

**THE LAW OF UNFAIR DISMISSAL  
IN SOUTH AFRICA**

**BY**

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## PREFACE

As an inexperienced articled clerk I was once consulted by a young widow who had two tiny children with her. She had lost her job and was wanting to know what her rights were. I had never studied any labour law but I had a vague idea that she was entitled to only notice pay. This was the terrible advice she ended up getting and it was only some months later that I realised my error.

I had not yet been introduced to the wondrous concept of fairness in law. Nor was I aware of the wonderful remedy of reinstatement which could have returned to this person not only her dignity and her self-esteem, but also the means, in a country wracked by unemployment, of fending off complete poverty.

Psychologists have shown that losing a job is one of the most distressing events in life. How much more distressing that loss must be when the dismissal is not fair and how much more devastating, when there is little prospect of finding other employment? This thesis is for all those people who have been unfairly dismissed and who, but for bad advice, might have been placed back in their jobs. It is hoped that it will contribute to the knowledge in this vitally important area of law and so help prevent the giving of unnecessarily bad advice.

I wish to thank my initial supervisor Mr Julian Riekert, particularly for his support in the early stages of my research and generally for sharing his wonderful insight into labour law in this country. I also wish to thank Dr John Hlophe who has been my supervisor for the last eighteen months. During that period he has given me invaluable advice and guidance, often at times which have not been convenient to him at all.

My thanks, too, to my two seniors at work, Mr Trevor Mann and Mr Bruce Robertson, who have assisted me a great deal in many ways. Furthermore, I wish to thank Mrs Priscilla Govender who often achieved the impossible by transforming the scrawl of my manuscript into wonderfully accurate print, and always without any apparent trace of exasperation.

I wish to thank my parents without whom I might never have had the opportunity of doing research at this level. Special thanks go to my wife Hillary for the initial inspiration which prompted me to begin this thesis and for her continued and consistent support and encouragement through some very bleak periods. And lastly, my apologies rather than thanks to my dear daughter Kathryn for the many precious hours we could otherwise have spent together.

I confirm that this whole thesis, except where it is otherwise specifically indicated, is my own original work.

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## INTRODUCTION

For those of us in this country fortunate enough to be employed, the security which comes with having a job is extremely important. For those to whom it is in many cases not only the sole form of security but also the very means of survival, it is invaluable. In a country like South Africa which has such massive employment, one would think that the importance of job security would have been easily recognised at an early stage. But it was not and only fairly recently have serious attempts been made to incorporate the right into our law.

It has been found that a good way of ensuring an appreciation of the value of job security is to stipulate that the decision to terminate the employment relationship should never be arbitrary or unjustified. The termination should, in other words, always be fair and where it is not, there should be a means of reversing it where necessary. In the past ten years, the Legislature has attempted to give effect to this method of protecting job security.<sup>1</sup> Basically it has done so by introducing the concept of fairness and by establishing an overseer in the form of the Industrial Court which it has given the power to order reinstatement.

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1. The protection is unfortunately not enjoyed by all employees, the most important exclusions being those employed in farming operations or in domestic service in private households, those employed by the State and those who teach in universities, technikons and in most schools (in terms of S2 (2) of the Labour Relations Act No. 28 of 1956).

This thesis will consider how effective the law has been in respect of individual dismissals. In order to do this, it will be necessary to emphasise the deficiencies of the common law by looking at the position in South Africa before the concept of unfair dismissal, both abroad and in this country, as well as the origin of the doctrine of fairness will then be briefly considered. This will lead on to an in-depth study of the requirements of procedural fairness as determined by the Industrial Court and this will be followed by a look at what, in the view of the court, constitutes substantive fairness in its many different forms. The thesis concludes with a study of the essential remedy of reinstatement, tracing its history and the reasons why it was initially rejected to the stage where it is undoubtedly a valid and accepted remedy.

## CHAPTER I

### THE POSITION IN SOUTH AFRICA BEFORE THE STATUTORY INTRODUCTION OF THE CONCEPT OF AN UNFAIR DISMISSAL

The belief on which our early law was based was that every employment contract was entered into voluntarily and either party was similarly free to end it at any time provided they gave sufficient notice<sup>1</sup> and provided there was no contractual provision to the contrary. Even if there was a contrary provision, all the employer was faced with was a claim for damages which would be the sum the employee would have earned had the contract been lawfully terminated. In a fixed-term contract this would generally be the equivalent of the payment still due under the contract. Where the contract was not for a fixed-term the sum would be equivalent to the notice period which, in the case of monthly paid employees would be a month and, in respect of weekly paid employees, a week.

Employer and employee were seen as having equal bargaining powers, each having the respective right to choose whom they wished to work for them and whom they wished to work for. What was not taken into account was that the choice each had was in fact very different. While the employer usually had a large reservoir of unemployed to choose from, the employee, in competing with his unemployed counterparts, was usually satisfied with any job he could get. This was particularly true of the unskilled employee.

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1. This provision was not peremptory and an employer could get rid of an employee immediately as long as he was paid in lieu of notice. Neither party had to give any reason, or indeed had to have any reason, for ending the contract. The possibility of an employee having any right to claim reinstatement would have been out of the question.



While both parties were believed to have had an equality of rights, it was only when one looked at the effects of that exercise of 'equal' rights that one realized how unequal they really were. When the employee exercised his right to end the contract, which seldom occurred, the detrimental effect on the employer would generally have been slight. In most cases, the employee would easily and quickly have been replaced. When the employer, on the other hand, exercised his right to end the contract, the effect on the employee would generally have been disastrous, especially in times of widespread unemployment, when the employee's 'equal' right to choose whom he wished to work for would be diminished, and in most cases non-existent. In South Africa, this inequality was increased by the fact that many workers, once they were dismissed, lost their rights to reside in the areas where they were most likely to find other jobs<sup>2</sup>.

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2. In terms of s 10 (1) (d) of the now repealed Black (Urban Areas Consolidation) Act 25 of 1945. Many employers, once dismissals had to be justified, took advantage of this loss of rights, knowing that it would have been extremely difficult for a dismissed worker to make a claim for reinstatement, once he had been bussed back to his 'homeland'. See, for example, ROOIBERG MINERALS DEVELOPMENT CO LTD v DU TOIT 1953 (2) S A 505 (T) and NGEWU AND OTHERS v UNION CO-OPERATIVE BANK AND SUGAR CO 1982 (4) SA 390 (N). For a discussion of the latter case, see N Haysom 'Dismissal and the Eviction of Employees From Their Employers' Premises' (1981) 2 ILJ 259.

The common law further entitled an employer to dismiss an employee without notice if he was guilty of any material breaches of his contractual obligations. The following were most commonly seen as being material breaches of an employment contract:

1. Refusal to work<sup>3</sup>;
  2. Insubordination (in the form of insolence which usually includes a refusal to perform work)<sup>4</sup>;
  3. Gross negligence or incompetence<sup>5</sup>;
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3. Including a strike which entitled the employer to cancel the contract summarily, see *R V SMIT* 1955 (1) SA 239 (C) and *MOONIAN v BALMORAL HOTEL* 1925 NPD 215.
  4. See, for example, *OATEN v BENTWICH AND LICHTENSTEIN* 1903 TH 118 where an employee "... became insolent and abusive in defendant's shop, a public place, it became impossible for the defendant to overlook his conduct ... . It (was) ... impossible under circumstances like these for the relationship of master and servant to continue". See, too, *JAMIESON v ELSWORTH* 1915 AD 115 where Innes C J said that the position of an employee, " ... compared with that of his employer was distinctly a subordinate one, so that the latter was entitled to expect from the former, not indeed subservience, but ordinary courtesy and civility certainly." Contrast with this the case of *OSCHE v HAUMMAN* 1910 OFS 59.
  5. See *COWIE v ELLARD & CO* (1894) 9 EDC 152, *WALLACE v RAND DAILY MAILS LTD* 1917 AD 479; *FRIEDLANDER v HODES BROS* 1944 CPD 169; *NEGRO v CONTINENTAL KNITTING AND SPINNING MILLS (PTY) LTD* 1954 (2) SA 203 (W).

4. Repeated absence without good cause and constant tardiness;
5. Incapacity (in the form of illness)<sup>6</sup>;
6. Drunkenness<sup>7</sup>;
7. Sleeping on duty;
8. Dishonesty;<sup>8</sup>

The above breaches were to be seen in the light of the persistence of the misconduct, the harm suffered by the employer and the nature of the work, although there was no provision for any sort of enquiry to be held prior to the decision to dismiss.

If an employee was dismissed without notice and without having been guilty of one of the abovementioned breaches, his dismissal would have been wrongful. His remedy for this would have been to sue for

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6. BOYD v STUTTAFORD 1910 AD 101.

7. SCHNEIER AND LONDON LTD v BENNETT 1927 TPD 346.

8. See, MWU v BRODRICK 1948(4) SA 959(A); FEDERAL COLD STORAGE v ANGHEN & PIEL 1910 TPD 1347; NOURSE v FARMERS' CO-OPERATIVE CO LTD 19 EDC 291.

damages, which damages he would have had to mitigate<sup>9</sup>.

This limited remedy was all the employee had prior to the watershed decisions in the cases of STEWART WRIGHTSON (PTY) LTD v THORPE<sup>10</sup> and NATIONAL UNION OF TEXTILE WORKERS AND OTHERS v STAG PACKINGS (PTY) LTD AND ANOTHER<sup>11</sup> when the remedy of reinstatement or specific performance in the employment contract was recognised<sup>12</sup>.

There had also been very limited statutory protection against unfair dismissal. Chapter IV of The Public Service Act<sup>13</sup>, for example, contains procedures which have to be complied with before an employee can be dismissed for misconduct or poor work performance. Furthermore, the dismissal of an employee because of his trade union

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9. See C NORMAN-SCOBLE THE LAW OF MASTER AND SERVANT IN SOUTH AFRICA (BUTTERWORTHS, 1956) 225; CUNNINGHAM v BROWN 1936 SR 175; KINEMAS LTD v BERMAN 1932 AD 246, SCHIERHOUT v MINISTER OF JUSTICE 1926 AD 107; DE PINTO AND ANOTHER v RENSEA INVESTMENTS (PTY) LTD 1977 (4) AD 529; BANCO DE PORTUGAL v WATERLOW & SONS LTD 1932 AC 452; KUBHEKA AND ANOTHER v IMEXTRA (PTY) LTD 1975 (4) SA 484 (W).

10. 1977 (2) SA 943 (A)

11. 1982 (4) SA 151 (T)

12. See chapter 6 below.

13. No. 54 of 1957. See further M Brassey, E Cameron, H Cheadle and M Olivier The New Labour Law (Juta & Co, 1987) 310 hereafter referred to as 'Brassey et al The New Labour Law.'

activities amounts to victimization and is a contravention of the provisions contained in numerous statutes aimed at curbing such practices.<sup>14</sup> In effect, though, these provisions gave very little protection because compliance with the procedure was all that was required and victimization was usually difficult to prove. The negligible amounts awarded in claims for damages were also of little help to people who had lost their source of income which could have lasted a lifetime.

The first glimmerings of the principles of unfair dismissal, however, emerged in South Africa as far back as 1948<sup>15</sup>. The

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14. See for example, Section 18 of the Basic Conditions of Employment Act No. 3 of 1983; Section 48 of the Manpower Training Act No. 56 of 1981; Section 4 of the Black Transport Services Act No. 53 of 1957; Section 66 of the Labour Relations Act No. 28 of 1956 and Section 25 of the Wage Act No. 5 of 1957. While Section 18 of the Machinery and Occupational Safety Act No. 6 of 1983 contains wording relating to the commission of certain Acts which is similar to the wording contained in the above-mentioned Acts, does not contain the provision relating to Trade Union activities, possibly because it is one of the only Acts which does not exclude farm workers from the definition of "employee", and the Legislature would have been loathe to extend such protection to them.

15. In the case of SOUTH AFRICAN ASSOCIATION OF MUNICIPAL EMPLOYEES v MINISTER OF LABOUR 1948 (1) SA 528 which concerned an application brought under Section 35 of the Industrial Conciliation Act No. 36 of 1937, in terms of which the court had to decide whether or not a Conciliation Board should be established to settle the dispute relating to a dismissal.

employee in that case had been lawfully dismissed on the ground of superannuation, although his efficiency was unimpaired and although he had always rendered faithful service. The court held that the question was not whether the employer was entitled to terminate the employee's services under the contract but it was whether, ".... notwithstanding its legal right to do so, (which was never disputed) it should have done so, in view of the various circumstances of the case".<sup>16</sup> The court made the distinction between what was lawful and what was right or fair and asked the question whether it was fair to superannuate an employee whose capabilities were not impaired by his age.<sup>17</sup>

Six years later, the Cape Provincial Division<sup>18</sup> held that the question which had to be resolved by the Conciliation Board was not whether the employer had acted within its legal rights but whether

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16. At 532

17. An argument put forward by counsel for the Minister illustrates the level of thinking at that stage. He tried to argue that an employee who had been dismissed was no longer an employee and could consequently not benefit from the provisions of the Act. The Court rejected the argument, relying on the case of CITY COUNCIL OF CAPE TOWN v UNION GOVERNMENT 1931 CPD 366 which had held that an employee who had been dismissed was still an employee for the purposes of the Act.

18. In the case of GEORGE DIVISIONAL COUNCIL v MINISTER OF LABOUR AND ANOTHER 1954 (3) SA 300 (C) AT 305 E.

it had acted 'inequitably or unreasonably'. In another case,<sup>19</sup> the term "unfair" makes its first appearance.<sup>20</sup> Counsel acting for the employee complained that he had been "unfairly dismissed" and although he, "... never contested the Council's legal right to dismiss him, it was the unreasonableness of his dismissal to which he objected."<sup>21</sup> The distinction between lawfulness and fairness was also made in the more recent case of FRANKFORT MUNISIPALITEIT v MINISTER VAN ARBEID EN 'N ANDER<sup>22</sup> where the Court went so far as to enquire into why the employee had really been dismissed.

The spectres of fairness and justification for dismissal were beginning to rise up, encroaching on what was once regarded as the prerogative of the employer.<sup>23</sup>

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19. CAPE TOWN MUNICIPALITY v MINISTER OF LABOUR AND ANOTHER 1965 (4) SA 770 (C).

20. At 774.

21. At 774-5.

22. 1970 (2) SA 49 (O)

23. See further Brassey et al The New Labour Law 314 ff.

## CHAPTER 2

### THE ORIGIN OF THE CONCEPT OF UNFAIR DISMISSAL ABROAD AND IN SOUTH AFRICA

The principle that a worker should not lose his job without good reason had been present in the legislation of a few countries prior to 1963 when the International Labour Organisation's Termination of Employment Recommendation No. 119 was adapted.<sup>1</sup> But the Recommendation ensured that the principle was almost universally accepted and enshrined in law and this Recommendation was such a success that certain countries such as Cambodia and Zaire requested the help of the Organization's technical experts to draft legislation for them<sup>2</sup>. Furthermore, the Recommendation emphasised the importance of job security and developed the thinking that there was no reason why security, one of the most fundamental of human needs, should not extend to the employment relationship.

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1. The Mexican Constitution of 1917, for example, provided that "The employer who dismisses a worker without just cause or for having joined an association or trade union or for having taken part in a legal strike shall be obliged, at the election of the worker, to carry out the contract or compensate the worker in the amount of three months 'wages' - article 123 (XXII) cited in E Yemin 'Job Security: Influence of ILO Standards and Recent Trends.' International Labour Review, Vol 113, No. 1, January - February 1976 at 20. Another early recognition of the principle is found in the Russian SFSR Labour code adapted in 1922 - also cited in Yemin at 20.

2. Yemin op cit at 21.



Since job security could not be assured in all circumstances, the Recommendation provided that a worker's employment contract could not be terminated unless there was a valid reason for termination connected with the conduct or capacity of the worker, or based on the operational requirement of the enterprise.<sup>3</sup> The employee's right to work must be reconciled with the employer's right to operate and the Recommendation recognising that neither of these rights can be absolute, sensibly limits them by proposing that the employee should only be dismissed for a valid cause.<sup>4</sup> It also laid down certain reasons which would always be invalid reasons for dismissal.<sup>5</sup> These were: trade union membership or activities, lodging complaints against the employer in good faith about the breach of a legal obligation, race, sex, colour, marital status, religion, political opinion, national extraction or social origin. The Recommendation also stated that workers who felt aggrieved by an unjustifiable dismissal be entitled to a right of appeal with the help of someone representing them.<sup>6</sup> If the termination was found to be unjustifiable, the body conducting the hearing should have the authority to order reinstatement together with the payment of lost wages or to order that the worker be paid adequate compensation.<sup>7</sup>

The Recommendation heralded the general application of the minimum standard that no worker should be dismissed in the absence of a valid or fair reason. Most countries in the world were to incorporate this into their law in some way or another.

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3. In terms of paragraph 2 (1).

4. See, further, T Poolman Principles of Unfair Labour Practice (Juta & Co, 1985) AT 155 - 156.

5. In terms of paragraph 3.

6. In terms of paragraph 4.

7. In terms of paragraph 6.

The term 'unfair dismissal' is used only in Britain and while it is used freely by our Industrial Court, the term was not found in our legislation prior to the Labour Relations Amendment Act No. 83 of 1988. The French talk of "abusive" dismissal, West Germans of "socially unwarranted" dismissals and Italians of dismissals without "justified motive" <sup>8</sup>.

As has been seen, the common law approach in South Africa had begun to lose substance before 1979.<sup>9</sup> However it was not until 1979, when the Government accepted the recommendations of the Report of the Commission of Enquiry into Labour Legislation, now better known as the Wiehahn Commission, that the way was paved for the statutory introduction of the concept.

While South Africa had withdrawn from the International Labour Organisation in 1964, the Wiehahn Commission suggested that the country should attempt to use international recommendations, such as Recommendation No. 119 of 1963, as yardsticks for its own labour legislation. As a result of the proposals contained in the Report, legislation introducing the concept of an 'unfair labour practice' was promulgated in 1979.<sup>10</sup>

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8. J B Cronin and R P Grime Labour Law (Butterworths, 1970) AT 129 p.p.

9. See the discussion above on the recognition of the principles of fairness in the early cases.

10. The Industrial Conciliation Amendment Act No. 94 of 1979. While there was no specific reference in the Legislation to the concept of unfair dismissal, it was soon accepted that the definition of an unfair labour practice was wide enough to include it. Only in 1988 was express provision for unfair dismissal included in the Legislation.

With the concept of an unfair labour practice being new to South African law, and since unfair dismissals were not then strictly regulated by statute as they are, for instance, in Britain, our Industrial Court has often been guided by the development of the concept in that country<sup>11</sup> and in the United States of America<sup>12</sup> as well as being guided by international standards of industrial relations.

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11. The concept of "unfair industrial practice" contained in the Industrial Relations Act of 1971 fell away in 1974 with the introduction of the Trade Unions and Labour Relations Act, but the sections dealing specifically with unfair dismissal, which had proved to be successful, were retained in the new Act. Although see : DB Ehlers - 'Dispute Settling and Unfair Labour Practices: The Role of the Industrial Court vis-à-vis the Industrial Council (1982) 3 ILJ 11 where he claims that the expression 'unfair labour practice' cannot borrow from the labour law of Britain where, ".... legislation exists dealing with the concept of 'unfair dismissals' which is then statutorily defined. That definition can probably be said to accentuate the dismissal aspect" (AT 13).

12. The term 'Unfair Labour Practice' has its origins in the legislation of the United States where the National Labour Relations Act of 1935, as amended by the Labour Management Relations Act of 1947 (generally referred to as the Taft-Hartley Act) defined and introduced remedies for unfair labour practices. See A Reichman and E Mureinik, 'Unfair Labour Practices' 1980 (1) ILJ 1 and T Poolman Principles of Unfair Labour Practice (Juta & Co, 1985) AT 128 p.p.

The concept was initially introduced by the use of the widest definition imaginable. An unfair labour practice meant "... any labour practice which in the opinion of the industrial court is an unfair labour practice".<sup>13</sup> This definition was soon amended<sup>14</sup> and was replaced by the definition which lasted from 1980 until 1988. The 1980 Amending Act defined an Unfair Labour Practice as:

- 'a) any labour practice or any change in any labour practice, other than a strike or a lockout or any action contemplated in s 66(1), which has or may have the effect that
  - i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;
  - ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
  - iii) labour unrest is or may be created or promoted thereby;
  - iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

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13. In terms of an amendment to s1 of the then Industrial Conciliation Act No. 28 of 1956, contained in the Industrial Conciliation Amendment Act No. 94 of 1979.

14. By the Industrial Conciliation Amendment Act No. 95 of 1980. As Mureinik wrote in 1980 "Plainly, this definition is open texture in the extreme, and its content depends very largely upon the manner of its interpretation". E Mureinik 'Unfair Labour Practices : Update' (1980) 1 ILJ 113.

- b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a)'.

The definition, though more restricted, was still fairly wide and the Industrial Court continued to have virtual carte blanche to decide what it believed were fair or unfair labour practices and the court appreciated this. In *UAMAWU & OTHERS v FODENS*,<sup>15</sup> for example, *EHLERS DP*<sup>16</sup> believed,

".....it would appear that the legislature by defining the concept in such wide terms could have intended that this court should lay down guidelines<sup>17</sup> as to what are to be considered unfair labour practices."<sup>18</sup>

In fashioning those guidelines the court was fairly creative and it took various factors into account in determining the fairness or otherwise of a dismissal. These have included the stipulations

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15. (1983) 4 ILJ 212.

16. As he then was.

17. The doctrine of 'stare decisis' is not applied in the court and for good reason. Industrial relations is, after all, a rapidly changing and dynamic field and this makes it essential for there to be a degree of flexibility in the law.

18. AT 224 F-G.

contained in contracts of employment,<sup>19</sup> the provisions contained in recognition agreements and disciplinary procedures and codes, factory rules or customs, and the provisions contained in various other statutes<sup>20</sup> and in industrial council agreements.<sup>21</sup>

The 1980 Unfair Labour Practice definition, but for an amendment in 1982<sup>22</sup> which removed the provision excluding victimization from the definition, lasted until 1st September 1988. It was then drastically amended<sup>23</sup> amidst much controversy and despite some very valid criticism by labour who saw it as an attempt to take away many of the rights which the court had laid down over the years.

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19. See, for example, *MWASA & OTHERS v THE ARGUS PRINTING AND PUBLISHING CO. LTD* (1984) 5 ILJ 16 at 26 - 27 I.

20. See in this regard, *MATSHOBA & OTHERS v FRY'S METALS (PTY) LTD* (1983) 4 ILJ 107 at 118D - 119C and 121H - 122A where the provisions relating to overtime in the Factories Machinery and Building Works Act were held to outweigh any contrary provisions in the employment contract. The provisions relating to victimization in various other statutes would also be of relevance.

21. See, for example, *MAWU v STOBAR REINFORCING (PTY) LTD* (1983) 4 ILJ 84.

22. Introduced by s 1 of the Labour Relations Amendment Act No. 51 of 1982.

23. By s 1 of the Labour Relations Amendment Act No. 83 of 1988. Act No. 51 of 1982.

The definition, in attempting to codify the concept of an unfair labour practice, now spans some three pages in the Act<sup>24</sup> and for the first time attempts specifically to regulate unfair dismissal. It has unfortunately been very poorly drafted, leaving many of its intentions unclear and many of those which are clear are ill-conceived. The attempted codification of an unfair dismissal, far from making matters more simple, will provide much ensuing litigation and though it will undoubtedly prove to be the dream of many practising lawyers, it will almost as certainly be a nightmare for the court's presiding officers.<sup>25</sup> The consideration of the contents and effect of the definition on the law of unfair dismissal, which is made below, leave little doubt that it is a 'tortuous'<sup>26</sup> definition.

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24. Because the definition is too lengthy to reproduce here, it is contained in Appendix I.

25. It is not surprising that the President of the court, Dr Ehlers, has been requested to retire early, particularly in view of his expressed preference for the unrestricting terms of the old definition.

26. The term is Clive Thompson's, quoted in Business Day 19 September 1989.

## CHAPTER 3

### THE DOCTRINE OF FAIRNESS

The foregoing discussion necessitates an analysis of the development of 'fairness' as a doctrine and, in particular, its relation to the dismissal of employees. As has been said,<sup>1</sup> concentration, "...on the words 'unfair' and 'unfairly' .... could be said to be of critical importance ..... in the determination of an unfair labour practice",<sup>2</sup> and consequently an unfair dismissal. In order to consider the source of the doctrine, it is necessary to distinguish between the 'procedure' and the 'substance' of fairness.

The procedure of fairness, or procedural fairness, has its basis in the principles of natural justice. While natural justice is sometimes seen as embodying the 'fundamental principles of fairness',<sup>3</sup> this is only correct insofar as it refers to procedural fairness.

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1. D B Ehlers "Dispute Settling and Unfair Labour Practices: The Role of the Industrial Court vis-a-vis the Industrial Council" (1982) 3 ILJ 11.
  2. At 13.
  3. See, for example, MINISTER OF THE INTERIOR v BECHLER 1948 (3) SA 409 (A) AT 451 and JOCKEY CLUB OF SOUTH AFRICA v FELDMAN 1942 AD 340 AT 351 and see L Baxter Administrative Law (Juta & Co, 1984) 540.



There is an on-going debate in English law that fairness, at least in the context of Administrative Law, should not have a substantive meaning.<sup>4</sup> The reason why it should not, it is argued, is that 'fairness' would then be confused with 'reasonableness'.<sup>5</sup> While there is generally no harm in giving 'fairness' a substantive context in Labour Law, and this is certainly always done, there have been occasions when the Industrial Court has indeed fallen into the trap of equating reasonableness with fairness.<sup>6</sup> In doing so, they have relied on the English law of unfair dismissal where the test of reasonableness is stipulated in the governing legislation.<sup>7</sup> The tests are of course very different.<sup>8</sup>

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4. See SA De Smith's Judicial Review of Administrative Action (London) Stevens 4th Edition by J.M. Evans (1980) 346; P.P. Craig 'Administrative Law' London (Sweet and Maxwell, 1983) 360.

5. See, L Baxter Administrative Law (Juta & Co, 1984) 596.

6. See, for example, LEFU & OTHERS v WESTERN AREAS GOLD MINING CO. LTD (1985) 6 ILJ 307 AT 314C - F; ROBBERTZE v MATTHEW RUSTENBURG REFINERIES (WADEVILLE) (1986) 7 ILJ 64 AT 70 D - E; NUM v EAST RAND GOLD & URANIUM CO. (1986) 7 ILJ 739 and NUWSAW v DISTILLERS CORP (1987) 8 ILJ 780. See, too, Brassey et al The New Labour Law 71-4

7. Initially, in terms of paragraph 6(8) of Schedule I to the Trade Union and Labour Relations Act of 1974 and now in terms of section 57 (3) of the Employment Protection (Consolidation) Act of 1978.

8. By means of the 1988 Amendments to the Labour Relations Act, in paragraph (a) of the definition of an unfair labour practice, the legislature has again endorsed its preference for the test of fairness. See E CAMERON, H CHEADLE AND C THOMPSON THE NEW LABOUR RELATIONS ACT (JUTA & CO, 1989) 109.

What then are the principles of Natural Justice? They are expressed by the maxims 'AUDI ALTERAM PARTEM' and 'NEMO IUDEX IN PROPRIA CAUSA' and they mean respectively that the other side should be heard and that no one should be a judge in his own cause.

The importance of hearing the other side has been seen as having beginnings which can be traced back to the Bible<sup>9</sup> and its value was recognised in Egypt as early as 2300 BC.<sup>10</sup> Both principles are also found in Roman Law with the Twelve Tables laying down the death penalty for any judge influenced by bribes<sup>11</sup> and the

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9. See, for example, the book of John, chapter VII verse 51: "According to our law we cannot condemn a man before hearing him and finding out what he has done. The English judge, Fortescue, put it quaintly when he said "... even God himself did not pass sentence upon Adam, before he was called upon to make his defence" in R v CHANCELLOR OF THE UNIVERSITY OF CAMBRIDGE (1723) 1 STR 557 AT 567 : See S A de Smith Judicial Review of Administrative Action (London) Stevens 4th Edition by J M Evans (1980) AT 158 n 33.

10. The cathartic benefit of a hearing is emphasised in the following excerpt from the instruction of Ptahhotep in the 6th Dynasty which lasted from 2300 to 2150BC:

'If you are a man who leads, listen calmly to the speech of one who pleads; Don't stop him from purging his body of that which he planned to tell. A man in distress wants to pour out his heart more than that his case be won. About him who stops a plea one says : "why does he reject it?" Not all one pleads for can be granted, but a good hearing soothes the heart.' See Lichtheim 'Ancient Egyptian Literature' Vol 1 (1973) 61 AT 68 quoted by Baxter in Administrative Law at 539.

11. In terms of paragraph 9.3.

importance of a hearing being expressed in Seneca's *Media*.<sup>12</sup> Both principles were also important in Roman Dutch Law<sup>13</sup> in which we find one of the earliest applications of the principle of 'audi alteram partem' to the termination of the employment contract. Prior to their dismissal on grounds of misconduct, judicial officers were entitled to a hearing.<sup>14</sup>

With such prevalence throughout the Ages and all over the world it is not surprising to find the basis of both principles present in the text of the International Labour Organisation's Termination of Employment Recommendation No. 119 which reads:

"A worker who feels that his employment has been unjustifiably terminated should be entitled, unless the matter has been satisfactorily determined through such procedures within the

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12. At lines 199 to 220 : "Qui statuit aliquid, parte inaudita altera, aequum, licet statuerit, haud aequum fuerit," translated as he who has come to a finding without hearing the other party has not been just even though his finding may have been just.' - see De Smith *Ibid* at 158.

13. See VOET 2.1.50 : 'It is entirely unjust to bestow on any person the freedom to give judgement in an affair of his own' and 51 and 2.4.1 which expressed the importance of the 'audi alteram partem' principle (see L Baxter Administrative Law (Juta & Co, 1984) 537 n 13).

14. HUBER 4.14.60. (see Baxter, *Ibid*).

undertaking .... to appeal, within a reasonable time, against that termination .... to a body established under a collective agreement or to a neutral body such as a court, an arbitrator, an arbitration committee or a similar body." <sup>15</sup>

So much then for procedural fairness which is, after all, only a pre-requisite to the more important element of substantive fairness. This lies at the centre of fairness and is generally best reached by way of the path of procedure.

What then of its origins? Though intangible and indefinite, fairness is that time-honoured and universal value which everyone would agree should be upheld. Because of its close links with morality, it is probably true to say the notion of fairness has existed since man first developed a sense of the rightness or blameworthiness of his own behaviour or, more simply, since he developed a conscience. Its value is certainly revered in the teachings of the Bible and it could be said to be the basis, in one way or another, of all religions. The concept has been considered and discussed since the Greek philosophers in the fifth century B.C. began grappling with ideas of social control<sup>16</sup> and it has continued to puzzle both philosophers and jurists ever since.

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15. At paragraph 4. See, too, paragraph 11(5) which reads "Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly .....".

16. See R Pound Justice According to Law (Yale U.P., 1952) AT 2.

It is, not surprisingly, extremely difficult to define. "Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognise."<sup>17</sup> If one were to attempt to define the concept, one would find that the terms 'fairness', 'justice' and 'equity' are often used interchangeably and are generally defined in dictionaries in terms of each other.<sup>18</sup> Thus, we find them described as implying an objectivity which manages to achieve a 'proper balance of conflicting rights.'<sup>19</sup> The terms consequently also imply a compromising or a massaging of those rights into a form which satisfies the conflicting parties.

Rights are very seldom evenly weighted and when they are created by or put into the form of laws, there is almost always an imbalance since made as they are by the ruling or stronger party, the benefits are naturally weighted in his favour. Laws are, in addition, by their very nature rigid and as a result their application tends to be problematical. What, it was realised at an early stage,<sup>20</sup> was

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17. Per Lawton L J in MAXWELL v DEPARTMENT OF TRADE AND INDUSTRY (1974) 2 ALL ER 122 (CA) AT 131.

18. See L Baxter 'Fairness and Natural Justice in English and South African Administrative Law (1979) SALJ 607 AT 633.

19. Webster's New Collegiate Dictionary (G & C Merriam Co, 1974).

20. See, for example, Aristotle's discussion of equity in his 'Nicomachean Ethics' Book Five, Chapter Ten (in J.A.K. Thompson's translation The Ethics of Aristotle (Harmondsworth : Penguin, 1955) p.p. 166-7) cited by D Jackson in 'Unfair Dismissals : How and why the law works' (Cambridge UP, 1975) 19.

necessary was some means of establishing the balance and at the same time adapting the inflexibility of laws to accommodate the vagaries of everyday life. Equity and fairness provided such a means. Their very indefiniteness and abstractness was ideal.

The English system of Equity, for example, managed to satisfy both these needs. Originating in the courts of Chancery, doctrines of equity assisted in making the narrow common law more workable and practicable. Where the common law was totally inapplicable, doctrines were formulated to override it.<sup>21</sup>

One of the distinguishing features of fairness and equity is that they require a consideration of all the particular circumstances of each different case whereas the law, generally speaking, cannot do so. It can only have regard to the rights of the parties, which rights it usually sees as being inflexible. The law's relative rigidity in a rapidly changing field such as industrial relations was clearly undesirable<sup>22</sup> and the value of fairness, which could

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21. See H R Hahlo AND E Kahn THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND (Juta & Co, 1973) 135.

22. It was indeed a concern expressed by a committee of the National Joint Advisory Council in England that the law would be too rigid to control industrial relations. See D Jackson 'Unfair Dismissals' : How and why the law works (Cambridge UP, 1975) 8. See the interesting discussion on why the English law specifically chose the term 'unfair' instead of 'unjust' or 'unreasonable' in Jackson Ibid AT 77 - 80.

far more easily adapt to the mores and demands of the day, was obvious. Its malleability in adapting to surrounding environments was essential and its readily compromising nature was perfectly suited to the built-in inequality of the employment relationship.

While the inherent flexibility and indefiniteness of the concept is so useful, it can also cause problems in practice because it enables so many different views of what is fair in any given situation.<sup>23</sup> But however varied the range of interpretations may be of what constitutes fairness, there are certain consistent principles or criteria<sup>24</sup> which ensure at least a semblance of consensus about fairness in the relatively restricted field of dismissal.

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23. See the distinction between a concept and its conceptions which Ronald Dworkin illustrates so well in his book Taking Rights Seriously (Duckworth, 1978) AT 134-5 cited by Baxter Administrative Law (Juta & Co, 1984) AT 484 n 39.

24. These will be considered in chapter 5 below. See generally T Poolman Principles of Unfair Labour Practice (Juta & Co, 1984) 42 - 61.

## CHAPTER 4

### PROCEDURAL FAIRNESS IN THE INDUSTRIAL COURT

In order to justify a dismissal one must have a good reason for terminating the contract, and the best way of establishing such a reason is by having a fair procedure. The need for a procedure has developed into the requirement which is today simply referred to as "Procedural Fairness". The requirement is essential since, without it, the search for fairness could lapse into a system of "palm-tree" justice, with no guiding qualities of distinct rules.

Up until recently, there was no statutory provision for procedural fairness.<sup>1</sup> The Labour Relations Amendment Act No. 83 of 1988, which came into effect on 1st September 1988, introduced for the first time the requirement that dismissals 'by reason of any disciplinary action' had to be preceded by a 'fair procedure'.<sup>2</sup> Where the termination is not as a result of the taking of any disciplinary action, the Act now requires that it complies with a retrenchment-like procedure.<sup>3</sup> The precise meaning of the words 'by reason of any disciplinary action' is unclear but it is hoped that they will be interpreted broadly to encompass any dismissal which is carried out in order to uphold standards of discipline in

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1. We have seen that the entire law of unfair dismissal was based on the broad 'unfair labour practice' definition.
  2. In terms of paragraph (a) of the definition of an unfair labour practice.
  3. In terms of paragraph (b) of the definition.



the workplace. Thus, where an employee is so ill that he cannot continue to work in his present job, he is 'disciplined' (even though no amount of disciplining will make him well again) by means of dismissal unless there is an alternative position for him. The same terminology could be applied to employees who are incompetent or incompatible and in this way paragraph (a) of the definition would cover all these forms of dismissal.<sup>4</sup>

The definition gives little idea of what is to comprise a 'fair procedure' in the case of dismissals by reason of disciplinary action<sup>5</sup> and it is hoped that the court will not deviate too far from decisions made prior to the amendments. In dismissals on grounds other than disciplinary action, the Act does specify what constitutes a fair procedure and sets out basically the same requirements as those laid down by the court in cases dealing with retrenchment.<sup>6</sup>

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4. See Cameron et al in The New Labour Relations Act at 108-10, 143-4 and 154 where the authors give the words a narrow meaning, interpreting them to apply only to dismissals for misconduct. Dismissals for incapacity or incompatibility, they say, are to be dealt with in terms of paragraph (b) of the definition. Such an inappropriate procedure for these dismissals, it is submitted, could not have been intended.
  5. Other than making it clear (in terms of paragraph (a) (iv)) that any dismissal 'which takes place after substantial compliance with the terms and conditions of an agreement relevant to the dismissal' would be fair.
  6. In terms of paragraph (b) (ii). There is also, in paragraph (b) (i), a proviso which makes fair my termination which is 'in accordance with any applicable agreement, wage regulating measure or contract of service.'

The Industrial Court has, over the years, laid down several requirements which, in the fairly consistent view of its presiding officers, make up procedural fairness. These requirements are that the employee be given a fair hearing; that an adequate system of warnings precedes the dismissal; and that the employee be given the right to appeal if necessary. We shall discuss these in turn.

### A fair hearing

The requirement of a fair hearing is the most important and fundamental aspect of procedural fairness and there have been few exceptions to it in the judgements of the Industrial Court. The object of a hearing is to enable the employer to hear the employee's version of the story to establish the existence or the extent of any alleged misconduct or incapacity before a decision is taken. For centuries lawyers have used the hearing in the form of courts of law as a means of getting to the truth and the device, though not infallible, remains the most suitable there is. The hearing also enables the employer to take into account any personal or other factors which may influence his decision on the question of the penalty to be given.

The need for a hearing is one of the essential principles of natural justice, expressed by the maxim 'audi alteram partem' and it places much emphasis on the employer being 'seen to be fair'<sup>7</sup>. This is important not only to the individual concerned but also to his fellow employees who would be more likely to take part in industrial

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7. So well expressed by Lord Hewart in *R v SUSSEX JUSTICES ex parte McCarthy* (1924) 1 KB 256 AT 259 : 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.' See the cases referred to by Edwin Cameron in his article 'The right to a hearing before Dismissal - Part I' (1986) 7 ILJ 183 at 206 n 245.

action in sympathy with him if they perceive the decision to be unfair. The value of the process is probably as important as the means it provides for establishing the truth,<sup>8</sup> for dissatisfaction over a decision is most often caused not by the decision itself but by the fact that the reasons for it are seen as being improperly established.

In confirming the need for a hearing, the Industrial Court has on numerous occasions referred to the International Labour Organisation's Recommendation No. 119 of 1963, as well as its Convention No. 158 of 1982, the relevant portions of which read respectively:

"Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case ...."<sup>9</sup> and,

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made ...."<sup>10</sup>

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8. See Baxter Administrative Law (Juta & Co, 1984) AT 536 ff and Brassey et al The New Labour Law AT 86 for further discussion on the process value of a hearing.

9. At paragraph 11.5.

10. At Article 7 of Part II.

The Convention goes on to lay down the exception that the employer is not obliged to hear the employee where he 'cannot reasonably be expected to provide this opportunity.' This exception has now been inserted almost verbatim into our law by the 1988 Labour Relations Amendment Act. In terms of paragraph (a) (iii) of the definition of an unfair labour practice, the Industrial Court is given the authority to decide whether or not it could reasonably have been expected of the employer to hold a hearing. A further exception is contained in paragraph (a) (ii) of the definition which empowers the Court to decide whether the employee was granted a 'fair opportunity to state his case'<sup>11</sup> and whether a hearing would 'not have had a different effect on the dismissal'.<sup>12</sup>

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11. The terms 'hearing', 'disciplinary enquiry' and 'fair opportunity to state his case' are used in the definition. See Cameron et al The New Labour Relations Act at 149-151 where the authors say the first two terms denote a 'measure of institutional formality' while the third implies a reduced degree of formality.

12. Edwin Cameron in his article 'The Right to a Hearing before Dismissal - Problems and Puzzles' (1988) 9 ILJ 147 AT 186, suggests that the proviso is not an attempt to entrench the discredited view which held that the lack of a hearing was not unfair as it would have made no difference in any event (see his criticism of this approach at 166-170). His reasoning is that the provision still necessitates that the employee be given a fair opportunity to state his case and it does no more than to allow the Court to decide whether such an opportunity ensured as fair a result as a more formal hearing might have had.

Prior to the 1988 Amendments, the court had already given effect to the exception laid down in the I.L.O. Convention No. 158. It did this by holding that an employer could be excused for not holding a hearing where the circumstances at the time of the dismissal make it impracticable for him to do so or where, in other words, he could not reasonably be expected to have done so. The court has found that such circumstances arise where there is an impending threat to life or property which leaves the employer no alternative but to dismiss without a hearing.<sup>13</sup> Circumstances which have also been

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13. See LEFU & OTHERS v WESTERN AREAS GOLD MINING CO. LTD (1985) 6 ILJ 307 where 205 employees were dismissed without a hearing soon after the ending of a riot which had killed 9 employees, injured 304 others and caused several million rands damage to the mine's property. See too" NUM v BUFFELSFONTEIN GOLD MINING CO LTD (BEATRIX MINES DIVISION) (1988) 9 ILJ 341 AT 347J - 348D where the court excused the lack of proper hearings on the same grounds.

Compare to LEBOTO & OTHERS v WESTERN AREAS GOLD MINING CO. LTD (1985) 6 ILJ 299 in which the employer tried to justify the dismissals of a further three employees arising from the same incident. The difference between this and LEFU was that the applicants in this case were dismissed between 15 to 21 days after the riot, at a time when life at the mine had returned to normal and the threat to life and property had apparently passed over.

recognised by the Court as making it unnecessary for the employer to hold a hearing are those in which the employee himself forfeits his right to a hearing.<sup>14</sup>

What then are the requirements of a hearing? In what follows we shall consider what have become generally accepted as the essential elements of a fair hearing. These are : timeous notice; proper notice, the right to representation; the right to question and to call witnesses; the need to be impartial and that the questions of guilt and sanction be considered separately.

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14. See, for example, MFAZWE v S.A. METAL MACHINERY CO. LTD (1987) 8 ILJ 492 in which the poor conduct of the applicant, while he was being given instructions on how to improve his poor performance, led the court to find that any proper hearing could not reasonably have been expected. In the light of this the employee in TGWU & ANOTHER v INTERSTATE BUS LINES (PTY) LTD (1988) 9 ILJ 877 (discussed below under Insubordination) who snatched the disciplinary chairman's notes away from him, and then ran out of the enquiry, could have come close to forfeiting his right to be heard. See further on the question of exceptions to the hearing requirement, Cameron 'The Right to a Hearing before Dismissal - Problems and Puzzles' (1988) 9 ILJ 147; Cameron et al 'The New Labour Relations Act' (Juta & Co, 1989) 149-151.

i) Timeous Notice of a Hearing

The employee must be timeously informed of the hearing. 'Timeous notice' means giving the employee sufficient time to enable him to prepare his case and defence adequately.<sup>15</sup>

In the case of *SIBISI v GELVENOR TEXTILES (PTY) LTD*<sup>16</sup>, where the applicant was informed of the enquiry only two hours before it took place, Van Schalkwyk was "... satisfied that even in the event of the applicant having been granted an indefinite period of time in which to prepare his defence, it could not have contributed favourably to the quintessence thereof..."<sup>17</sup>.

In the case of *BOSCH v THUMB TRADING (PTY) LTD*<sup>18</sup>, on the other hand, where the employee was charged with failing to come to work immediately after being released from detention, a refusal by the company to accede to his request for a two week postponement was held to be unfair in the circumstances. The employer was also criticized for not considering the traumatic effect which the detention may have had on the applicant.

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15. See, for example, the case of *BISSESSOR v BEASTORES T/A GAME DISCOUNT WORLD* (1986) 7 ILJ 334, where Rees A.M. said an employee, "should be allowed to make a proper defence which implies that he should be given reasonable time to prepare his defence ...." (at 337H).

16. (1985) 6 ILJ 122.

17. At 126B - C thereby adopting the approach that it would have made no difference in any event).

18. (1986) 7 ILJ 341.

At the other end of the scale of what is reasonable and timeous notice, undue delay on the part of the employer could mean that he has ' .... waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable time after he has knowledge of the misconduct'<sup>19</sup>. The balance will be found somewhere between allowing the employee sufficient time to enable him to prepare his defence adequately and ensuring that the enquiry is held 'promptly before recollections fade'<sup>20</sup>.

As a general rule, a period of 24 to 48 hours would normally be seen to be reasonable unless of course there were good reasons why the employee needed a longer period. He may for example not be able to arrange for his witnesses or representative to be available in which event it would not be fair for the employer to insist that the hearing proceed.

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19. See paragraph 10 of the International Labour Organisation Recommendation 166 of 1982, which proposes this.

20. From paragraph 11 of the ACAS Code of Practice, cited by Cameron in his article 'The Right to a Hearing before Dismissal - Part 1' (1986) 7 ILJ 183 AT 200 and 107.



ii) Proper Notice of Charges and Allegations

Ancillary to the above, is the right of an employee to be properly<sup>21</sup> advised of all<sup>22</sup> the charges against him before a hearing is convened. The purpose of a proper notice is to enable the aggrieved (employee) to prepare his defence effectively.

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21. John Brand, in a paper presented to the Institute for Industrial Relations entitled "Dismissals" said that it was common for the employee to be notified "in writing". This makes good sense in practice as it precludes any subsequent arguments about what the charges were. It also avoids any dispute about whether or not the employee was advised and about when he was advised. The failure to notify in writing has however only once been criticised by the Court. See MAWU AND OTHERS v TRANSVAAL PRESSED NUTS" BOLTS AND RIVETS (PTY) LTD (1988) 9 ILJ 129 AT 135 F-G and 139 A-B.
22. In NUM & ANOTHER v KLOOF GOLD MINING CO. LTD (1986) 7 ILJ 375, where there was a discrepancy between the allegations in the original charge and the allegations formulated at the conclusion of the enquiry, the court said it could "..... reasonably conclude that the employee was prejudiced in presenting his case. If justice is to be done, then it is essential that an employee be informed of all the allegations and charges against him prior to the holding of the enquiry itself." (at 384D). See ANNAMUNTHODO v OILFIELDS WORKERS TRADE UNION (1961) AC 945 (PC) See, too the case of FIHLA v PEST CONTROL TVL (1984) 5 ILJ 165, which concerned the dismissal of five employees for the failure to clock in and out properly. In the proceedings, the employer tried to justify the dismissal

The need for adequate prior notice was emphasised by Bulbulia AM (as he then was) in MAHLANGU v C.I.M. DELTAK<sup>23</sup> where he listed it as one of ten ingredients of a fair hearing. The need was also recognised in MAWU v BENBREW STEEL<sup>24</sup>, where the court found that the charges initially presented to the dismissed employees were 'vague'. Where, however, there can be no doubt about the nature of the charge, the court would probably not make the right an essential requirement of procedural fairness<sup>25</sup>. Unless of course, it was satisfied that the employee had not been properly advised of the time and venue of the hearing in which case he would clearly be prejudiced.

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22. (Contd) ...of one applicant, because she had been guilty of repeated absenteeism and drunkenness. The court found, however, that she was not drunk on the day she was dismissed and that she did not "seem to have been confronted with those allegations." (at 169B) and see TUCK v S.A. BROADCASTING CORPORATION (1985) 6 ILJ 570, where it became apparent to the applicant that an informal meeting she had been requested to come to, was in fact a " .... formal enquiry which was in the process of being finalised thus not allowing her the opportunity of hearing most of the allegations made against herself." (at 586A)

23. (1986) 7 ILJ 346 at 357A.

24. (1984) I.C.D.(1) 27 at 28.

25. See, for example, NUM & OTHERS v DRIEFONTEIN CONSOLIDATED LTD (1984) 5 ILJ 101 at 145H.

iii) Entitled to Representation

The employee is entitled to be represented at a disciplinary enquiry. The court has been quite consistent in upholding this requirement and the failure to allow an employee such representation has often contributed to findings of unfair dismissal.<sup>26</sup> Where the employee is content to proceed without a representative however, the court will not generally consider the absence serious enough to make the enquiry unfair<sup>27</sup>.

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26. See VAN ZYL v O'OKIEP COPPER CO. LTD (1983) 4 ILJ 125 at 135E-H, DLAMINI v CARGO CARRIERS (1985) 6 ILJ 42 at 48 D-F and NAAWU v PRETORIA PRECISION CASTINGS (PTY) LTD (1985) 6 ILJ 369 at 378A where the court in all three cases referred, with approval, to paragraph 11(5) of ILO Recommendation 119 of 1963 which reads : 'Before a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the assistance where appropriate of a person representing him.' See, too, KAHN & OTHERS v RAINBOW CHICKEN FARMS (PTY) LTD (1985) 6 ILJ 60 at 73C; DREYER v FRANZ FALKE TEXTILES (PTY) LTD (1985) 6 ILJ 223 at 228C; KOYINI & OTHERS v STRAND BOX (PTY) LTD (1985) 6 ILJ 453 at 467G; BISSESSOR v BEASTORES (PTY) LTD T/A GAME DISCOUNT WORLD (1986) 7 ILJ 334 at 337B-C and MAHLANGU v C.I.M. DELTAK (1986) 7 ILJ 346 at 357B-C.

27. See, for example, the case of NUM & OTHERS v EAST RAND GOLD AND URANIUM CO (1986) 7 ILJ 739. Although the court criticized the fact that representation was not allowed at the initial hearing, it took cognisance of one employee's willingness to allow the appeal hearing to proceed without a representative he had requested but who had failed to arrive.

As to what the entitlement to representation at the hearing entails, Bulbulia AM, in MAHLANGU v C.I.M. DELTAK,<sup>28</sup> took the view that it was 'to assist the employee and ensure that the discipline procedure is fair and equitable'<sup>29</sup>. IN NUM & ANOTHER v BLINKPAN COLLIERIES LTD<sup>30</sup>, FABRICIUS AM, after emphasizing that representation did not 'mean the mere physical but impassive presence of another'<sup>31</sup>, went on to list what he considered would be necessary duties of a representative. He should, if he established that the employee did not wish to be actively represented, try to ensure that he understood the charges, explain the procedure to him and advise him that he could challenge any adverse evidence. If the employee wished to be actively represented, he should, in addition to what has been referred to above, establish the nature of the defence, consult with and ensure the attendance of any witnesses and generally ensure that the case is as fully presented as possible<sup>32</sup>.

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28. (1986) 7 ILJ 236.

29. At 357C.

30. (1986) 7 ILJ 579.

31. At 583A.

32. At 583B-E Fabricius had also said that a helpful representative was particularly necessary where the charged worker was illiterate or uneducated (at 583A). The point was taken a step further in NUM & ANOTHER v KLOOF GOLD MINING CO. LTD (1986) 7 ILJ 375 at 383B-C where Bulbulia M said that where an employee was unfamiliar with disciplinary procedures or insufficiently articulate, he would need a suitable representative to assist him.

As to whom the representative may be, it has been ruled that he could be 'anyone from the work-place'<sup>33</sup>. It has also been suggested that the employer should have a representative 'of his choice, including a union official,<sup>34</sup> if necessary.

On the question of when a union representative (either in the form of a shop steward or a union official) may be allowed, it appears that the court will take into account the provisions of the particular disciplinary procedure in question<sup>35</sup>. Where

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33. MAHLANGU v CIM DELTAK (1986) 7 ILJ 346 at 357B-C. Bulbulia M gave examples such as a shop steward, a works council representative, a colleague or a supervisor. See, though, the rigid approach of the court in MAWU & ANOTHER v HENDLER & HENDLER (PTY) LTD (1985) 6 ILJ 362 where the employee was fairly understandably not satisfied with the shop steward representing him since he belonged to a rival union. His unheeded request to be represented by a shop steward of his choice found no sympathy with the court (at 365C).
34. S A LAUNDRY, DRY CLEANING, DYEING and ALLIED WORKERS UNION & OTHERS v ADVANCE LAUNDRIES LTD T/A STORK NAPKINS (1985) 6 ILJ 544 at 569B.
35. See WAHL v AECI LTD (1983) 4 ILJ 298 at 302H. In this case the employee had been represented, in both the enquiry and the appeal, by an employee of his choice but had apparently only later claimed that he hadn't been adequately represented because a union representative had not been present. The court in this case (at 302F-H) rather unfortunately interpreted the meaning of 'person', in paragraph 11(5) of the 1963 ILO Recommendation of Termination of Employment, as not to include a union representative thereby, unintentionally it seems, lowering their human status! See, too, the case of MAWU & ANOTHER v HENDLER & HENDLER (PTY) LTD referred to in n 33 above.

the procedure is silent, the court will consider whether or not the presence of a union representative was requested. Where the request is made but refused, the fairness of the refusal would depend on the quality of the representation allowed and the type or level of employee who is being charged.

Thus in one case,<sup>36</sup> where the employee was a shop steward, the court suggested that an employer familiar with good industrial relations practices would be aware of the sensitive nature of the dismissal of such an employee and, ".... would ordinarily advise the Union of the contemplated enquiry prior to the event, or ensure that the other shop steward (or shop stewards) are present ....."<sup>37</sup>. In another case<sup>38</sup>, any suggestion that the union was entitled to represent the applicants at an enquiry was even rejected by their own counsel. It is not clear from the judgement whether any of the applicants were shop stewards.

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36. BLACK ALLIED SHOPS, OFFICE AND DISTRIBUTORS TRADE WORKERS UNION & ANOTHER v HOMEGAS (PTY) LTD (1986) 7 ILJ 411.

37. At 416B-C.

38. NUM & OTHERS v DRIEFONTEIN CONSOLIDATED (1984) 5 ILJ 101 at 145F-G.

It is clear that the entitlement does not extend to having a legal representative<sup>39</sup> and this, it is submitted, is correct. Such an entitlement could complicate matters unduly and would create far more delay than there often already is as it would necessitate the employer being legally represented as well, with all parties having to coincide their diaries.

iv) The employee must be allowed to question the employer's witnesses and to call his own

The right to question any hostile witnesses should be fundamental to a fair hearing as it goes a long way to establishing the truth or otherwise of their evidence. In civil and criminal courts, the absence of cross-examination is seen as an extremely serious irregularity which can almost

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39. See NUM & ANOTHER v KLOOF GOLD MINING CO. LTD (1986) ILJ 375 at 383A where Bulbulia M expressly excluded lawyers when ruling that the need for a representative was an elementary requirement of justice and in MAWU AND OTHERS v TRANSVAAL PRESSED NUTS, BOLTS AND RIVETS (1988) 9 ILJ 129 AT 135 H - I Bulbulia again found that the employer was correct in refusing legal representation. In the case of MQHAYI v VAN LEER S A (PTY) LTD (1984) 5 ILJ 179 at 181 C-D, the court unfortunately made no pronouncement on the fact that an attorney had been allowed to represent the applicant at an enquiry. Cameron in 'The Right to a Hearing before Dismissal - Part I' (1986) 7 ILJ 183 at 207 submits that it is not necessary to allow a 'lawyer or rank outsider'.

invariably prejudice a party.<sup>40</sup> The purpose of cross-examination is two-fold : firstly to elicit evidence which could be used against the party; and secondly to cast doubt upon the credibility of the witnesses. It goes hand in hand with the rights of being present<sup>41</sup> and of being fully informed of the case against one<sup>42</sup>. The right was referred to in *BISSESSOR v BEASTORES (PTY) LTD T/A GAME DISCOUNT*

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40. L H HOFFMAN AND D T ZEFFERT South African Law of Evidence (Butterworths, 3rd Edition 1981) 353.

41. See *NUM & ANOTHER v KLOOF GOLD MINING CO LTD* (1986) 7 ILJ 375 at 385E-H, where Bulbulia M found that the fact that some witnesses gave evidence in the absence of the charged employee caused the latter to believe that certain members of the committee had acted partially. Bulbulia also found that the exclusion of the employee was contrary to the principle that justice was not only done but also seen to be done and said that it was 'highly desirable' that the employee should at all times have been present.

42. See *NUM & OTHERS v TRANSVAAL NAVIGATION COLLIERIES & ESTATE CO. LTD* (1986) 7 ILJ 393 at 397A, where Roux D P said that although the charged employees had been allowed to state their cases, they could not do so where they did not even know whom their accusers were. They had merely been confronted with the claim that affidavits had been made by fellow employees whom they had allegedly intimidated. They were not told of the names of the fellow employees nor of the specific contents of the affidavits. The court found the dismissals to have been unfair. Contrast though with *SAAWU AND ANOTHER v EAST LONDON MUNICIPALITY* referred to in n 51 below.



WORLD<sup>43</sup>, and was one of the irregularities which made the presiding officer decide that a fair enquiry had not been held<sup>44</sup>.

The right was also impliedly affirmed in NTSHANGASE v ALUSAF (PTY) LTD<sup>45</sup> and in MAKHATHINI & ANOTHER v UNIPLY (PTY) LTD<sup>46</sup>, the court found that an appeal hearing, at which the applicants had been given the right to ask questions, had rectified any such irregularity which there may have been at the earlier disciplinary hearing. See too NUM & OTHERS v EAST RAND GOLD & URANIUM CO. LTD (1986) 7 ILJ 739 AT 745C-I.

Despite this, the court has not consistently upheld the entitlement largely due to the fact that the issue has arisen most often in cases involving the very emotional and prevalent offence of intimidation. In the present climate in this country where revenge has become so commonplace, the court has vacillated a great deal. In some cases it has rigidly insisted on the entitlement at the risk of allowing the alleged transgressors to go unpunished and in others it has rejected it in the interests of pragmatism.

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43. (1986) 7 334 at 336I - 337A.

44. The other not insubstantial irregularities were that the applicant had not been given prior warning of the charges against him, he was not allowed to call his own witnesses and he did not have a representative. It is doubtful whether the hearing would have been held to be unfair, had it been the only irregularity.

45. (1984) 5 ILJ 336 at 340D.

46. (1985) 6 ILJ 315 at 323D-I.

In MALAPILE AND ANOTHER v GERMISTON CERAMICS AND POTTERIES,<sup>47</sup> where the employer had dismissed employees for alleged intimidation on the basis of informants' statements which it had not disclosed to the accused employees, the court held that it would,

"..... not be part of setting its stamp of approval on any hearing where charges or so-called charges are put to employees by way of informants without such applicants having a proper opportunity to consider such either by themselves or through their union if necessary or even with the aid of legal representatives..... This would go against the grain of any concept of fairness and justice as we know it and have known it since the early days of Roman-Dutch law".<sup>48</sup> The same approach was followed in KOMPECHA v BITE MY SAUSAGE C.C.,<sup>49</sup> where the court ruled that even in a small undertaking an employee should be allowed to question her accusers.

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47. (1988) 9 ILJ 855

48. AT 858 G-I This endorsed the view adopted in NUM & OTHERS v TRANSVAAL NAVIGATION COLLIERIES referred to in n 42 above.

49. (1988) 9 ILJ 1077 AT 1083 A-B

In NUM & OTHERS v RANDFONTEIN ESTATES GOLD MINING CO. (WITWATERSRAND) LTD,<sup>50</sup> however, the court adopted a pragmatic approach. The employer here again, fearing reprisals against its witnesses, only allowed their statements to be read out to the accused. The employer, the court said, was entitled to take into account the reality of threats against the lives of witnesses and was in fact 'obliged' to take whatever steps were necessary to ensure the safety of its employees.<sup>51</sup> This was paramount and was apparently more important than the upholding of any principle of law or of justice.

The court in E.A.W.T.U. & ANOTHER v THE PRODUCTIONS CASTING CO. (PTY) LTD,<sup>52</sup> in which an application had been made to examine a witness privately, set out some considerations which it felt should be taken into account before any such application would be allowed. These considerations provide useful guidelines which go some way at least in drawing together the court's seemingly irreconcilable decisions.

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50. (1988) 9 ILJ 859

51. AT 869 A-C. See, too, the unreported case of SAAWU AND ANOTHER v EAST LONDON MUNICIPALITY DATED 7.12.87 in which the court adopted a similar approach and upheld a dismissal which had relied on evidence contained in affidavits, blanked-out versions of which had been shown to the applicant.

52. (1988) 9 ILJ 902

The court firstly warned of the dangers of allowing the evidence of accusers to be heard without being challenged. This could, it went on, open a 'Pandora's' box to let elements of secrecy, covertness, prejudice and even malice enter the question. Secondly, the evidence would at least have to be material if not decisive and thirdly, there would have to be a very real possibility that the witness would indeed be harmed if his identity was known.<sup>53</sup>

Enabling the employee to call his own witnesses is a part of allowing him to present his case as fully as he can and the court has in a number of cases considered it to be one of the requirements of a fair hearing.<sup>54</sup>

It would seem to be necessary for the employee to request to call the witness and for the request to be turned down, before the employer would be seen to have acted unfairly.<sup>55</sup>

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53. AT 706 E-G

54. See, for example *S A LAUNDRY, DRY CLEANING, DYEING & ALLIED WORKERS UNION v ADVANCE LAUNDRIES T/A STORK NAPKINS* (1985) 6 ILJ 544 at 569B; *BISSESSOR v BEASTORES(PTY) LTD T/A GAME DISCOUNT WORLD* (1986) 7 ILJ 334 at 337A-B and 337I; *MAHLANGU v CIM DELTAK*, *GALLANT v CIM DELTAK* (1986) 7 ILJ 346 at 357C-D.

55. See, *BUILDING CONSTRUCTOR & ALLIED WORKERS' UNION OF S A & OTHERS v JOHNSON TILES (PTY) LTD* (1985) 6 ILJ 210 at 216I. Although see the *BISSESSOR* case cited above, where the court apparently ignored the employer's claim that the employee had not requested to call a witness and accepted the employee's allegation that he was simply not afforded the opportunity (at 337A-B).

v) The Chairman of the Hearing must be Impartial

This requirement is essential and embodies the principle of natural justice expressed by the maxim 'nemo index in sua causa'

The requirement is tempered by the fact that in the employment relationship, there is always the possibility of some prejudging having taken place due to the proximity of the parties. The courts have accordingly been fairly reluctant to make findings that the Chairman of the enquiry was biased or impartial and it is only where there is some clear indication to the contrary that it has done so.

Such indications have taken the form of a notice of dismissal having been prepared and signed prior to the employee being invited prior to state his case<sup>56</sup>. Another example of such an indication was where from a reading of the transcript of the disciplinary enquiry the impression was gained that it had been conducted in a "domineering and high-handed way and was not completely impartial"<sup>57</sup>. In another case, the court found that there was an "obvious lack of impartiality" due to the nepotism of the chairman of the enquiry<sup>58</sup>.

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56. NOODELE v MOUNT NELSON HOTEL & ANOTHER (1984) 5 ILJ 216 at 225G in which the court took into account the "applicant's appraisal of the meeting that the hotel had already decided to dismiss him" (at 225H). See, too, BISSESSOR v BEASTORES T/A GAME DISCOUNT WORLD (1986) 7 ILJ 334 at 337C-F.

57. In NUM & ANOTHER v UNISEL GOLD MINES LTD (1986) 7 ILJ 398 at 403C-D.

58. TUCK v S A BROADCASTING CORPORATION (1985) 6 ILJ 570 at 589I.

In NUM & ANOTHER v KLOOF GOLD MINING CO Ltd<sup>59</sup>, the court found that the chairman of the enquiry had taken a 'jaundiced view of the case.' Bulbulia M said this was clear from the record which showed he had only taken into account factors which were unfavourable to the employee. His partiality was also apparent from remarks he had written on the disciplinary form to the effect that the employee appeared to be an undesirable person who threatened other people and, lastly, the court found that his decision to dismiss had been influenced by the fact that the union had called for a legal strike and the employee was the chairman of the shaft stewards' committee<sup>60</sup>.

In MHLONGO v S A FABRICS LTD<sup>61</sup>, however, the court rejected a 'bald accusation' by the applicant that the enquiry was biased because it took the form of a senior manager merely endorsing the decision of a subordinate to dismiss.

vi) Questions of Guilt and Sanction to be Considered Separately

There have been a number of cases which have established an employee's entitlement to be heard not only on the question of his guilt or otherwise but also on the question of what sanction would be most fair in the circumstances. The requirement at times seems to contradict the need for consistency but it has become an essential to a fair hearing.

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59. (1986) 7 ILJ 375.

60. At 387C-H.

61. (1985) 6 ILJ 248 at 251C.

The necessity for the dual function of a hearing was first noted<sup>62</sup> in *FIHLA & OTHERS v PEST CONTROL TVL*,<sup>63</sup> where Hiemstra AM, in finding that the applicants had made out a prima facie case of unfair dismissal, listed, as one of three reasons, the fact that ".... their personal circumstances and their past work records do not seem to have been considered when it was decided to dismiss them."

Erasmus AM, as has been his wont, reversed the trend in *ROSENBERG v MEGA PLASTICS (PTY) LTD*<sup>64</sup> and found that the test in unfair dismissal was an objective one and the court could not 'take into consideration the applicant's personal or family circumstances.' The court decided it could not bend the rules for the applicant and applied the company's disciplinary code rigidly.<sup>65</sup>

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62. The opportunity to ".... put forward any comment they wished to make....." given to an employee's representatives in respect of a suggestion by management that the employee be dismissed, had been referred to by Van Schalkwyk M in an earlier case but the reference was incidental to the matter; see *MWASA & OTHERS v THE ARGUS PRINTING & PUBLISHING COMPANY LTD* (1984) 5 ILJ 16 at 23B-E.

63. (1984) 5 ILJ 165 at 169E.

64. (1984) 5 ILJ 29 at 32H-I.

65. At 33B.

The need for the dual function was emphasized in NAAWU PRETORIA PRECISION CASTINGS (PTY) LTD<sup>66</sup> where Fabricius AM referred to the ILO Recommendation in this regard, and said that it should not be viewed only as a recommendation but that it formed part of South African law.<sup>67</sup> He went on to refer to the English case of JOHN v REES,<sup>68</sup> where it was pointed out that "... the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change ....."<sup>69</sup> and concluded that, "There may be something to be said in support of the 'open and shut' approach when it comes to the consideration of guilt but when it comes to the imposition of a sanction I do not believe it can ever be apposite".<sup>70</sup>

The importance of the separation of guilt and sanction has perhaps nowhere in our law been more clearly expressed than in

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66. (1985) 6 ILJ 369.

67. At 378A-B.

68. 1970 ChD 345.

69. At 400.

70. At 379H. See, too, at 378E-F.



MOAHLODI v EAST RAND GOLD MINE AND URANIUM CO. LTD<sup>71</sup> when Bulbulia M, in dealing with the belief of the employer that it was up to the employee to raise mitigating factors, said,

"The boot should have been on the other leg. It is the tacit duty of every person who is entrusted with the responsibility of having to mete out punishment, to obtain all relevant information about an employee's personal circumstances as well as his service record and if need be to lean over backwards in an effort to find other extenuating circumstances in the employee's favour."<sup>72</sup>

#### The need for warnings to precede dismissal

It is generally accepted that an employee should be warned if there is a possibility of his losing his job.

The principle applies not only to dismissal on the grounds of misconduct or incompetence, but also to cases where the operational requirements of the employee necessitate dismissal or retrenchment.

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71. (1988) 9 ILJ 597

72. AT 605 F-G. The principle has also been followed in the following cases : NUM & ANOTHER v WESTERN AREAS GOLD MINING CO LTD (1985) 6 ILJ 380 at 386C; and in BISSESSOR v BEASTORES (PTY) LTD T/A GAME DISCOUNT WORLD (1986) 7 ILJ 334 at 337E-F where it was more formally expressed as being an 'opportunity to plead in mitigation of the penalty'.

The purpose of warnings in cases involving misconduct is an attempt 'to make the employee change, and (an indication) to him of the consequences' if such an attempt is unsuccessful.<sup>73</sup> The purpose of warnings in cases of incompetence, is along much the same lines and is to make the employee aware of the standard required and to afford him the opportunity of improving to attain that standard.<sup>74</sup> The purpose of warning employees about a possible retrenchment, on the other hand, would be to afford them the opportunity of suggesting a practicable alternative to prevent retrenchment, and, where there was no such alternative, to allow them a reasonable period within which they could hopefully restructure their working lives by obtaining employment elsewhere.

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73. Per the English Employment appeal Tribunal in *PLASTICISERS LTD v HAROLD AMOS*, cited by Steven Anderman in The Law of Unfair Dismissal (Butterworths, 2nd edition, 1985) at 136.

74. See, for Example, the case of *SAAWU & OTHERS v ROQUE CO. T/A TECHNIMOULD* (1986) ICD (1) 321 where Bulbulia M was critical of the manner in which employees were alleged to have been warned. The company claimed to have endorsed warnings on employees' clock-cards 'in the expectation' that they would read them. The court also quoted with approval the English case of *JAMES v WALTHAM, HOLY CROSS*, which found that, "an employer should be very slow to dismiss upon the grounds that an employee is incapable of performing work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibilities or likelihood of dismissal on this ground and giving him an opportunity of improving his performance."

In cases of dismissal on grounds of incompatibility, warnings are inappropriate. The reason for this is based on the assumption that an employee would seldom change his character, or be able to do so, in order to make himself compatible with his employer, and consequently no amount of warnings would ensure that he did so. Thus, in *STEVENSON v STERNS JEWELLERS (PTY) LTD*,<sup>75</sup> the court accepted that the employee's 'particular style of management' did not suit the company and found that whether or not he was warned was not decisive.

Warnings in cases of dismissal for incapacity due to ill health, are similarly inappropriate for the simple reason that a man cannot be warned to get well again.

A warning may take the form of a particular warning to a single employee or it may be in the form of a general rule aimed at all employees. Rycroft<sup>76</sup> distinguishes the two by referring to the former as a specific warning and to the latter as a general warning. A general warning, he points out, gives notice of the employer's intention to enforce an aspect of discipline or to expand the list of disciplinary offences and ensuing sanctions.<sup>77</sup>

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75. (1986) 71LJ 318 at 324D-E. This case, in which the applicant had been appointed as the Managing Director of the respondent and had been dismissed three weeks later, established incompatibility as a separate category for dismissal of the first time in South Africa.

76. Alan Rycroft 'Between Employment and Dismissal: The Disciplinary Procedure.' (1985) 6 ILJ 405 at 420.

77. Ibid.

Thus, where a disastrous fire in one of the branches of a large department store was caused by a short circuit, it had led to strict warnings that all plugs were to be removed at the end of each day. The failure to obey this apparently trifling warning, the court subsequently held, justified the dismissal of the employee who was already on a final warning for the same type of offence.<sup>78</sup>

The nature of warnings requires a distinction to be drawn between oral, written and final written warnings. It is common practice for disciplinary codes to provide for such a progression and if an employer has a code, the court expects him to abide by it.<sup>79</sup>

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78. See, CCAWUSA AND ANOTHER v O.K. BAZAARS 1929 Ltd. (1986) 7 ILJ 438 at 439 G - H. See, too, SWANEPOEL v AECI LTD (1984) 5 ILJ 41, cited by Rycroft, where the development of inter-racial conflict had necessitated a general rule prohibiting such conduct and the applicant, who was subsequently dismissed for derogatorily referring to a black man as a 'fur' was held by the court to have been fairly dismissed. And, see, NUM AND ANOTHER v BLINKPAN COLLIERIES LTD. (1986) 7 ILJ 579 at 582 A - D for an example of the two being confused. Also see NAAWU v PRETORIA PRECISION CASTINGS (PTY) LTD (1985) 6 ILJ 369 AT 373 A- D.

79. See, for example, SFAWU AND ANOTHER v DELMAS KUIKENS (1986) 7 ILJ 628 where the employer who had a code requiring three written warnings, including a final written warning was held to have unfairly dismissed an employee after he had received only two written warnings. The court found that the respondent 'by notifying its employees of the disciplinary code led the employees legitimately to expect that unless they accumulated three written warnings for the specified minor offences they

Oral warnings, or reprimands, are not given much weight since the court adopts the approach that they indicate a less serious attitude on the part of the employer.<sup>80</sup>

Written warnings, on the other hand, are generally given more attention although the court has in the past been wary of the fact that written warnings are sometimes given for offences which are not necessarily serious. It has consequently held that it will investigate and consider the nature and seriousness of the previous offences.<sup>81</sup>

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79. (Contd) would not be dismissed.' (At 634. I-J). See, too, RHODES v S A BIAS BINDING MANUFACTURERS (PTY) LTD (1985) 6 ILJ 106 at 120 D-F; NUM AND ANOTHER v BLINKPAN COLLIERIES LTD (1986) 7 ILJ 579 at 582A and at 582 E-G; FIHLA AND OTHERS v PEST CONTROL TVL. (PTY) LTD. (1984) 5 ILJ 165 at 168G and 169C.

80. See VAN ZYL v O'OKIEP COPPER CO LTD (1983)4 ILJ 125 at 134A; DLAMINI v CARGO CARRIERS (NATAL) (PTY) LTD (1985) 6 ILJ 42 at 48A and FIHLA AND OTHERS v PEST CONTROL TVL. (PTY) LTD (1984) 5 ILJ at 168 G-H.

81. NODLELE v MOUNT NELSON HOTEL AND ANOTHER (1984)5 ILJ 216 at 225 C-D. See, too, WAHL v AECI LTD. (1983)4 ILJ 298 at 305 A where the employee had received five previous written warnings, some of which were considered by the court not to have been of a serious nature; NTSHANGASE v ALUSAF (PTY) LTD (1984) 5 ILJ 336 at 341 F-G where the court queried the validity of a previously issued final warning; NUM and ANOTHER v UNISEL GOLD MINES LTD (1986) 7 ILJ 398 at 403 A-B where a warning given for recruiting activities, when access for that purpose had not been granted, was considered to have fallen away when access was subsequently allowed; and MAWU AND ANOTHER v HENDLER AND HENDLER (PTY) LTD (1985)6 ILJ 362 at 365E - 366C.

Another factor which the court takes into account is the number of warnings an employee has had, and especially if he has had a final warning. Thus, where an employee had 'previous warnings including a final warning for persistent non-compliance with laid down procedures', and had left his workplace, an offence which, 'if taken in isolation, would not justify his dismissal', the court held that he had been fairly dismissed.<sup>82</sup>

Of particular relevance are warnings which are of the same nature as the offence for which the employee is dismissed,<sup>83</sup> in much the same way as the criminal courts order that a suspended sentence is

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82. See, too, CCAWUSA AND ANOTHER v OK BAZAARS 1929 Ltd (1986)7 ILJ 438 at 439E - 440E; NUM AND ANOTHER v BLINKPAN COLLIERIES LTD (1986)7 ILJ 579 at 582E-G where the alleged final warning was held to have not been 'unequivocally final 'as required by the respondent's code and was consequently not considered to have had the effect of a true final warning.

83. See, for example, MQHAYI v VAN LEER SA (PTY) LTD. (1984)5 ILJ 179 at 181D; MAWU AND NDEBELE v SA TRACTION MANUFACTURERS (1985) ICD (1) 32; CCAWUSA AND ANOTHER v OK BAZAARS 1929 LTD (1986) 7 ILJ 438 at 439E - 440E, and NUM AND ANOTHER v WESTERN AREAS GOLD MINING CO. (1985) 6 ILJ 380 at 388F-H where the court ruled that an employer was entitled to take a 'common sense' approach to the relevance of previous charges of assault, even though the employee had been acquitted on both occasions. See, too, BASODTWU & ANOTHER v HOMEGAS (1986) 7 ILJ 411 AT 416 E-F.

to come into operation if the criminal is found guilty of committing the same crime or a crime of a similar nature. Rycroft<sup>84</sup> says that the '....trend appears to be that a warning can lapse only if the employee is not found guilty of any offence...' but the 'trend has not been that clear. The court has in one case taken unrelated warnings into account<sup>85</sup> but has expressed a reluctance to do so in another.<sup>86</sup>

As to what time period must lapse before warnings are considered to fall away, Bulbulia M, in the case of NUM AND ANOTHER v EAST RAND PROPRIETARY MINES<sup>87</sup> said that in the absence of any agreed procedure, '.... it would not be reasonable to assume that the tenure of a warning could last indefinitely', and concluded that '.... it would appear to be a good principle that a written warning lapses after six months.' This was approved of in a subsequent case in which the court also expressed the view that the seriousness of the offence should be taken into account in determining the period of a warning's validity.<sup>88</sup>

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84. See Alan Rycroft 'Between Employment and Dismissal: The Disciplinary Procedure'. (1985) 6 ILJ 405 at 421.

85. In the unreported case of ZAKWE v AECI LTD case No NH 13/2/77 dated 3 February 1984 in Brassey et al The New Labour Law at 411 n 38.

86. See MOFOKENG v B B BREAD (1984) ICD (1) 34 at 35. See, too, CCAWUSA AND ANOTHER v WOOLTRU LTD T/A WOOLWORTHS (RANDBURG) (1989) 10 ILJ 311 in which the court found that an undue reliance had been placed on unrelated warnings.

87. (1987) 8 ILJ 315.

88. In CCAWUSA v WOOLTRU referred to in n 86 above.

### The right to an Appeal

It has become a fairly well established practice for employers to allow employees to appeal against the finding or penalty of a disciplinary enquiry to a higher level of management and the practice has, to a certain extent, been encouraged by the Industrial Court.<sup>89</sup>

The purpose of an appeal, like an enquiry, is to decide on the misconduct, incapacity or incompetence of the employee, and to decide on the appropriate disciplinary action, after a consideration of all circumstances.<sup>90</sup> Cameron<sup>91</sup> refers to the right as a

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89. See MAHLANGU v CIM DELTAK (1986) 7 ILJ 346 at 357 E-F; SALDCDAWU v ADVANCE LAUNDRIES T/A STORK NAPKINS (1985) 6 ILJ 544 at 569 B-C and MAWU AND OTHERS v TRANSVAAL PRESSED NUTS, BOLTS AND RIVETS (PTY) LTD. (1988) 9 ILJ 129 at 139 G-H, in which, for the first time, the employer's failure to inform the employee of his right to appeal was considered to be an irregularity. See, too, PILLAY v C.G. SMITH SUGAR LTD (1985) 6 ILJ 530 at 538E; SWANEPOEL v AECI LTD. (1984) 5 ILJ 41 at 44F; MAWU AND MAGUBANE v SA TRACTION MANUFACTURERS (1984) ICD (1) 29 at 30 where the fact that appeals had been heard was referred to as a matter of course.

90. Where the employee does not query the finding in respect of guilt but believes the penalty to be inappropriate, his appeal should naturally only be necessary in respect of the latter. See in this regard, FINCK v OHLSSONS CAPE BREWERIES (1985) KD (1) 20 cited in Brassey et al The New Labour Law 419 n 140.

91. Cameron 'The Right to a Hearing Before Dismissal.' (1988) 9 ILJ 147 at 160.



'mature reconsideration by persons detached from the initial assessment,' and, as such, it is especially useful and important when different surrounding circumstances to those at the enquiry exist.<sup>92</sup> Another advantage is that properly conducted, an appeal by its very nature, lying, as it does to another person, should provide a safeguard against bias.

There has been a fair amount of uncertainty over whether an appeal hearing, in the form of a re-hearing, can remedy an irregular enquiry. In MAKHATINI AND ANOTHER v UNIPLY (PTY) LTD,<sup>93</sup> the court said that even if it was accepted that the enquiry was unfair, it could not, '.....be overlooked that an appeal was allowed which was conducted on the basis that it was a full hearing and every opportunity was given to all concerned to ask questions and put their respective cases.'<sup>94</sup> A similar approach was adopted by the court in NUM AND ANOTHER v ZINC CORPORATION OF SA<sup>95</sup> where an appeal in the form of a re-hearing was held to have remedied a serious defect in the enquiry.

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92. See, for example, NUM AND ANOTHER v UNISEL GOLD MINES LTD (1986) 7 ILJ 398 at 403 E-G, where the court said, in respect of, inter alia, a charge of inviting others to strike, the fact that the strike had not taken place should have been considered as a mitigating factor at the appeal, when this fact was known.

93. (1985) 6 ILJ 315.

94. At 323 G-H.

95. (1987) 8 ILJ 499 at 502.

The Appellate Division decision of *TURNER v JOCKEY CLUB OF SA*<sup>96</sup> is normally cited as authority for the contrary view that where an individual is entitled to a fair hearing followed by an appeal, a defect in the hearing cannot be rectified by a re-hearing or appeal.<sup>97</sup>

What the argument depends on, however, is the basis of the entitlement. In *TURNER*, there was a contractual entitlement while in the *MAKHATHINI* and *ZINC CORPORATION* cases, there was no such entitlement. It is not correct to say that fairness 'requires a fair enquiry followed by a fair appeal.'<sup>98</sup> All that fairness does require, in terms of one of the principles of natural justice, is that an employee is given a fair hearing. As Brassey<sup>99</sup> says, an employer's,

'obligations at law ..... require him to give the employee a fair hearing and are satisfied by a proper appeal in the nature of a re-hearing just as much as by a proper enquiry.'

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96. 1974 (3) SA 633 (A) at 656F - 658H.

97. See, for example, Cameron 'The Right to a Hearing before Dismissal' (1986) 7 ILJ 183 at 214 - 215 and also, in the second part of the article entitled 'The Right to a Hearing before Dismissal - Problems and Puzzles' (1988) 9 ILJ 147 at 159.

98. As Cameron seems to suggest in 'Problems and Puzzles' at 159 (referred to in the footnote above.) although it may indeed be good for industrial relations.

99. See Brassey et al The New Labour Law 89.

If there is a contractual entitlement, on the other hand, in terms of which an employee is to be given two full hearings, the position will be different and will depend on what the entitlement entails.

Given the court's tendency to expect an employer to abide by his procedure,<sup>100</sup> it is unlikely that the approach in MAKHATHINI and ZINC CORPORATION would be followed where the procedure in question allows two full hearings.

Aligned to this is the question whether, where the enquiry has been fair, the re-hearing of evidence at the appeal is necessary. In ROBBERTZE v MATTHEW RUSTENBURG REFINERIES,<sup>101</sup> the court held that it was not necessary to recall witnesses for cross-examination and all that was required was for the enquiry proceedings to be reviewed.

This approach would be the correct one, as long as the relevant procedure did not entitle an appeal in the form of a re-hearing. The view adopted in ROBBERTZE would also depend on whether it was practically possible to review the evidence,<sup>102</sup> in the same way that an appeal court is able to review the record of the court a quo. If there were no records of the evidence at the enquiry, in the form of a transcript, detailed minutes or statements, the appeal would have to be a re-hearing to enable evidence to be considered.

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100. See n 79 above.

101. (1986)7 ILJ 64 at 69 B-D.

102. Related to this aspect, see ROBBERTZE at 69 D-H where the court held that the employer's failure to give the employee's representative a copy of the record of the enquiry and written statements prevented his case being properly presented and was consequently an irregularity.

Provided there was no entitlement to a re-hearing in the procedure and provided it was possible to review the enquiry proceedings, the only oral evidence fairness would require the appeal to hear, would be that of witnesses who were unable to be present at the enquiry or of witnesses who had only come forward after the enquiry.

One further question needs to be considered. Where there is a right, be it to a re-hearing or to a review, will the court not require the employee to exercise that right prior to approaching the court for relief? The answer to this has consistently been answered in the negative, particularly where it can be shown that attempts were made to settle the dispute as was the case in both *MATSHOBA & OTHERS v FRY'S METALS (PTY) LTD*<sup>103</sup> and *NUM & ANOTHER v KLOOF GOLD MINING CO LTD*.<sup>104</sup> A further factor taken into account in *MATSHOBA* was that the thirty day period within which an employee had to file his application limited his attempts to pursue an appeal.<sup>105</sup>

So, it can be agreed that procedural fairness basically requires that prior to a decision to dismiss being taken, an employee should be given a fair hearing and he should be warned where his breach is not so gross as to justify dismissal on its own. We have also seen that once he has been dismissed, it is fair to allow him to appeal against the decision. We now go on to look at the substantive and, as its name indicates, more important aspect of dismissal.

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103. (1983) 4 ILJ 107 at 122 B-F.

104. (1986) 7 ILJ 375 at 388 A-G.

105. AT 122 G-H. See too *ROSSOUW v S.A. MEDIESE NAVORSINGSRAAD* (1987) 8 ILJ 650 at 659 C-E and see the recent Supreme Court cases reflecting the same approach : *MSOMI v ABRAHAMS NO & ANOTHER* 1981 (2) SA 256 (N) AT 260-1 and *RAMPA & ANDERE v REKTOR, TSHIYA ONDERWYSKOLLEGE & ANDERE* 1986 (1) SA 424 (O) AT 430 I cited in Cameron 'The Right to a Hearing before Dismissal - Part 1' (1986) 7 ILJ 183 at 215 n 193.

## CHAPTER 5

### SUBSTANTIVE FAIRNESS IN THE INDUSTRIAL COURT

It has been seen that before the concept of an unfair labour practice was introduced, employment contracts could generally be terminated at the will of either party by the giving of notice. That is no longer the position and it is now necessary to have a good substantive reason for dismissing an employee. The 1988 Amendments to the Labour Relations Act firmly entrenched the element of substantive fairness into the definition by stipulating that dismissals by reason of disciplinary action must be for a 'valid and fair reason'.<sup>1</sup> The dismissal, in other words, must be justified. To ensure this, the law allows an independent body, in the form of the Industrial Court, to assess the facts and to decide whether the dismissal was justified or fair.

There are naturally numerous reasons for dismissal, but they can basically be separated into categories of misconduct, incompetence, incapacity due to ill health, incompatibility and the operational requirements of the business.<sup>2</sup>

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1. In terms of paragraph (a) of the definition introduced by the Labour Relations Amendment Act No. 83 of 1988.
  2. Due to the collective nature of this reason, it is not to form part of this thesis. See H Cheadle 'Retrenchment : The New Guidelines' (1985) 6 ILJ 127; Brassey et al The New Labour Law (Juta & Co, 1987) 279-297; Cameron et al The New Labour Relations Act (Juta & Co, 1989) 120-129.

The test of substantive fairness involves a two-stage approach. Firstly, it must be established whether the employee committed the act of misconduct or was incompetent, incapacitated or incompatible or, in the terms of the 1988 Amendments, there must be a valid reason for the dismissal. Secondly, the seriousness of the breach is considered and, once assessed, will lead to the decision as to how significantly this affects the particular contract or relationship between the employer and the employee. This would make up the second requirement in the recently amended definition, namely that there is a fair reason. Various factors, such as whether the employee has ever been warned,<sup>3</sup> whether his service record is unblemished, or whether other employees have in the past been dismissed for similar breaches, will either aggravate or alleviate the degree of seriousness. Fortunately the legislature has not attempted to define substantive fairness. By requiring only that the reason for a dismissal be valid and fair, it left the concept as broad as it indeed is, enabling the Court to continue fashioning what it believes is fair or unfair in any given circumstances. To do otherwise would have been pure folly.

The substantive fairness of the reasons for dismissal will now be dealt with in their separate categories.

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3. The 'procedural' requirement for warnings is inextricably linked to substantive fairness in the same way that the requirement for a hearing is, in that they both make it easier for the employer to reach fair decisions in the two stages of the search for substantive fairness. If the employee can truthfully say that he had no idea his action would lead to dismissal and that he had never been warned of this, either personally or by means of a disciplinary code or general rule, this could seriously affect the substantive fairness of the dismissal.

## MISCONDUCT

The dismissal of an employee on this ground occurs as a result of his failure to abide by the rules or terms which govern his particular job.

The terms or rules regulating his employment would depend on his specific employment contract, or the nature of his job<sup>4</sup> or, more generally, on what industry it is in or, what general company rules and disciplinary codes were in existence at the time. This contract could also be regulated by what was contained in Industrial legislation or other applicable wage regulating measures such as Wage Determinations under the Wage Act No. 5 of 1957 or Industrial Council Agreements in terms of the Labour Relations Act No. 28 of 1956.

The reasons themselves can generally be classified under the same breaches as those recognised at common law for dismissal without notice.<sup>5</sup> These are basically: absence from work, assault, dishonesty, drunkenness, failure to obey instructions, insubordination, negligence and sleeping on duty.

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4. See, for example, ROSENBERG v MEGA PLASTICS (1985) ICD (1) 20 in which it was found to be very serious for a driver of a heavy duty vehicle to be drunk. Had the employee not been in control of dangerous machinery, the offence would not have been so serious. (The case is referred to under the heading of Drunkenness below).

5. Which were necessary for the dismissal to have been lawful in the event of proper notice not having been given. See Chapter 1 above.

(a) Absence from Work

This offence reaffirms the importance of having an enquiry, not for establishing that the employee was absent, for this is usually no problem, but to establish the reason for his absence. The fairness or otherwise of the dismissal will depend on the reason for the absence.

The Court has been assuringly quick to come to the assistance of employees whose reasons for absence had been that their lives would have been endangered had they come to work. In *BASODTWU AND ANOTHER v HOMEGAS (PTY) LTD*<sup>6</sup>, for example, the court approved of the approach of employers who had been "... particularly sensitive to the predicament of black employees caught (often literally) in the cross-fire of unrest which has enveloped many black residential areas, and have not regarded an absence from work in such circumstances as sufficient ground for terminating the services of the defaulting employees."<sup>7</sup>

The court took a similar view in *SALDCDAWU AND OTHERS v ADVANCE LAUNDRIES T/A STORK NAPKINS*,<sup>8</sup> where the employer was advised that he should have taken account of the reality of violence and intimidation during stayaways and should not have dismissed employees who would have risked their lives by remaining at work any longer than they did. In the judgement special mention is made of the evidence of one employee who said under cross-examination that while she was aware that her employer

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6. (1986)7 ILJ 411.

7. At 417 B-C.

8. (1985) 6 ILJ 544.



would not have been happy with her leaving early, 'she valued her life more than her employer's happiness'.<sup>9</sup>

In a similar vein the court, in BOSCH v THUMB TRADING (PTY) LTD,<sup>10</sup> held that it was 'highly unreasonable' for the employer to expect an employee to return to work the day after he was released from detention under the emergency regulations and the 'traumatic effect' which the detention must have had on him justified his unauthorized absence.<sup>11</sup>

Where there is an element of disobedience or lack of regard for agreements or procedures in the absence, the court has been less willing to come to the assistance of employees. Thus, in SOSIBO AND OTHERS v QUALITY PRODUCTS (PTY) LTD,<sup>12</sup> where the absence from work on a public holiday in contravention of an agreement that non-statutory holidays in the middle of the week would be worked in return for another day's leave, the dismissal was found to be fair.<sup>13</sup>

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9. At 566 H-I.

10. (1986)7 ILJ 341.

11. At 345 C-D.

12. (1986)7 ILJ 621.

13. The employer had offered the employees a two-week suspension as an alternative to dismissal but the offer was refused. The case is to be contrasted with SACWU & OTHERS v C.E. INDUSTRIAL (PTY) LTD T/A PANVET (1988) 9 ILJ 639 where the employees' disobedience was tempered by the insensitivity and unfairness of the employer.

In *BCAWU AND OTHERS v JOHNSON TILES (PTY) LTD*,<sup>14</sup> the court adopted a similar approach where, although the facts smacked of victimization and constructive dismissal, a disobeyed instruction and a failure by the employee to air his grievances through an established procedure, were factors it took into account in deciding that the dismissal was fair.<sup>15</sup>

Generally, however, absence from work without permission does not appear to warrant dismissal, especially if it is a first offence. In *RADEBE v KEELEY FORWARDING (PTY) LTD*,<sup>16</sup> the employee, who was a security guard who had absented himself from his post for half an hour to go to the toilet, was found to have been guilty of misconduct, 'but not so serious as to warrant dismissal',<sup>17</sup> particularly since there was no proof of written warnings having been given. Similarly, a failure to be punctual, a lesser form of unauthorized absence, is more appropriately sanctioned by means of warnings.<sup>18</sup>

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14. (1985)6 ILJ 210 at 217 - 222.

15. At 222 C-F.

16. (1988)9 ILJ 504. See, too, *NUM AND OTHERS v TRANSVAAL NAVIGATION COLLIERIES AND ESTATE CO.* (1986)7 ILJ 393 at 397C-I and *NUM AND ANOTHER v BLINKPAN COLLIERIES LTD.* (1986)7 ILJ 563.

17. At 506 E-F.

18. See, for example, *MAWU AND ANOTHER v HENDLER AND HENDLER (PTY) LTD* (1985)6 ILJ 362 at 365I where the court found that coming five minutes late justified a written warning.

(b) Drunkenness

In proving drunkenness, employers have sometimes resorted to using breathalyzers to test the alcohol level of employees.<sup>19</sup> The test is a good one in that it is objective but the employee's consent is necessary before it can be administered. If he does refuse, an adverse inference can, of course, always be drawn from such refusal.

An admission by the employee that he has been drinking alcohol is normally sufficient provided the offence for which he is charged is actually consuming alcohol and not that of being drunk, for the former of course only leads to the latter once the amount consumed is significant.<sup>20</sup> From this it follows that where the employee is charged with drunkenness, an

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19. See, for example, the case of ROSENBERG v MEGA PLASTICS (PTY) LTD. (1984)4 ILJ 291 at 30I-31A, where the employee, in addition to having tested positive, admitted at the enquiry to having had possibly four or five beers. See, too, MOFOKENG v B.B. BREAD (1984) ICD (1) 34 at 35, in which two breathalyzer tests with different instruments, one proving positive and the other negative, had been conducted. The court seemed to take this into account when it inferred that requiring the employee to attend an enquiry while he was allegedly drunk, was an indication that he 'could only have been slightly intoxicated.'

20. See FINCK AND ANOTHER v OHLSSONS CAPE BREWERIES. (1985)6 ICD (1) 20 at 21 for an example of a factory rule making the mere consumption of alcohol on company premises a dismissable offence.

admission that he has been drinking will only go some way towards proving drunkenness. Additional evidence will be necessary and this normally takes the form of observations by witnesses that his breath was smelling of alcohol, that he was unsteady on his feet or that his speech was slurred.

Where such evidence is used to justify a dismissal, the court requires it to be reliable and convincing. In *KOYINI and OTHERS v STRAND BOX (PTY) LTD*<sup>21</sup>; the court, after expressing reservations about the credibility of the manager who had witnessed the alleged drunkenness, found that it had not been adequately proved. The employer had also tried to justify the dismissal on the ground that a rule, in the form of a regulation under the Factories Act,<sup>22</sup> demanded it. The court rejected this, finding that the regulation not only made no mention of dismissal but also seemed to have been inapplicable because there was apparently no machinery in the vicinity other than a fire hose.<sup>23</sup>

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21. (1985)6 ILJ 450 at 468C - 470I.

22. Regulation C6 of the repealed Factories Act No. 28 of 1918 rules inter alia:

(i) that no person shall consume intoxicating liquor whilst in the vicinity of or whilst working on or near machinery; and

(ii) no person in a state of intoxication shall enter or remain or shall be permitted by the user to enter or to remain on premises where machinery is used.

23. At 470 B.

Similarly in MAWU AND ANOTHER v HENDLER AND HENDLER (PTY) LTD,<sup>24</sup> the court found that there was not sufficient prima facie evidence for issuing a warning for drunkenness in light of the fact that the employee's explanation had been that he was assaulted while on his way to work. Erasmus AM said the employee might indeed have been 'incoherent or unsteady on his feet as a result of a blow, or blows on his head.'<sup>25</sup> It had indeed been common cause that the employee had had some congealed blood on the side of his mouth which would have been in keeping with his version.

Once the court is satisfied that drunkenness was proved, it takes several factors into account in deciding whether or not the dismissal was fair. In the case of FINCK AND ANOTHER v OHLSSONS CAPE BREWERIES<sup>26</sup> for example, the employer claimed that it was especially loath to tarnish its image in any way by having intoxicated employees seen to be handling its products.<sup>27</sup> This, together with the fact that safety was extremely important due to the mechanised nature of the plant, added to an alleged problem with theft of liquor, led the court to decide the dismissal was fair.

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24. (1985)6 ILJ 362.

25. At 366 A-C.

26. (1985) ICD (1) 20.

27. At 21. Mention has also already been made of the existence of the strict company rule prohibiting the consumption of alcohol.

In ROSENBERG v MEGA PLASTICS<sup>28</sup>, the fact that the employee was a driver in control of a heavy duty vehicle who had jeopardised the lives of other road users, as well as of the two loaders subordinate to him by drinking about three beers while making a delivery, was found to have justified the dismissal.

In LÖTTER v SOUTHERN ASSOCIATED MALTSTERS (PTY) LTD,<sup>29</sup> the employee had broken a strict company rule by drinking while on standby. The court took cognisance of how the rule appeared to be inconsistently applied to managers and artisans. It also took into account the fact that the employer had made alcohol freely available to the employees as well as the fact that the employee had only been on standby. All of these factors, the court held, made the dismissal unfair.<sup>30</sup>

(c) Sleeping on duty

Proof that the employee was sleeping is normally not a problem as the employee is almost always caught 'red-handed.' What must be considered, however, is the reason he puts forward as to why he was sleeping.

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28. (1984)5 ILJ 29 at 33 A-B.

29. (1988)9 ILJ 332.

30. At 335 J - 336 C.

In *SIBISI v GELVENOR TEXTILES (PTY) LTD.*,<sup>31</sup> an employee charged with this offence said he had not been sleeping but had only sat down for a few minutes as a result of feeling nauseous and dizzy. At the enquiry, the employee could not explain why he had been found lying on cardboard sheets with a plastic pillow nor why he had not been found next to his machine. The court did not believe the employee's version and because he had previously received a final warning, for the same offence, found the dismissal to be fair. Had the employee in this case merely had his head on his chest, the court's finding would undoubtedly have been different. The nature of the job would also be a factor to be taken into account. Where someone is employed as a security guard for example, the offence would have to be viewed more seriously.

The offence in this country is one which lends itself to the raising of mitigating factors particularly in respect of Black employees.

In many cases there may be very good reasons as to why an employee was sleeping on duty. Lack of sleep could very realistically be due to overcrowded or noisy living quarters, violence in a township or due to poor transport and inordinate periods of time spent getting to and from work and it would be unfair of an employer not to take such factors into account were they to be advanced.

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31. (1985)6 ILJ 122

(d) Negligence

Evidence of negligence in the performance of duties is usually not too difficult to prove since the negligence often 'speaks for itself'.<sup>32</sup> The employer must, however, be careful to consider all the facts. Where he does not do so, the court will come to the assistance of employees in finding that the negligence was not properly proved. Thus, in *RAMPERSAD v BB BREAD*,<sup>33</sup> where the employee, a driver - salesman was charged, sometime before he was dismissed, with having caused a vehicle's engine to seize by revving it excessively, the court took note of the employer's failure to consider other factors such as the car's poor case history and the fact that it was very old, and found that the negligence had not been conclusively proved. Although the employee had only been given a final warning for this alleged negligence, the employer had relied on it<sup>34</sup> in deciding subsequently that the employee should be dismissed for alleged negligent driving. The employer had also relied on a tachograph to prove that the employee had been speeding and had relied on the evidence of a member of the public who alleged that he had been forced off the road by the employee. The member of the public had merely informed the employer of this

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32. As expressed by the maxim '*res ipsa loquitur*'.

33. (1986)7 ILJ 367.

34. Even though the employee's appeal against the warning had not been heard at the time of the subsequent enquiry.



incident over the telephone and had not been present at the enquiry<sup>35</sup>. The court had no doubt that the employee had been speeding and also concluded that he had 'in all possibility'<sup>36</sup> been inconsiderate to other road users. But, since the afore-mentioned negligence had not been adequately proved, it ruled that the dismissal was not justified.

Proving the alleged negligence properly will entail allowing the employee to challenge the allegations and to put forward any reason as to why the alleged behaviour might not amount to negligence.

In KANTOLO & ANOTHER v SUPER RENT (CAPE) (PTY) LTD T/A CONNAUGHT MOTORS AND SUPER RENT TRUCK HIRE,<sup>37</sup> the employer tried to impute negligence by saying that the employee concerned had usually carried a shoulder bag containing money and that he consequently had to 'shoulder responsibility'<sup>38</sup> for any shortfall there may have been. A shortfall would automatically prove, according to the employer, that the employee had been either negligent or dishonest. The employee

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35. The employee did not deny the allegations at the enquiry, thereby enabling the employer to avoid the necessity of presenting the witness to allow his evidence to be challenged.

36. At 372C-D.

37. (1988) 9 ILJ 120 at 127G-128.

38. At 128E-F.

was not given an opportunity to challenge this assumption or to advance some other explanation as to how there may have been a shortfall. The employer had not even proved to the employee that there had been a shortfall and had refused to allow the employee to view the books which an accountant had allegedly found did not balance. The dismissal was accordingly held to be unfair. There was a similar problem in *VAN ZYL v O'OKIEP COPPER CO LTD*,<sup>39</sup> a case involving a diesel mechanic who had allegedly been negligent in causing damage to the gearbox of a piece of mining equipment. The court took the view that although the employee's conduct may indeed have amounted to negligence, the fact that there was no proper hearing, which could have cleared up some doubt as to whether or not the negligence had actually caused the damage in question, made the dismissal unfair.<sup>40</sup>

If there is no doubt about the negligence it must be sufficiently gross to warrant the sanction of dismissal. In *NUM & ANOTHER v EAST RAND PROPRIETARY MINES LTD*<sup>41</sup> the failure

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39. (1983) 4 ILJ 125.

40. See at 127A-B and 135H.

41. (1987) 8 ILJ 315. See, too, *NAAWU v PRETORIA PRECISION CASTINGS (PTY) LTD* (1985) 6 ILJ 369, where the court found that the failure to hold a hearing may be excused in respect of the consideration of guilt where there was no doubt about the employee's negligence (at 379H). The court also found, though, that the failure to hold a hearing in respect of the imposition of a sanction, made the dismissal unfair and reinstated the applicant notwithstanding having earlier concluded that the negligence justified his dismissal (at 375F-G and 376D). See the criticism of the decision in *Brassey et al* The New Labour Law at 87-88.

of the employee, who was a member of the mine's security personnel, to inform management of an impending hostel bar boycott was not considered to have constituted negligence which justified his dismissal.

(e) Insubordination

Insubordination sometimes supplements the offence of a failure to obey a lawful instruction. When it does, it is secondary to the main offence and is considered as an aggravating factor. If the employee is dismissed, it will usually not be on account of the insubordination but for the main charge of failing to obey the instruction<sup>42</sup>. Where the offence is in respect of insubordination alone, a single act of insubordination will seldom be sufficient to warrant dismissal unless, of course, it is a gross act.

The question of what is gross and what is not has become a particularly interesting and relevant one in the changing socio-political climate which South Africa finds itself in at the moment. As a result of black employees becoming increasingly less subservient and more outspoken, white employers, unused to such behaviour, have generally tended to interpret this as a challenge to their authority and have often over-reacted, condemning it as insubordination. The fact that the majority of the court's presiding officers are fairly conservative white South Africans has further complicated matters.

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42. See CCAWUSA & ANOTHER v AERIAL KING SALES (1987) ICD (1) 345 for an example of a case where insubordination is coupled to the failure to obey an instruction.

True insubordination usually takes the form of an act by an employee which belittles someone in charge of him and this makes the offence difficult to prove since much depends on the intention of the employee and on how whatever he has done is interpreted by the person in charge.

The difficulty is well reflected in the facts of *NKALA v PINETOWN ENGINEERING FOUNDRY CO.*<sup>43</sup> There an employee was dismissed for allegedly putting a union sticker on a foreman's back. The court found that the act was no more than a 'distasteful prank' which had unjustifiably been given a 'sinister content' by the employer. The dismissal was consequently held to be unfair.

In *NUM & ANOTHER v ZINC CORPORATION OF S.A.*,<sup>44</sup> the alleged gross insubordination in question occurred during a strike. The employee who was a spokesman for the strikers, in response to being asked by a manager what his name was, suggested that the latter look it up in a list of names lying on the desk between them. On being asked again, he repeated his suggestion. The employer made much of the fact that while the question had been phrased in Xhosa, the reply was in English, which it interpreted as a sign of marked disrespect. Adopting

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43. (1985) ICD (1) 45 at 46.

44. (1987) ICD (1) 380

a typically conservative approach, Le Roux A.M. found the dismissal to have been justified in the circumstances.<sup>45</sup> It is submitted that the court would almost certainly have come to a different conclusion had the parties both been white, where there would have been no elements of 'baaskap'.

The court in FAWU AND ANOTHER v HARVESTIME CORPORATION (PTY) LTD<sup>46</sup> drew an important and realistic distinction between the role of shop stewards and that of ordinary employees. The alleged insubordination took the form of a shop steward asking a superior if he thought he was the 'fucking paymaster'. For this he was dismissed. In ruling that the behaviour did not amount to gross insubordination, the court found that an employee who was a shop steward had to be afforded more of an equivalent status with supervisors. He wore in effect, two hats - one as a shop steward and one as an employee, the former

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45. See, too, ROSTOLL EN 'N ANDER v LEEUPOORT MINERALE BRON (1987) 8 ILJ 366, where the employee, on being confronted by her employer about several complaints clients had made, threw her keys onto a counter, told him to do the work himself if he wasn't happy and left the building, leaving him to carry out her duties for the night. The court in this case decided that the dismissal was fair even though no hearing had been held. Compare this to the employee's complained of behaviour in MAFALALA v DERBERS (PTY) LTD (1987) ICD (1) 627.

46. (1989) 10 ILJ 497.

entitling him to relate to his seniors in a more relaxed fashion. In this particular case certain employees had had their pay tickets unreasonably withheld by the supervisor in question and it was this which had prompted the outburst. The employees had had good reason to be dissatisfied and had requested the second applicant in his capacity as chairman of the shop stewards to attend to the problem.

In another case involving a shop steward, TGWU & ANOTHER v INTERSTATE BUS LINES (PTY) LTD,<sup>47</sup> the second applicant had been the subject of a disciplinary hearing which was considering an unrelated incident. During this hearing he had allegedly grabbed the chairman's notes and had run out of the enquiry with them. The following day he was dismissed for insubordination even though he had not been properly advised of this additional charge. Despite this and other procedural irregularities, the court found the dismissal to have been substantively fair. His behaviour, the court found, was inexcusable and had the effect of disregarding the respondent's authority and of making a mockery of the respondent's disciplinary procedure.<sup>48</sup>

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47. (1988) 9 ILJ 877

48. AT 881 B-C

(f) Dishonesty

Dishonesty in the sphere of employment comes in many guises. It can include theft, fraud,<sup>49</sup> the unauthorised removal of company property<sup>50</sup> and the disclosure of confidential information<sup>51</sup>. Such offences are seen in a serious light and provided they are adequately proved, they generally make a dismissal justifiable. The standard of proof which the Industrial Court requires is the same as in the civil courts, namely that the offence is proved on a 'balance of probabilities'.<sup>52</sup> The employer is never expected to prove his

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49. See, FAWU v REYROLLE PARSONS OF S.A. (1986) 7 ILJ 509 and MAKHATHINI & ANOTHER v UNIPLY (PTY) LTD (1985) 6 ILJ 315.

50. AMOS v STUTTAFORDS (1986) 7 ILJ 506. The phrasing of the offence in this form helps to overcome the ever-present technical difficulty of proving the intention to steal.

51. See, for example, BISSESSOR v BEASTORES T/A GAME DISCOUNT WORLD (1986) 7 ILJ 334 and WHITCUTT v COMPUTER DIAGNOSTICS AND ENGINEERING (PTY) LTD (1987) 8 ILJ 356.

52. See, for example, MAHLANGU v CIM DELTAK (1986) 7 ILJ 346 at 357G; SIMONS v GRAND BAZAARS (1986) ICD (1) 311 at 312. Julian Riekert Basic Employment Law (Juta & Co, 1986) at 78-79 explains the standard well when he says '... if, in a disciplinary enquiry, the evidence against the employee is weightier and more convincing than the evidence in his favour, disciplinary action will be justified.'

case beyond all reasonable doubt, as a result of which an employee may be acquitted in a criminal court but may still be fairly dismissed on the same facts<sup>53</sup>.

There must, however, be adequate proof of the offence. As Levy<sup>54</sup> says,

'If the employer has based his evidence on suspicion, hearsay or security reports and there is no hard evidence, he is not entitled to say that a theft has occurred. He therefore has no justification to dismiss for theft.'

Employees faced with this difficulty have gone to some lengths in trying to prove the offence of theft. In MAHLANGU v CIM DELTAK<sup>55</sup>, for example, the employer tried to use lie-detectors. In considering what evidential weight should be given to such tests, the court examined what the position was in various foreign jurisdictions as well as in South African criminal and civil courts<sup>56</sup> and concluded that findings based on such tests could not be relied upon.

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53. See MOAHLODI v EAST RAND GOLD AND URANIUM CO LTD (1988) 9 ILJ 597 at 601B.

54. Andrew Levy Unfair Dismissal : A Guide for South African Management (Divaris Stein, 1984) at 82.

55. (1986) 7 ILJ 346.

56. At 353A - 354D.



In *EAWTU & ANOTHER v THE PRODUCTIONS CASTING CO (PTY) LTD*<sup>57</sup>, the employer twice tried to get the court to accept the evidence of an allegedly frightened informer who had not given oral evidence at the disciplinary enquiry. The first attempt was made by way of an application in terms of S.17(11)(a) after the parties' statements of case had been filed. The evidence was taken on commission in chambers but the presiding officer subsequently advised the parties that his taking the evidence in this manner 'in no way constituted a ruling as to the admissibility of such evidence' nor was it 'indicative of the weight to be attached thereto'<sup>58</sup>. During the Section 46(9) proceedings, the employer made another application to have the witness's evidence heard in-camera. The presiding officer in those proceedings ruled that the evidence on commission was inadmissible because, inter alia, the section under which the application had been brought was not intended for such a procedure.

In respect of the application to have the evidence heard in-camera, although he was mindful of the need for the Industrial Court not to allow the normal rules of procedure and evidence to prevent the establishment of truth and justice, he was wary of 'opening a Pandora's box to let elements of secrecy, covertness, prejudice and even malice enter the portals of an institution which, in the nature of things, would be ill-equipped to handle and control them'<sup>59</sup>.

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57. (1988) 9 ILJ 702.

58. At 704E-F.

59. At 706F

The presiding officer also seemed to indicate that the court would accept a lesser standard of proof than a 'balance of probabilities' in cases of misconduct, where the employer could show that a justifiable mistrust was 'counter-productive to his commercial activities or to the public interest',<sup>60</sup>.

There has been varied success in the use of confessions or admissions in proving the occurrence of theft. In *SIMONS v GRAND BAZAARS*<sup>61</sup>, the court found that the alleged confessions were not true confessions 'as required by law',<sup>62</sup> and, since there was no direct proof or corroborating evidence, decided that the dismissal was unfair. In other cases, however, the court has accepted confessions as being adequate proof of theft<sup>63</sup>.

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60. See at 708F-709B.

61. (1986) ICD (1) 311.

62. At 311. See, too, the court's interesting disapproval of the employer's failure to report alleged thefts to the police whom were 'best qualified to conduct the required investigations.'

63. See *HLALUTYANA v NABE BAZAAR* (1987) ICD (1) 351 and *FAWU & OTHERS v AMEENS FOOD PRODUCTS & BUTCHERY* (1988) 9 ILJ 659 at 670 E-F. The court in this case, though, decided that the dismissal was unfair because no proper enquiry had been held.

If the dishonesty is satisfactorily proved, dismissal will generally be justifiable. For example, in *PILLAY v C.G. SMITH SUGAR LTD*<sup>64</sup>, the dismissal of an employee for the theft of twenty litres of diesel fuel was held to be fair even though the employee had been with the employer for twenty two years. The presiding officers found that,

'It would be incorrect for this court to set the precedent that an employee is entitled to steal once from his employer before the latter is entitled to dismiss him.'<sup>65</sup>

The employer must, however, ensure that he is consistent in his treatment of employees, for any inconsistency can cause the court to believe that the employer himself does not regard the offence as sufficiently serious to justify dismissal<sup>66</sup>.

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64. (1985) 6 ILJ 530.

65. At 538H.

66. See *FAWU & OTHERS v AMEENS FOOD PRODUCTS & BUTCHERY* (1988) 9 ILJ 659 at 671E-F and *SIMONS v GRAND BAZAARS* (1986) ICD (1) at 311 at 312.

(g) Refusal to obey a lawful instruction

A refusal to obey an instruction which forms part of an employee's contracted obligations normally justifies dismissal, provided the refusal is wilful and serious and provided the instruction is lawful and reasonable.

Proving the offence does not normally present too much of a problem. There is seldom any doubt about an instruction having been given or that there has been a wilful refusal to obey it<sup>67</sup>. It is also fairly simple to establish the lawfulness of the instruction and if it is unlawful, it will obviously be unfair to dismiss an employee for a refusal to obey the instruction<sup>68</sup>.

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67. Although see the case of MAWU & OTHERS v TRANSVAAL PRESSED NUTS (1988) 9 ILJ 129 at 137C-139I in which there was no allegation of a refusal to carry out an instruction, but only 'that the employee had been 'disinclined' to do so. The court noted rather humorously that '(i)f mere disinclination is an offence, then half the country's population would soon lose their jobs.' (at 381I). See, too, NJAPHA v OTH BEIER (1984) ICD (I) 44 in which the alleged refusal to submit to a body search was found to have been merely a refusal to empty out pockets and DREYER v FRANZ FALKE TEXTILES (1985) 6 ILJ 223 at 229A-E where the court found it unlikely that an order had been given.

68. See NAAWU v CHT MANUFACTURING CO (PTY) LTD 1984(5) ILJ 186 and NUTW & OTHERS v JAGUAR SHOES (1986) 7 ILJ 359.

What causes more difficulty is establishing whether the instruction or refusal was reasonable and assessing whether the refusal was sufficiently serious to justify dismissal. In deciding the reasonableness of the instruction, the court considers all the circumstances in which it was given. In *BCAWU & ANOTHER v E ROGERS & C BUCHEL CC & ANOTHER*<sup>69</sup>, for example, the court found that an instruction to a lorry driver to operate a loader machine with defective brakes and which he had had little experience in handling, was unreasonable. In *MATSHOBA & OTHERS v FRY'S METALS (PTY) LTD*,<sup>70</sup> the court found that a refusal to work overtime<sup>71</sup> was not reasonable due to the fact that the instruction had been given at short notice and the employees had made other plans and that the reason for the need to work the overtime had not been explained to them. Where the reason for the refusal is due to a concern for personal safety, dismissal will not be justified since such a refusal will generally be reasonable<sup>72</sup>.

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69. (1987) 8 ILJ 169.

70. (1983) 4 ILJ 107.

71. Although in terms of the employees' contracts, the working of overtime was compulsory, in practice all that was required was for employees to give a reasonable explanation as to why they were unable to work. See, too, *ESTERHUIZEN v PORTER SIGMA, PAARDEN EILAND* (1982) ICD (1) 19; *MABIZELA v SIEMENS* (1984) ICD (1) 25 and *CHETTY v RAYDEE (PTY) LTD T/A ST JAMES ACCOMMODATION* (1988) 9 ILJ 318 in which the reasonableness or otherwise of instructions is considered.

72. See *SALDCDAWU & OTHERS v ADVANCE LAUNDRIES LTD T/A STORK NAPKINS* (1985) 6 ILJ 544 and *NUM & OTHERS v DRIEFONTEIN CONSOLIDATED LTD* (1984) 5 ILJ 101.

The refusal or failure to obey an instruction must be sufficiently serious to justify dismissal. Again the degree of seriousness must be assessed in light of all the circumstances and much depends on the implications of the refusal.

Thus, in *CCAWUSA & ANOTHER v OK BAZAARS 1929 Ltd*<sup>73</sup>, where the failure to obey an instruction to remove an electrical plug from a wall socket, appeared at first to be a 'trifling incident',<sup>74</sup> the court found that it was serious enough to warrant dismissal. The court came to this conclusion after taking into account the fact that the employer had made it a strict instruction following a disastrous fire in one of its branches which had been attributed to a short-circuit.

Similarly in *MAWU & NDEBELE v S A TRACTION MANUFACTURERS*,<sup>75</sup> the employer had experienced problems with shop stewards wandering around the premises. Instructions had been given that they were not to do so without the permission of their supervisors, but despite this, the second applicant had returned an oversupply of washers to another department without permission to do so. The court, in assessing the seriousness of the failure to obey the instruction, found that dismissal was the only option open to the employer who had to try to '... eliminate the undermining of its authority ... the lack of which could have had a detrimental effect on employer/employee relationships'.<sup>76</sup>

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73. (1986) 7 ILJ 438.

74. At 439G.

75. (1984) ICD (1) 31.

76. At 32.

(h) Assault

This offence can take the form of actual assault, intimidation, horseplay or abusive language. The misconduct can constitute a serious offence in any of these forms since it disrupts the running and well-being of the business.

Proving the offence is often difficult especially in cases of alleged intimidation where there is usually an understandable reluctance to give evidence. In the other forms of the offence, there are also often disputes of fact due to exaggerations, and a lack of objectivity caused by heightened emotions. Where the alleged offence is not witnessed by other employees, one is faced with having one man's word against another's which is always a problem since, even if the assault is admitted, the defences raised are often either self-defence or provocation.

The problems an employer faces in proving the offences are of course alleviated to a certain extent by the fact that the Industrial Court does not apply the same test of proof as that required by the Criminal Courts. It is sufficient if the offence is proved on a balance of probabilities and if the employer had a 'bona-fide and reasonable belief'<sup>77</sup> that the

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77. NUM & ANOTHER v WESTERN AREAS GOLD MINING CO. (1985) 6 ILJ 380 at 388E. See too at 388 F-H where the court endorsed the 'common sense' approach adopted by the employer who had taken into account two previous assault charges even though the employee had been acquitted on both occasions. See, too, NUM & OTHERS v EAST RAND GOLD MINING AND URANIUM CO (1986) 7 ILJ 739 at 744H.

employee is guilty. Once proved, the offence of assault normally justifies dismissal provided the employer is consistent in his treatment of the employees involved<sup>78</sup>.

The substantive fairness of the dismissal will depend on a number of factors, including the degree of force used, whether the offence took place on or off the premises and whether employees of a different level or race were involved.

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78. See, for example, NUM & ANOTHER v KLOOF GOLD MINING CO LTD (1986) 7 ILJ 375 and NUM & OTHERS v DURBAN ROODEPOORT DEEP (1987) 8 ILJ 156. Contrast, though, MAWU & MAGUBANE v SA TRACTION MANUFACTURING (1984) ICD (1) 29 where the court found that the employee who caused the fracas should be dismissed.



In respect of the degree of force used, mere threats of assault are generally considered to be less serious than actual assaults<sup>79</sup>. In cases of intimidation, on the other hand, which usually involve no more than threats, the offence is obviously more serious because of the reason for the intimidation which is generally to get other employees to take part in industrial action<sup>80</sup>.

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79. In *NTSHANGASE v ALUSAF (PTY) LTD* (1984) 5 ILJ 336, Ehlers DP (as he then was) said 'whether summary dismissal could be justified where there had only been threats of assault appears to be questionable.' (at 342B)

80. In most cases dealing with intimidation, the failure of the courts to uphold the dismissals has been because the offence has not been adequately proved and not because the offence was considered insufficiently serious. See, for example, *NUM & OTHERS v TRANSVAAL NAVIGATION COLLIERIES & ESTATE CO* (1986) 7 ILJ 393; *SAAWU & OTHERS v DORBYL AUTOMOTIVE PRODUCTS (PTY) LTD* (1987) ICD (1) 520; *KEBENI & OTHERS v CEMENTILE PRODUCTS CISKEI (PTY) LTD & ANOTHER* (1987) 8 ILJ 442 and *MAWU & OTHERS v TRANSVAAL PRESSED NUTS BOLTS AND RIVETS (PTY) LTD* (1988) 9 ILJ 129 at 134A - 135E. See, too, *SAAWU and ANOTHER v EAST LONDON MUNICIPALITY*, an unreported judgement dated 7.12.87, in which the court upheld the dismissal.

In considering cases of assault off company premises, the court takes into account whether the assault did in fact take place off company premises<sup>81</sup> and, if it did, how the employment relationship is nevertheless affected. Thus, in *VAN ZYL v DUVHA OPENCAST SERVICES (PTY) LTD*<sup>82</sup>, although the assault was technically off company premises, the fact that the assaulted employee was the applicant's supervisor, led the court to decide that the dismissal of the subordinate was fair.

The fact that the assault does take place off the premises exacerbates the problem of proof which usually results in the employer seldom taking action in such cases.

Where assaults are made on superiors by their subordinates, the court sees it as an aggravating factor.<sup>83</sup> Similarly,

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81. See, for example, *NUM AND OTHERS v EAST RAND GOLD AND URANIUM CO* (1986) 7 ILJ 739, where the court found that employees who assaulted fellow-employees on a company-owned bus conveying them home were 'still within the scope of their employment'. (at 744 B-F) The court also made it clear that a dismissal could be justified where the assault took place outside the scope of employment, and referred with approval to English law which adopts the same approach (at 743 D-H).

82. (1988) 9 ILJ 904.

83. See, for example, *NTSHANGASE v ALUSAF (PTY) LTD* (1984) 5 ILJ 336 at 342C; *MAWU and OTHERS v FERALLOYS* (1987) 8 ILJ 124 at 137C and the *DUHVA* case referred to in the above footnote.

assaults on members of another racial group are also viewed more seriously. The court considers the wider implications of such an assault including the importance of having good race relations in the present climate of the country. It takes into account as well the greater chance which assaults of this nature have of causing industrial unrest<sup>84</sup>. The court views inter-racial friction in such a serious light that it has even upheld dismissals for racially abusive language. In *BEZUIDENHOUT v AFRICAN PRODUCTS (PTY) LTD*,<sup>85</sup> a white employee was dismissed for crossing out the word 'black', referring to a language on a vacancy notice, and replacing it with the word 'kaffir', which had resulted in a work-stoppage. The court found his dismissal to have been fair.

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84. See *KNOETZE v RUSTENBURG PLATINUM MINES* (1984) ICD (1) 23; *SAYSVNU EN 'N ANDER v ASEA ELECTRIC SA (PTY) LTD* (1988) 9 ILJ 463 and *WAHL v AECI LTD* (1983) 4 ILJ 298.

85. An unreported judgement dated 23.3.87 (Case No. NH 13/2/1714). See, too, *SWANEPOEL v AECI Ltd* (1984) 5 ILJ 41 and *UAMAWU AND OTHERS v FODENS (SA) (PTY) Ltd* (1983) 4 ILJ 212 at 235A where the court ruled it to be an unfair labour practice for an employer not to stop its managers and employees from using the word 'kaffir'.

### INCOMPATIBILITY

The court has relatively recently recognised that dismissal can be justified on the grounds of incompatibility. This separate category was first established in the case of STEVENSON v STERNS JEWELLERS (PTY) Ltd,<sup>86</sup> where the court distinguished it from misconduct and accepted that there had been fairly serious friction between the applicant, who had been appointed as Managing Director three weeks prior to his dismissal, and the respondent's Chairman and managers. This had apparently resulted from an 'incompatibility in their managerial philosophy and style.'<sup>87</sup>

That there had been friction was common cause although the applicant felt that the reason for this was that he was brought in as a 'new broom' who was expected to change the management structure and certain methods of operation. It was consequently inevitable that he would cause offence to some employees. The court accepted, however, that he had probably been warned to change his approach and when he did not do so, the respondent's action in the circumstances was not unfair.

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86. (1986) 7 ILJ 318. In an earlier case, RHODES v SA BIAS BINDING MANUFACTURERS (1985) 6 ILJ 106, the employee had been dismissed because, it was alleged, he had not 'fitted into the system of work' but it is not clear from the judgement what exactly was meant by this and whether the reason for the dismissal was true incompatibility.

87. In the terms of the respondent's counsel's submissions at 322 I.

In a further case<sup>88</sup> where this separate category of incompatibility was recognised, the court found that the employer had failed to prove that the employee was incompatible. In order to resolve certain difficulties which had arisen between himself and another employee whose duties appeared to have overlapped with his, the applicant had accepted a revised job description and was subsequently assured that his position was secure. The court found that following this and prior to his dismissal, the company had not proved that he had been warned about any alleged incompatibility or that his conduct was unacceptable to other employees. It is submitted that the court would probably have upheld the dismissal if it was proved that he had been warned.

It is clear from the facts of *G v K*<sup>89</sup> that the category has its limits. In this case, a female employee who had had an affair with a senior director was dismissed when the affair came to an end. In attempting to justify the dismissal, the respondent claimed that she worked 'too independently' and that she had an unwarranted 'air of superiority'. It had also tried to argue that its clients would be offended by her continued presence as they were 'conservative people with conservative moral views'.

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88. *LARCOMBE v NATAL NYLON INDUSTRIES (PTY) LTD*, PIETERMARITZBURG (1986) 7 ILJ 326.

89. (1988) 9 ILJ 314.

It was clear to the court, however, that the 'root cause' of the dismissal was the affair and the decision to terminate her employment was to spare the senior director and his family any embarrassment. This was obviously unfair and the court held that to find otherwise would '... be tantamount to rendering every female employee vulnerable and expendable once she had slept or cavorted with her employer.'<sup>90</sup>

One of the factors which the court took into account in deciding the dismissal was unfair, was that the parties had apparently worked out a solution two weeks prior to her dismissal which would have enabled her to stay on.<sup>91</sup> This apparently convinced the court that the parties could not have been so incompatible that dismissal was justified.

It is also clear that where a supervisor or manager has problems with his inter-personal relations with employees under his control because, for example, they belong to another race group, his dismissal would be fair where it is obvious that he would not be able to alter his prejudices.<sup>92</sup>

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90. At 316J.

91. At 315J - 316A.

92. See, for example, ERASMUS v BB BREAD LTD (1987) 8 ILJ 537 at 544B-E.

### INCAPACITY

An employer may, in certain circumstances, dismiss an employee for absence due to ill-health or injury. As already mentioned, his first task will be to establish whether the employee is truly incapable of doing the work he was employed to do or whether he is merely a malingerer. If the latter is the case it must be treated as misconduct. Proving the incapacity may involve having the employee examined by one or more medical practitioners including one of his own choice if he is dissatisfied with the findings of those to whom he has been referred.

Once the incapacity is established, the substantive fairness of the dismissal would depend on a number of factors. The severity and nature of the incapacity and the employee's prognosis would be important. Where the employee's condition makes him incapable of doing his normal duties but it is not so serious as to prevent him from doing any other job which may be available, it would be unfair of the employer to dismiss him instead of offering him the alternative position.<sup>93</sup>

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93. See, for example, *DLOKWENI v A* (1984) ICD (1) 16 in which the court found the dismissal of a driver, who was no longer able to drive due to an in operable cataract in his eye, to have been unfair because the employer did not consider the alternative of employing him as a car-washer. Where the injury or ill-health is caused by the employee's job, it could be argued that there would be more of an obligation on the employer to find him an alternative position.

The fairness of a dismissal would depend on the duration and frequency of the employee's past absence and the expected frequency of his future absence. It would also depend on how feasible it is for the employer to do without his services. The size of the business and the employee's dispensability will obviously also have a bearing on these considerations.<sup>94</sup>

While an employer is expected to exercise a reasonable degree of patience in providing the employee an opportunity to return to his duties, the court will take into account the employee's attempts to restore his condition to normal. Thus, in *NUM AND ANOTHER v THE VRYHEID RAILWAY COAL AND IRON CO LTD*,<sup>95</sup> where an underground worker had, due to an ear infection, become partially deaf thereby endangering his own safety as well as the safety of other employees, the court upheld his dismissal which had taken place some four months after he had developed the infection.<sup>96</sup>

In coming to this finding, the court took into account the unreasonable attitude of the employee who had rejected remedial treatment offered by the employer and had apparently made no attempt to arrange for treatment himself. From this, it also appears as if an employer may be expected to provide whatever assistance he can to enable the employee to return to work and where such assistance is lacking it may affect the fairness of the dismissal.

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94 See the article 'Really Sick or Only Tired' in *Employment Law* Vol 2 No. 3 AT 42.

95. (1986) 7 ILJ 587. See at 597 A-H.

96. See at 595 E-F and 597 E-F where the court referred approvingly to the employer's patient handling of the matter.



### INCOMPETENCE

An employer is expected to verify an employee's competence prior to his being engaged on a permanent basis. This is done during the process of selection when the employee's competence is rigorously checked by means of tests, interviews and the perusal of testimonials.

Where the employer is still not assured of the employee's competence after such a process, he may decide to offer him employment on a trial or probationary basis. An employment contract subject to such a condition is a good idea from the employer's point of view since it enables him to see for himself whether the employee can perform according to the required level of competence and whether he is capable of doing so over a reasonable period of time. If, at the end of the period,<sup>97</sup> he decides not to offer the employee permanent employment, he can do so without the risk of a claim of unfair dismissal.<sup>98</sup>

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97. In *BAWU & OTHERS v ONE RANER STEAK HOUSE* (1988) 9 ILJ 326, the court went even further when it found that the termination of the contract could take place before the end of the probationary period provided the employee was given the necessary notice.

98. The 1988 Amendments to the Labour Relations Act have now effectively entrenched probationary periods in almost all employment contracts by providing that the termination of a contract in the first six months of employment cannot be an unfair labour practice provided, in dismissals 'by reason of any disciplinary action', there is a fair procedure. In terminations 'on grounds other than disciplinary action', there will be no unfair labour practice as long as there is

Where the employee later proves to be less competent than initially believed, the employer is not expected to continue employing him indefinitely although it will be more difficult for him to prove the employee's incompetence.

The substantive fairness of a dismissal for incompetence is inextricably linked to its procedural fairness. Since, before dismissal for this reason can ever be substantively fair, the employee must have been warned about the areas in which his performance was below standard and of the possible consequences in the event of no improvement. This naturally also entails affording him an opportunity within which to improve,<sup>99</sup> as well as enabling him to attend a hearing at which any reason for the sub-standard performance may be advanced.

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98. (contd) compliance with 'any applicable agreement, wage regulating measure or contract of service'. See clauses (a)(i) and (b)(i) of the definition of an unfair labour practice as amended by s I(h) of Act No. 83 of 1988.

99. In respect of the need to give an opportunity to improve performance, our court has often referred with approval to the English case of JAMES v WALTHAM HOLY CROSS URBAN DISTRICT COUNCIL 1973 ICR 398 which contained the following passage: 'An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibilities or likelihood of dismissal on this ground and giving him an opportunity of improving his performance'. See STEVENSON v STERNS JEWELLERS (PTY) LTD (1986) 7 ILJ 318 AT 324F-I; MADAYI v TIMPSON BATA (PTY) LTD (1987) 8 ILJ 494 AT 497 B-D and SAAWU & OTHERS v ROQUE t/a TECHNIMOULD ICD 321.

Even where there is no doubt about an employee's work being below standard, his dismissal would nevertheless be unfair where it could be shown, for example, that any personal problem he was having were not taken into account. His dismissal would similarly be unfair if the poor performance was not entirely his fault but was due to, for instance, improper training or bad tools supplied by the employer. In such circumstances, the employer would be under an obligation to consider the reason carefully and help to rectify the cause of the problem before any decision to dismiss could be fair.<sup>100</sup>

Our court has unfortunately failed to provide consistent guidelines on this ground of dismissal.

In one of the first cases to come before the court in which alleged incompetence was involved, the court held that it would have expected the employee to<sup>101</sup> have been apprised of the the fact that he did not fit into the respondent's system in an effort to afford him the opportunity to improve prior to his employment being terminated.<sup>102</sup> In deciding that the dismissal was unfair, the court took into account that the employer did not indicate anything

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100. *BCAWU & ANOTHER v WEST RAND BRICK WORKS (PTY) LTD* (1984)5 ILJ 69 provides rather questionable authority for the view that the employer is obliged to do no more than offer to retrain the employee and where this is refused, his subsequent dismissal would not be unfair.

101. *RHODES v SA BIAS BINDING MANUFACTURERS (PTY) LTD* (1985) 6 ILJ 106.

102. AT 120 E - F.

specific as constituting a deficiency in the employee's performance.<sup>103</sup> It also considered, as proof of reasonable competence, the fact that the employee had been employed in a similar position by his previous employer for 28 years.

The need for a system of warnings and an opportunity to improve was again recognised in *MHLONGO v S A FABRICS LTD*<sup>104</sup> where the employee, after having received three warnings and being given a hearing, was found to have been fairly dismissed.

In *NODLELE v MOUNT NELSON HOTEL and ANOTHER*,<sup>105</sup> although it was clear that the employee had been warned about his poor performance, the dismissal was held to be unfair because he had not been given a hearing. Similarly, in *SAAWU and OTHERS v ROQUE t/a TECHNIMOULD*,<sup>106</sup> despite alleged counselling and warnings, the court found that the dismissal was unfair as there had been no hearing.<sup>107</sup>

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103. AT 120 F - G. See, too, *GWU and ANOTHER v DORBYL MARINE (PTY) LTD* (1985) 6 ILJ 52, where the fact that an employee had been employed for 6 years was an indication to the court that he was not incompetent.

104. (1985) 6 ILJ 248

105. (1984) 5 ILJ 216

106. (1986) ICD (1) 321

107. The court was also apparently not satisfied that the warnings, which were supposed to have been written on the employees' clock cards, were indeed given. See, too, *FBWU & ANOTHER v EAST RAND BOTTLING CO. (PTY) LTD* (1985) 6 ILJ 231, where the failure to hold a hearing rendered the dismissal unfair.

In ZUNGU v STRIP AND GASKET INDUSTRIES,<sup>108</sup> on the other hand, the court suprisingly found that no hearing was necessary and even considered it '...difficult to envisage what form of enquiry could be undertaken where the unsatisfactory nature of the applicant's work over several months, without improvement despite warnings, had led the employer to the conclusion that the applicant's services can no longer be retained'.<sup>109</sup>

This view was also referred to and, unfortunately, followed in MADAYI v TIMPSON BATA (PTY) LTD.<sup>110</sup> Also, in BAWU and OTHERS v ONE RANDER STEAK HOUSE,<sup>111</sup> the court found that if the dismissal of an employee on probation was substantively fair, there would be no obligation on the employer to hold a hearing.<sup>112</sup> The finding is anomalous for without a hearing, both the proof of the offence and the fairness of the decision are always open to some doubt.

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108. (1986) 7 ILJ 747

109. AT 749 B - C.

110. (1987) 8 ILJ 494 AT 497 D - H.

111. (1988) 9 ILJ 326.

112. In terms of the recent amendments to the Act, referred to above, this decision would probably no longer be correct. Now even probationary dismissals, for disciplinary reasons, must take place in compliance with a fair procedure.

### CONSTRUCTIVE DISMISSAL

The term unfair dismissal also encompasses the concept of constructive dismissal whereby the actions of the employer, either those which inadvertently repudiate implied terms of the contract making continued employment intolerable or those by which the employer intentionally repudiates any express terms of the contract, amount to the virtual dismissal of the employee.

An inadvertent repudiation could arise, for example, where an employer refuses to put a stop to the sexual harrassment of a female employee despite her complaints. Such refusal, it could be argued, would be a breach of an implied term of the employment contract, namely that an employee could expect to work without being harassed by fellow employees. It would make the female employees situation intolerable and her refusal to continue working under such conditions would be understandable. The use of vulgar language in the presence of female employees who had made it clear that they did not approve of such languages could similarly amount to a repudiation of an implied term of the contract. It would obviously depend on the circumstances as to whether or not certain terms could be said to be implied and, if this was alleged, whether this was reasonable. A male employee in an all-male environment in, say, a brick factory could hardly claim that that it was an implied term of his contract that he would not have to be exposed to vulgar language. The use of such language, one would think, would almost be a requirement in these circumstances! The use of abusive language, on the other hand, would not have to be tolerated and all employees could claim that it was an implied term of their contracts that they would not be verbally abused.

Where the employer is guilty of repudiating an express term of the contract, the matter is more simple. If an employer failed to pay

wages, for example, he could hardly expect his employees to remain in his employ and his action would clearly be tantamount to dismissing them.<sup>113</sup> An employer who failed to take the necessary precautions to protect his employees would similarly be seen to have constructively dismissed them, particularly where it had been brought to his attention that they were unhappy about the safety of their working conditions.<sup>114</sup>

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113. Even partial non-payment can amount to constructive dismissal. See, for example, the case of *SMALL & OTHERS v NOELLA CREATIONS (PTY) LTD* (1986) 7 ILJ 614 where the employer had made deductions from employees' remuneration to make up for stock shortages. The employees decided to resign rather than continue working under such conditions and were subsequently reinstated by the court.

114. The point is well illustrated in the English case of *KEYS v SHOEFAIRE LTD* (1978) I.R.L.R. 476 in which the employer's failure to protect his employees thereby exposing them to an unnecessary high risk of robberies which had led to the resignation of the applicant, was seen as a fundamental breach of the contract. See, too, the cases referred to at n 72 in which employees were dismissed for failing to carry out instructions jeopardizing their safety. Contrast this with *BCAWU & OTHERS v JOHNSON TILES (PTY) LTD* (1985) 6 ILJ 210 AT 218 D-E and 219 I.

A further example of a repudiation of express terms of contract which amounts to constructive dismissal arises in cases where an employer insists on altering the contractual nature of an employee's job without his consent and without good reason.<sup>115</sup> In *NTULI v NATAL OVERALL MANUFACTURING CO*,<sup>116</sup> a security guard had been instructed to carry out duties of an allegedly inferior and degrading nature as a result, she claimed, of being involved in certain union activities. She did the job for a week under protest and in the hope her employer would rectify the position when she refused to continue carrying out the duties and returned instead to her old job which she was contractually obliged to do, she was dismissed. The Industrial Court cited with approval *SMITH v CYCLE & MOTOR TRADE SUPPLY CO*.<sup>117</sup> in which it had been held that an employee, who is employed to perform certain agreed duties and is

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115. Where there is a valid reason for the alteration and it is offered, for example, as an alternative to retrenchment, the situation would clearly be different.

116. (1984) ICD. (1) 47

117. 1922 TPD 324. The case is also referred to in *HALGREEN v NATAL BUILDING SOCIETY* (1986) 7 ILJ 769 AT 775 I as authority for the existence of the concept of constructive dismissal in our law. In this case, however, the court found that the applicant had failed to prove an attempt by the respondent to reduce his status.



then ordered to carry out other duties of a more menial nature, could be humiliated by such action which would in some circumstances be tantamount to dismissal. The applicant was accordingly found to have been unfairly treated and she was reinstated. Had she not been dismissed and had she instead resigned, the court would presumably have applied the same principle and would have found that she had no reasonable option other than to resign. The employer's insistence that she do the more menial work would thus have amounted to her constructive dismissal.<sup>118</sup>

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118. See, however, the circumstances surrounding the third applicant's dismissal in *MAWU & OTHERS v TRANSVAAL PRESSED NUTS, BOLTS & RIVETS (PTY) LTD* (1988) 9 ILJ 129 AT 137-139 over his alleged inability to carry out the additional duties of a fellow employees who was on strike. The court rather surprisingly did not even query the fairness of these instructions and the possibility of constructive dismissal was not discussed at all. See further S Anderman The Law of Unfair Dismissal (Butterworths, 1985) AT 62 ff; T Poolman Principles of Unfair Labour Practice (Juta & Co, 1985) AT 158-9; Cameron et al The New Labour Relations Act (Juta & Co, 1989) AT 110 and 144 and *GWALA v QUALITY PIK & PAK* (1988) 9 ILJ 914.

## CHAPTER 6

### REINSTATEMENT AS A REMEDY

We have seen that the Industrial Court has established some fairly consistent guidelines in respect of what is required in order to be procedurally and substantively fair and in doing so it has successfully managed to restrict many employers from terminating contracts of employment arbitrarily. What happens though when the guidelines are not followed, when employees are dismissed unfairly? What remedy do they have to rectify this unfairness? In this chapter we shall focus on the remedy of reinstatement which is the most meaningful method of protecting job security.

Until fairly recently, the ordinary courts in South Africa refused to grant the remedy of specific performance in contracts of employment.<sup>1</sup> For more than fifty years, the view of INNES CJ in the Appellate Division case of SCHIERHOUT v THE MINISTER OF JUSTICE,<sup>2</sup>

"Now it is a well established rule of English law that the **only** remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages."<sup>3</sup>

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1. See BLISMAS v DARDAGAN 1951 (1) SA 140 AT 148H; ROBERTS CONSTRUCTION CO LTD v VERHOEF 1952 (2) SA 300 AT 305A; MYERS v ABRAMSON 1952 (3) SA 121 AT 125D; POUINET v RAMLAKAN 1961 (2) SA 163; NGWENYA v NATALSPRUIT BANTU SCHOOL BOARD 1965 (1) SA 692; GRUNDLING v BEYERS 1967 (2) SA 131 and MABASO v NEL'S MELKERY (Pty) Ltd 1979 (4) SA 358.

2. 1926 A.D. 99

3. AT 107

was referred to by the courts in refusing to grant the remedy.<sup>4</sup> Schierhout, of course, was not an ordinary servant. He was a civil servant whose employment was governed by the relevant statute. And therefore the above-mentioned dictum, so faithfully followed by our courts for so long without question, was obiter and should have had little effect on subsequent cases dealing with ordinary common law employees.

The Roman-Dutch writers seemed to support the principle of specific performance but only as far as the payment of wages was concerned<sup>5</sup>

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4. Prior to this, the same view had been taken. See, for example, INTERNATIONAL CORRESPONDENCE SCHOOLS LTD v ROBERTSON 1920 CTR 355; FARRINGTON v ARKIN 1921 CPD 268 at 289; HUNT v E.P. BOATING CO 1883-4 EDC 12 and DENNY v S.A. LOAN CO. LIMITED 1883-4 EDC 47.

5. See, for example, Voet ad Pandectas 19.2.27 and Lee in his translation of Grotius' Jurisprudence of Holland where, at 391 paragraph 13, he says 'a person who dismisses a servant within the period of service without lawful reason must pay the full wage.'

and not in the form of reinstatement.<sup>6</sup> In SPENCER v GOSTELOW,<sup>7</sup> however, Innes CJ questioned the weight which could be attached to these authorities as they were not based on any general principle of law but on the legislation, in the form of ordinances and general 'placaats' which, he held,<sup>8</sup> never formed part of our law.

The courts in South Africa therefore followed the approach adopted by English Law.<sup>9</sup> Although the English Equity Courts at one stage issued decrees of specific performance,<sup>10</sup> this practice was not followed.

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6. Although DE VILLIERS CJ in BASSARAMADOO v MORRIS 6 SC 28 relied on the above-mentioned text of VOET and VAN LEEUWEN'S Censura Forensis 1.4.22 para 11 as authorities for the master's right to force the servant to render the services owed, an order of this nature was never made in favour of an employee. See NGWENYA v NATALSPRUIT BANTU SCHOOL BOARD 1965 (1) SA 692 at 696, where Dowling J felt himself bound by the decision in SCHIERHOUT to disregard the principle set out by Grotius referred to in the footnote above.

7. 1920 AD 617 AT 628.

8. AT 631.

9. 'It may be taken that South African practice in regard to the remedy of an ordinary servant for wrongful dismissal is the same as the practice of the courts in England,' per INNES CJ in SCHIERHOUT v THE MINISTER OF JUSTICE 1926 AD 99 at 108.

10. See BALL v COGGS (1710) 1 Bro Parl CAS 140 (HL) and EAST INDIA COMPANY v VINCENT (1740) 2 ATK 83 both of which cases are cited by M.S.M. Brassey in his excellent article 'Specific Performance - A New Stage For Labour's Lost Love' (1981) 2 ILJ 57 AT 57.

A number of reasons have been advanced why an order of specific performance should not be granted in employment contracts.

The only reason based on legal principles is that known as the doctrine of automatic termination. According to the theory of "automatic termination", a breach or repudiation of an employment contract automatically terminates it, making it impossible for the non-defaulting party to enforce.<sup>11</sup>

The doctrine was finally rejected by the Appellate Division in STEWART WRIGHTSON (PTY) LTD v THORPE,<sup>12</sup> when it ruled that a breach of an employment contract, like any other contract, entitled the non-defaulting party the choice of either enforcing or terminating it<sup>13</sup>.

The other reason often advanced, apart from the above, is based on personal factors. How, the argument goes, can a man be expected to employ someone in whom he no longer has any trust or confidence?<sup>14</sup>

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11. See GRACIE v HULL BLYTHE AND CO. (SA) LTD 1931 CPD 539; ROGERS v DURBAN CORPORATION 1950 (1) SA 65 AND NGWENYA v NATALSPRUIT BANTU SCHOOL BOARD 1965 (1) SA 692.

12. 1977 (2) SA 943 (A) AT 952.

13. The court referred to VENTER v LIVNI 1950 (1) SA 524 and MYERS v ABRAMSON 1952 (3) SA 121 in reaching this finding.

14. Allied to this is the argument that the employee does not usually want reinstatement. While there may be some substance to this in other countries, it would hardly ever be true in South Africa where employment is so rife, particularly in respect of unskilled employees.

This was the basis of the above-mentioned view in SCHIERHOUT'S case as well as of the finding in *POUGNET v RAMLAKAN*<sup>15</sup>. The question of the employer's confidence in the employee in the latter case was seen as the decisive factor against an order of specific performance.<sup>16</sup>

The personal nature of the employment contract and the emphasis placed on trust and confidence has been exaggerated. There are many occasions when such factors, due to the size of the operation, the level of the employee and the nature of the offence, really have no bearing on the question of whether the employee should be reinstated or not. At one time they may indeed have been relevant but they are generally no longer so, particularly in large companies where there is always the alternative of transferring the employee. The number of employees in such organisations makes it difficult for the court to continue to be mindful of the employer's trust because there will inevitably be some employees whom he will either not know at all or in whom he will have no confidence.

Another reason given for not granting specific performance is that such an order would be contrary to the rule of mutuality which requires that no order can be made against the employer if it cannot

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15. 1961 (2) SA 163.

16. The court found that this would be the case even where the employer and employee would not come into contact since the employer would still be aware that in his employ was a man in whom he had lost confidence (AT 166F and 167H).

be made against the employee. Since courts would not consider ordering an employee to work for a certain employer against his wishes,<sup>17</sup> the rule prevents them from making the order in favour of the employee.<sup>18</sup>

A reason which, though never relied upon by our courts, has been considered<sup>19</sup> is that an order of specific performance is not necessary because an award of damages would be a sufficient remedy. The high rate of unemployment alone enables an appreciation of the lack of substance in this argument in South Africa today. We have also seen that the amount of a damages award is negligible in comparison to the value of a lifetime of income.

With this fairly imposing list of reasons against the granting of specific performance in employment contracts, how did our courts get around them to alleviate the devastating effect which this refusal had in practice?

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17. As O KAHN-FREUND says in 'Uses and Misuses of Comparative Law' (1974) 37 MLR 1 AT (24), such an order would 'savour of compulsory labour.'

18. See the recognition given to the reason in SCHIERHOUT v THE MINISTER OF JUSTICE 1926 AD 99 AT 107 and MYERS v ABRAMSON 1952 (3) SA 121 AT (127) where the court held that although there was no general bar to specific performance, it could not be granted in that case since it would not be in accordance with the rule of mutuality in that it was too late for the servant to perform his share of the bargain.

19. See FARMERS' CO-OPERATIVE SOCIETY v BERRY 1912 AD 319.

Firstly, a distinction was made between ordinary employees who were employed under common law and statutory employees whose conditions of service were governed by statute. Where the latter type of employee was dismissed in contravention of the provisions of the particular statute regulating his employment, the courts declared the dismissal a nullity and ordered it to be set aside,<sup>20</sup> the effect of which was that the employer had to fulfill his duties in terms of the contract. The employer would thus not have to reinstate the employee physically but he had to pay him his wages as long as the employee tendered his services.

In some cases, the courts went so far as to order reinstatement<sup>21</sup> although their ability to make such orders seems doubtful. In terms of an employment contract, the employer generally has no duty to provide work for the employee - he only has a duty to pay him.<sup>22</sup>

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20. See FARMERS' CO-OPERATIVE SOCIETY v BERRY 1912 AD 319; GUILDFORD v MINISTER OF RAILWAYS AND HARBOURS and UNION GOVERNMENT 1920 CPD 606; SCHIERHOUT v MINISTER OF JUSTICE 1926 AD 99; BRAMDAW v UNION GOVERNMENT 1931 NLR 57; ADMINISTRATOR, CAPE PROVINCE v XABANISA 1940 EDL 198 AND MPHELENE v MINISTER OF NATIVE AFFAIRS 1954 (4) SA 445.

21. See ROGERS v DURBAN CORPORATION 1950 (1) SA 65; VAN COLLER v THE ADMINISTRATOR, TRANSVAAL 1960 (1) SA 110 AND SOMERS v DIRECTOR OF INDIAN EDUCATION 1979 (4) SA 713.

22. See ETIENNE MUREINIK 'Invalid Dismissals : Reinstatement and Other Remedies' (1980) 1 ILJ 41 AT 44. The nature of the employment could, however, imply a duty to provide work. The employee may, for example, be a salesman who would have to work in order to earn a commission.



The statutory employee thus had a remedy which, though it was not true specific performance, was tantamount to it. In 1937 a limited version of this remedy became available to ordinary employees.

Innes CJ in SCHIERHOUT had distinguished between Crown, civil and ordinary servants. He placed civil servants midway between Crown servants, who could be dismissed at pleasure, and ordinary servants, whose length of service was governed by contract. The statutory protection given to civil servants, he said, was to restrict 'the power of the crown to dismiss its servants at pleasure'<sup>23</sup>. This protection consisted of legislation which entrenched the procedure by which he was to be dismissed. In 1937, the Industrial Conciliation Act<sup>24</sup> provided protection for employees, who were in all other respects ordinary employees, when the reason for their dismissal was trade union activity.<sup>25</sup> A dismissal for this reason could be nullified in the same way as a dismissal in breach of any regulated procedures could be. This enabled a full bench of the Transvaal Provincial Division<sup>26</sup> in ROOIBERG MINERALS DEVELOPMENT CO. LTD v DU TOIT, to hold that a dismissal in contravention of the section was void and had not ended the contract.

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23. AT 108

24. No. 36 OF 1937

25. In terms of S66 (1) (c)

26. 1953 (2) SA 505.

Although this judgement lasted for more than twenty years, the court in KUBHEKA v IMEXTRA (PTY) LTD<sup>27</sup> managed to destroy any of the benefit which had been derived from it. In this case, a single judge sitting in the same province ruled that a civil court had no jurisdiction either to reinstate workers or to declare their dismissals void, since the relevant Act<sup>28</sup> only allowed the criminal court to order the reinstatement of an employee once it had found the employer guilty of victimization.

As it happened, however, this unfortunate judgement was a relatively minor stumbling block in the way of the many attempts which were made to ensure that employees who were wrongfully dismissed would be granted the remedy of specific performance. We have already seen how STEWART WRIGHTSON<sup>29</sup> finally overturned the doctrine of automatic termination by holding that the general rule, that a party to a contract which has been breached could elect to hold the defaulting party to it, applied to employment contracts as well. This was confirmed in NUTW & OTHERS v STAG PACKINGS (PTY) LTD AND ANOTHER<sup>30</sup>.

The court in STAG PACKINGS made a further ruling which was to alter forever our court's general acceptance of the 'rule' in Schierhout that an ordinary employee's only remedy for wrongful dismissal was to claim damages.

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27. 1975 (4) SA 484

28. The now repealed Black Labour Relations Act No. 48 of 1953 (in terms of S 24 (2))

29. STEWART WRIGHTSON (PTY) LTD v THORPE 1977 (2) SA 943 (A).

30. 1982 (4) SA 151, (1982) 3 ILJ 285 AT 290G - 291A.

In examining the scope of the remedy of specific performance, the court found that it had a discretion whether to grant it or not<sup>31</sup> and relied on the Appellate Division case of HAYNES v KINGWILLIAMSTOWN MUNICIPALITY<sup>32</sup> as authority for this. It pointed out that Haynes had made no attempt to exclude ordinary employees when formulating the approach to the granting of specific performance and concluded that the discretion in respect of the remedy was 'equally applicable' to such employees.<sup>33</sup>

The court went on to suggest that the personal nature of the contract and the absence of mutuality, which were the reasons cited in SCHIERHOUT for the remedy having been abandoned, were facts which were 'weighty indeed and in the normal case ... might well be conclusive'<sup>34</sup> but it emphasised that they were only to be taken into account in the exercise of discretion. They were not legal principles.

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31. AT 290 A

32. 1951 (2) SA 371 AT 378 AND 379. The court also referred to DINER v DUBLIN 1962 (4) SA 36 AT 40 in terms of which a confidential relationship had been enforced as a result of the court finding it had a discretion to grant specific performance.

33. AT 292 D

34. AT 292 E-F

This approach has been confirmed by the Appellate Division in *BENSON v SA MUTUAL LIFE ASSURANCE SOCIETY*<sup>35</sup> in which the court found it had an absolute discretion to grant specific performance and that this was not to be restricted by any rigid rules<sup>36</sup>.

The employer's general aversion to reinstatement is at last changing. One of the main reasons for this has been the Industrial Court's power to grant the remedy in terms of both S43 and S46(9) of the Labour Relations Act.

Prior to the amendments<sup>37</sup> S43 enabled the court to 'cancel the suspension or to reinstate' an employee in a dispute concerning the suspension or termination of his employment contract.<sup>38</sup> The court was also empowered 'to restore the labour practices' which existed prior to the commission of an unfair labour practice in a dispute concerning an unfair labour practice.<sup>39</sup> Under S46(9) the court had to 'determine the unfair labour practice dispute as soon as

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35. 1986 (1) SA 776 (A)

36. See, too, *RANCH INTER-PARK LINES (TVL) (PTY) LTD v L.M.G. CONSTRUCTION CITY (PTY) LTD* 1984 (3) SA 861 AT878 I - 879 I; *MULTI TUBE SYSTEMS v PONTING & OTHERS* 1984 (3) SA 182 (D) AT 186; *TSHABALALA & OTHERS v MINISTER OF HEALTH & MAYEKISO v MINISTER OF HEALTH & WELFARE & OTHERS* (1986) 7 ILJ 227 AT 230 H - I.

37. In terms of the Labour Relations Amendment Act No. 83 of 1988

38. S43(1)(a) read with S43(4)(b)(i)

39. S43(1)(c) read with S43(4)(b)(iii)

possible.<sup>40</sup>

While the court's power to reinstate under S43 was express,<sup>41</sup> there was no similar express provision under S46(9). This gave rise to the argument that the legislature had thus obviously not intended the court to order reinstatement in determining the dispute under S46(9) but the argument has been rejected by the court on a number of occasions.<sup>42</sup>

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40. S46(9)(c). The provisions of sections 49 to 58, 62, 69 and 71 were to be applicable to any such determination. These sections were relevant insofar as they made the determination final and binding (S49(1)), a breach of which was a criminal offence (S53(1)). In terms of S49(3), the determination could also be made retrospective for six months.

41. Although the employer could avoid physical reinstatement by electing instead simply to pay an employee his remuneration in terms of S43(7).

42. See, for example, S.A. DIAMOND WORKERS' UNION v THE MASTER DIAMOND CUTTERS ASSOCIATION OF S.A. (1982) 3 ILJ 87 AT 111E- H; MAWU v FILPRO (PTY) LTD (1984) 5 ILJ 171 AT 178A-B; GUMEDE & OTHERS v RICHDENS (PTY) LTD T/A RICHDENS FOODLINER (1984) 5 ILJ 84 AT 94A; NUTW & OTHERS v SEA GIFT SURFWARE MANUFACTURERS (1985) 6 ILJ 391 AT 395F - 397H; SEAWUSA & OTHERS v TRIDENT STEEL (PTY) LTD (1986) 7 ILJ 418 AT 436I - 437A AND MAWU & OTHERS v NATAL DIE CASTING CO (PTY) LTD (1986) 7 ILJ 520 AT 545 H. See, too, the article 'Determining "Determine" : The Court's Power to Re-instate' in Employment Law Vol 3 No. 5 82.

The 1988 Amendments have altered the position and have placed the court's power to order reinstatement beyond any doubt. It is now empowered in terms of S43(4)(b)(v) to 'make such order as it deems reasonable in the circumstances',<sup>43</sup> and in terms of S46(9)(c), the court is required to 'determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation'.<sup>44</sup> That the Industrial Court now has the power to order reinstatement is beyond question. What remains to be seen is what the court takes into account in the exercise of its discretion in deciding whether or not to grant the remedy. The very different nature of the section 43 and section 46(9) applications and the difference between the former's status quo order and the latter's determination have had important effects on the exercise of its discretion. In exercising its discretion under section 43 prior of the September 1988 Amendments, the court could take into account any 'matters which it considered relevant'.<sup>45</sup> Now, in making 'such order as it deems reasonable in the circumstances',<sup>46</sup> the court is obliged to consider whether it would be 'expedient' to do so.<sup>47</sup> In deciding whether or not the

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43. The employer's option to pay the remuneration where reinstatement is ordered is retained in S43(7).

44. Section 47 has been added and section 69 has been omitted from those sections referred to in footnote 40 above which are to be applicable to the determination.

45. In terms of the old section 43(4)(b)

46. In terms of the new section 43(4)(b)

47. Section 43(4)(b)(v)

granting of an order of reinstatement would be expedient, it is likely that the court will continue to take into account the relevant matters which it did in the past and in weighing their relevance, will still make use of the interim interdict test of the 'balance of convenience.' The test compares the relative prejudice either party will suffer in the event of the relief either being granted or refused. The effect of this is that the employee generally gets the relief he is seeking at this stage as he is usually the party who will suffer more prejudice, all factors considered.

The difference between the effect of the section 43 status quo order and the section 46(9) determination has also had a significant bearing on the court's decisions. The status quo order is only a temporary one<sup>48</sup> with the employer having the added convenience of being able to elect simply to pay the employee and still comply with the order.<sup>49</sup> In addition, the employer is provided with a further 'safeguard against hardship'<sup>50</sup> in that the order is made only for limited periods, extensions of which may only be granted after the court has considered attempts made by the parties to settle the dispute.<sup>51</sup> The determination, on the other hand, entails not only

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48. Although in practice the losing party normally accepts defeat at this stage, the 'temporary' order thus effectively having permanent consequences.

49. In terms of section 43(7)

50. Per THIRION J in CONSOLIDATED FRAME COTTON CORPORATION LTD v PRESIDENT INDUSTRIAL COURT AND OTHERS (1985) 6 ILJ 7 AT 17H-I.

51. In terms of the proviso to section 43(6).

permanent reinstatement but actual physical reinstatement<sup>52</sup> as well, thereby fulfilling all the requirements of the employer's dreaded old bogey.

These differences between section 43 and section 46(9) in turn have a marked effect on the factors which the court takes into account in deciding whether or not to grant the relief sought. Consequently it often happens that certain factors which could sway the court against reinstatement at the section 46(9) stage could be considered irrelevant in a section 43 application. It also happens that factual disputes, which cannot be as easily clarified at section 43 as they can be at section 46 (9) due to the fact that the former application is argued on affidavit, may have a bearing on the court's decision. Various of the factors which the court has taken into account in assessing whether or not to grant reinstatement will now be examined.

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52. The Appellate Division, in CONSOLIDATED FRAME COTTON CORPORATION LTD v THE PRESIDENT INDUSTRIAL COURT AND OTHERS (1986) 7 ILJ 489, appears to accept that the natural and ordinary meaning of 'reinstate', in respect of someone who has been dismissed, is 'to put him back into the same job or position which he occupied before the dismissal, on the same terms and conditions' (AT 494D-E). The court further makes a distinction between this meaning and the meaning of 'reinstate' in section 43 (AT 495F).



### THE COURT'S DISCRETION

The Industrial Court's discretion, though wide, both in Section 43 and Section 46 applications, may be fettered to some extent by the "unfair labour practice" definition. The relevant portion of the definition identifies the employee's employment opportunities and work security,<sup>53</sup> the unfair disruption of the employer's business and the harmful effect on labour unrest and on the employment relationship as the limits within which the discretion is to be exercised.<sup>54</sup> The limits amount to a system of checks and balances which the court weighs up before making a decision and this, generally speaking, it has done fairly well.

The question of the employee's employment opportunities and work security has, except in one case,<sup>55</sup> hardly been considered by the court. In a country as beset by unemployment as ours, this omission is astonishing to say the least. The court often takes the factor into account in assessing in whose favour the balance of convenience

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53. Before the 1988 Amendments, a consideration of the employee's 'physical, economic, moral or sound welfare' was also required in terms of Clause (a)(i) of the old definition.

54. Section 1(0) of the Act. See Ada A H Ver Loren Van Themaat 'Re-instatement and Security of Employment - Part One : South Africa' (1989) 10 ILJ 205 AT 221.

55. That of SADWU v THE MASTER DIAMOND CUTTER'S ASSOCIATION OF S.A. (1982) 3 ILJ 87. See AT 117G - 118C

lies in interim reinstatement applications. At the Section 46(9) stage however, where the factor would be thought to be of far more relevance, with the employee otherwise facing the bleak prospect of almost certain unemployment, it has not done so.

The extent to which an order of reinstatement would unfairly affect the employer's business has been considered on several occasions, with varying results.

Where a period of time has elapsed between the date of dismissal and the date on which the court makes its order, which is inevitably the case in Section 46(9) hearings, the duration of the period and the extent to which the enterprise has returned to normal, are factors taken into account by the court. In *SEAWUSA and OTHERS v TRIDENT STEEL (PTY) LTD*<sup>56</sup> the court, in making its determination, decided that an order of reinstatement fifteen months after the re-employment of the rest of the workforce would have been too disruptive.<sup>57</sup> The 35 applicants were consequently awarded six months wages as compensation for their unfair dismissals. This reasoning was approved of and followed in *MAWU and OTHERS v TRANSVAAL PRESSED NUTS, BOLTS AND RIVETS (PTY) LTD*<sup>58</sup> where the period after the dismissals ranged from twenty to twenty-four months.

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56. (1986) 7 ILJ 418

57. AT 437 H-I

58. (1988) 9 ILJ 129 AT 144 H-145 A. See, too, the recognition given to the disruptive potential of such an order in *KHUMALO & OTHERS v MILLBURG PAINTING CONTRACTORS (PTY) LTD* (1988) 9 ILJ 338 AT 340 I.

The effect of the section 43 order can never be as disruptive since it is usually made fairly soon after the dismissal, it is temporary in nature and it does not have to entail physical reinstatement.<sup>59</sup> This last mentioned factor has been taken into account in a number of cases where the court as a result exercised its discretion in favour of the employees.<sup>60</sup>

It has also, rather surprisingly, been held to be too disruptive to reinstate employees on the ground that their positions have been filled. Although the court in one case criticised the employer for having done so, particularly when the dismissed employees' intentions to be reinstated were known, it nevertheless took the factor into account before ordering their reinstatement.<sup>61</sup> In the well known case of MAWU AND OTHERS v BTR SARMCOL,<sup>62</sup> the employees applying for reinstatement were not so fortunate. The court decided that it could not only consider the position of the dismissed employees. Having been given the task of maintaining good labour, it considered itself bound "to have regard to the present work-force who stepped into the breach to save the Company from bankruptcy some

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59. In terms of Section 43(7)

60. See, for example, MAWU v HENDLER AND HENDLER (1985) ILJ 362 AT 368 E-F; ROBBERTZE v MATTHEW RUSTENBURG REFINERIES (WADEVILLE) (1986) 7 ILJ 64 AT 71B-G AND BASODTWU v HOMEGAS (1986) 7 ILJ 411 AT 417 D-F.

61. MAINE v AFRICAN CABLES (1985) 6 ILJ 234 AT 245 C-F

62. (1987)8 ILJ 815

of them suffering great personal loss in the process."<sup>63</sup> The court went on to find that reinstatement would not be fair as it would have the effect of "ousting" people who were "innocent"<sup>64</sup> to the dispute notwithstanding the fact that most of those ousted by the Company had been employed on average for seventeen years.<sup>65</sup>

The argument that the effect of the order would seriously disrupt the employer's economic viability, has had mixed success. The Appellate Division, in CONSOLIDATED FRAME COTTON CORPORATION LTD v THE PRESIDENT OF THE INDUSTRIAL COURT<sup>66</sup> recognised that the Industrial Court had the power to make orders which may indeed have such far-reaching consequences but went on to presume that the legislature must have intended the power to be exercised 'reasonably and equitably, and with due regard to the interests not only of employees but also of the employers'<sup>67</sup>. It has been seen how the weight given to the argument by the court has been largely dependent upon whether the finding was a status quo order or a determination. In the former instance the argument has had little sway, with the court in one case granting the order even though the respondent company had already been liquidated.<sup>68</sup> Similarly, in BASODTWU AND

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63. AT 839 F-G

64. AT 839 G-H

65. See AT 818 I-J

66. (1986) 7 ILJ 489

67. AT 495 D-E

68. MAWU v G & H ERECTORS (1985) ICD (1) 28 AT 29.

ANOTHER V HOMEGAS,<sup>69</sup> the contention that an order would so seriously affect the respondent's business that it would probably have had to close down one of its operations would, the court held, have been an important factor in respect of a determination but not in respect of a status quo order.<sup>70</sup> In SAAWU & OTHERS v DORBYL AUTOMOTIVE PRODUCTS (PTY) LTD<sup>71</sup> however, where a similar contention was raised, the court questioned why the same approach as that adopted in the HOMEGAS case should not also apply to section 46(9) proceedings,<sup>72</sup> and in its determination reinstated the employees.

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69. (1986) 7 ILJ 411 AT 417 D-F.

70. Contrast this with G.W.U. & OTHERS v AFRICAN SPUN CONCRETE CO. (PTY) LTD (1986) 7 ILJ 35 AT 39 A-B, where the court in deciding against reinstatement, took into account and accepted the respondent company's contention that a reinstatement order could financially cripple it, even though it was only a status quo order.

71. (1988) 9 ILJ 680 AT 689 B.

72. AT 689 B. See, too, KOMPECHA v BITE MY SAUSAGE. C.C. (1988) 9 ILJ 1077 AT 1083 G-1084 D and FAWU v OTHERS v AMEENS FOOD PRODUCTS & BUTCHERY (1988) 9 ILJ 659 AT 671 F-G where the court did not accept the employer's alleged inability to afford to reinstate employees and consequently ordered their reinstatement under S 46 (9).

Another factor taken into account by the court as having a possible disruptive effect is whether or not an order of reinstatement would undermine management authority. In *FIHLA & OTHERS v PEST CONTROL TVL (PTY) LTD*,<sup>73</sup> the court said "There is much more at stake for an employer than his ability to pay the wages. A reinstatement order, even if only of temporary nature, is a serious invasion of the managerial prerogative of an employer, and could undermine his authority and frustrate enforcement of discipline."<sup>74</sup> But in *NODLELE v MOUNT NELSON HOTEL*<sup>75</sup> in response to the employer's argument that reinstatement could persuade the applicant's fellow waiters that they would get away with poor service in future, the court realistically held that it could not accept that its judgement would be regarded as a licence to disobey the hotel's work procedures.<sup>76</sup>

A further factor taken into account by the court is what effect an order of reinstatement would have on labour unrest. Since one of the most important objectives of the Labour Relations Act is to reduce strife in the workplace, it would be expected that the factor would be an important one. Before the court is swayed by the argument however, it must be satisfied that there is a very real prospect that reinstatement would lead to unrest. Where this would not be the case, in Section 43 orders for example where the employer

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73. (1984) 5 ILJ 165

74. AT 169

75. (1984) 5 ILJ 216

76. AT 226 H-I. See, too, *NGOBENI & OTHERS v VETSAK (CO-OP) LTD* (1984) 5 ILJ 205 AT 214 F-G, where the argument also failed to impress the court.

is not obliged to reinstate the employee physically, the court has been quick to refer the employer to such right in granting the order.<sup>77</sup>

The court has even in one case been reluctant to accept the argument where the reinstatement would be physical. In NTULI & OTHERS v LITEMASTER PRODUCTS LTD<sup>78</sup>, where the employer had argued that reinstatement would have the effect of making labour relations in the factory untenable and would jeopardise his financial viability, the court held that it was,

".... not a principle of our law that a court should deny relief to a litigant who is entitled to such relief, purely upon the ground that it may or will cause embarrassment, or financial or economic hardship to the opposite party."<sup>79</sup>

Allied to this factor is another which the court considers in its discretion and that is whether or not an order of reinstatement could have the effect of making the parties more amenable to conciliation. Settling disputes is, of course, another of the Act's

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77. See, for example, ROBBERTZE v MATTHEW RUSTENBURG REFINERIES (WADEVILLE) (1986) 7 ILJ 64 AT 71B, where fears that reinstatement would spark off industrial action, and MAWU & ANOTHER v HENDLER & HENDLER (PTY) LTD (1985) 6 ILJ 362 AT 368E, where alleged intimidation and threats by the rival union did not preclude the court from granting the orders.

78. (1985) 6 ILJ 508

79. AT 519E

objectives and where there is any likelihood that an order could have this effect, the court rules accordingly. In *GOVENDER v KAISER-KRONE*<sup>80</sup>, despite an alleged breakdown between the applicant and the respondent's director, the court nevertheless found that there were,

".... prospects of conciliation in the sense of a settlement of the dispute on a businesslike basis, reached after honest, if hard negotiation, on terms acceptable to both parties which need have no effect at all on other aspects of their past or future relationship."<sup>81</sup>

What effect reinstatement would have on the employment relationship is still one of the most important factors taken into account. Due to the differences of the effect of the court's order under section 43 and its determination under section 46(9), the factor does not weigh as heavily on the court in cases brought under the former section.

The factor is, of course, the same as that which was most often advanced by our ordinary courts when they decided against ordering specific performance of employment contracts. The difference, however, is that the Industrial Court does not merely accept it as a foregone conclusion that reinstatement would detrimentally affect every employment relationship and the court generally examines the circumstances of each case in deciding whether or not reinstatement would be appropriate.

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80. (1987) I.C.D. (1) 347

81. AT 349. See, too, *MDLALOSE v I E LAHER & SONS (PTY) LTD* (1985) 6 ILJ 350 AT 360C and *FAWU & OTHERS v AMEENS FOOD PRODUCTS & BUTCHERY* (1988) 9 ILJ 659 AT 671 F-G



In doing so, the court considers a number of facts. The degree of acrimony between the parties, the level of the employee, the size of the undertaking and the nature of the offence are all relevant considerations. Where senior employees are concerned, the degree of acrimony between the parties is often a decisive factor. The court appears to recognise that respect, trust and understanding are usually as vital to a good working relationship at this level as they are to any other close relationship and it has appreciated that it cannot order senior employees to work together where there would be a lack of trust and harmony.<sup>82</sup> The court is cautious however and must be convinced that there is incompatibility between the parties before it refuses to grant reinstatement for this reason.<sup>83</sup>

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82. See STEVENSON v STERNS JEWELLERS (PTY) LTD (1986) 7 ILJ 318 AT 325 C - E. The applicant in this case had been appointed as the Managing Director of the Respondent for a period of three weeks at the time of his dismissal. See too CLARKE v NINIAN AND LESTER (PTY) LTD (1988) 9 ILJ 651 AT 658 E - F where the court decided that an order of compensation was more appropriate due to the friction which had arisen between the parties after the dismissal. Compare this to the case of MAFALALA v DERBERS (PTY) LTD (1987) ICD (1) 627 in which the applicant, a fabric presser, had been employed for seventeen years. From this the court drew the conclusion that the level of acrimony, if there was any at all, was not likely to prevent a good working relationship from being re-established (AT 629).

83. See, for example LARCOMBE v NATAL NYLON INDUSTRIES (PTY) LTD (1986) 7 ILJ 326.

The existence of acrimony between the parties would not be as significant where the applicant was a low-level employee or where the enterprise was large enough to ensure that he would not come into contact with those with whom conflict was likely.<sup>84</sup>

The position is different where the business is a small concern where close contact is inevitable. Where the application is brought under section 43, this factor is normally considered to be irrelevant,<sup>85</sup> but where the matter is before the court under section 46(9), the consideration is often a vital one. Thus, in CCAWUSA AND ANOTHER v WOOLTRU LTD T/A WOOLWORTHS,<sup>86</sup> even though the dismissal was seen as substantively unfair, the employee was refused reinstatement. The reason for this, the court held, was due to the fact that the acrimonious parties would have to work in close contact and this would lead to tension in the workplace. The court

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84. Although see BCAWU AND ANOTHER v WEST RAND BRICK WORKS (1984) 5 ILJ 69 AT 81 I - 82 D.

85. See BASODTWU AND ANOTHER v HOMEGAS (PTY) LTD (1986) 7 ILJ 411 AT 417 F - G. See too GOVENDER v KAISER-KRONE (1987) ICD (1) 347 AT 349 where the court did not consider that the employer would even have to resort to section 43(7) due to the 'separateness' of the two working areas concerned.

86. (1989) 10 ILJ 311 AT 319 D - G. See, too, KOMPECHA v BITE MY SAUSAGE C.C. (1988) 9 ILJ 1077 AT 1083 D - G where the court, in deciding the nature of relief to be afforded, took into account the fact that the employer's business only had five employees who had to work closely together. The court also found that the employer-employee relationship had been badly affected by the whole incident and this ruled out reinstatement as a remedy.

has also decided against reinstatement where there has been a history of instructions being ignored and of other ill-disciplined action.<sup>87</sup>

A factor intrinsic to the effect reinstatement may have on the employment relationship is the nature of the offence. In the same way that the consideration may affect the fairness of the dismissal itself, so too is it taken into account in determining how appropriate the remedy of reinstatement would be. The court has accordingly held, in a case involving fraud, that the employers' loss of trust in the employee had possibly led to an irretrievable breakdown of the relationship and this made the remedy of reinstatement inappropriate in the circumstances.<sup>88</sup>

Now that the Industrial Court undoubtedly has the power to order reinstatement, there has regrettably been a disturbing trend recently for awards of compensation to be ordered instead. Such awards are in some cases obviously more appropriate<sup>89</sup> and in

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87. See *SACWU AND OTHERS v C.E. INDUSTRIAL (PTY) LTD T/A PANVET* (1988) 9 ILJ 639 AT 650 F - H.

88. *HLALUTYANA v NABE BAZAAR* (1987) ICD (1) 351 AT 352.

89. The legislature of course recognised that there was a place for awards of compensation and made express provision for them in both S43 and S46(9). Where the employee, for example, makes it clear that reinstatement is not being sought, it would be absurd to make such an order. The use of an award of this nature was also approved of by the International Labour Organisation in paragraph 2(6) of Recommendation No. 119 of 1963 which did stipulate though that the compensation had to be "adequate".

others are made only after the court has exercised its discretion and has seriously considered some of the above-mentioned factors in deciding against reinstatement. There have been instances however, where the rejection by the court of reinstatement as a remedy has been inexplicable. Examples of this failure shall be dealt with below.

In discussing the appropriateness of the remedy, it is necessary to draw a distinction between cases where the employer has only been procedurally unfair and those in which he has also been substantively unfair.

The court in *NAAWU v PRETORIA PRECISION CASTINGS*<sup>90</sup> failed to draw this distinction and accordingly ended up making a rather extreme and unfair finding. Notwithstanding the fact that there was no doubt whatsoever about the substantive fairness of the dismissal,<sup>91</sup> the employee was permanently reinstated as a result of the employer's failure to hold a hearing. In a criticism of the decision, Brassey<sup>92</sup> correctly, it is submitted, points out that the court erred, inter alia, in regarding reinstatement as the 'automatic consequence' of procedural unfairness. Clearly, an award of compensation would have been more appropriate in the circumstances or, as Brassey suggests,<sup>93</sup> the court could have made

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90. (1985) 6 ILJ 369.

91. The presiding officer having been 'satisfied that .... (the employer) was entitled to dismiss his employee.' (at 376D-E).

92. Brassey et al The New Labour Law (Juta & Co, 1987) 87-88.

93. Ibid at 88.

the reinstatement last until the employee had been heard.<sup>94</sup>

The court has, however, generally recognised the differing effects which procedural and substantive unfairness should have on the type of order to be made and where it is satisfied that a dismissal is substantively fair it has normally granted compensation as a more appropriate remedy.<sup>95</sup> What is to be emphasised is that the court

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94. This would have rectified the presiding officer's valid concern about the need to distinguish between guilt and sanction in hearings (at 379 H). See, for example, *MAWU & OTHERS v FERALLOYS* (1987) 8 ILJ 124 where the court appreciated that its reinstatement order would not deprive the employer of the right to dismiss in the event of evidence of the alleged offence being obtained. Contrast the curious order made by the court in *MAWU & OTHERS v SIEMENS LTD* (1986) 7 ILJ 547 in which the court merely directed the employer to hold an enquiry to remedy the unfair labour practice resulting from its failure to do so initially. At the same time, however, the applicants were not reinstated.

95. See, for example, *EAU v REYROLLE PARSONS OF SA* (1986) 7 ILJ 509; *CCAWUSA & OTHERS v RONDALIA VAKANSIE-OORDE BPK T/A BUFFELSPPOORT VAKANSIE-OORD* (1988) 9 ILJ 871; *TGWU & ANOTHER v INTERSTATE BUS LINES (PTY) LTD* (1988) 9 ILJ 877 and *KOMPECHA v BITE MY SAUSAGE C.C.* (1988) 9 ILJ 1077. Private arbitrators in South Africa have apparently also endorsed the principle that procedural unfairness is more appropriately remedied by compensation. See C O'Regan 'The Development of Private Labour Arbitration in South Africa - A Review of the Arbitration Awards' (1989) 10 ILJ 557 AT 571. What remains to be said is

must be satisfied with the merits of the employer's case before it can reject the use of reinstatement as the remedy. There are, of course, occasions where it is not possible to decide on substantive fairness due to the procedural lapse<sup>96</sup> and if this is the case, compensation is clearly not appropriate. In such circumstances, reinstatement is the better remedy, even if it does last only so long as the substantive fairness takes to be established. It may after all so happen that in rectifying the lapse, the employer could come to realise that the dismissal was not substantively fair in which event the employee would of course retain his job.

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95. (contd) that the awards made by the court would scarcely act as deterrents to unscrupulous employers. In the above cases, they ranged from one week to four weeks which would hardly meet the I.L.O.'s recommendation that compensation should be "adequate".

96. However, see *ROSTOLL EN 'N ANDER v LEEUPOORT MINERALE BRON* (1987) 8 ILJ 366 where the court after rejecting the approach used in the English case of *BRITISH LABOUR PUMP CO v BYRNE* (1979) IRLR 94 (EAT), proceeded to apply it to overcome the obstacle of uncertainty on the merits. Having satisfied itself that the reasonable employer would have dismissed the applicant, the court refused to order even temporary reinstatement and the employee went away with nothing in the face of glaring procedural (and possibly even substantive) unfairness.

While it is generally accepted, then, that procedural unfairness should not as a matter of course be remedied by means of reinstatement, there have recently been a number of instances in which the court has rejected the remedy even though it has been satisfied that the dismissal was substantively unfair as well. In doing so, the court has in some cases not even justified its refusal on the basis of its discretionary powers and the reasoning behind the denial of reinstatement has been very dubious.

In ACTWUSA & OTHERS v AFRICAN HIDE TRADING CORPORATION (PTY) LTD,<sup>97</sup> for example, the court found that the dismissals were substantively unfair and that the sanction of dismissal had been wrong<sup>98</sup> but it nevertheless refused to reinstate the applicants. The reason for this, it said, was because the 'applicants had scraped home virtually by the skin of their teeth as to substantive fairness.'<sup>99</sup> The court's reasoning is clearly faulty particularly in view of the it's earlier insistence that the dismissals were substantively unfair and that dismissal was the wrong penalty.

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97. (1989) 10 ILJ 475

98. AT 479 H-I. The court rather surprisingly also found that although the enquiries were fair, the dismissals were also procedurally unfair in that the sanction applied was wrong!

99. AT 479J

Where the court went wrong, it is submitted, was in introducing the degree of substantive fairness into the question of deciding on the appropriate remedy. There are always, of course, degrees of fairness and fairness is itself a relative concept but such degrees weigh upon the substantive fairness or otherwise of the dismissal. They should never be taken into account in deciding what remedy should be adopted.

In considering what the appropriate remedy should be, the court also took into account the fact that the dismissals had been the result of a 'political' stay-away. This, it seems, was the real reason for the court's reluctance to grant the remedy of reinstatement, for it had emphasised that it could not condone such action which it saw as serving 'no .... purpose, apart from disrupting the country's economy and causing employers irreparable financial loss'.<sup>100</sup> The reasoning is again bad as this is a factor which impacts not on what remedy should be granted but on the question of substantive fairness itself. As we have seen, the court had had no hesitation in finding that the dismissals were substantively unfair. It is indeed unfortunate and distressing that the court itself should have adopted such a political stance so weighted in favour of employers, particularly at this point in time when its credibility with Unions is already tenuous.

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100. AT 478 J - 479 A. Contrast this with the fairer and far more realistic approach adopted in *BASODTWU & ANOTHER v HOMEGAS (PTY) LTD* (1986) 7 ILJ 411 and *SALDCDAWU & OTHERS v ADVANCE LAUNDRIES T/A STORK NAPKINS* (1985) 6 ILJ 544 (the cases are dealt with under the heading 'Absence from Work' in Chapter 5 above).



In *SACWU & OTHERS v TOILETPAK MANUFACTURERS (PTY) LTD & OTHERS*<sup>101</sup> the court's denial of reinstatement was even worse. It again made no attempt to justify its refusal in terms of its exercise of discretion and it provided no reason for not reinstating the employee. Instead, it simply decided against reinstatement and found that compensation would be more 'feasible and appropriate'.<sup>102</sup>

Although it did say that it had reached this decision 'after having regard to the circumstances of the case',<sup>103</sup> this merely serves to aggravate the matter for the case involved such gross unfairness that one can only conclude that the court could not have had very serious regard to the circumstances.

The case involved the transfer of business from one company to another as a result of industrial unrest caused by retrenchments. The remaining employees' services were dispensed with on the closure of the former company and this was followed by the selective re-employment of some of them.

The court found that the retrenchments had been unfair and it saw the transfer of the business as a ruse by the employer to get rid of his employees. Even where a transfer was genuine, the court said it would expect the employer to 'consider the interests of the workforce as human beings who have families to support'.<sup>104</sup> The

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101. (1988) 9 ILJ 295

102. AT 307 H - I

103. IBID

104. AT 305 G-H

resultant termination of their employment could not be justified on the basis of retrenchment since none of the guidelines had been followed<sup>105</sup> and nor could it be justified on the basis of dismissal for misconduct since there was no evidence of this.<sup>106</sup> The court also found that the employer had further compounded the issue by selectively re-employing several employees. The employer, it can be said, could not have acted more unfairly if he had tried.

Despite these being the circumstances of the case however, the court nevertheless felt that a monetary determination would be more appropriate. Almost aggravating the unfairness suffered by the employees it awarded them paltry sums ranging between R220 and R580.<sup>107</sup> Unscrupulous labour practices, it seems, have never come cheaper.

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105. AT 305 A-B

106. AT 306 D-E

107. Had the individual applicants' applications not been financed by their Union, the amounts awarded would undoubtedly not even have covered their legal costs. They would have been not only unemployed but out of pocket as well and this in a case where the employer had by all accounts been grossly unfair.

In another case in which the dismissals were found to have been both procedurally and substantively unfair, the court refused reinstatement after a questionable exercise of its discretion. In *SACWU & OTHERS v C.E. INDUSTRIAL (PTY) LTD T/A PANVET*,<sup>108</sup> the remedy was denied due to a 'deliberate ignoring of instructions and other ill-disciplined actions'<sup>109</sup> on the part of the individual applicants. Such behaviour, it is submitted, should have been the subject of disciplinary enquiries at the time which could have focused on the individuals responsible for the alleged offences. They then would have been disciplined accordingly, had the breaches been established. But for the court to take them into account as a factor justifying the refusal of reinstatement to all employees was clearly unsatisfactory. The court also took an impending retrenchment into account as a factor which it felt, would not make reinstatement 'fair to the employer.'<sup>110</sup>

The award made by the court in this case was again negligible, with employees being given the equivalent of ten week's wages. *Ver Loren Van Themaat* suggests that even the six month retrospective award provided for in the Act<sup>111</sup> bears 'no proportionality to the loss which a worker experiences when he is unjustly deprived of his

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108. (1988) 9 ILJ 639

109. AT 650 F-G

110 AT 650 G-H

111. In terms of S49 (3) (b).

employment.<sup>112</sup> He goes on to argue that the wording in the relevant provisions should be interpreted to limit the award to six months only retrospectively. It places no limit on the award's future validity and such an unrestricted order, he says, would be more appropriate.

It is however unlikely that the court would ever make such an order<sup>113</sup> which would not in any event be as preferable as an order of reinstatement. In cases involving substantive unfairness, the court should be very wary of granting compensation and should instead, wherever possible, award reinstatement. Where it cannot do so and where there are good reasons for rejecting the award, these must be spelt out by the court.

Reinstatement is, after all, the best way to rectify the devastating consequences of unfair dismissal. It has been recognised in a general survey by the I.L.O.'s Committee of Experts<sup>114</sup> to be the most effective way to protect job security and, where alternative employment is scarce, it is seen to be the 'only truly satisfactory means of redress.'<sup>115</sup>

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112. Ada A H Ver Loren Van Themaat 'Reinstatement and Security of Employment - Part One : South Africa' (1989) 10 ILJ 205 AT 225.

113. See the views expressed by the Industrial Court in *SEAWUSA v TRIDENT STEEL (PTY) LTD* (1986) 7 ILJ 418 AT 438A and by the Supreme Court when the matter was taken on review in *TRIDENT STEEL (PTY) LTD v JOHN NO* (1987) 8 ILJ 27 (T) AT 33B. Both cases are cited by Ver Loren Themaat, *ibid*.

114. See E Yemin 'Job Security : Influence of ILO Standards and Recent Trends' *International Labour Review*, Vol 113, No. 1, January-February 1976, 17 AT 28.

115. By Yemin, *ibid*.

## CONCLUSION

We have looked at the position in South Africa prior to the introduction of the concept of unfair dismissal and we have seen what inadequate protection employees were afforded when their contracts were terminated. The most the employer was obliged to do in order to terminate the employment was to give the employee notice in terms of the contract. This notice ranged between one week to a month but could have been as little as one day. Where the employee was guilty of a breach of the contract, he could be dismissed immediately and the employer would not be obliged to comply with the notice provision. Where the employee could prove that he had not breached the contract and that his dismissal had been wrongful, his only remedy was a claim for damages.

The decision to dismiss was in all cases the employer's and there was seldom any question, other than in a few statutorily defined situations, of taking the employee's version of events into account. So, whether the employee was dismissed summarily, given notice or successful in a claim for damages, he obviously had very little protection for the loss of a job which could have provided income for a lifetime. We saw, as a consequence, that there was a growing appreciation and acceptance of the importance of job security.

We then looked at how this led to the idea that an employee should not be dismissed unless there was a good reason for the dismissal and we saw that it was up to the employer to justify this by showing that he had acted fairly. The concept of fairness is obviously extremely wide and at times it is almost nebulous. But it does have limits and it is made more definite as a yardstick in the sphere of dismissal by being broken down into procedural and substantive aspects.

We have seen that procedural fairness basically requires that an employee is given a fair hearing, that he is warned where the breach is not so gross that it justifies dismissal and that he has the right to appeal against his dismissal if he so wishes. We looked at substantive fairness and saw that in the view of the Industrial Court, various acts of misconduct, incapacity as a result of ill health, incompetence and incompatibility could under certain circumstances constitute fair and valid reasons for dismissal. The Industrial Court has, it can be said, developed some quite consistent guidelines in this regard and has managed to define, as far as this is possible, fairly well what it considers to be substantively fair in respect of the termination of employment.

This then brought us to the point where we could examine the use of the remedy of reinstatement. We found that it was a vital factor in the whole concept of unfair dismissal and one which gave real meaning to the protection of job security. Without it, the requirements of procedural and substantive fairness become meaningless. We have seen that although there was originally confusion in the minds of some as to whether the Legislature ever intended the court to have the power to order permanent and physical reinstatement, there is now no longer any doubt about this. The Court has regrettably not always exercised this power as it could have done.

Where there is procedural unfairness, the court has, correctly it is submitted, tended to recognise that reinstatement may not always be an appropriate remedy. But where a dismissal is substantively unfair, the granting of the remedy in almost all cases should be unquestioned. Where the reinstatement is not physical and is ordered in terms of the status quo provisions of the Labour Relations Act, there has been little hesitation on the part of the court to make the order. But where the reinstatement is physical, with an employee having to be thrust onto an unwilling employer, the court has at times shown a reluctance to make the order. While it

is appreciated that the court has a discretion and that reinstatement cannot be granted in each and every case in which there has been substantive unfairness, it is submitted that the remedy should only be refused where there are extremely good reasons for such refusal. Naturally the importance of job security has to be weighed against the employer's interests and there will be cases in which these interests will make it difficult for the court to grant reinstatement, but it will always be essential for the court to explain and motivate exactly why it is rejecting the remedy.

The court must be mindful of the fact that one of the purposes of its creation was to minimise industrial conflict. One of the ways it was empowered to do this was by being granted the authority to order reinstatement. If it fails to exercise this power without good reason, it will very soon cause employees and their unions to lose confidence in the court. It will create a perception on the part of employees that the presiding officers of the court are refusing to grant reinstatement in order to appease employers who have never really accepted the remedy. It will also demonstrate that the true worth and importance of job security has not yet been fully grasped by the court's officers, most of whom are white and have no idea of what it means to lose a job in this country.

It is essential that the court develops to the stage where it realises that job security in South Africa is a highly political issue and one which indeed makes reinstatement the 'only truly satisfactory' remedy where dismissals are substantively unfair. Until the court comes to this realisation, its credibility will be threatened and this will help to increase, rather than minimise, industrial conflict.



DEFINITION OF 'UNFAIR LABOUR PRACTICE'

'Unfair labour practice' means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following :

- a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure : Provided that the following shall not be regarded as an unfair labour practice, namely :
  - i) the dismissal of an employee during the first six months of his employment with a particular employer or during such shorter period as may have been agreed upon : Provided that such dismissal does not take place without compliance with a fair procedure;
  - ii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that it could not reasonably have been expected of an employer to hold such a hearing or enquiry;
  - iii) the dismissal of an employee where an employer fails to hold a hearing or a disciplinary enquiry and the industrial court thereafter decides that such employee was granted a fair opportunity to state his case and a hearing or enquiry would in the opinion of the court not have had a different effect on the dismissal;
  - iv) any dismissal which takes place after substantial compliance with the terms and conditions of an agreement relevant to the dismissal; or
  - v) the selective re-employment of dismissed employees providing such re-employment takes place in accordance with fair criteria and not on the ground of an employee's trade union activities;
- b) The termination of the employment of an employee on grounds other than disciplinary action, unless -
  - i) such termination of employment takes place during the first six months of such employee's employment with a particular employer or during such period as may have been agreed upon; and in accordance with any applicable agreement, wage regulating measure or contract of service; or



- ii) (aa) prior notice of such termination of employment in accordance with any applicable agreement, wage regulating measure or contract of service, has been given either to the employee, or if such employee is represented by a trade union or body which is recognized by the employer as representing the employees or any group of them, to such trade union, body or group; and
  - (bb) prior consultation in regard to such termination of employment took place with either such employee or where the employee is represented by a trade union or body recognised by the employer as representing the employees or any group of them with such trade union, body or group; and
  - (cc) such termination of employment takes place in compliance with the terms of agreement or contract of service, regulating the termination of employment of the employee whose employment is terminated; and
  - (dd) such termination of employment takes place in a case where the number of employees in the employment of an employer is to be reduced, according to reasonable criteria with regard to the selection of such employees, including, but not limited to, the ability, capacity, productivity and conduct of those employees and the operational requirements and needs of the undertaking, industry, trade or occupation of the employer;
- c) the unfair unilateral suspension of an employee or employees;
  - d) the unfair unilateral amendment of the terms of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure;
  - e) the use of unconstitutional, misleading or unfair methods of recruiting members by any trade union, employers' organisation, federation, member, office-bearer or official of any trade union, employers' organisation or federation : Provided that the refusal of a trade union in accordance with the provisions of such trade union's constitution to admit an employee as a member, shall not constitute an unfair labour practice;
  - f) the refusal or failure by any trade union, employers' organisation, federation, member, office-bearer or official of any trade union, employers' organisation or federation to comply with any provision of this Act;

- g) any act whereby an employee or employer is intimidated to agree or not to agree to any action which affects the relationship between an employer and employee;
- h) the incitement to, support of, participation in or furtherance of any boycott of any product or service by any trade union, federation, office-bearer or official of such trade union or federation;
- i) the unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed : Provided that any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labour practice;
- j) subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employers' organisation, federation or members, office-bearers or officials of that trade union, employer, employers' organisation or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-bearers or members of those bodies to liaise or negotiate with employees employed by the employer who are not represented by such trade union or federation;
- k) the failure or refusal by an employer, employee, trade union or employers' organisation, to comply with an agreement;
- l) any strike, lock-out or stoppage of work, if the employer is not directly involved in the dispute which gives rise to the strike, lock-out or stoppage of work;
- m) any strike, lockout or stoppage of work in respect of a dispute between an employer and employee which dispute is the same or virtually the same as a dispute between such employer and employee which gave rise to a strike, lock-out or stoppage of work during the previous 12 months;
- n) any strike, lock-out or stoppage of work in contravention of section 65;
- o) any other labour practice or change in any labour practice which has or may have the effect that -
  - i) any employee's or class of employees' employment opportunities or work security is or may be unfairly prejudiced or unfairly jeopardized thereby;
  - ii) the business of any employer or class of employer is or may unfairly be affected or disrupted thereby;

- iii) labour unrest is or may be created or promoted thereby;
- iv) the relationship between employer and employee is or may be detrimentally affected;
- v) any employee is dismissed or otherwise unfairly prejudiced in his conditions of service by an employer solely or principally on the grounds of any compulsory service or training performed or undergone or to be performed or undergone by such employee in terms of the Defence Act, 1957 (Act No 44 of 1957).

LIST OF ABBREVIATIONS

ACTWUSA	Amalgamated Clothing & Textile Workers Union of South Africa
AECI	African Explosive & Chemical Industries
BASODTWU	Black Allied Shops, Offices & Distributive Trade Workers Union
BAWU	Black Allied Workers Union
BCAWU	Building, Construction & Allied Workers Union
CCAWUSA	Commercial Catering & Allied Workers Union of South Africa
CPD	Cape Provincial Division
EAWTU	Engineering & Allied Trade Workers Union
EDL	Eastern Districts Local Division
FAWU	Food & Allied Workers Union
FBWU	Food Beverage Workers Union
GWU	General Workers Union
ICD	Industrial Court Digest
ILJ	Industrial Law Journal
MAWU	Metal & Allied Workers Union
MWASA	Media Workers Association of South Africa
MWU	Mineworkers Union (Mynwerkersunie)
NAAWU	National Automobile & Allied Workers Union
NIC	National Industrial Council
NLRB	National Labour Relations Board (US)
NUM	National Union of Mineworkers
NUTW	National Union of Textile Workers

NUWSAW	National Union of Wine, Spirit & Allied Workers
SA	South African Law Reports
SAAME	SA Association of Municipal Employees
SAAWU	SA Allied Workers Union
SABC	SA Broadcasting Corporation
SADWU	SA Diamond Workers Union
SACWU	South African Chemical Workers Union
SALJ	South African Law Journal
SAYSYNU	Suid Afrikaanse Yster Staal & Verwante Nywerhede Unie
SEAWUSA	Steel, Engineering & Allied Workers Union of South Africa
SFAWU	Sweet Food & Allied Workers Union
TGWU	Transport & General Workers Union
TPD	Transvaal Provincial Division
UAMAWU	United African Motor & Allied Workers Union
WLD	Witwatersrand Local Division

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