meeting was vague and contradictory. The manager could not recall when the claimed meeting had taken place, what the employee's responses were during the meeting, or what exactly was discussed.⁹⁹ The employer further testified that he was under the impression that the employee would not return after her pregnancy. The court emphasised that this assumption would not cast any doubt on whether there was actually other valid reason that she had been dismissed as the respondent claim was an improper defense. The courts held that the contradictions in his testimony cast doubt on the manager's version of events.

As with the *Mnguni*¹⁰⁰ case, the employer argued that the dismissal was not based on pregnancy but on operational requirements. It should be noted that neither the employee nor the manager had any supporting evidence attached to their witness statements, thus the court was left to determine which version was most probable.¹⁰¹ Francis J held in that regard:

*"I do not agree with the respondent's contentions. In terms of S187(1)(c) of the Act, a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any other reason related to her pregnancy. For all of these reasons, I am satisfied that the applicant has on a balance of probabilities proven that her dismissal was related to her pregnancy".*¹⁰²

⁹⁶ Note 97 above, 3.

⁹⁷ Note 97 above, 5.

⁹⁸ Note 97 above, 13.

⁹⁹ Note 97 above, 16 (the manager stated that the meeting was a general discussion and that a further meeting would have taken place in the future).

¹⁰⁰ Note 47 above, 17.

¹⁰¹ Note 97 above, 17-18.

¹⁰² Note 97 above, 18.

The Court therefore held that the dismissal was automatically unfair under s187. The employee was awarded 18 months' remuneration in compensation.¹⁰³ Why did the court award this amount? What did it take into account? This case illustrates that even where there is some ambiguity as to the true reason for dismissal, it is sufficient that there be a causal link between the dismissal and the pregnancy. The court demonstrated that it would not be fooled by an employer's attempt to disguise a pregnancy related dismissal on other grounds. Moreover, the courts will not turn a blind eye to matters that concern dismissal of pregnant employees, and that doing so constitutes discrimination on the ground of sex and pregnancy as prohibited by the constitution.

3.5 *Sheridan v The Original Mary Anne's at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC)*

In this case the employee was promoted from waitress to administrative manager, but still retained her former duties.¹⁰⁴ The applicant was then summoned to a meeting where her shifts were decreased from five shifts to only one, effective immediately.¹⁰⁵ This meant that she would work on Monday evenings. The applicant expressed her dissatisfaction and got no response.¹⁰⁶ The employer then relieved her of her duties with immediate effect and was told not to return to work the following Monday.¹⁰⁷ The applicant did come to work and found she had been replaced, which she took to be a dismissal. At the time, she was three months pregnant¹⁰⁸ and her pregnancy was known to the respondent who argued that she could not cope with the work load. The applicant then asked for her unemployment card and the respondent refused.¹⁰⁹

The applicant took the matter to a dispute resolution council but it remained unresolved. She then brought the case to the CCMA where it was still unresolved, before proceeding to Labour Court.¹¹⁰ The Applicant argued that she had been unfairly dismissed based on her pregnancy while the respondent argued that she had been dismissed based on her inability to cope with her work load.¹¹¹

¹⁰³ Note 97 above, 19.

¹⁰⁴ *Sheridan v The Original Mary Anne's at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC)*, 5.

¹⁰⁵ Note 106 above, 13.

¹⁰⁶ Note 106 above, 15.

¹⁰⁷ Note 106 above, 16.

¹⁰⁸ Note 106 above, 17.

¹⁰⁹ Note 106 above, 19.

¹¹⁰ Note 106 above, 14.

¹¹¹ Note 106 above, 17.

The Labour Court began by reviewing the inadequate protection that was provided for in past legislation regarding dismissal of pregnant women,¹¹² then examined various provisions of legislation that had been reformed to provide adequate protection such as the LRA,1996 Constitution and BCEA. On the basis of S187(1)(e) the court held that:¹¹³

“A pregnant employee who finds herself dismissed on the grounds that she is pregnant can now approach this court in protection, on any of the two grounds set out in s187(1)(e) and 187(1)(f) of the Act, or the residual unfair labour practices below. Alternatively, she can invoke the provisions of the Constitution. In the first instance interms of s187(1)(e), the dismissal would be automatically unfai, because the Act proscribes unfair dismissal on the grounds of pregnancy. In the second instance in terms of s187(1)(f) the dismissal is discriminatory on arbitrary grounds. Further she could argue that her discrimination is unfair on the ground of her sex. The latter argument can be entertained both under the Act and under the Constitution”.

The court further stated that:¹¹⁴

“significantly s187(1)(f) is apparently a restatement of article 5(d) of Convention 158 of the International Labour Organization which provides as follows: ‘the following, interalia, shall not constitute valid reasons for termination:(d) race, colour, sex, religion, political opinion, national extraction or social lreligion.”

The court found that the employer’s actions had been insensitive and despicable having refused the unemployment card, and that she was entitled to unemployment benefits whether she had been dismissed or not.¹¹⁵ The court held that the dismissal was automatically unfair and awarded the employee compensation of 24 months’ remuneration.¹¹⁶

The case above demonstrates that S187(1)(e) reconciles the irregularities of the previous legislation that did not provide compensation for pregnancy related dismissals. The court, in

¹¹² Note 106 above ,21(Basic Conditions of Employment Act 3 of 1983, Labour Relations Act no 28 of 1956 and Unemployment Insurance Act 30 of 1966).

¹¹³ Note 106 above, 38.

¹¹⁴ Note 106 above, 39.

¹¹⁵ Note 106 above, 47.

¹¹⁶ Note 106 above, 49.

examining previous legislation, allowed the application of S187(1)(e) to address inequality and sex discrimination within the workplace. The case shows how S187(1)(e) of the LRA should be applied and interpreted so that it shall have a positive impact in protecting unfairly dismissed pregnant employees.

CHAPTER FOUR

ONUS OF LIABILITY

4.1 Introduction

This chapter will discuss what constitutes fairness of dismissal under section 187(1)(e) of the LRA, and on the valid reasons that may be given for a dismissal to be fair. Such reasons include misconduct, ancillary reasons for dismissal and operational requirements, and these will be discussed along side relevant case law showing how S187(1)(e) has been applied to pregnancy related dismissals.

4.2 Fairness According to the LRA

The LRA requires in order for a dismissal to be upheld, both the procedural and substantive aspect of the dismissal must be deemed fair.¹¹⁷ Failure on either procedural or substantive grounds will render the dismissal unfair,¹¹⁸ and thus it is incumbent on an employer to ensure that both requirements have been positively fulfilled when dismissing an employee, or risk paying compensation to the wronged employee.

The procedural aspect of a fair dismissal demands that the employee be heard before dismissal¹¹⁹ on the basis of the natural law theory of *audi alteram partem*¹²⁰ (the right to a fair hearing). This requirement does not mean that the employee must take the matter to court in order to have a fair hearing but merely that the employee is given a chance to give their version of events.

Substantive fairness requires that the reasons of the dismissal can be justified and adheres to the law. The employer must not have broken a rule or regulation that is consistent with public policy their employment contract.¹²¹ The following grounds for termination constitute a fair dismissal:

- “*Misconduct (the employees conduct has to be grossly negligent).*”¹²²

¹¹⁷The procedural and substantive requirements of a fair dismissal are located in the Code of Good Practices for Dismissals (schedule 8,) of the LRA.

¹¹⁸ Note 47 above.

¹¹⁹ DuToit *et al* Labour Relations Law 5ed (2005) 403.

¹²⁰ “*Hear both sides*”.

¹²¹ Du Toit *et al* Labour Relations Law 399.

¹²² Chapter 6 – Labour Law <http://www.paralegaladvice.org.za/docs/cha06/15.html>, accessed on 8th August, 2014.

- “*Incapacity (the employee fails to meet his/her job description, or is unable to fulfill the duty within the employment contract due to illness, disability or lack of skill).*”¹²³
- “*Retrenchment or redundancy (the employer is reducing the number of employed staff, or there ‘is a restructuring of the company).*”¹²⁴

The above reasons are exclusive, and are the only legitimate reasons for dismissal. Thus, even were it not stated directly, it would be clear that any dismissal on the basis of discrimination is invalid.¹²⁵ Such a dismissal falls under S187 as an automatically unfair regardless of the procedural aspect (as discussed in 2.1). However a dismissal based on discrimination may not be automatically unfair the employer can justify it on the grounds of operational requirements.¹²⁶ In other words a claim of S187(1)(e) does not give the right to the full maximum compensation of 24 months remuneration until the employer has failed to justify the reason for dismissal.

4.3 Causation

When an employee claims that they have been discriminated against,¹²⁷ it is important that they prove that there is a causal link between the discrimination and dismissal.¹²⁸ In the matter of an alleged pregnancy related dismissal, the court must determine if the pregnancy really was the reason for the dismissal, or if there was another reason.¹²⁹ In other words, would the dismissal still have taken place if there had been no knowledge of the employee’s “*pregnancy*” or “*reasons related to her pregnancy*”? If the answer is yes, the dismissal was not automatically unfair. If no, then the pregnancy had an influence on the dismissal and depending on the facts, render the employers conduct automatically unfair.¹³⁰

Establishing that the dismissal would not have occurred in the absence of knowledge of the pregnancy does not in itself render the dismissal automatically unfair, but depending on the specifics of the case, that is often the most probably inference to be drawn.¹³¹ The question of

¹²³ Chapter 6 –Labour Law <http://www.paralegaladvice.org.za/docs/cha06/15.html>, accessed on 8th August, 2014.

¹²⁴ Chapter 6 –Labour Law, *Ibid*.

¹²⁵ Du Toit *et al* (Note 124 above, 402).

¹²⁶ Note 43 above.

¹²⁷ Either on the grounds of EEA (s6) or s187 of the LRA.

¹²⁸ Note 43 above.

¹²⁹ LJ Ledwaba *Dismissal due to pregnancy* for the degree of *Magister Legum* in the Faculty of Law at the Nelson Mandela Metropolitan University 2006, 20.

¹³⁰ LJ Ledwaba (*Ibid* 20).

¹³¹ LJ Ledwaba (note 131 above 20)

whether the employee would have been dismissed irrespective of their pregnancy status is a crucial one in evaluation these cases.¹³²

4.4 Burden of Proof

Section 192 of the LRA clarifies who bears the burden of proof in matters of dismissal, stating that:

“192. Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair”.

The burden falls on the employee firstly to establish that a dismissal has in fact occurred. The provision does not elaborate specifically how the employee might go about proving that they have been dismissed, but in practice, any written document with clear notification of dismissal or conduct that clearly indicates dismissal is generally accepted. Once the employee has established that they have been dismissed, the burden then shifts to the employer to demonstrate that the dismissal was fair.

While the provision does not refer directly to automatically unfair dismissals, the words “*any dismissal*” suggests that the provision is inclusive of such proceedings. However, it is submitted that in cases with a strong claim of an automatically unfair dismissal, the word “*fair*” within the provision should not be interpreted to allow the employer to argue substantive and the procedural elements. Doing so would weaken the application of S192 on automatic unfair dismissals by failing to consider S187 alongside s192.¹³³ This would open the door to allow employers to mask their true, discriminatory reason for dismissal as an operational requirement, and to focus the attention of the courts on the “fairness” of their “red herring,” rather than on the question of discrimination. This would permit employers to escape the liability of discriminatory dismissals,

¹³² *Woolworths v Whitehead (Pty) Ltd* (2000) 21 ILJ 571 (LAC), *Mashava v Cuzen & Woods* (2000) 6 BLLR 691 (LC).

¹³³ R Ismail Analyzing the onus issue in dismissals emanating from the enforcement of unilateral changes to conditions of employment <http://saflii.org/za/journals/PER/2011/42.rtf>.

wherever there is uncertainty or disputes to the reason for dismissal. Under this interpretation, an employer who wished to be rid of a pregnant employee, would be highly motivated to manufacture this uncertainty, allege another reason for her dismissal, and expect to be heard on the “fairness” of their red herring. This would nullify the “automatic” aspect of finding a dismissal automatically unfair.

In the case of *SACWU v AFROX*,¹³⁴ the courts used section 187(1)(c) to show what was required of the employee to meet their burden of proof in establishing an automatic unfair dismissal. The courts stated:¹³⁵

- (i) *“The employee needs only to establish the existence of a dismissal, in the simplest form, as in defined in section 186(1)(a), to discharge the onus in section 192(1)”*.
- (ii) *“Thereafter the employer must prove that the dismissal was not effected for the purposes set out in section 187(1)(c), to discharge the onus in section 192(2),”*
- (iii) *“If the employer overcomes the onus referred to in subparagraph (ii) herein above (which would mean that the dismissal is not automatically unfair, then the employer may need to further establish that the dismissal was effected for a fair reason based on the employers operational requirements in accordance with fair procedure”*.

This illustrates that in matters seeking an automatic unfair dismissal, a simple burden of proof is placed on the employee to demonstrate that the dismissal was based on grounds listed in S187. The employer then must prove that the dismissal was not based on discriminatory grounds in order to avoid the finding of automatic unfair dismissal. If the employer is able to prove that discrimination was not the cause, then and only then may they attempt to argue that the dismissal was substantively and procedurally fair, on the basis of operational requirements or another valid cause for dismissal.¹³⁶ It is submitted that this case sets out the proper reading of the law, in which s187 is enforced alongside s192.

¹³⁴(1999) 20 ILJ 1718 (LAC).

¹³⁵ R. Ismail note 135 above available, <http://saflii.org/za/journals/PER/2011/42.rtf>

¹³⁶Further, that a fair and formal procedure of dismissal has been carried out.

4.5 Ancillary Reasons

Where the main reason for the dismissal is pregnancy, the employer cannot rely on an ancillary reason to dismiss, such as failure to disclose pregnancy. This is meant to prevent employers from hiding the prejudiced dismissal behind a secondary reason. The following cases illustrates the point:

In the case of *Mashava v Cuzen & Wood*¹³⁷ the applicant was employed on probation anticipating that she would enter in to articles of clerkship with a partner of the firm. However, the firm terminated her services claiming that she had be dishonest by failing to reveal and concealing her pregnancy. They argued that in doing so, the employee had lured the firm in to registering her for articles of clerkship. The employee then made an application to the court on the grounds of automatic unfair dismissal. The employer argued before the court that the “*employer-employee*” trust had been broken by failing to disclose her pregnancy status when they offered a position as a candidate attorney. The court held that there is “*no immediate obligation of the employee to disclose her pregnancy to the employer*”. The court affirmed that the same standard applied to those employed on a probationary basis. In addition, the alleged deceit was found to be non-existent because the real reason for the dismissal was her pregnancy status, and because there was never any obligation to disclose that information to begin with. This case demonstrates that the failure to disclose pregnancy to an employer is not an obligation and cannot be a ground for dismissal.

In the case of *Swart v Greenmachine Horticultural Services (A division of Sterikleen (Pty) Ltd)*¹³⁸ the employee did not inform her employer that she was pregnant at the time of her appointment. When this became known to the employer, she was subjected to harassment by her manager, on the supposed basis of a break down in trust and inability of the employee to cope with her job. She was there after dismissed by the employer for “*insubordination,*” “*poor performance,*” and “*omission of critical information at time of application for employment regarding pregnancy.*” The employer argued that there was no connection between the employee’s dismissal and her pregnancy, and that only the “*dishonesty*” and performance were at issue. The court found the

¹³⁷ (2000) 6 BLLR 691 (LC).

¹³⁸ (2010) 3 IILJ 180 (LC).

opposite, that there was a strong connection between the termination and the pregnancy, and found the dismissal to be automatically unfair. The court reinforced that there exists no legal or moral responsibility to disclose a pregnancy to an employer other than as required for purposes of the Basic Conditions of Employment Act.¹³⁹ This obligation extends to both unexpected and planned pregnancy. It follows logically, that there can be no dishonesty, deceit, or breach of trust in not revealing information that you are under no obligation to reveal.

In *Memela and another v Ekhamanzi Springs Pty Ltd*,¹⁴⁰ the employer's spring water bottling business was located on the premises of a mission station. Both applicants were employed by the bottling company, and worked on property belonging to the mission station. The Mission's code of conduct prohibited that unmarried women staying or working on its premises become pregnant.¹⁴¹ Given that the employer operated on the mission's premises, the employees became subject to the mission's code of conduct. However, the two applicants became pregnant in breach of the mission's regulations, and consequently were denied entry to the premises.¹⁴² With no access to their work stations, they were unable to carry out their duties, and their employment was terminated. The applicants claimed that their dismissal was automatically unfair, as the reason for their dismissal was based on their "pregnancy" and "or a reason related to their pregnancy."¹⁴³ The employer argued that it had not dismissed its employees.

The first applicant was dismissed from the case due to her non-attendance at court, but the second case proceeded. The courts placed the evidential burden on her to establish both that she had been dismissed and that the dismissal was due to her pregnancy.¹⁴⁴ The employee argued that the dismissal was for reasons related to her pregnancy, as the employer had failed to intervene with the mission to grant them access to the work premises. The court held that the mission's preventing them from working not only amounted to a dismissal but to an automatically unfair dismissal' under section 187(1)(e), entitling them to either reinstatement (with backpay) or compensation equal to 24 months' remuneration. The court noted crucially, that an employer may not relinquish its duty to protect their employees from discrimination, by resorting to their code of conduct, or in this instance

¹³⁹ Section 25 of the BCEA.

¹⁴⁰ (2012) 33 ILJ 2911 (LC)

¹⁴¹ Ibid, 2.

¹⁴² Note 142 above, 1.

¹⁴³ Note 142 above, 1.

¹⁴⁴ Note 142 above, 13.

the mission's code of conduct.¹⁴⁵ The case further established that the employer had an obligation to protect their employees irrespective of the marital status by making arrangements with the mission to accommodate such scenarios.¹⁴⁶ This case is significant in asserting that a company must provide job security and freedom from discrimination to its employees, and may not "contract out" or otherwise avoid this responsibility, even if the discriminatory policy comes from a secondary entity, such as the property owners.

4.6 Incapacity

Incapacity in regards to poor work performance in item 9 of schedule 10 of the LRA states:

"Any person determining whether a dismissal for poor work performance is unfair should consider—

- (a) whether or not the employee failed to meet a performance standard; and*
- (c) if the employee did not meet a required performance standard whether or not—*
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;*
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and*
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard".*

The above provision makes it clear that an employee may be dismissed on the ground of poor work performance, and that the employer may use this provision as a defense to a claim of unfair dismissal or even automatically unfair dismissal. This defense takes full effect if the employee was aware of, and had fair opportunity to meet the employer's work standards. The defense of poor work performance has been supported by the courts regarding pregnant employees thus section 187(1)(e) does not render a pregnant employee immune to dismissal based genuinely on work performance.

In the case of *Nadia v B & B t/a Harvey World Travel Northcliff*,¹⁴⁷ the employee began employment subject to a three month probationary period. On the second month, she discovered that

¹⁴⁵ Note 142 above, 16.

¹⁴⁶ Note 142 above, 18.

¹⁴⁷ (JS547/10) [2013] ZALC JHB 168 and T Gandidze 'Dismissals for Operational Requirements' 2011 *Law and Development* 87

she was three months pregnant¹⁴⁸ and informed her employer; whereupon the employer congratulated her on the pregnancy, and informed her that her work performance was unsatisfactory.¹⁴⁹ The employers offered her alternate position at a lesser salary out of good will. The following day they handed her a two weeks' notice of dismissal from the probationary position, which she signed.¹⁵⁰ The employee then informed her employer that she would not be accepting the lessor position and left her job. She later took the matter to the CCMA alleging she had been automatically unfairly dismissed based on her pregnancy. She argued that she was given notice of dismissal the day after informing them of her pregnancy, leading her to assume that the real reason for her dismissal was her pregnancy status. The employer argued it had established a problem with her poor work performance and lateness before she announced her pregnancy.¹⁵¹ The court found in favor of the employer; that her dismissal was based solely based on performance, and that even when offered a new job still failed to perform her duties.¹⁵²

4.7 Inherent Job Requirements

The phrase “inherent requirements of the job” implies that the job itself have essential requirements that are unavoidable in the performance of that job.¹⁵³ The courts have often taken a strict approach interpreting this phrase, as a looser interpretation could be the basis for many unjust findings. In the case of *Association of Professional Teachers and Another v Minister of Education and others*,¹⁵⁴ the Labour Court held that the inherent job requirement defense be disallowed when it is based on the perception that one sex is superior to the other. Elaborate on this. What are the circumstances when sex can be argued as an inherent job requirement? Read the case carefully. The case of *IMATU & Another v City of Cape Town*¹⁵⁵ emphasized that the inherent job requirement defense must not violate the Constitutional principles of human dignity, freedom and equality. What was the inherent job requirement in this case?

¹⁴⁸ Note 149 above, 5.

¹⁴⁹ Note 149 above, 5.

¹⁵⁰ Note 149 above, 6.

¹⁵¹ Note 149 above, 32.

¹⁵² Note 149 above, 6.

¹⁵³ Grogan *JWorkplace Law* 7th ed (2000) 107.

¹⁵⁴ (1995) 16 ILJ 1048 (IC).

¹⁵⁵ (2005) 26 ILJ 1404 (LC).

In other cases, however, the courts have acknowledged the importance of inherent job requirements and upheld them as defense in particular circumstances. The best illustration of this, with regard to S187 (1) (e) is the case of *Whitehead v Woolworths (Pty) Ltd.*¹⁵⁶ Woolworths advertised an opening for a Human Resources Generalist in its Cape Town IT department. The Applicant Whitehead applied for the job, was interviewed and offered the position. She turned down the offer and Woolworths again placed the job post seeking applicants. They then contacted Whitehead, asking if her circumstances had changed and again offering her the position.¹⁵⁷ She told them that yes, she was available and at the interview, revealed that she had recently discovered that she had become pregnant.¹⁵⁸ Woolworths stated that two days later they left a voice message for Whitehead to contact them to discuss matters further. The Respondent disputed the content of the message, claiming that they wished to "*finalize the paperwork,*" suggesting that the hiring decision had been made, and was awaiting only legal formalities.¹⁵⁹

Woolworths, rather than following up to employ Whitehead, instead hired another applicant, Dr. Young, on the basis that they were more highly qualified. The Applicant took the matter to court on claiming to have been unfairly dismissed on the basis of her pregnancy which was contrary to section 2(1)(a) of Schedule 7 of the LRA. She claimed that she had been offered, and accepted the job, creating an existing employment relationship.¹⁶⁰ The Respondent argued that the requirement of uninterrupted job continuity was not an arbitrary ground on which the respondents unfairly discriminated against the Applicant because it was the inherent requirement for the position the Applicant applied for, and thus they had not acted fairly according to section (2)(c) of Schedule 7 of the LRA.¹⁶¹ The court a quo dismissed the Respondent's argument by holding that an inherent job requirement is a requirement that must be so inherent that if not met an applicant would simply not qualify for the post. The court found that in the circumstances the requirement was not so inherent that the Applicant would not have been able to carry out the job, and thus upheld the Applicant's claim that she had been refused the job due to her pregnancy.

¹⁵⁶ (1999) 20 ILJ 2133 (LC).

¹⁵⁷ Note 43 above, 4.

¹⁵⁸ Note 43 above, 14.

¹⁵⁹ Note 43 above, 9.

¹⁶⁰ Note 43 above, 15

¹⁶¹ This section allowed for discrimination to be granted against employees or job applicants; however the section has been removed from the schedule under section 55(a) of the Labour Relations Act of 2002.

Woolworths then appealed to the Labour Appeal Court¹⁶² and argued that they had not discriminated against the Respondent on the basis of her pregnancy, but that they required an individual who would be available to work for an uninterrupted period of one year. In addition they argued, Dr Young who they hired instead of Whitehead was better suited for the position both in qualifications and experience,¹⁶³ and was better able to perform the job requirements.

Three judges heard the appeal. *Zondo AJP* rejected Woolworth's continuity requirement and held that Whitehead was mainly denied the position advertised because there was a more suitable candidate that would be available for the required 12 month period, and not due to her pregnancy.¹⁶⁴ *Willis JA* held that Woolworths' need for an employee who would be available for a continuous period was "*rational and commercially understandable*", and was thus appropriate of them to employ a person that would fulfill the continuity requirement.¹⁶⁵ *Conradie JA* took the minority opinion that Whitehead had in fact been refused employment on the basis of her pregnancy,¹⁶⁶ and argued in addition that the continuity requirement was not valid in determining whether Whitehead was suitable for the job.¹⁶⁷

The court held that the Respondent had been rejected in favor of a more qualified applicant,¹⁶⁸ and not because of her pregnancy. This case emphasizes that where an employer can demonstrate that a pregnant employee is unfit for a particular job position due to the operational requirements of the job, refusal to give the applicant or employee the job position may be justified depending on the inherent job requirement.

4.8 Conduct

An employee may be properly dismissed on the grounds of misconduct,¹⁶⁹ which may be classified as either ordinary or gross misconduct according to item 3(4) of schedule 8 of the LRA. The section stipulates:

¹⁶² Note 43 above.

¹⁶³ Note 43 above, 15

¹⁶⁴ Note 43 above, 24.

¹⁶⁵ Note 43 above, 47.

¹⁶⁶ Note 43 above, 47.

¹⁶⁷ Note 43 above, 48.

¹⁶⁸ Note 43 above, 150.

¹⁶⁹ Item 3(4) of schedule 8 of the LRA.

“Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or willful damage to the property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188”.

An employer is obliged to investigate each case of misconduct adequately (though not necessarily formally) to obtain the facts of the incident.¹⁷⁰ The employer must then give notice of warning to the employee, alerting them that they risk dismissal if the conduct is continued, except in cases of gross misconduct, where the requirement of notice is waived.¹⁷¹ If the requirements have been satisfied, the dismissal will be deemed fair. However the employer must take into account considerations such as the employees’ circumstances and the nature of the misconduct.¹⁷² It is important to note that S187(1)(e) does not provide pregnant employees blanket immunity from dismissal, and they may be fairly dismissed on the basis of ordinary or gross misconduct, provided that the dismissal is substantively and procedurally fair.

It should be highlighted, that cases involving misconduct must be treated consistently. In *National Union of Mineworkers in South Africa obo Engelbrecht v Delta Motor Corporation* (1998) 5 BALR 573 (CCMA) the employee was relieved of his employment contract for concealing a previous act of dishonesty whilst employed for another company in his job application. However, the court ordered that the employee be re-instated on the basis that the employer had previously allowed similar misconduct by another employee.

¹⁷⁰Item 4(1) of schedule 8 of the LRA.

¹⁷¹Item 4(1) of schedule 8 of the LRA.

¹⁷²Item 3(5) of schedule 8 of the LRA - ‘When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances including length of service, previous disciplinary record and personal circumstances), the nature of the job and the Circumstances of the infringement itself’.

CHAPTER 5

REMEDIES

5.1 Introduction

This chapter will discuss the remedies available for automatic unfair dismissals under S187(1)(e) of the LRA. It will explore the two remedial aspects of compensation and damages, and further discuss whether or not the compensation awarded in such matters are intended to be punitive.

5.2 Remedies Available for Unfair Dismissals

In ordinary unfair dismissals, the employee may be re-instated, re-employed, and/or granted monetary compensation under S193(1) of the LRA which states:

193. Remedies for unfair dismissal and unfair labour practice

(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 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.

Re-instatement entails that the employee be treated as if they had not been dismissed, and paid for the lost earnings incurred during the period of unfair dismissal.¹⁷³ The employee is also entitled to any favorable changes in the terms of employment that were expected during that period, such as pay raises or benefits. The remedy of re-employment returns the employee to work, either in their previous position, or another, but does not provide compensation for loss of earnings.¹⁷⁴ Monetary compensation is the final remedy, awarded to the aggrieved employee to cover the financial loss that they have occurred. The maximum compensation awarded for normal unfair dismissal claims

¹⁷³ JC Kanamugire, TV Chimuka 'Reinstatement in South African Labour Law' 2014 (5) 1 *Mediterranean Journal of Social Sciences*, 256.

¹⁷⁴S Cokile *the Remedies for Unfair Dismissal* for the degree of Masters Legum (Labour Law) in the Faculty of Law at the Nelson Mandela Metropolitan University 2006, 38.

is the equivalent of 12 months' pay.¹⁷⁵ The courts calculate the amount of compensation by examining the extent of the employee's financial loss and unique circumstances of the matter.¹⁷⁶

The procedure to determine which remedy to follow is set out in S193(2) of the LRA which states:

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

Therefore, by default, an employer is obliged to re-instate or re-employ an unfairly dismissed employee unless the employee does not wish to be, or if the employee-employer relationship has been rendered intolerable during the conflict, or if re-instatement/re-employment is unpractical. Lastly, the obligation on the employer to re-instate/re-employ is waived if the dismissal was unfair only for procedural reasons, but substantively fair.¹⁷⁷

It is important to note that while an employee may refuse re-instatement or re-employment, this does not automatically entitle them to claim compensation the refusal is found to be unreasonable. This was illustrated in the case of *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA) in which, the appellant fell pregnant and agreed with her employer that she would take two months maternity leave, two weeks of which would be paid.¹⁷⁸ The employer then suggested that she find alternative employment as the practice was facing financial difficulties and in order to save money, wished to employ a junior doctor at a lower salary.¹⁷⁹ The employer then wrote a letter terminating her employment due to financial circumstances of the practice.¹⁸⁰ The employee then took the matter to the CCMA seeking a finding of automatic unfair dismissal due to pregnancy and

¹⁷⁵Section 194 (1) of the LRA.

¹⁷⁶SVettori The Role of Human Dignity in The Assessment of Fair Compensation For Unfair Dismissals (2012) 15 (4) *PER* 106.

¹⁷⁷JC Kanamugire, T VChimuka (Note 173 above, 258).

¹⁷⁸*Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA) at 5.

¹⁷⁹ *Ibid* 6.

¹⁸⁰ Note 178 above, 14.

sought 24 months' salary as compensation. Failing to reach consensus, the matter was taken to Labour Court, which held that the employee had not been dismissed based on her pregnancy but that she had been dismissed unfairly and awarded her compensation in the amount of 12 months' salary and upheld that the employee's refusal to be re-instated was reasonable.

The employer brought the matter to the Labour Appeal Court to decide whether the compensation was payable, and the court was divided in the judgment. The majority (Zondo JP and Waglay JA) held that there was no need for compensation as the employee had not been dismissed unfairly. The minority judge held that the employee should have received only 6 months' salary as compensation. There upon, the matter was taken to the Supreme Court of Appeal,¹⁸¹ which held that the employee was not entitled to compensation for unfair dismissal. They reasoned that the reason for compensation is to ensure that the employee recovers from any financial loss incurred by the dismissal and that the employee would have a great chance to obtain alternative employment given her qualifications.¹⁸²

The Supreme Court of Appeal further held that when an employer acknowledges its error in dismissing an employee, and makes a reasonable offer to remedy the situation, the employee must carefully consider that offer, and realize that by rejecting a reasonable remedy,¹⁸³ they risk being refused compensation. The Supreme Court of Appeal then dismissed the matter. This case shows that when fair remedy is offered, the employee's right to refuse re-instatement or re-employment is not an opportunity to "cash in" and move on to other work. The expectation of fairness and good faith applies to both parties.

In matters of automatically unfair dismissals, remedies frequently impose a larger financial burden on the employer on the basis that employee labour rights have been infringed upon or that the employee has been discriminated against, in violation of their Constitutional rights.¹⁸⁴ The severity of such violations justify heavier and more financially straining remedies in these cases, in the hopes of keeping safe fair labour practices and basic human rights belonging to every individual.¹⁸⁵

¹⁸¹ Note 178 above, 14.

¹⁸² Note 178 above, 18.

¹⁸³ Note 178 above, 18.

¹⁸⁴ C Van Heerden, H Coetzee 'Minister for Justice and Constitutional Development v Tshishonga 22099 BBLR 862 (LAC)' Onlangeregspraak/Recent case law 2011 *De Jure* 479.

¹⁸⁵ C Van Heerden and H Coetzee Ibid (Note 184 above, 480)

It is submitted that the penalties levied against employers found to have committed an automatically unfair dismissal is intended in part as a deterrent to other employees from behaving in the same manner; and to forcefully assert the basic rights of all individuals irrespective of their employment contracts. Section 193(3) of the LRA provides that:

“If a dismissal is automatically unfair or, if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.”

This section gives the courts broad discretionary power to assign additional sanctions to an employer if they are found to have committed an automatically unfair dismissal. It is submitted that the legislature intended to give the courts flexibility and latitude in providing sufficient remedy to cases of automatic unfair dismissal. The word “*appropriate*,” left undefined, enables the courts to use providing various forms of remedy to aggrieved employees dismissed on discriminatory grounds. Section 193(3) provides an example for an “*appropriate*” order, stating:

“The Court, for example, in the case of a dismissal that constitutes an act of discrimination, may wish to issue an interdict obliging the employer to stop the discriminatory practice in addition to one of the other remedies it may grant”.

The courts have elected in many cases to use damages as “*appropriate*” remedy for such discriminatory dismissals. For instance, in the case of *Hunt v ICC Car Importer Services Co (Pty) Ltd*¹⁸⁶ the court ordered the employer to pay compensation and awarded the employee *solatium* (sentimental “damages”) for the harm the employee had suffered. Note that damages are a separate remedy under the EEA, not s187 of the LRA.

Section 194(3) of the LRA then states that:

“The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal”.

¹⁸⁶ 1999 ILJ 364 (LC).

The section makes clear that in matters of automatic unfair dismissal an employee is entitled to a maximum of 24 months' salary in compensation. This provision allows for twice the amount of ordinary unfair dismissals, which is limited to 12 months' salary. However it should be noted that the courts have upheld the notion that "*the statutory provision for a maximum of 24 months compensation for an automatically unfair dismissal should not be used as a yard stick against which to measure appropriate compensation,*¹⁸⁷ *it was merely intended to set an upper limit on compensation.*"¹⁸⁸

This provision additionally places a burden on the courts to uphold "*just*" and "*equitable*" compensation in matters involving discrimination. The court must then interpret the meaning of these words when assigning the amount of compensation. The court in the *Rawlins*¹⁸⁹ case discussed above, decided that to be "*just*" and "*equitable*" meant to compensate the employee so as to place them as they would have been if they had not been unfairly dismissed, and not to go beyond that, and place them in a better financial position.

In summary, a pregnant employee wrongfully dismissed under S187(1)(e) can claim a readily available remedy in terms of the LRA. The remedies available for an automatic unfair dismissal are re-instatement, re-employment, compensation and any other remedy that is found appropriate by the courts.

5.3 Compensation

Compensation in S194 of the LRA refers to the employees' remuneration. As mentioned above the courts can grant a maximum of 24 months' remuneration to the employee if for an automatically unfair ground of dismissal, such as pregnancy'.

It was held in *CEPWAWU v Glass & Aluminum 2000 CC* "*that the amount of compensation awarded for an automatically unfair dismissal must reflect the fact that, save in exceptional circumstances, the employee would be entitled to fully retrospective reinstatement, not only to ensure that the employee lost nothing as a result of the dismissal. Where reinstatement is not requested, compensation should be calculated accordingly*".

¹⁸⁷ Note 139 above, 407.

¹⁸⁸ Note 139 above, 407.

¹⁸⁹ Note 178 above, 149.

There are a number of factors to be taken into account when calculating the amount of compensation involved. These factors were summarized by the court in the matter of C. Van Heerden and H Coetzee as follows:

- (a) the nature of the dismissal (whether it was automatically unfair);*
- (b) whether the dismissal is substantively or procedurally unfair or both;*
- (c) the nature and extent of the deviation from the procedural requirements when a dismissal is procedurally unfair;*
- (d) whether the employee was guilty of misconduct in so far as the reason for dismissal is misconduct (see also *Transnet Ltd v CCMA*¹⁹⁰ where the court stated that the ‘offensive nature’ of the misconduct of an employee must play a role in the quantum of compensation awarded (1300a) and that even when there are procedural irregularities, if the offence was of a ‘reprehensible nature, compensation would be inappropriate (1301a));*
- (e) the consequences for the parties when compensation is awarded and when it is not;*
- (f) the need to provide a remedy where a wrong has been committed;*
- (g) the impact of the conduct of the employee upon the employer or the business of the employer in so far as the employee may have done something wrong which gave rise to his dismissal but where it was not sufficient to warrant dismissal and the conduct by either party that undermines or promotes any objects of the LRA,...*¹⁹¹

The factors mentioned above will vary depending on the facts of each case, therefore there is no closed list of what the court must take into consideration when determining compensation.¹⁹² It should be brought to an employee’s attention that figure of 24 months’ salary is the maximum figure, and the employee is by no means guaranteed to receive that amount. Some courts are reluctant to award the maximum amount, and stick to the principle that compensation should be “just” and “equitable,” as taken to mean that it should restore, but not improve the financial status of the employee.

¹⁹⁰ (2008) 29 ILJ 1289 (LC)

¹⁹¹ C Van Heerden and H Coetzee (Note 184 above, 481-482).

¹⁹² SVettori (Note 176 above, 108).

In the case of *Johnson & Johnson (Pty) Ltd v CWIU*¹⁹³ it stipulated that compensation for unfair labour practices was not intended to punish the employer but to be “*fair and reasonable*”. In regards to what should be considered as adequate compensation, the court held “*in matters of unfair dismissal, once the court has decided that compensation should be granted it is obliged to grant at least the full amount as prescribed for by section 194(1), where as in an unfair labour practice the court or the arbitrator must grant such amount as it considers to be fair and reasonable.*”¹⁹⁴

The *Rawlins* case¹⁹⁵ discussed above, is a clear example of the court’s reluctance toward the maximum amount to an automatically unfairly dismissed employee on the basis of pregnancy if that amount would have the effect of enriching the employee rather than simply restoring them to the state had not been dismissed.

Some cases have awarded the employee an amount close to the maximum 24 months,¹⁹⁶ hence the compensation will vary based on the facts of the case and the inclination of the courts. In the case of *Lukie v Rural Alliance cct/a Rural Development Specialists* (2004) 25 ILJ 1445 (LC) the court awarded 20 months of compensation, for the unfair dismissal of a pregnant employee. This tendency towards greater compensation is not seen often in dismissals based on S187(1)(e). Thus wrongfully dismissed pregnant employees should bear in mind that exceptional circumstances are often required to be awarded the maximum amount. A dismissal on the grounds of pregnancy does not guarantee a maximum award of 24 months’ salary.

5.4 Damages

Damages under the LRA can be awarded to an aggrieved employee that has been unfair dismissed under S158 (1)(a)(vi) of the LRA. The section entails that the Labour Court may make “*an award of damages in any circumstances contemplated*” within the LRA. It should be noted that compensation is a tool used by the statute to comfort the employee for the infringement of their entitled employment rights to fair labour practices, while damages derived from common law which is used to pay the employee that has been unfairly dismissed patrimonial loss based on a

¹⁹³ (1998) 12 BLLR 1209 (LAC).

¹⁹⁴ Note 194 above, 45.

¹⁹⁵ Note 178, above.

¹⁹⁶ Note 142, above.

breach of contract or delict law.¹⁹⁷ There is a distinction between compensation and damages due to their origins and their purpose. However, damages are divided into patrimonial loss and non-patrimonial loss. The patrimonial aspect of damages deals with the actual financial loss such as loss of income, while the non-patrimonial loss deals with pain and suffering, and attacks on human dignity.¹⁹⁸ The courts have acknowledged non-patrimonial damages in S187(1)(e) matters by awarding *solatium* damages to wrongfully dismissed pregnant employees.¹⁹⁹

Solatium damages are simply “an amount of solace money paid to a plaintiff by a defendant for the impairment of the personality interest of the plaintiff.”²⁰⁰ The object of *solatium* damages is that the employee have a feeling of satisfaction for the “Injustice, injury and suffering which he (actually or presumably) sustained as a result of the defendant’s conduct.”²⁰¹ Consequently the LRA provides for compensation for patrimonial loss under S193 and allows for non-patrimonial *solatium* damages in S158. With no fixed method on how to calculate *solatium* damages, the courts rely on their discretion on what an adequate amount of *solatium* damages would be, in the circumstances of each case.²⁰² Remember that this does not relate to a cause of action under s187 – this deals with dismissal. S158 deals with other causes of action that are not dismissal.

In the case of *Wallace v DuToit*²⁰³ the court awarded *solatium* damages for the impairment of the applicant’s dignity and self-esteem due to the dismissal being based on the discriminatory ground of pregnancy.²⁰⁴ In the case of *Hunt v ICC Car Importer Services Co (Pty) Ltd*²⁰⁵ the Court ordered the employer to pay *solatium* damages as well as six weeks remuneration for patrimonial loss suffered. You need to read these cases and notice how the relief calculated and why.

5.5 Punitive

The next aspect to be discussed is if the courts deliberately aim to award punitive compensation in matters that deal with automatic unfair dismissals under S187(1)(e) of the LRA. It is not able that the automatic unfair compensation has double the limit of ordinary unfair dismissals, which shows

¹⁹⁷ C Van Heerden and H Coetzee (Note 184 above, 482).

¹⁹⁸ C Van Heerden and H Coetzee (Note 184 above, 483).

¹⁹⁹ Neethling, Potgieter & Visser *Law of Delict* 6 ed (2010) 322.

²⁰⁰ Neethling, Potgieter & Visser *Ibid* 251.

²⁰¹ Note 139, above.

²⁰² C Van Heerden and H Coetzee (Note 184 above, 483).

²⁰³ Note 75, above.

²⁰⁴ Note 75, above 21.

²⁰⁵ Note 186, above.

its intention to uphold section 23 of the 1996 Constitution and the basic rights of each individual under the 1996 Constitution.²⁰⁶

However, in spite of the obligation to determine a “just” and “equitable” compensation, some courts do go beyond this measure and punished the employer for their discriminatory behavior.²⁰⁷

In the case of *Hoffmann v South African Airways* 2000 ILJ 2357(CC) the court held that:

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of a constitutional right; second, to deter future violations, third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, indetermining the appropriate relief, ‘we must carefully analyze the nature of [the] constitutional infringement, and strike effectively at its source’”.

The above opinion argues that in determining compensation the courts should take into account the Constitutional and labour interests of the employee so as to determine the extent of the infringement. Thus compensation should focus on determining the extent or degree of the infringement to determine the amount of damages needed to rectify the constitutional infringement.

In the case of *Mogale v Seima* 2008 (5) SA 637(SCA) the court expressed that awarding of compensation should not be punitive in civil courts proceedings.²⁰⁸ It further emphasized that damages are awarded to console a plaintiff for his “wounded feelings” and not to “penalize or to deter the defendant for his wrong doing, nor to deter people from doing what the defendant has done.”²⁰⁹ In addition it also held that “punishment and deterrence are functions of the criminal law, not the law of delict.”²¹⁰

However, in other cases such as *Botha v Import Export International CC*,²¹¹ the courts have taken the punitive approach in awarding compensation so as to deter employers from acting in a

²⁰⁶ Chapter 2 of the Constitution-Human Rights.

²⁰⁷ *Botha v Import Export International CC* (1999) 20 ILJ 2580 (LC).

²⁰⁸ *Mogale v Seima* 2008 (5) SA 637 (SCA) at 11.

²⁰⁹ Note 208 above, 11.

²¹⁰ Note 208 above, 11.

discriminatory manner. The case of *Sheridan v The Original Mary–Ann’s at the Colony (Pty) LTD (1990) 20 ILJ 2952 (LC)* also took a punitive approach when awarding compensation. The court held that, the employer’s conduct was aggravating. Consequently, the court instructed the employer to pay 24 months’ salary as compensation to the employee for the automatically unfair dismissal. It should be noted that cases that allow for a more punitive approach are more likely to award the maximum compensation or close to it. In the *Lukie* case²¹² the court awarded 20 months’ salary as compensation and in the *Mnguni* case²¹³ the court awarded the maximum amount.

The case law is split, with two different approaches as to whether compensation in automatically unfair dismissals should be punitive in nature, or only to remedy the employee’s constitutional interest.²¹⁴

CHAPTER 6

CONCLUSION

It is imperative that both women and men have equal footing with in the labour market. Labour practices that do not allow for women to enjoy the same rights and privileges as men should be addressed and removed by law, as women are entitled by the 1996 Constitution and LRA to fair and safe labour practices. Women are biologically unique as the sex that carries unborn children and thus a dismissal based on pregnancy can be taken as discrimination against women. This study has shown that section 187(1)(e) of the Labour Relations Act has been highly effective in protecting the employment and Constitutional rights of pregnant employees and those on maternity leave from discrimination on the basis of their pregnancy status.

The wording of S187(1)(e) has been interpreted and applied by the courts to ensure that women that are dismissed for reasons linked to their pregnancy may seek redress under the provision. The courts have demonstrated through precedent that the provision permits a broad and inclusive view of what constitutes discrimination on the basis of pregnancy to disallow any form of such discrimination in employment. Crucially, S187(1)(e) also shields pregnant applicants and probationary employees from discrimination in obtaining employment, ensuring that employers

²¹¹ Note 207 above.

²¹² Note 97above.

²¹³ Note 47above.

²¹⁴ S Vettori (Note 176 above,107).

must take care to avoid denying a hopeful applicant employment on the basis of pregnancy status. The law also protects women from ancillary pregnancy related discrimination when pregnant employees fail to disclose their pregnancy status, fail to perform efficiently at work due to the natural biological effects of pregnancy such as morning sickness, or have a child against the wishes of their employer. Women under these circumstances are frequently dismissed along with an accusation of dishonesty, incompetence, or insubordination and the courts have rejected all such attempts as invalid.

The provision entails that the evidential burden falls on the employee first, to demonstrate that they have been dismissed, and then on the basis of pregnancy. The employer may then attempt to defend themselves by proving that the employee has been dismissed on valid grounds. The employer may not rely simply on their own family values or preferences in dismissing a pregnant employee, but only on legally valid grounds such as misconduct, incapacity, or in some instances operational requirements. Many employers have turned to the excuse of operational requirements, often arguing that uninterrupted employment periods are necessary, and validate the dismissal of a pregnant woman, who would not meet this requirement. However, the courts have made sure that dismissing a pregnant employee under operational requirements would be deemed fair and a valid reason only if the employer can prove that the employee is unfit for the job description.

The remedies available within the provision are re-instatement, re-employment and compensation. The unfairly dismissed employee can choose to be re-instated or re-employed, or refuse those options and claim for compensation if the relationship between them and the employer has been made intolerable. However, if an employee unreasonably refuses to be re-instated or re-employed after the employee has attempted to make fair restitution, the courts may refuse to grant the compensation. Therefore, employees should be cautioned to be reasonable when considering re-instatement or re-employment.

A claim to dismissal based on S187(1)(e) is not an assurance of compensation or damages. The courts will evaluate the facts of the circumstances and determine whether the employee had been dismissed on other lawful grounds such as misconduct, operational requirements or incapacity. There are no set criteria used in when determining the amount of compensation, however the courts do take into account fairness regarding the extent of discrimination; the impact of the discrimination; and the reason given for the discrimination.

In addition, the statutory limit of compensation that can be claimed by the employee is 24 months' salary for automatically unfair dismissals, and 12 months' for normal cases. Section 158 of the LRA further allows for *solatium* damages to be administered when calculating the amount of compensation awarded to the employee. Therefore, the employee can claim for both damages and compensation. Consequently, some courts have regarded the remedy of compensation in matters involving S187(1)(e) of the LRA as punitive towards the employer, while other reject this practice.

The question of whether the amount of compensation should be punitive or merely compensatory has been debated in several cases regarding automatically unfair dismissals. There have been cases and literature that support the view that compensation should not have a punitive aspect but should be “*fair*” and “*equitable*”. It is submitted, that the mere fact of having double the limit in compensation compared to ordinary dismissals, is grounds for a punitive element to exist within compensation. The courts must establish a consensus whether the aspect of compensation should be made punitive or only compensatory and based on the element of fairness. It would be in the courts' interest to make a clear formula that is applicable to matters involving dismissed pregnant employees, so that there is a consistent fairness across all courts when awarding damages in regards to S187(1)(e) of the LRA.

Pregnant employees should be aware that they are protected under S187(1)(e) of the LRA as well as the 1996 Constitution. However, they should also be aware that they should only claim for dismissal under the section if they can prove they have been dismissed on the basis of their pregnancy, and not for other reasons such as misconduct, incapacity and operational requirements. In many cases, the employer may attempt to hide their discriminatory dismissal behind a false claim to these legitimate reasons. But there is also false assumption that a positive pregnancy status will automatically secure a certain amount of compensation and damages, while in reality the facts of the case will determine whether there really has been a dismissal based on pregnancy. The courts have a clear duty to protect pregnant employees from unfair dismissal; but also a duty to protect employers from false and extortionist claims to being dismissed on the basis of pregnancy. Consequently, it is of great importance that employers inform their employees clearly and in simple terms of the reasons for dismissal and show evidence to support their decision to prevent the employee from taking the matter to court.

BIBLIOGRAPHY

B

Grant B 'The Protection of Employees from Discrimination in the Context of Gender Re-Assignment' 2011(23) *SA MercIJ* 82-87

Banks Jand Russell H 'Pregnancy and Employment: A Literature Review' 2011 *ESRI* 1-53

C

Chapter 6 – Labour Law <http://www.paralegaladvice.org.za/docs/cha06/15.html>, accessed on 8 August 2014

Cokile S 'The Remedies for Unfair Dismissal' for the degree of Masters Legum (Labour Law) in the Faculty of Law at the Nelson Mandela Metropolitan University 2006.

D

DuToit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, GS; Bosch, C and Rossouw, J *Labour Relations Law: A Comprehensive Guide* (2006) 5ed (Butterworths: Durban)

E

ExParte Chairpers on of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996

G

Gandidze T 'Dismissals for Operational Requirements' 2011 *Law and Development* 83-96

Grogan J 'Workplace Law' 2000 7thed (Juta: CapeTown)

Grogan J 'Workplace Law' 2011 10thed (Juta: CapeTown)

K

Kanamugire JC and Chimuka TV 'Reinsatement in South African Labour Law' (2014) 5 (9) *Mediterranean Journal of Social Sciences* 256-266

L

Ledwaba LJ *Dismissal due to pregnancy* for the degree of *Magister Legum* in the Faculty of Law at the Nelson Mandela Metropolitan University 2006

M

Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 1st ed 2004 (Juta: Durban)

N

Neethling, Potgieter & Visser *Law of Delict* 2010 6thed (Lexis Nexis: Durban)

S

‘Summary: Labour Relations Act’ available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2000/appendieces/000229LRASummary.htm> February 25, 2000, accessed on 13 March 2015.

T

The Origins and History of the International Labour organization available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 16 June 2014.

V

Van Heerden, C and Coetzee, H ‘Minister for Justice and Constitutional Development v Tshishonga 22099 BCLR 862 (LAC)’ Onlangeregspraak/Recent case law 2011 *De Jure* 478-488

Vettori S ‘The role of Human Dignity in the Assessment of Fair Compensation for Unfair Dismissals’ (2012) 15 (4) PER 102-123

W

Workman D ‘Automatically unfair dismissals – does what you believe matter?’ 2009 *Without Prejudice* 53-55

CASES

Association of Professional Teachers and Another v Minister of Education and Others (1995)16 ILJ 1048 (IC)

Atkins v Datacentrix (Pty)Ltd (2009) 18LC 8.29.3 and [2010]4 BLLR 351 (LC)

Beaurain and Leslie Martin N.O v PublicHealth and Social Development Sectoral Bargaining Council, and others (C16/2012)

Botha v Import Export International CC (1999)20 ILJ 2580 (LC)

Brown v Stockton-on-Tees Borough Council [1988] IRLR 263

CEPWAU v Glass & Aluminium 2000 CC (2002) 23 ILJ 695 (LAC)

DeBeer v SA Export Connection CC t/a Global Paws (2008) 29ILJ347 (LC)

Department of Correctional Services and another v Police and Civil Rights Union (POPCRU) (107/12) [2013] ZASCA40

Equity Aviation Services (Pty) Ltd v SATAWU & Others [2012]3 BLLR 245 (SCA).

Hibbert v ARB Electrical Wholesalers (Pty) Ltd D 775/10 (LC)

Hunt v ICC Car Importer Services Co(Pty) Ltd 1999 ILJ 364 (LC)

Johnson & Johnson (Pty) Ltd v CWIU (1998) 12 BLLR 1209 (LAC)

IMATU & Another v City of Cape Town (2005) 26 ILJ 1404(LC)

Louw v Golden Arrow Bus Services (Pty) Ltd 2001 22 ILJ 2628 (LAC)

Lukie v Rural Alliance cct/a Rural Development Specialists (2004) 25 ILJ 1445 (LC)

Mashava v Cuzen&Woods (2000) 6 BLLR 691 (LC)

Masondo v Crossway (1998) 19 ILJ 171(CCMA)

Memela and another v Ekhamanzi Springs Pty Ltd (2012) 33ILJ2911 (LC)

Minister of Health&others v Treatment Action Campaign and Others 2002 (5) SA 703 (CC)

Mnguni v Gumbi (2004) 25 ILJ 715(LC)

Mogale v Seima 2008 (5) SA 637 (SCA)

Nadia v B&B t/a HarveyWorld TravelNorthcliff (JS547/10) [2013] ZALCJHB 168

National Union of Mineworkers in South Africa obo Engelbrecht v DeltaMotor Corporation (1998) 5 BALR 573(CCMA)

Randall v Progress Knitting Textiles Ltd (1992) 13 ILJ 200

(IC) *Rawlins v Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA)

SACWU v AFROX (1999) 20 ILJ 1718 (LAC).

Sheridan v TheOriginal MaryAnne's at the Colony (Pty) Ltd (1999) 20 ILJ 2952 (LC)

Soobramoney v Minister of Health, KwaZulu-Natal 1998(1) SA 756 (CC)

Swart v Greenmachine Horticultural Services (A division of Sterikleen (Pty) Ltd) (2010) 31 ILJ 180 (LC)

Union of Mineworkers in South Africa obo Engelbrecht v Delta Motor Corporation 5 BALR 573 (CCMA) (1998)

Uys v Imperial Car Rental (PTY) LTD (2007) 3 BLLR 270 (LC)

Wallace v Du Toit (2006) 8 BLLR 757 (LC)

Whitehead v Woolworths (Pty) Ltd (1999) 20 ILJ 2133 (LC)

Woolworths v Whitehead (Pty) Ltd (2000) 21 ILJ 571 (LAC)

LEGISLATION

Basic Conditions of Employment Act 3 of 1983

Basic Conditions of Employment Act 75 of 1997

Republic of South Africa Constitution Act 108 of 1996

Employment Equity Act 55 of 1998

Labour Relations Act no 28 of 1956

Labour Relations Act no 66 of 1995

Unemployment Insurance Act 30 of 1966

TREATIES

ILO Discrimination in respect of (Employment and Occupation) Convention 111 of 1958 (ILO)