

COMPENSATION AS A REMEDY FOR UNFAIR DISMISSAL:
A COMPARISON OF SOUTH AFRICAN AND
AUSTRALIAN LABOUR LAW

by

REMEMBER KANEGO NDOBELA

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Supervisor : **Prof. K.O. Odeku**

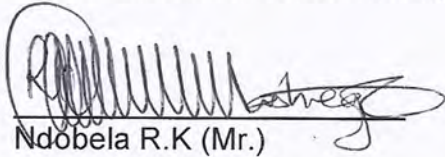
2012

Dedication

This work is dedicated to my beloved family especially my mother Sibongile Lillian Mathebula, my son Kgantsho and my daughter Tlangelani, and their lovely mother Mmatshepo.

Declaration

I Remember Kanego Ndobela, declare that the Mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of Law in Labour Law has not previously been submitted by me for a degree at this University or any other University, that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.



Ndobela R.K (Mr.)

31 August 2012

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Abstract

This research is titled 'Compensation as a remedy for unfair dismissal, a comparison of South African and Australian labour law'. The Australian labour law systems and structures share some important features with South African labour law jurisprudence pertaining to the awarding of compensation as a remedy to unfairly dismissed employees. Some of these important features include the method of calculating compensation and the existence of a compensation cap. The research sets out, amongst other things guidelines or directives to be followed by adjudicators of unfair dismissal dispute in South Africa when awarding compensation, and highlight comparative analysis of South African and Australian labour law approach on compensation as a remedy for unfair dismissal.

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SOUTH AFRICA

NO.	YEAR	SHORT TITLE
108	1996	Constitution of the Republic of South Africa
28	1956	Labour Relations Act
66	1995	Labour Relations Act
12	2002	Labour Relations Amendment Act
68	1969	Prescription Act

AUSTRALIA

NO.	YEAR	SHORT TITLE
28	2009	Fair Work Act
86	1988	Industrial Relations Act
60	1996	Workplace Relations Act
100	2001	Workplace Relations Amendment (Termination of Employment) Act
153	2005	Workplace Relations Amendment (Work Choices) Act

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CHAPTER 1

INTRODUCTION AND OVERVIEW

1. Introduction

The concept of compensation generally involves the payment of 'a sum of money for something lost.'¹ The primary enquiry for a court is to determine the extent of that loss taking into account the nature of the unfair dismissal and the scope of the wrongful act on the part of the employer.² In South Africa compensation as a remedy in employment relations may take different forms namely, compensation as provided for in section 193 of the Labour relations Act, 66 of 1995 (LRA), notice pay, severance pay, recovery for breach of employment contract. The LRA protects against unfair dismissal and in appropriate circumstances makes provision for awarding of compensation to the employee for this unfairness.³ The ordinary meaning of compensation is to 'make amends for a wrong that has been inflicted,'⁴ and as a result has been traditionally regarded as being similar to a delictual claim than a claim based on breach of contract.⁵

¹ *Chotia v Hall Longmore & Co (Pty) Ltd* (1997) 6 BLLR 739 (LC) at 745 with reference to *Russell NO & Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at 145 D-E; *Mphosi v Central Board For Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 642-643.

² *Le Monde Luggage CC t/a Pakwells Petjie v Commissioner Dunn & Others* (2007) 10 BLLR 909 (LAC).

³ Section 193 of the Labour Relations Act 66 of 1995; see also Tamara Cohen-*Exercising a judicial Discretion –Awarding of compensation for unfair dismissals* (2003) 24 IU 737.

⁴ *Amalgamated Beverages Industries v Jonker (Pty) Ltd* (1993) 14 ILJ 1232 (LAC).

⁵ *Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 655 (LAC).

In Australia, the Fair Work Australia (FWA)⁶ is empowered in terms of the provision of Fair Work Act (the FW Act),⁷ to order an employer to pay an unfairly dismissed employee an amount *in lieu* of notice. The FW Act came into effect on 1 July 2009. Under this legislation, the FWA has become the new industrial umpire, thus a forum responsible for labour dispute resolution. It has replaced the Australian Industrial Relations Commission (AIRC) as well as other bodies and is a 'one-stop shop' for the resolution of labour disputes. The FW Act represents another legislative milestone in labour law in Australia, thus, the FWA is empowered to make any other order it considers appropriate for an employer to pay related to remuneration lost or likely to have been lost because of the dismissal.⁸ This could include any money the person may have earned during the period since the dismissal. As these orders are only to compensate for lost remuneration, they do not include any compensation for shock, distress or humiliation caused by the manner of the person's dismissal.⁹ The FW Act provides the same framework of remedies as under the Workplace Relations Act (WRA), 1996 (Cth),¹⁰ namely reinstatement or where that is 'inappropriate,' an order for

⁶ The Fair Work Australia replaced the Australian Industrial Relations Commission (AIRC).

⁷ 28 of 2009.

⁸ Section 391 of the FW Act.

⁹Section 391(3) of the FW Act.

¹⁰ Cth means 'Commonwealth'-indicating that the Act is valid for the whole country (Commonwealth of Australia).

compensation to a capped amount.¹¹ The Work Choices amendments¹² to the WRA brought in two new rules that, if applied, reduced the amount of compensation ordered *in lieu* of reinstatement following a finding of unfair dismissal. These have been continued under the FW Act.¹³ The first is that the FWA must take into account any misconduct of the employee that contributed to the decision of the employer to dismiss in order to reduce the amount of compensation ordered. Secondly, compensation orders must not include a component for 'shock, distress or humiliation, or other analogous hurt, caused to the employee by manner of terminating the employee's employment.'¹⁴ This second rule brings unfair dismissal in line with common law limits on damages.¹⁵ If the FWA concludes that the termination of employment was harsh, unjust or unreasonable it may make an order for reinstatement, or re-employment (with a consequent order concerning back pay and continuity of re-employment), or alternatively, if it thinks that reinstatement is inappropriate, it may make an order

¹¹ Section 392 of the Fair Work Act, 28 of 2009. The Compensation cap is the lesser of the half the amount income threshold (\$100,000 for full-time employee, indexed by earnings from 27 August 2007 and annually each year after that on 1 July of each year), and the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal.

¹² The Work Choices package was the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*, which took effect from 27 March 2006.

¹³ Section 392(3) of the FW Act.

¹⁴ Section 392(4) of the Fair Work Act, 28 of 2009.

¹⁵ *Intico (Vic) Pty v Walmsley* (2004) VSCA 90. See Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *Economic and Labour Relations Review* 237; Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225.

requiring the employer to pay the employee an amount *in lieu* of reinstatement up to the equivalent of six months remuneration.¹⁶

In assessing the appropriate amount in terms of section 392 of the FW Act the FWA must have regard to¹⁷ the effect of the order on the viability of the employer's business,¹⁸ the employee's length of service,¹⁹ the remuneration that the employee would have been likely to receive had the employment not been terminated,²⁰ the employee's efforts to mitigate his or her loss²¹ and any other matter the commission considers relevant.²² The FWA must make the assessment of appropriate amount independent of the statutory limit and, if the assessment is over the statutory limit, will apply the statutory limit.²³

In South Africa, when making an award of compensation the adjudicator or the arbitrator must have regard to what is fair to both the employer and the employee, bearing in mind

¹⁶ Section 392 of the FW Act.

¹⁷ Section 392(2) of the FW Act.

¹⁸ In respect of which the onus is on the employer to bring relevant evidence: *Moore v Highpace Pty Ltd* (18 May 1998, AIRC, Boulton J, Watson SDP and Whelan C, Print Q0871).

¹⁹ *GH Operations Pty Ltd (trading as The Grand Hyatt Melbourne) v Smith* (14 May 2001, AIRC, Giudice P, O' Callaghan SDP and Smith C, Print PR904136).

²⁰ This involves an assessment of how long it was likely that the employment would have continued: *Fastida Pty Ltd v Goodwin* (2000) 102 IR 131.

²¹ The behaviour of the employee is clearly relevant to the assessment of the compensation.

²² Section 392(3) and (4) of the FW Act. The FWA may reduce the amount of compensation awarded to an unfairly dismissed employee, in so doing the FWA may take into account any misconduct of the employee that contributed to the decision of the employer to dismiss them.

²³ *Perrin v Des Taylor Pty Ltd* (1995) 58 IR 524 at 258.

that the purpose of the LRA is to protect against unfair dismissal and at the same time to advance economic development and effectively resolve labour disputes.²⁴ It is submitted the same notion applies in Australia.²⁵

Under the 1956 Labour Relations Act, the Industrial Court as it then was, had an unfettered discretion in regard to the amount of compensation it could grant unfairly dismissed employees. In terms of this Act, the Industrial Court and Labour Appeal Court extended the compensatory net to include compensation for delictual losses sustained by the employee.²⁶ Compensation was intended to place the employee in the position that he or she would have been had the unfair labour practice not been committed, subject to the strictures of considerations of reasonableness and fairness.²⁷ Under FW Act, the FWA may also make any order that it considers appropriate to cause the

²⁴ *Boymans Clothiers (Pty) Ltd* (2001) 22 ILJ 454 (LC).

²⁵ Section 381(1) of the Fair Work Act, 28 of 2009. Explanatory Memorandum, Fair Work Bill 2008 (Cth) (1507).

²⁶ In *Harmony* any misconduct of the employee that contributed to the decision of the employer to dismiss them and to reduce the amount of compensation ordered accordingly. Secondly, compensation orders must not include a component for 'shock, distress or humiliation, or other analogous hurt, caused to the employee by manner of terminating the employee's employment' *Harmony Furnishers (Pty) Ltd v Prinsloo* (1993) 14 ILJ 1466 (LAC), the court upheld the award of compensation for sentimental loss. The Industrial Courts and Labour Courts have generally regarded sentimental damages as not constituting a basis for compensation.

²⁷ In *Elluman v Mossagas (Pty) Ltd* (1995) 16 ILJ 946 (IC); (1995) 7 BLLR 48 (IC), it was held that an actuarial assessment was not necessary in proving the loss.

employer to pay to an unfairly dismissed employee for the remuneration lost, or likely to have been lost, by the employee because of the dismissal.²⁸

In terms of section 194 of the LRA, compensation is calculated on the basis of the employee's lost remuneration. Remuneration as provided for in terms of section 194 of the LRA appears to be limited to wages and ancillary benefits.²⁹ This is reinforced by section 195 of the LRA, which provides that an award of compensation made in terms of Chapter 8 (Unfair Dismissal) of the LRA, is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.³⁰

Section 193 of the LRA, provides for remedies for the unfair dismissal of an employee. Reinstatement and re-employment are regarded as primary remedies, unless the provisions of section 193(2) apply. Compensation is regarded as the appropriate remedy where the employee does not wish to be reinstated, the circumstances are such that the continuation of the employment relationship would be intolerable, it is not

²⁸ Section 391(3) of the FW Act.

²⁹ In *Maartens v Van Leer SA (Pty) Ltd* (1998) 19 ILJ 182 (CCMA), the commissioner held that relocation expenses arising out of the dismissal were contractual damages which did not fall within the bound of compensation awardable in terms of section 194 of the LRA.

³⁰ This refers to awards made in terms of Unemployment Insurance Act, the Compensation for Occupational Injuries and Disabilities Act or provident fund payment and could not even extend to orders made by the criminal and civil courts, where the cause of action is the breach of the employment contract.

reasonably practicable for the employer to reinstate the employee or the dismissal is only procedurally unfair.³¹

The Labour Relations Amendment Act 12 of 2002, amended section 194 which makes provision for the awarding of compensation for an unfair dismissal or unfair labour practice. Section 194(1) provides as follows:

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

2. Problem statement

Before the enactment of the Labour Relations Amendment Act,³² sections 193 and 194 of the LRA³³ there was no clear meaning of reinstatement coupled with backpay as a remedy to an unfairly dismissed employee. In terms of section 194 of the LRA as amended, the courts and arbitrators adjudicating unfair dismissal cases have judicial

³¹ Section 193(2) of the LRA, 1995.

³² 12 of 2002.

³³ 66 of 1995.

discretion to award compensation that is 'just and equitable.' However the award of compensation should be on the basis of fairness. The adjudicators of unfair dismissal cases usually come across challenges in awarding compensation; this is so because it is not an exercise of exact science,³⁴ and as a result this should be in the interests of consistency and certainty. Currently there are no guidelines or directives for the awarding of compensation issued in terms of the LRA. The courts on the other hand, have through practice created their own guidelines in the exercise of discretion.³⁵ The factors to be taken into account in awarding compensation were set out in *Ferodo v De Ruiter*³⁶ as follows-

- '(a). there must be evidence before the court of actual financial loss suffered by persons claiming compensation;
- (b). there must be proof that the loss was caused by the unfair labour practice;
- (c). the loss must be foreseeable, i.e. not too remote or speculative;
- (d). the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;

³⁴ *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 20 ILJ 1314 (LC) at 1325. The Labour Court that 'guidance as to how such a discretion should be exercised must be derived from the purposes of the LRA (section 1), read within the broader Constitutional context, and sections 193 and 194 of the LRA.

³⁵ *Ferodo v De Ruiter* (1993) 14 ILJ 974 (LAC).

³⁶ (1993) 14 ILJ 974 (LAC).

(e). in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;

(f). there is a duty on the employee (if he is seeking compensation) to mitigate his damage by taking all reasonable steps to acquire alternative employment;

(g). any benefit which the applicant receives- e.g. by way of severance package-must be taken into account.'

Adjudicators of unfair dismissal cases were also faced with the questions as to whether or not an award for reinstatement coupled with backpay is subject to the limits provided in section 194 of the LRA. The Supreme Court of Appeal held that retrospective remuneration becomes due under the terms of the contract and does not constitute compensation as envisaged by section 194 of the LRA. Accordingly, no limit can be read into the LRA.³⁷

3. Literature review

The LRA³⁸ and FW Act³⁹ protect against unfair dismissal and in appropriate circumstances make provision for the awarding of compensation to the unfairly

³⁷ *Republican Press (Pty) Ltd CEPPWAWU and Others* (2007) 28 ILJ 2503 (SCA).

³⁸ Section 193, Act 66 of 1995.

³⁹ Section 392 of the FW Act.

dismissed employee. In South Africa, the courts and arbitrators are urged to have regard to what is fair to both the employer and the employee bearing in mind the purpose of the LRA, thus, to protect against unfair dismissal and advance at the same time economic development and effectively resolve labour disputes. In Australia the government provided two main rationales for the FW Act changes. The first was the need to restore 'balance' between two competing interests: fairness to employees and employer freedom to manage.⁴⁰ The second rationale was to enact a scheme that better recognises the needs of small business.⁴¹

The 2002 amendments to the LRA tightened the advancement and protection of the right to fair labour practice as provided in section 23 of the 1996 Constitution of the Republic of South Africa.⁴² In order for the courts or arbitrators to award appropriate relief in the circumstances, it is of utmost importance to determine the manner in which the employment contract was terminated, thus, whether or not the dismissal or termination was procedurally or substantively fair.

The Commission For Conciliation, Mediation and Arbitration (CCMA), Bargaining Councils, Private Agencies as well the courts are empowered to take a very strong action against employers who commit unfair labour practices or dismiss employees unfairly. With regard to the latter, three options exist under the LRA, namely

⁴⁰ Section 381(1) of the FW Act.

⁴¹ See eg, Explanatory Memorandum, Fair Work Bill 2008 (Cth) (1507).

⁴² Act 108 of 1996.

reinstatement, re-employment and compensation. Reinstatement is generally regarded as the primary remedy, given the objects of the LRA to preserve jobs. In the case of reinstatement an unfairly dismissed employee may be entitled to backpay. Re-employment occurs if the court or arbitrator finds that the employee was at fault in some way but not sufficiently to warrant dismissal. Compensation occurs where the court or arbitrator rules that the employee was unfairly dismissed, but he or she does not want to return to the job, it is impossible for him or her to do so, circumstances surrounding dismissal are such that a continued employment relationship would be intolerable, the dismissal was not effected in accordance with a fair procedure. Section 193(2) of the LRA provides that the Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless:

- The employee does not wish to be reinstated or re-employed;
- The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- It is not reasonably practicable for an employer to reinstate or re-employ the employee;
- The dismissal is unfair only because the employer did not follow a fair procedure.

Once it is found that a dismissal of an employee is unfair, whether substantively or procedurally, section 193 makes provision for the remedies available to the unfairly dismissed employee.⁴³

In Australia, the FWA can make an order for payment *in lieu* of reinstatement if it is satisfied that reinstatement is inappropriate and the FWA must take into account all of the circumstances of the case in determining the amount of compensation.⁴⁴

3.1 The significance of comparison with Australian labour law

The Australian Labour Law systems and structures share some important features with South African Labour Law jurisprudence pertaining to the awarding of compensation as a remedy to unfairly dismissed employees.

Some important features:

- Compensation is regarded as a secondary remedy in both jurisdictions.
- Compensation is calculated from the date of dismissal.⁴⁵
- Compensation can only be awarded if reinstatement is inappropriate in the circumstances.⁴⁶

⁴³ In *National Union of Metalworkers of SA & Others v Fry's Metal (Pty) Ltd* (2001) 22 ILJ 701 (LC), the court held that section 193 'does not provide a remedy for an impending unfair dismissal, but only dismissals which have occurred'. The same, it is submitted, applies in respect of unfair labour practices.

⁴⁴ Section 392 of the FW Act.

⁴⁵ Section 392(1) of the FW Act and Section 194(1) of the LRA.

⁴⁶ Section 392 of the FW Act and Section 193 of the LRA.

- The existence of criteria for deciding amounts.⁴⁷
- The existence of compensation cap.⁴⁸

4. Objectives of the research

- To appraise and evaluate the sufficiency or adequacy of the guidelines created by the courts in exercising discretion when awarding compensation;
- To analyse the effect of Prescription Act in South Africa in so far as it relates to compensation;
- To evaluate comparative analysis of South African and Australian labour law approach on compensation as a remedy for unfair dismissal and present lesson learnt from Australian jurisprudence.

5. Rationale

This research illustrates the need to develop South African labour law approach on compensation as a remedy for unfair dismissal. In South Africa, there are no guidelines or directives to be followed by the arbitrator or the courts in awarding compensation, however, the courts have created their own guidelines in the exercise of discretion. The commissioner adjudicating upon unfair dismissal dispute exercise discretion when

⁴⁷ Section 392 of the FW Act and see eg, in South Africa, *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC).

⁴⁸ In Australia compensation is limited to 6 months (section 392 of the FW Act), and in South Africa, compensation for ordinary dismissal is limited to 12 months and in case of automatically unfair dismissal, compensation is limited to 24 months (section 194 of the LRA).

awarding compensation. This study seems to contribute a meaningful modest reform to the law. Towards this the legislature should consider putting in place provisions in the LRA to include criteria for deciding amounts, to avoid unnecessary reviews of arbitration awards, for failure by commissioners to exercise their discretion properly. In Australia, the adjudicator must in determining an amount of compensation to be awarded take into account all the circumstances of the case, including the factors listed in section 392(2) of the FW Act.

6. Research methods

The main method to be used in this research is literature review based on the material from the library and desktop. Legislations, case law as primary and secondary sources of law and other material such as text books, journal articles have been used in this study.

CHAPTER 2

THE LEGAL FRAMEWORK GOVERNING UNFAIR DISMISSALS

1. Introduction

The law relating to unfair dismissal in South Africa is contained in Chapter 8 of the LRA, and the applicable Code of Good Conduct issued in terms of the LRA.⁴⁹ However, in Australia the law of unfair dismissal is found mainly in the FW Act.⁵⁰ This Chapter deals with the legal frameworks governing the law of unfair dismissal in Australia and South Africa respectively. It also examines the procedures to be followed in instituting a claim of unfair dismissal and the powers of the institutions involved in awarding compensation in appropriate circumstances.

2. Legal framework governing unfair dismissal in Australian labour law

2.1 Unfair dismissal and the Fair Work Act, 28 of 2009

The unfair dismissal provisions in the Fair Work Act, (the Act) apply to 'national system employees' and 'national systems employers.'⁵¹ These terms are defined in sections 13 and 14 of the Act.

2.2 What is an unfair dismissal claim

An unfair dismissal occurs where the FWA holds that:

- the dismissal has occurred at the initiative of the employer;

⁴⁹ See, Schedule 8- Code of Good Practice: Dismissal issued in terms of the LRA.

⁵⁰ Division 2 and 3 of the FW Act.

⁵¹ Section 380 of the Act.

- the person terminated was an employee and not an independent contractor;
- the termination was 'harsh, unjust or unreasonable';
- the termination was not consistent with the Small Business Fair Dismissal Code;
- and
- it was not a case of genuine redundancy.⁵²

2.3 What are the other qualifying requirements to bring an action

On the assumption that the dismissal was unfair, an employee must be able to demonstrate that he or she:

- has completed a minimum period of employment of 12 months in the event that the employer employs less than 15 people; or
- has completed a minimum period of 6 months in the event that the employer employs more than 15 people;
- has a (modern) award or enterprise bargaining agreement that is applicable to their employment relationship;
- earns less than the 'salary cap.'⁵³

If the above requirements are satisfied the employee is allowed to file an unfair dismissal application.

⁵² Section 385 of the Act.

⁵³ This is indexed in July each year.

2.4 When must an unfair dismissal application be filed and what is the process

Applications to FWA must be filed within 14 days after the day on which the termination took effect, with FWA having an ability to extend that time period in 'exceptional circumstances.'⁵⁴ However, the FWA⁵⁵ has discretion to accept an application that is lodged out of time. The essential consideration is whether it would be unfair to the Applicant not to extend time for late filing of an unfair dismissal claim. Two factors generally guided the discretion, first, whether there was an acceptable explanation for the delay and secondly, whether the unfair dismissal application was not without merit.⁵⁶ Subsidiary considerations included whether the employee actively contested the decision and whether there is any prejudice to the employer as a result of the late lodgment of the application. There are circumstances where the delay is caused by error on the part of the employee's representative.⁵⁷ The leading case on the extension of prescribed time frame is *Brodie-Hanns v MTV Publishing Ltd*,⁵⁸ this case laid down six principles to govern the adjudicator's discretion to extend time:

- special circumstances are not necessary but the court must be positively satisfied that the prescribed period should be extended. The *prima facie*

⁵⁴ Section 394 of the Act.

⁵⁵ Section 394(3) of the Act.

⁵⁶ *Telstra Network Technology Group v Kornicki* (22 July 1997, AIRC, Ross VP, Watson SDP, Gay C, Print P3168).

⁵⁷ See *Clark v Ringwood Private Hospital* (1997) 74 IR 413 at 418.

⁵⁸ (1995) 67 IR. 298.

position is that the time limit should be complied with unless there is an acceptable explanation of the delay, which makes it equitable to so extend.

- action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
- prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
- the mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
- the merits of the substantive application may be taken into account in determining whether to grant an extension of time.
- Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.

The FWA must first attempt to resolve the unfair dismissal claim by conducting a conference.⁵⁹ In determining whether the termination was harsh, unjust or unreasonable, FWA is required to have regard to a number of matters specifically identified in section 387 of the Act.

If the FWA finds that the termination of employment was harsh, unjust or unreasonable it may make an order for reinstatement, or re-employment (with a consequent order

⁵⁹ Section 398 of the Act.

concerning back pay and continuity of employment), or alternatively, if it thinks that reinstatement is inappropriate, it may make an order requiring the employer to pay the employee an amount *in lieu* of reinstatement up to the equivalent of six months remuneration.

The provisions of section 381 of the Act are intended to ensure that 'a fair go all round' is accorded to both the employer and the employee concerned. The expression 'a fair go all round' was used by Sheldon J in *Re Loty and Holloway v Australian Workers Union*,⁶⁰ where, it was held that:

'the objective in these cases is always industrial justice and to this end weight must be given in varying degrees according to the requirements of each case to the importance but not the inviolability of the right of the employer to manage his business, the nature and quality of work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made. There certainly may be cases where the dismissal had many elements of unfairness but an industrial authority if it was convinced of the practical uselessness of trying to re-establish the employer-employee relationship, would not influence at all. There may be other cases where there are reasonable

⁶⁰ (1971) AR (NSW) 95.

prospects for the future of the relationship if clarifying conditions are imposed.'

In order to bring an unfair dismissal claim an employee is required to satisfy the following requirements under the FW Act namely, to establish that he or she is not excluded employee and that the employment was terminated at the initiative of the employer. Only if satisfied that these matters are made out will the FWA consider whether the termination was harsh, unjust or unreasonable and consider appropriate remedy.

2.5 Jurisdiction

Following recent enactment of the FW Act⁶¹ an application cannot be made by an employee who has not completed a qualifying period of employment with the employer.⁶² The employee must be able to demonstrate that he or she has completed a minimum period of employment of 12 months in the event that the employer employs less than 15 people; or he or she has completed a minimum period of 6 months in the event that the employer employs more than 15 people.

⁶¹28 of 2009.

⁶² Sections 385(c), 388, 385(d), 389, 382(a), 383, 384(2)(b) of the FW Act.

2.6 Termination at the initiative of the employer

An employee will only be entitled to a relief if there has been a 'termination of employment.'⁶³ Termination of employment is defined as a dismissal of employee at the initiative of the employer.⁶⁴ In *Mohazab v Dick Smith Electronics Pty Ltd* the Full Court of the Industrial Relations Court of Australia said that the phrase 'termination at the initiative of the employer' involves:

'termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. An important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.'⁶⁵

In order to establish that there has been a termination of employment, it is essential that the Australian Industrial Relations Commission (Commission) make a finding that the

⁶³ Section 386(1) of the Act.

⁶⁴ Section 386 of the Act.

⁶⁵ (No 2) (1995) 62 IR 200 at 205; see also *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154 at 160-161. Moore J queried whether a termination would be at the initiative of the employer if the action of the employer would on any reasonable view have the effect of bringing the employment to an end, even where it may not have been intended by the employer to do so.

person making the application is an employee of the respondent.⁶⁶ The decisions of the Commission do not make it clear whether a 'termination of employment' is a termination of the employment relationship, or a termination of the contract of employment. Under the former provisions, the Industrial Relations Court of Australia was concerned with the termination of the employment relationship, rather than the termination of the contract of employment.⁶⁷ The provisions of the Workplace Relations Act 1996 (Cth) do not place the same level of reliance upon the Termination of Employment Convention. At the time of writing and compilation of this study, there was no Full Bench decision of the Commission which determined the issue. In *Wilkinson v Skippers Aviation Pty Ltd*,⁶⁸ when given the opportunity to comment on the distinction, The Full Bench said that there was no need to do so. It is submitted that, in order to satisfy the requirement that there be a 'termination of employment,' there must be a termination of the employment relationship. The Commission and the Federal Court have accepted that the construction of the phrase 'termination of employment at the initiative of the employer'

⁶⁶ *Pawel v Australian Industrial Relations Commission* (1999) 94 FCR 231 at para [14]; *Sammartino v Mayne Nickless* (2000) 98 IR 168. In order to establish that an employment relationship exists, there must be a contract between the parties: *Paisley v American Banknote Australasia Pty Ltd* (15 September 2000, AIRC, Munro J, Williams SDP, Smith C, Print T0808); compare *Advanced Australian Workplace Solutions Pty Ltd v Fox* (25 October 1999, AIRC, Giudice P, McIntyre VP, Redmond C, Print S0253).

⁶⁷ *Capay Holdings Ltd (trading as Cuddles Long Day Centre) v Slattery* (unreported, Industrial Relations Court of Australia, Wilcox CJ, Moore & Marshall JJ, 11 December 1996).

⁶⁸ (30 April 2001, AIRC, McIntyre VP, Cartwright SDP and Harrison C, PR903635).

adopted by the Full Court of the Industrial Relations Court of Australia in *Mohazab case* above continues to apply.⁶⁹

Where an employee is demoted and elects not to continue in the employment and resigns, the FWA will have jurisdiction if the demotion was significant and it was not open to the employer to demote the employee in this way.⁷⁰ Under the provisions of the former Industrial Relations Act 1988 (Cth), a Full Court of the Federal Court took the view that, despite the demotion, which may involve a termination of one contract of employment and the commencement of a new contract, the employment relationship continued and, therefore, it was not necessarily termination of employment for the purposes of the unfair dismissal provisions.⁷¹ In its consideration of the provisions of the Workplace Relations Act 1996 (Cth), prior to the recent amendment as mentioned above, the Commission has distinguished this case on the basis of the change in the statutory regime which has reduced the emphasis on the Termination of Employment Convention. Instead, it adopted the position of the Full Court of the Supreme Court of South Australia in *Advertiser Newspapers Pty Ltd v Industrial Relations Commission of South Australia and Grivell*.⁷² The various decisions of single members of the

⁶⁹ *Pawel v AIRC* (1999) 94 FCR 231.

⁷⁰ *Western v Union des Assurances de Paris* (unreported, IRCA, Madwick J, 28 August 1996; *Cowell v Irlmond Pty Ltd* (1997) 76 IR 352.

⁷¹ *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99.

⁷² (1999) 70 SASR 340; 90 IR 211.

Commission do not distinguish the decision in *Grivell* on the basis that it was concerned with the particular statutory unfair dismissal regime in place in South Australia.

In applying the test in *Mohazab's case*, the Commission has concluded that a resignation submitted under duress,⁷³ or as response to a direction to perform different duties or reduced hours of work,⁷⁴ amounts to a termination at the initiative of the employer. On the other hand, a termination of employment as a result of the effluxion of time,⁷⁵ or as a result of the operation of a statutory provision providing for compulsory retirement,⁷⁶ does not amount to a termination at the initiative of the employer.

2.7 Harsh, unjust or unreasonable

In determining whether a termination was harsh, unjust or unreasonable, the FWA must have regard to:⁷⁷

⁷³ *Ngo v Link Printing Pty* (1999) 94 IR 375; compare *Beck v Castran Gilbert Real Estate Pty Ltd* (14 March 2000, AIRC, Giudice P, Williams SDP, Holmes C, Print S4014).

⁷⁴ *Pawel v Australian Industrial Relations Commission* (1999) 94 FCR 321 and, after remittal back to the Full Bench of the Australian Industrial Relations Commission from the Full Court of the Federal Court of Australia, *Pawel v Advanced Precast Pty Ltd* (12 May 2000, AIRC, Polites SDP, Watson SDP and Gay C, PrintS5904); *Hambly v Ramsey Buthering Services Pty Ltd* (23 June 2000, Marsh SDP, Harrison SDP, Larkin C, Print S7354).

⁷⁵ *Mitchell v Senia & Associate* (8 August 2000, AIRC, Giudice J, Watson SDP and Foggo C, Print S8899) compare *Bloomfield v Jayrook Pty Ltd* (13 July 2001, AIRC, Boulton J, Duncan SDP, Gay C Print PR906467).

⁷⁶ *Fraser v Sydney Harbour Casino Pty Ltd* (23 December 1997, AIRC, Marsh SDP, Polites SDP, Whelan C, Print P7676).

⁷⁷ Section 387 of the Act.

- (a) Whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operation requirements of the employer's undertaking, establishing or service; and;
- (b) Whether the employee was notified of that reason; and;
- (c) Whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and;
- (d) If the termination related to unsatisfactory performance by the employee-whether the employee had been warned about the unsatisfactory performance before the termination; and;
- (e) Any other matters the Commission considers relevant.

The FW Act also requires the FWA to take into account the degree to which the size of the employer's business would be likely to impact upon the procedures to be followed in effecting the termination, and the degree to which the absence of a dedicated human resources specialist or expertise in the business would be likely to impact on the procedures followed in the termination.⁷⁸

As a consequence of this statutory prescription, the relevance of the historical interpretation of the phrase 'harsh, unjust or unreasonable' by the courts, both in the state unfair dismissal jurisdictions and federal award unfair dismissal provisions, is confined to the consideration of any other matters the FWA considers relevant under

⁷⁸ Section 392(2) of the Act.

section 392(2) of the Act. Nevertheless, in considering what is 'harsh, unjust or unreason,' the Commission needs to ensure that a 'fair go all round' is accorded to both the employer and the employee concerned.⁷⁹ This is also applicable in South African jurisprudence.

2.7.1 Valid reason

Under the provisions of the Industrial Relations Act 1988 (Cth), Div 3 of Part VIA the Industrial Relations Court of Australia was required to determine whether there was a valid reason for the termination of employment⁸⁰ and, if so, whether the termination was harsh, unjust or unreasonable.⁸¹ The latter provision was declared constitutionally invalid by the High Court of Australia in *Victoria v the Commonwealth*.⁸² Prior to the declaration of invalidity, the Industrial Relations Court of Australia took a limited view of the phrase 'valid reason' suggesting that considerations of the effect of a dismissal on the employee were irrelevant to the assessment of whether the reason was valid. After the declaration of invalidity, the court seemed to take a more generous view of the phrase 'valid reason' suggesting that it imposed a requirement that, in all the circumstances, the termination must not be unjust or unfair.⁸³

⁷⁹ *Winsor Smith v Liu* (13 July 1998, AIRC, Giudice J, Polites SDP and Gay C, Print Q3462). The importance of providing a fair go all round does not override the considerations under section 170CG(3).

⁸⁰ Industrial Relations Act 1988 (Cth), section 170DE(1).

⁸¹ Industrial Relations Act 1988 (Cth), section 170DE(2).

⁸² (1996) 187 CLR 416 at 517.

⁸³ *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370; compare *Kerr v Jaroma Pty Ltd* (1996) 70 IR 469.

The provisions of the Workplace Relations Act 1996 (Cth) take a different form. In assessing whether a dismissal is harsh, unjust or unreasonable, the Commission must take into account whether the employer has a valid reason for terminating the employee's employment, which is connected with the employee's capacity or conduct, or with the operational requirements of the employer's business. In *Selvachandran v Peteron Plastics Pty Ltd*,⁸⁴ it was said that, in order to be valid, the reason must be:

'sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason.... In considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must be 'applied in a practical, common sense way to ensure that' the employer and employee are each treated fairly.'

When determining whether a termination is for a valid reason, the Commission has consistently applied the test in *Selvachandran* and accepted that the reason must be defensible or justifiable on an objective analysis of the facts, taking into account the

⁸⁴ (1995) 62 IR 371 at 373.

'entire factual matrix.'⁸⁵ The focus of the consideration is upon the employer and the basis for its decision to terminate rather than the consequences for the employee.⁸⁶ Nevertheless, the penalty of termination must be proportionate to the reason relied upon.⁸⁷ The valid reason must be related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service.⁸⁸

An employee's capacity covers not only her or his physical capacity⁸⁹ or mental capacity, but also the employee's performance.⁹⁰ There must be evidence upon which the Commission can make a finding that the employee is incapable of performing the inherent requirements of the position.⁹¹

⁸⁵ *Beck v Castran Gilbert Real Estate Pty Ltd* (14 March 2000, AIRC, Giudice P, Williams SDP, Holes C, Print S4014).

⁸⁶ *Container Terminals Australia Ltd v Toby* (24 July 2000, AIRC, Boulton J, Marsh SDP and Jones C, Print S8434). These are matters that are to be taken into account under the other heads of section 170CG (3).

⁸⁷ *Ricegrowers Co-operative Ltd v Schliebs* (31 August 2001, AIRC, Duncan SDP, Cartwright SDP and Harrison C, Print PR908351) at para [12].

⁸⁸ Workplace Relations Act 1996 (Cth), section 170CG(3)(a).

⁸⁹ *Hobbs v Capricorn Coal Management Pty Ltd* (30 April 2001, AIRC, McIntyre VP, Cartwright SDP and Harrison C, Print PR903643).

⁹⁰ *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137; *Re Crozier; Ex parte AIRC* (2001) FCA 1031 (1 August 2001, Gray, Branson and Kenny JJ) at paras [13]-[14].

⁹¹ *Erskine v Chalmers Industries Pty* (30 March 2001, AIRC, Williams SDP, Acton SDP and Blair C, Print PR902746).

2.8 Notice of the reason to be given to the employee

Procedural fairness requires that an employee be notified of the reason for the termination before any decision is taken to terminate the employment so as to provide the employee with an opportunity to respond to the reason before the termination takes effect.⁹² To this extent, the obligation to notify the employee of the reason for the termination in section 387(b) of the FW Act operates in conjunction with the obligation to provide the employee with an opportunity to respond to any reason related to capacity or conduct under section 387(a) of the FW Act.

The notification must be made in such a way as to give the employee adequate time to respond to the allegation⁹³ and it must clearly set out the grounds upon which the employment is being terminated⁹⁴ in a way which avoids pre-judgment.⁹⁵ The provision does not extend to require the employer to ensure that the opportunity is taken up by employee.⁹⁶ Whether the opportunity is actually taken up by the employee is

⁹² *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137.

⁹³ *GH Operations Pty Ltd (trading as The Grand Hyatt Melbourne) v Smith* (14 May 2001, AIRC, Giudice P, O' Callaghan SDP and Smith C, Print PR904136) at para [18].

⁹⁴ *Guttridge v AC & R Pty Ltd* (9 January 1998, AIRC, Cargill C, Print P7971; *Lang v Tenix Defence System Pty Ltd* (20 April 2000, AIRC, Williams SDP, Print S5182).

⁹⁵ *ASU v Ansett Australia limited* (2000) 175 ALR 173; *Shields v CUB* (1999) FCA 377 (8 April 1999), Ryan, Moore and Marshall JJ).

⁹⁶ *Mollinger v National Jet Systems Pty Ltd* (18 March 2001, AIRC, Giudice P Polites SDP and Gregor C, Print R3130)

irrelevant⁹⁷ other than for the purposes of establishing whether or not the opportunity which is provided was a proper opportunity.⁹⁸

2.9 An opportunity to respond to any reason related to capacity or conduct

The obligation to provide an opportunity to respond to the reason for termination under section 387(a) of the FW Act arises only where the termination is related to the employee's capacity or conduct.

2.10 Key aspects of the unfair dismissal regime

The unfair dismissal provisions in the FW Act apply in relation to 'national system employees'⁹⁹ and 'national system employers.'¹⁰⁰ The main feature of the FW Act

⁹⁷ *Phan v Unilever Australia Ltd* (29 April 1998, AIRC, Watson SDP, Williams SDP and Larkin C, Print Q0498).

⁹⁸ *Jancso v Telstra Corporation Ltd* (1 June 2001, AIRC, Giudice P, Harrison SDP and Larkins C, Print PR904791; *GH Operations Pty Ltd trading as the Grand Hyatt Melbourne v Smith* (14 May 2001, Giudice P, O' Callaghan SDP and Smith C, Print PR904136)

⁹⁹ National System Employee: is an individual so far as he or she is employed, or usually employed, as described in the definition of National System Employer in section 14 of the FW Act.

National System Employer: is -

- (a) a Constitutional Corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth Authority, so far as it employs, or usually employs, an individual; or
- (d) a person so far as the person, in connection with Constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker.
- (e) a body corporate incorporated in a territory, so far as the body employs, or usually employs, an individual; or

provisions on unfair dismissal is that they will increase the number of employees with access to making a claim of unfair dismissal.

The main sets of exemptions and exclusions that place a dismissal outside the scope of the FW Act are examined, thus, they are compliance by a 'small business employer' with the Small Business Fair Dismissal Code; 'genuine redundancy'; 'minimum employment period'; and the non-award high income earner exclusion.

2.10.1 Exclusions

(a) Small Business Employers and the Code

Provisions have been enacted with the FW Act to the effect that a dismissal by a 'small business employer' cannot be an unfair dismissal where it was consistent with the 'Small Business Fair Dismissal Code.'¹⁰¹

The meaning of a 'small business employer' is defined in section 23 of the FW Act to mean an employer who 'employs fewer than 15 employees' at the relevant time.¹⁰²

A 'Small Business Fair Dismissal Code' was declared under the FW Act on the 24 June 2009.¹⁰³ In relation to allegedly serious misconduct justifying summary dismissal (that

-
- (f) a person who carries on an activity (whether of a Commercial, Governmental or other nature) in a Territory of Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

¹⁰⁰ Section 380 of the FW Act.

¹⁰¹ Sections 385(c) and 388 of the FW Act.

¹⁰² Section 388 of the FW Act.

¹⁰³ Section 388(1) of the FW Act.

is, dismissal without notice), the Code provides that it is a fair dismissal where the employer 'believes on reasonable grounds' that the employee's behaviour would justify summary dismissal. Theft, fraud violence, or serious breach of occupational health and safety procedures are identified in this respect. It is sufficient, though not essential, states the Code, that an allegation of theft, fraud or violence be reported to the police. It is implicitly irrelevant whether or not the allegations turns out to be well founded. For the employer to believe on 'reasonable grounds' that a summary dismissal is justified may require that a level of procedural fairness be accorded to an employee, such as being provided with an opportunity to respond to allegations of misconduct or lack of performance. This notion is in consonance with South African jurisprudence.¹⁰⁴

In relation to less serious misconduct or performance issues, the Code provides that the employee 'must' give a valid reason as to why he or she is at risk of being dismissed. The valid reason must be based on the employee's conduct or capacity. In those situations the employee must receive a warning (which need not be in writing). In addition, the code provides that the employee is entitled to have a person present to assist them in discussions 'in circumstances where dismissal is possible.' Lawyers are excluded from representing employees.

¹⁰⁴ Dismissal to be preceded by a fair hearing. See, Schedule 8: Code of Good Practice: Dismissal of the LRA.

The provisions in the Code regarding less serious misconduct or performance issues place considerable emphasis on procedural fairness, and lesser emphasis on substantive fairness. Although the employer should provide a valid reason in writing, the Code does not actually require that there be a valid reason for the ultimate dismissal.

FWA has the task of assessing whether the 'small business employer' has complied with the code, as part of determining whether it has jurisdiction in relation to an application of unfair dismissal.¹⁰⁵ The Code states that a 'small business employer will be required to provide evidence of compliance with the Code.

(b) Genuine Redundancy

The FW Act provides that a 'genuine redundancy' will not be an unfair dismissal.¹⁰⁶ A 'genuine redundancy' is defined to mean where the employer 'no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise,' and 'the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.'¹⁰⁷ The FW Act provides that it is not a 'genuine redundancy' if it would have been reasonable in all the circumstances for the person to be redeployed in the employer's enterprise or that of an 'associated entity.'¹⁰⁸

¹⁰⁵ Section 385(c) of the FW Act.

¹⁰⁶ Section 385(d), 389 of the FW Act.

¹⁰⁷ Section 389(1) of the FW Act.

¹⁰⁸ Section 389(2) of the FW Act.

(c) Minimum Employment Period

An employee cannot pursue an unfair dismissal application until he or she has served the 'minimum employment period' that period is 6 months, or 12 months in the case of a 'small business employer.'¹⁰⁹ The 'minimum employment period' requires 'continuous service,' which is identified in section 22 of the FW Act, to deal with situations such as periods of unauthorized absences, unpaid leave, and transfer of business.¹¹⁰

(d) Non-Award High Income Earners

This exemption relates to a 'national system employee,' who is not covered by a modern award, or an enterprise agreement does not apply to them, and they earn more than the 'high income threshold.'¹¹¹ The threshold is currently \$108 300 per annum (indexed) for full time employees.¹¹²

3. Legal framework governing the law of unfair dismissal in South Africa

3.1 The Constitution (Act 108 of 1996)

Section 23 of the Constitution¹¹³ provides that 'everyone has the right to fair labour practices,' thus an employer may not infringe an employee's right to fair labour

¹⁰⁹ Section 382(a), 383 of the FW Act.

¹¹⁰ Section 384(1) of the FW Act.

¹¹¹ Section 382(b) of the FW Act.

¹¹² Section 12, 333 of the FW Act.

¹¹³ Act 108 of 1996.

practices, without just cause.¹¹⁴ The LRA was promulgated in terms of section 23(5) and (6) of the Constitution to give effect to the right to fair labour practices. Section 39 of the Constitution also play a role in labour dispute resolution, in that obliges the court, tribunal or forum when interpreting the Bill of Rights,¹¹⁵ to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and it must consider international law; and may consider foreign law.

3.2 The scheme of the LRA

Section 3 of the LRA enjoins any person applying that Act to interpret its provisions-

- ‘(a) to give effect to its primary object;
- (b) in accordance with the Constitution;
- (c) in compliance with the public international law obligations of the Republic.’

The LRA sets an elaborate scheme to protect the right not to be unfairly dismissed. By so doing, the Act extends the common law concept of dismissal, renders dismissal for certain reasons impermissible in any circumstances, and limits to three the reasons for which employers are permitted to dismiss employee. These are misconduct by, or incapacity of, the employee, and operational requirements of the employer. This scheme in turns dictates the procedures for the dispute resolution of dismissal disputes,

¹¹⁴ Section 36 of the 1996 Constitution.

¹¹⁵ Chapter 2 of the Constitution.

and the principles that are applied to determine whether the respective forms of dismissals are fair.

3.2.1 Who can be dismissed

Under the common law, only employees, i.e. persons who are parties to current contracts of employment, can be dismissed.¹¹⁶ Section 186 of the LRA extends the concept of dismissal to include persons who are not parties to contracts of employment. Section 186(1)(b) of the LRA provides that a dismissal may be deemed to have taken place even if the preceding contract has lapsed at the time the employee fails to conclude a new contract.

Contract of employment extends even in situations when employers reach an agreement with employees that they can commence work on a future date, and the employer alters the decision to employ, the employee, in that case the employment contract is binding and enforceable. Therefore withdrawal by either party from the agreement before the stipulated dates constitutes a termination of the contract by the withdrawing party. Under the common law, a person who has been promised employment in the future may hold the employer to the contract or sue for damages.¹¹⁷

¹¹⁶ *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC).

¹¹⁷ See, *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC).

In *Whitehead v Woolworths (Pty) Ltd*,¹¹⁸ the Court held that the company offered Ms. Whitehead a position, which she had accepted. However, the court held that she could not claim to have been dismissed within the statutory meaning of the term in the statutory definition because at the time the company withdrew from the contract, she was not an 'employee' within the meaning of that term in the statutory definition, which *inter alia*, recognizes people as employees only if they 'receive or are entitled to receive remuneration' from an employer. It is submitted that this judgment is incorrect, for the reason set out below. Section 188(1)(a) of the LRA which the form of dismissal upon which Ms. Whitehead relied, does not contain the word 'employee.' It provides that a dismissal takes place if an employer has terminated a contract of employment. If the agreement between Ms. Whitehead and Woolworths amounted to a binding contract, which the court apparently accepted, it can only have been a contract of employment. That being the case, the company's withdrawal of its offer constituted the termination of a contract of employment. It is submitted that *Whitehead's* case was incorrectly decided.

In *Wyeth SA (Pty) Ltd v Manqele & Others*,¹¹⁹ the Labour Court disagreed with *Woolworth's* judgment in this respect. The court remarked that the interpretation of 'employee' adopted in the latter judgment consigns a person who has contracted a valid employment contract but has not yet commenced working for the employer to a

¹¹⁸ (1999) 20 ILJ 2133 (LC).

¹¹⁹ (2005) 26 ILJ 749 (LAC).

'jurisprudential limbo.'¹²⁰ The court noted that the definition of dismissal in section 186(1)(a) of the LRA makes no reference to an employee. According to the court, all what the statutory definition requires is a valid contract of employment and a termination of that contract by an employer. The court adopted a similar approach in *Jack v Director –General of the Department of Environmental Affairs*.¹²¹

Employees in the position of *Manqele and Jack* are also entitled to a fair hearing before their contracts are terminated.¹²² However, a dismissal cannot occur before the contract is finalized¹²³ or if the contract is invalid.¹²⁴

¹²⁰ The employee had not commenced rendering services to his or her employer.

¹²¹ (2003) 1 BLLR 28 (LC); see also *Greyvenstein & Illoso Consulting Engineers* (2004) 25 ILJ 613 (CCMA); *Mills & Drake International SA (Pty) Ltd* (2004) 25 ILJ 1519 (CCMA), in which the applicant sued for damages under Basic Conditions of Employment Act for unlawful dismissal. This debate ended with the judgment of the Labour Appeal Court in *Wyeth SA (Pty) Ltd v Manqele and Others* (2005) 26 ILJ 749 (LAC), in this judgment, unanimous bench held that a literal interpretation of the statutory definition of 'each employee' would in this context render the LRA unconstitutional. The court accepted that the definition be given an extended meaning by applying a legal 'fiction' similar to that which gives protection to unborn children. By the same token, protection against dismissal afforded by the LRA now extends to persons who have accepted offers of employment, but have not yet commenced working at the time the employer repudiates the contract. However employers may also prove that such 'dismissals' are fair.

¹²² *Van Deventer & Venture SA (Pty) Ltd* (2007) 28 ILJ 268 (CCMA).

¹²³ *Schoeman v IT Management Advisory Services* (2002) 23 ILJ 1074 (LC); *Coombe v Manong & Associates (Pty) Ltd* (2004) 25 ILJ 1507 (CCMA); *Bayat v Durban Institute of technology* (2006) 27 ILJ 188 (CCMA).

¹²⁴ *Hood v Association for Retired Persons & Pensioners* (2004) 225 ILJ 111 (CCMA); the commissioner's finding that the contract was invalid was overturned on review; see *Hood v Association of Retired Persons & Pensioners & Others* (2006) 27 ILJ 1017 (LC), however, the commissioner's finding that an employee cannot be dismissed if the contract is null and void must stand is supported.

3.2.2 Categories of unfair dismissal

The provisions regulating dismissal disputes are built upon a three-fold classification of dismissals: automatically unfair dismissals, dismissals related to the conduct or capacity of the employee, and dismissals related to the operational requirements of the employer. This classification determines not only the forum in which dismissal disputes must ultimately be resolved, it also determines the principles that must be applied by those forums when they decide whether a dismissal was fair.

Common to any inquiry into the fairness or otherwise of all forms of dismissal are three issues: whether the termination of the employment relationship amounted to a dismissal; if so, whether there was a fair reason for the dismissal and whether the employer followed a fair procedure before taking the decision to dismiss the employee. Dismissals that are not for a fair reason are referred to as substantively unfair, dismissal not in accordance with a fair procedure are termed procedurally unfair.

Section 188 of the LRA makes it clear that procedural fairness and substantive fairness are independent requirements for a dismissal. It may therefore be that a dismissal is found to be for a fair reason, but that it is nevertheless unfair because the employer failed to follow a fair procedure. It may also be that a dismissal is both procedurally and substantively unfair.

3.2.3 Fair reasons

With the exception of constructive dismissals, the reason for the dismissal on the ground or grounds that prompted the employer to terminate the contract. The ground for a dismissal, and its adequacy, must be established by objective inquiry. How the parties characterize the dismissal is therefore irrelevant when determining whether a dismissal was substantively fair.¹²⁵

Assessing the substantive fairness of a dismissal generally entails a two-stage inquiry; first is to establish why the employer dismissed the employee, the second is to establish the adequacy of that reason. If the reason is found to be on reasons listed in section 187 of the LRA (i.e. automatically unfair), that is the end of the inquiry, unless the statute permits the employer to raise a defence. If, however, the dismissal is found to be for reasons related to the conduct or capacity of the employee or for reasons not covered by section 187 of the LRA, the adequacy of that reason must be assessed. Fairness generally requires some correlation between the seriousness of the employee's misconduct or incapacity and the employer's action.

¹²⁵ Section 188 of the LRA.

The arbitrator or the court is empowered to award compensation to an unfairly dismissed employee, if the reason for dismissing the employee was found to be unfair, and the employee concerned does not want to be reinstated.¹²⁶

3.2.4 Fair procedure

Section 188 of the LRA requires dismissals relating to the conduct or capacity of employee, or to the operational requirements of the employer; to be conducted 'in accordance with a fair procedure.'

The elements of procedural fairness depend on the reason for the dismissal.¹²⁷ Dismissals relating to misconduct must generally be preceded by a fair hearing. Dismissals relating to incapacity must be preceded by attempts to counsel the affected employees, find them alternative positions, and, finally, by an incapacity inquiry. The procedures required for a dismissal for retrenchment are provided in detail in section 189 of the LRA.

The effect of non-compliance with a fair procedure by the employer in unfair dismissal cases is that the arbitrator or the court is empowered to award unfairly dismissed employee compensation, even if the dismissal was substantively fair.¹²⁸

¹²⁶ Section 193(2) of the LRA.

¹²⁷ Section 188(2) of the LRA.

¹²⁸ Section 194(1) of the LRA.

3.2.5 The relationship between substantive and procedural fairness

Judges and arbitrators normally make specific findings, where relevant, on whether a dismissal is procedurally or substantively unfair, or both. Separate inquiries are normally conducted in respect of these two aspects of a dismissal. However, a finding that a dismissal was either procedurally or substantively unfair is sufficient to stigmatise the dismissal as unfair.¹²⁹ There is nothing contradictory about finding that a particular dismissal was thoroughly warranted, but unfair because the employer failed to follow a fair procedure.¹³⁰

3.2.6 What is a dismissal

A dismissal takes place when the contract is terminated at the instance of the employer and entails some communication by the employer to the employee that the contract has come to an end. This message can be communicated in words or by conduct, for example, when the employer indicates that the employee will no longer be paid. The LRA has extended the concept of dismissal to include other forms. The LRA defines dismissal as follows:

1. 'Dismissal'-means that-
 - (a). an employer has terminated a contract of employment with or without notice;

¹²⁹ Section 188 of the LRA.

¹³⁰ Section 193 of the LRA.

- (b). an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it;
- (c). an employer refused to allow an employee to resume work after she-
- (i). took maternity leave in terms of any law, collective agreement or her contract employment;
- (d). an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or;
- (e). an employee terminated a contract of employment with or without notice because the employer made continued employment relationship intolerable for the employee;
- (f). an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.¹³¹

¹³¹ Section 186 of the LRA.

3.2.7 Burden of proof

In dismissal proceedings, the onus is on the employees to prove that they were in fact dismissed, and on the employer to show that the dismissal was fair.¹³² Proof that a dismissal took place requires employees to prove on a balance of probabilities that they were employees as defined at the time of the termination of employment relationship. In cases where employees claim to have been dismissed by virtue of non-renewal of a fixed-term contractor selective non-re-employment, they must prove they were employees at the time of the original termination or dismissal and must prove that they had a reasonable expectation of renewal or that they had been dismissed in circumstances similar to those in which the re-employed employees were dismissed. In other words, the employee must prove that the termination of the employment relationship took one of the forms mentioned in section 186 of the LRA.

3.2.8. Codes of good practice

The LRA requires any person who is considering whether a dismissal was for a fair reason and in accordance with a fair procedure to take into account 'any relevant Code of Good Practice issued in terms of the LRA. The principal codes are those dealing with dismissal generally, dismissal for operational requirements, and sexual harassment. These codes are merely guidelines, and do not give rise to substantive rights. They are

¹³² Section 192 of the LRA.

not intended to supplant collective agreements.¹³³ The codes are important because they encapsulate the main principles of substantive and procedural fairness relevant to the various types of dismissal. The principles of dismissals for misconduct and incapacity are dealt with in Schedule 8 of the LRA. There is also a separate code governing dismissals for operational requirements.¹³⁴

3.2.9 Disputes about unfair dismissal

3.2.9.1 Pre-dismissal arbitration

A recent amendment to the LRA¹³⁵ makes it possible for employers to use the services of CCMA commissioners or persons appointed by accredited bodies to conduct pre-dismissals hearings and to 'direct' the action that may be taken against the employee in cases of alleged misconduct or incapacity.¹³⁶ Employees must consent to this process after they have been advised of the allegation against them. The employer may be represented by a director, employee or (with the consent of the employee), a legal practitioner. The commissioner has all the powers of commissioner conducting a post-dismissal arbitration, except that, instead of issuing an award, the commissioner must 'direct what action if any, should be taken against the employee.' The LRA does not expressly deprive employees dismissed by commissioner of the right to refer a dispute to the CCMA for arbitration. However, as the commissioner's directive is 'final and

¹³³ *Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU & Another* (1998) 19 ILJ 1481 (LC).

¹³⁴ GN 1517 of GG 20254 of 16 July 1999.

¹³⁵ Labour Relations Amendment Act 12 of 2002.

¹³⁶ Section 188 of the LRA.

binding' it cannot be reversed by another commissioner. A further referral would be *res judicata*.¹³⁷

3.2.9.2 The procedure for challenging dismissals

The procedure for challenging alleged unfair dismissals are set-out in section 191 of the LRA. The procedure may be described as follows: Dismissed employees may refer disputes about the fairness of their dismissals in writing within 30 days of the date of the dismissals to the bargaining council having jurisdiction or, if there is no bargaining council having jurisdiction, the CCMA.¹³⁸ If the employer's disciplinary procedure provides for an appeal, the 30 days run from the date on which the employer took the final decision to dismiss the employee. A dispute concerning a dismissal can only be referred after the employee has been dismissed or given notice of dismissal. If the dispute is referred before the employee is given notice of dismissal, the CCMA and the Labour Court lack jurisdiction to arbitrate or adjudicate even if the employee has been dismissed after referral.¹³⁹ Dismissal disputes may be referred while employees are on

¹³⁷ *Junid Manufacturing CC v National Bargaining Council for the Clothing Manufacturing Industry & Others* (2009) 30 ILJ 1603 (LC).

¹³⁸ If the bargaining council has jurisdiction, the CCMA does not and *vice versa*.

¹³⁹ *Molemi & Others v Hellman Parcel Systems (Pty) Ltd* (1999) 20 ILJ 2082 (LC); *Paper Printing Wood & Allied Workers Union & Others v Nasou-via Africa, a Division of the National Education Group (Pty) Ltd* (1999) 20 ILJ 2101 (LC).

notice of termination.¹⁴⁰ If the dispute is referred outside the 30 days limit, the CCMA or bargaining council may condone the late referral.¹⁴¹

The first step in the dispute resolution process is conciliation. The council or the commissioner must then attempt to resolve the dispute by conciliation within 30 days of the date of the referral, failing which the conciliating commissioner must certify that the dispute remains unresolved.¹⁴²

Once the certificate of outcome has been issued, the employee may refer the dispute for final determination. In cases of alleged unfair dismissals, the decision whether to take the matter further lies with the employee alone. Depending on the reason for the dismissal, the dispute is finally determined either by arbitration or adjudication.

In most cases, arbitration takes some time after the employee refers the dispute for arbitration. However, in terms of the latest amendment to the LRA,¹⁴³ arbitration can take place, immediately after conciliation fails. 'Con-arb'¹⁴⁴ is permissible when the dispute concerns a dismissal for any reason relating to probation or where the parties agree to this expedited procedure.¹⁴⁵

¹⁴⁰ Section 191(2).

¹⁴¹ Condonation must be granted prior to the commencement of the conciliation proceedings, as condonation in such cases is a jurisdictional precondition for the validity of all that follows.

¹⁴² Section 191 of the LRA.

¹⁴³ 2002 Amendment to the LRA.

¹⁴⁴ 'Con-arb' refers to a combination of conciliation and arbitration process.

¹⁴⁵ Section 191(5A) of the LRA.

Dismissal disputes must be referred to the Labour Court or the CCMA within 90 days of the date on which a commissioner certifies that the dispute remains unresolved.¹⁴⁶ An application filed after the lapse of the 90-day period can be condoned 'on good cause shown.'

3.2.10 Date of dismissal

To establish whether dismissed employees have complied with the 30-day deadline for referral of a dispute or to determine compensation, it is necessary to pinpoint that the date on which the dismissal occurred. For this purpose, section 190 of the LRA provides:

(1) The date of dismissal is the earlier of-

(a) The date on which the contract of employment terminated; or

(b) The date on which the employee left the service of the employer.

(2) Despite subsection (1)-

(a) If an employer has offered to renew on the less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered less favourable terms or the date on which the employer notified the employee of the intention not to renew the contract;

¹⁴⁶ See section 191(11)(a) of the LRA.

(b) If the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;

(c) If an employer refused to reinstate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee.

Prior to the 2002 amendment to the LRA, when an employer takes a decision to dismiss after a disciplinary hearing and then affords the employee an opportunity to appeal, whether in terms of a disciplinary code or not, the date of dismissal was the time the employee was initially dismissed, not the date that the appeal was rejected.¹⁴⁷ Before the 2002 amendment to LRA, this meant that employees whose appeals were rejected more than 30 days after their dismissals were required to seek condonation for the late referral. Now section 191(1)(b)(i) provides that the 30-day deadline runs from the date on which the employer takes the final decision to dismiss the employee-i.e. after the dismissal of an appeal, if any.

The date of dismissal of employees who resign on notice and then claim to have been constructively dismissed, the dismissal date is the date on which the employee tendered their resignation, not the date on which they stopped working if all the factual

¹⁴⁷ *SACCAWU & Another v Edgars Stores Ltd* (1997) 18 ILJ 1046; *Edgars Stores Ltd v SACCAWU & Another* (1998) 19 ILJ 771 (LAC).

circumstances upon which the employee bases the claim to have been constructively dismissed were in existence at the time of the resignation.¹⁴⁸

4 The International Labour Organisation (ILO) Convention

The Constitutional Court in the case of *South African Defence Union v Minister of Defence and Another*¹⁴⁹ acknowledged that in interpreting section 23 of the Constitution, Act 108 of 1996 an important source of international law will be the conventions and recommendations of the International Labour Organisation (ILO).¹⁵⁰ An important source of international law in this regard is ILO Convention 158 of 1982.¹⁵¹ Article 4 of Convention 158 lays the foundation for South African legislation regarding unfair dismissal based on misconduct, capacity and operational requirements. The Article safeguards the security of employment by ensuring that employers do not dismiss employees at will. It provides that-

'the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct

¹⁴⁸ *Kgapola v University of the North* (1999) 4 LLD 702 (LC).

¹⁴⁹ (1999) ZACC 7; 1999 (4) SA 469 (CC); 1999 6 BCLR 615 (CC) at para 25.

¹⁵⁰ In *NUMSA and Others v Bader Bop (Pty) Ltd & Another* (2002) ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); (2003) BLLR 103 (CC); (2003) 24 ILJ (CC) at para 26, the Constitutional Court stated that South Africa's international obligations are important to the interpretation of the LRA.

¹⁵¹ Convention 158 of 1982 is titled '*Termination of Employment at the Initiative of the Employer*.' This Convention superceded Recommendation 119 of 1963 of the ILO upon which the Industrial Court in formulating its guidelines regarding unfair dismissal.

of the worker or based on the operational requirements of the undertaking, establishment or service.'

Section 188 of the LRA endorses Article 4 by ensuring that employers do not terminate contracts of employment at will,¹⁵² this is to say, without giving fair reasons for the terminations of employment contracts.

¹⁵² Under the common law a contract of employment could be terminated without any reason being furnished as long as the proper notice was given where notice was required. In such circumstances a summary dismissal would be unlawful only for want of notice. The employee's damages may then be restricted to his or her loss of earnings in the notice period. See in this regard *Key Delta v Marriner* (1998) 6 BLLR 647 (E) at 652 G wherein Erasmus J, commented *obiter* on this point.

CHAPTER 3

COMPENSATION AS A REMEDY FOR UNFAIR DISMISSAL

1. Introduction

The LRA was amended in 1996, 1998 and 1999 which introduced substantial changes¹⁵³ particularly to section 194 of the LRA, thereby giving arbitrators a proper discretion to determine compensation in the event of dismissals.

This section deals with the limits on compensation in dismissal cases. This section provides that any compensation for either procedural or substantive unfairness or both must be just and equitable. Compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.¹⁵⁴ Subsection 3 provides that the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but may not be more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

¹⁵³ 11 November 2002.

¹⁵⁴ Section 194(1) of the LRA.

Section 193 of the LRA provides for reinstatement as a primary remedy reinstatement, and compensation as a secondary remedy. It should be borne in mind that reinstatement as a remedy involves the payment of money to the unfairly dismissed employee. Compensation as a remedy on the other hand is regarded as the appropriate remedy where the employee does not wish to be reinstated; circumstances are such that the continuation of the employment relationship would be intolerable; it is not reasonably practicable for the employer to reinstate the employee; or the dismissal is only procedurally unfair.¹⁵⁵ Reinstatement and Re-employment are regarded as the primary remedy, unless the abovementioned circumstances exist.

The LRA as amended by the Labour Relations Amendment Act 12 of 2002, amended section 194, which makes provision for the awarding of compensation for an unfair dismissal or unfair labour practice. Section 194(1) of the LRA provides that:

'compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all circumstances, but may not be more than the equivalent of 12 months' remuneration

¹⁵⁵ Section 193(2) of the LRA.

calculated at the employee's rate of remuneration on the date of dismissal.'

Prior to the repealing of the statutory minimum compensation that was imposed in terms of the previous section 194(1),¹⁵⁶ and (2)¹⁵⁷ of the LRA signals the demise of unsatisfactorily and probably unintended 'all or nothing' principle enunciated in *Johnson & Johnson (Pty) Ltd v CWIU*,¹⁵⁸ in this case the Labour Appeal Court interpreted section 193 read with section 194(1) of the LRA to mean that the arbitrator or adjudicator retained a discretion whether to award compensation or not. If compensation was awarded, the court held that it had to be in accordance with the formula set out in section 194(1) of the LRA.

The enactment of these amendments give judicial discretion to be exercised by the arbitrator or the court in awarding compensation that is just and equitable. It was held in *Whall v BrandAdd Marketing (Pty) Ltd*,¹⁵⁹ that the 'awarding of compensation on the basis of fairness is not an exact science.'¹⁶⁰ At the time when this research was

¹⁵⁶ In terms of the previous section 194(1) of the LRA compensation for a procedurally unfair dismissal must be equal to the remuneration that the employee would have been paid between the date of the dismissal and the last date of the remuneration or adjudication.

¹⁵⁷ The previous section 194(2) of the LRA provided that compensation for a substantively unfair dismissal on the ground of misconduct, incapacity and operational requirements must be just and equitable in all circumstances but not less than the amount awarded in terms of section 194(1) and not more than the equivalent of 12 months remuneration.

¹⁵⁸ (1999) 20 *ILJ* 89 (LAC).

¹⁵⁹ (1999) 20 *ILJ* 1314 (LC). At 1325.

¹⁶⁰ Meaning that the adjudicator is required to exercise discretion judicially.

conducted, it should be noted that the CCMA had not provided commissioners with guidelines or directives for the awarding of compensation.

2. The effect of 2002 amendment on the LRA

The amendments to the LRA remove the 'all or nothing' principle in relation to compensation from the LRA. Now a court is required to consider what is just and equitable in all the circumstances. The likely effect of this is that actual loss suffered by the employee will become one amongst many factors that a court must take into account and it will therefore be necessary to lead evidence in respect of the financial loss occasioned by the dismissal and the steps taken by the employee to mitigate that loss. This does not mean, however, that compensation for procedural or substantive unfairness will not still be considered a *solatium* that may be granted irrespective of the employee's actual damages.¹⁶¹

The amended section 194 eliminates the distinction between compensation for procedurally and substantively unfair dismissals, but preserves the ceiling of 24 months' compensation for automatically unfair dismissals.

3. Reinstatement and re-employment as primary remedies

Section 193 of the LRA sets out the remedial options open to the Labour Court or an arbitrator for an unfair dismissal. These are limited to reinstatement, re-employment or

¹⁶¹ *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 20 ILJ 1314 (LC).

compensation¹⁶² except that in the case of an automatically unfair dismissal or a dismissal based on the employer's operational requirements the court or the arbitrator may, in addition, make any other order that it considers appropriate.¹⁶³ In all cases the option of no award also exists.¹⁶⁴ A proper interpretation of the LRA is that these options are exhaustive.¹⁶⁵

The choice of remedy is specifically directed towards reinstatement or re-employment. These are the primary remedies under the LRA, and have to be ordered unless one of the following four exceptions apply-

- the employee does not wish to be reinstated or re-employed;
- the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- it is not reasonably practicable for the employer to re-instate or re-employ the employee;
- the dismissal is unfair only because the employer did not follow a fair procedure.¹⁶⁶

¹⁶² Section 193(1) of the LRA.

¹⁶³ Section 193(3) of the LRA, such as an interdict against a discriminatory or unfair practice or the creation of equivalent employment.

¹⁶⁴ This is so because the permissive word 'may' is used-see *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) 99F-J.

¹⁶⁵ See Brassy *Employment and Labour Law* Vol 3 A8:63-64.

¹⁶⁶ Section 193(2) of the LRA.

Where one of these exceptions is proved, on a balance of probabilities, reinstatement or re-employment may not be ordered. The preference for reinstatement or re-employment marks a departure from the common law of contract, where specific performance is a discretionary remedy for breach of contract, and the norm was not to order specific performance of contracts of service.¹⁶⁷ The discretion has now been removed save where it may be necessary to interpret and apply the exception.

The LRA does not explicitly specify the difference between reinstatement and re-employment and the terms must therefore be given their ordinary meaning.¹⁶⁸ Section 193(1)(b) of the LRA, which deals with re-employment, provides that re-employment may either be the work in which the employee was employed before the dismissal or in other reasonably suitably work on any terms.

Reinstatement implies placing the employee in the same position the employee was in prior to the dismissal. If the dismissed employee's position no longer exists and cannot reasonably be created, re-employment doing the same or similar kinds of work is the next best option.¹⁶⁹ In respect of both reinstatement and re-employment, the award may

¹⁶⁷ *Myers v Abreahamson* 1956 (3) SA 121 (C) at 124 B -127C; *Ngwenya v Natalspruit Bantu School Board* 1965 (1) SA 692 (W)- this was not the rule of law- *National Union of Textile Workers v Stag Packages (Pty) Ltd* 1982 (4) SA 151 (T).

¹⁶⁸ *Grogan Dismissal* at 333 and 334.

¹⁶⁹ The Namibian Supreme Court of Appeal considered the difference between the terms 'reinstatement' and 're-employment' in *Transnamib Holding Ltd v Engelbrecht* (2007) 28 ILJ 1394 (Nm).

be made retrospective from any date not earlier than the date of dismissal¹⁷⁰ conflicting judgments in the Labour Appeal Court on whether or not one should read into this limitation based on the upper compensation limitations¹⁷¹ have now been resolved by the Supreme Court of Appeal in *Republican Press (Pty) Ltd v CEPPWAWU and Others*.¹⁷² In particular, the court disagreed with the finding in *Chemical Workers* case that the LRA had to be construed so that an order for reinstatement could not be given retrospective operation for longer than 24 months' in the case of an automatically Unfair dismissal, and 12 months in the case of other dismissals. The court held that retrospective remuneration becomes due under the terms of the contract and does not constitute compensation as envisaged by section 194 of the LRA. Accordingly, no limit can be read into the LRA.

4. A condition precedent for ordering a remedy in unfair dismissal cases

A finding that a dismissal is unfair, it was held in *De Beers Consolidated Mines Ltd v CCMA & Others*,¹⁷³ is a 'condition precedent' for ordering a remedy. In this matter Willis JA, advanced the following interpretation of section 193 of the LRA:

¹⁷⁰ Section 84(1) of the Basic Conditions of Employment Act provides any break in employment of less than a year is regarded as continuous for the purposes of that Act, which includes a provision to severance pay (section 41).

¹⁷¹ *Kroukam SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC)-see also a dissenting judgment by Davis AJ and *Chemical Workers Industrial Workers Union & Others v Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC).

¹⁷² (2007) 28 ILJ 2503 (SCA).

¹⁷³ (2000) 9 BLLR 995 (LAC) at 1007.

'The onus is thus on the employer to prove the facts upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of the arbitration proceedings, then...the employer has failed to prove the fairness of the dismissal. On the other hand, if the employer does prove the facts upon it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she considers being a fair sanction in the circumstances. This intention of the legislature is plain from a reading of section 193 as a whole.'

In *Toyota SA motors (Pty) Ltd v Radebe*,¹⁷⁴ however, Nicholson JA, found that a Commissioner ought to 'independently consider what sanction he or she would have imposed in the circumstances, as part and parcel of the inquiry into whether the dismissal was fair.' The Constitutional Court has now resolved the issue. In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,¹⁷⁵ it was held that while the decision to dismiss belongs to the employer, the determination of its fairness does not. In determining the fairness of a dismissal and the sanction imposed a Commissioner is

¹⁷⁴ (2000) 3 BLLR 243 (LAC).

¹⁷⁵ (2007) 12 BLLR 1097 (CC).

not required to defer to the decision of the employer but must consider all relevant circumstances in reaching an objective determination of fairness.¹⁷⁶

5. The exercise of discretion

In *Johnson & Johnson (Pty) Ltd v CWIU*,¹⁷⁷ the Labour Appeal Court noted that the use of the word 'may' in section 193(1) and section 158(1)(a)(v)¹⁷⁸ of the LRA is 'permissive in nature' and that 'none of the other provisions of the LRA compels a different reading of section 193(1).' Thus the court or the CCMA has discretion whether to order any of the forms specified by section 193(1) of the LRA.¹⁷⁹

6. Ordering the employer to pay compensation to the employee

Compensation generally involves the payment of 'a sum of money for something lost'¹⁸⁰ the primary enquiry for a Court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and the scope of the wrongful act on the part

¹⁷⁶ Followed in *Fidelity Cash Management Service v CCMA & Others* (2008) 3 BLLR 197 (LAC); see also *Edcon Ltd v Pillemer No & Others* (2008) 5 BLLR 391 (LAC) and *Phalaborwa Mining Co Ltd v Cheetam & Others* (2008) 6 BLLR 553 (LAC).

¹⁷⁷ (1998) 12 BLLR 1209 (LAC).

¹⁷⁸ Makes it clear that a compensation order is only one of the forms of 'appropriate' orders that the Labour Court may make.

¹⁷⁹ *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 6 BLLR 626 (LC).

¹⁸⁰ *Chotia v Hall Longmore & Co (Pty) Ltd* (1997) 6 BLLR 739 (LC) at 745 with reference to *Russel NO & Loveday NO v Collins Submarines Pipelines Africa (Pty) Ltd* 1975 (1) SA 110 (A) at paragraph 145-D-E; *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 642 -643.

of the employer.¹⁸¹ The objective of compensation for procedural unfairness, the Labour Appeal Court held in *Johnson & Johnson (Pty) Ltd v CWIU*,¹⁸² is to offer 'solatium'¹⁸³ for the loss of the employee's right to a fair procedure prior to dismissal and not necessarily to compensate for actual losses suffered as a result of the dismissal. However, section 193(1), creates discretion whether to award compensation or not.¹⁸⁴

However, in practice the remedies referred to in sections 193 have not been treated as being exhaustive. In *Country Fair v CCMA & Other*,¹⁸⁵ Landman J found that-

'although the Act provided for the awarding of reinstatement, re-employment or compensation, the commissioner had not exceeded his powers by adding a final warning to his order.'

In *Parry v Astral Operations Ltd*,¹⁸⁶ the dismissal of an employee for operational reasons was found to be unfair and unlawful on the grounds, *inter alia*, that notice pay and severance benefits had not been paid. The employee relied on statutory and other causes of action and was awarded damages and various amounts due in terms of statute and contract, in addition to compensation equivalent to twelve months

¹⁸¹ *Le Monde Luggage CC t/a Pakwells Petjie v Commissioner Dunn & Others* (2007) 10 BLLR 909 (LAC).

¹⁸² (1998) 12 BLLR 1209 (LAC).

¹⁸³ *Solatium* means compensation for injured feelings from financial loss or physical suffering.

¹⁸⁴ *BMD Knitting mills (Pty) Ltd v SACTWU* (2001) 7 BLLR 705 (LAC).

¹⁸⁵ (1998) 6 BLLR 577 (LC).

¹⁸⁶ (2005) 10 BLLR 989 (LC).

remuneration. The judgment was overturned on appeal on the basis that the Labour Court lacked jurisdiction to entertain the dispute.¹⁸⁷

In *Kroukam v SA Airlink (Pty) Ltd*,¹⁸⁸ the majority of the Labour Appeal Court expressed the view that reinstatement or re-employment may be ordered retrospectively to the date of dismissal, even if that period exceeds twelve months, in case of substantively unfair dismissal, or twenty four months, in the case of automatically unfair dismissal. In summary, Davis AJA, held that-

'the working of section 193(1)(a) supports appellant's contention that the court has a discretion in respect of the retrospectiveness of a reinstatement award. In exercising this discretion, a court can address *inter alia* the time period between the dismissal and the trial. The court can accordingly ensure that an employer is not unjustly financially burdened if reinstatement is ordered.'

Zondo JP, in a minority judgment took a contrary view¹⁸⁹ and in *CWIU & Others v Latex Surgical products (Pty) Ltd*,¹⁹⁰ on behalf of a differently constituted court, held that it is not competent for a court or arbitrator to order retrospective reinstatement in excess of twelve months, in the case of substantively unfair dismissal or twenty four months in the

¹⁸⁷ *Astral operations Ltd t/a County Fair v Parry* (2008) 29 ILJ 2668 (LAC).

¹⁸⁸ (2005) 12 BLLR 1172 (LAC) at pars 61-64; followed in *SACCAWU & Others v Primeserve ABC Recruitment (Pty) Ltd t/a Primeserve outsourcing Incorporating* (2007) 1 BLLR 78 (LC).

¹⁸⁹ At par 116.

¹⁹⁰ (2006) 2 BLLR 142 (LAC) at par 113H.

case of automatically unfair dismissals. Back pay accompanying a reinstatement order, the court reasoned, in effect constitutes compensation 'in much the same way' as compensation awarded in terms of section 194.¹⁹¹ In *Republican Press v CEPPWAWU*,¹⁹² the Supreme Court of Appeal held that the decision in *CWIU* was erroneous because reinstatement of the employment contract was unrelated to the issue of compensation. The Constitutional Court endorsed this approach in *Equity Aviation Services (Pty) Ltd v CCMA & Others*,¹⁹³ concluding that the sum of money paid to an unfairly dismissed employee subsequent to an order of reinstatement with retrospective effect is not compensation as contemplated in section 193(1)(c) of the LRA or section 194 of the LRA. The back pay to which an unfairly dismissed employee becomes entitled when retrospective reinstatement is ordered is therefore not limited to the maximum period of compensation.

7. Compensation

Where reinstatement or re-employment is not possible, based on one of the exceptions listed, the arbitrator or court must decide whether or not to grant compensation, and if compensation is granted, the amount of compensation. Section 194 of the LRA sets the broad criteria for awarding compensation and sets upper limits. An arbitrator who orders an employer to reinstate or re-employ an employee may not simultaneously award

¹⁹¹ At par 114, citing par 123 of *Kroukam v SA Airlink* (2005) 12 BLLR 1172 (LAC).

¹⁹² (2007) 11 BLLR 1001 (SCA) at par 19.

¹⁹³ (2008) 12 BLLR 1129 (CC).

compensation to that employee.¹⁹⁴ This applies irrespective of whether the arbitrator also finds that the dismissal is also procedurally unfair.

The upper limit on compensation is 24 months' remuneration¹⁹⁵ for an automatically unfair dismissal¹⁹⁶ and 12 months' remuneration for other unfair dismissals. The latter limit applies whether the dismissal is procedurally or substantively unfair, or both. The compensation awarded must be just and equitable in all the circumstances.¹⁹⁷

The requirement that compensation must be 'just and equitable' reflects the fact that the Labour Court is a court of both law and equity.¹⁹⁸ As such it applies the rule of law as well as society's conception of fairness.¹⁹⁹ The same applies to the arbitrator acting under the powers conferred by sections 193 and 194 of the LRA respectively.

Prior to the 2002 amendment to the Act, the 'just and equitable' criteria only applied if a dismissal was only procedurally unfair, section 194(1) of the LRA (prior to the

¹⁹⁴ *Equity Aviation Services (Pty) Ltd v CCMA & Others* (2008) 29 ILJ 2507 (CC).

¹⁹⁵ 'Remuneration' is defined in section 213 as 'any payment in money or in kind, or both in money and in kind, made owing to any person in return for that person working for any other person, including the state, and 'remuneration' has corresponding meaning' the provisions of section 35, read with section 28(1) of the Basic Conditions of Employment Act 75 of 1997 on the calculation of remuneration are also relevant. All contractual benefits (not gratuities) making up the total packages-salary and benefits must be included.

¹⁹⁶ Section 194(3) reads: 'the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on date of dismissal'.

¹⁹⁷ Section 194(1) and (3) of the LRA.

¹⁹⁸ Section 151(1) LRA.

¹⁹⁹ See Brassy *Employment and Labour Law* vol. 3 A7: 84

amendment), provided that 'compensation must be equal to the remuneration the employee would have been paid between the date of dismissal and the last day of the adjudication or arbitration. Compensation for a substantively unfair dismissal was also subject to this minimum amount.

7.1 Refusal to order compensation

Section 193, read with section 158(1)(a)(v) of the LRA, makes the award of compensation a permissive power in that it provides that a court or arbitrator 'may' order reinstatement, re-employment or compensation.²⁰⁰

This issue was addressed by the Labour Appeal Court in *Johnson & Johnson* case, in the context of the now repealed section 194(1) of the LRA that prescribed a minimum formula for compensation.²⁰¹ The court established the 'all or nothing' principle by finding that compensation for a procedurally unfair dismissal had to either be nil or had to equal the full amount as per the formula (i.e. the remuneration the employee would have received between date of dismissal and last day of adjudication). In determining when no compensation should be granted, the court said that '[the] discretion not to award compensation in the particular circumstances of a case, must of course, be exercised judicially': The court held further that the discretion not to award compensation may be exercised in circumstances where the employer has already

²⁰⁰ *Johnson & Johnson* (1999) 20 ILJ 89 (LAC) 99F-H.

²⁰¹ Which was compensation at the employee's last rate of remuneration from the date of dismissal to the last date of the hearing-repealed section 194(1) of the LRA.

provided the employee with substantially the same kind of redress, or its willingness to do so has been frustrated by the employee.

The 'all or nothing' approach was further developed in *Whall v BrandAdd Marketing (Pty) Ltd*,²⁰² which the Labour Court said the following:

'guidance as how such discretion should be exercised must be derived from the purposes of the LRA as a whole, read within the broader constitutional context, and sections 193 and 194 in particular. When exercising the discretion as to whether to grant compensation the court must, in my opinion, have regard to what is fair to both the employer and the employee. One of the purposes of the Act is to protect employees against unfair dismissal.²⁰³ Others are to advance economic development²⁰⁴ and to effectively resolve labour disputes.²⁰⁵ As a court retains the discretion not to grant compensation, this case law remains relevant notwithstanding the amendments to the Act. In the case of a dismissal that is only procedurally unfair, it remains competent for a court to determine that it is just and equitable to award no compensation. In making this determination a court is likely to consider in particular whether the employer offered substantially similar redress. The difficult question is

²⁰² (1999) 20 *ILJ* 1314 (LC), 1322-1323, per Grogan AJ.

²⁰³ Section 185 of the LRA.

²⁰⁴ Section 1 of the LRA.

²⁰⁵ Section 1(d) (iv)-At 123E-G.

whether a court should also consider the actual financial loss suffered by the employee in making the determination.'

7.2 Patrimonial loss versus *solatium*

An issue that has caused considerable controversy is whether a person is being compensated for actual damages established by the employee at arbitration or adjudication. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*,²⁰⁶ the Labour Appeal Court held that compensation for procedural unfairness is in the nature of a *Solatium*, in other words it is not necessarily linked to actual financial loss suffered by the employee.

The court said that:

'the compensation for the wrong in failing to give effect to the employee's right to fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer who breached the right must pay a fixed penalty for causing the loss.'²⁰⁷

The case was however, decided in the context of the 'all or nothing' principle where, if an award of compensation was to be paid, it had to equal a pre-determined amount irrespective of an employee's actual damages.

²⁰⁶ (1999) 20 *ILJ* 89 (LAC).

²⁰⁷ (1999) 20 *ILJ* 89 (LAC) 100-A-B.

In *Whall v BrandAdd Marketing (Pty) Ltd*,²⁰⁸ per Grogan AJ, the court considered whether it should take patrimonial loss into consideration when weighing up the fairness to both parties in a decision to grant all or nothing in terms of compensation. The court concluded that it was appropriate to take patrimonial loss into consideration.²⁰⁹ Subsequently, the Labour Appeal Court rejected this approach as being contrary to compensation as a *solatium*.²¹⁰

The amendments to the LRA remove the 'all or nothing' principle in relation to compensation. Now a court is required to consider what is just and equitable in all the circumstances. The likely effect of this is that actual loss suffered by the employee will become one amongst many factors that a court must take into account and it will therefore be necessary to lead evidence in respect of the financial loss occasioned by the dismissal and the steps taken by the employee to mitigate that loss. This does not mean, however, that compensation for procedural or substantive unfairness will not still be considered a *solatium* that may be granted irrespective of the employee's actual damages.²¹¹

²⁰⁸ (1999) 20 ILJ 1314 (LC), at 1322-1323.

²⁰⁹ Whall at 1323 H-1324A; departed from *Lorentzen v Senachem (Pty) Ltd* (1999) 20 ILJ 1811 (LC) and *Mamabolo & Others v Manchu Consulting CC* (1999) 20 ILJ 1826 (LC) 1834 F-G.

²¹⁰ *HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandez* (2002) 23 ILJ 278 (LAC).

²¹¹ *Johnson & Johnson* (1999) 20 ILJ 89 (LAC).

The following statement from the *Johnson and Johnson* judgment seems to support the view that in respect of procedural unfairness, compensation will continue to be regarded as a *solatium*-

'even if it is accepted that compensation means 'a sum of money for something lost', the something lost under section 194(1) of the LRA is the employee's right to a fair hearing or procedure prior to dismissal and not necessarily the actual losses suffered by the employee as a result of dismissal.... That kind of non-patrimonial loss is not foreign to South African law.'²¹²

In *HM Liebowitz* case above, the Labour Appeal Court had to decide the relevance of patrimonial loss in determining whether to grant compensation above the minimum as set out in the formula (prior to the amendments). The court said the following-

'patrimonial loss is relevant because, if no patrimonial loss was suffered, an award of compensation exceeding the minimum may offend the requirement of the subsection that compensation awarded must be just and equitable in all the circumstances. This does not necessarily mean that the absence of patrimonial loss would operate as a bar to the court awarding compensation exceeding the minimum. Indeed, there may be circumstances which satisfy the court that, despite the absence of

²¹²At para 9 E-F.

patrimonial loss, it would be 'just and equitable' in all the circumstances, for the court to award the employee compensation that goes beyond the minimum.'

The factors to be considered cannot be limited to whether the employer tendered procedural redress, or whether this was frustrated by the employee. All factors germane to the requirements of fairness and justice now become relevant in a determination of whether to grant compensation and if so, the amount of that compensation. The factors mentioned by the courts, such as judicial exercise of discretion, the consideration of the purposes of the LRA in the constitutional context, and the weighing up of fairness in respect of both parties, fit well within the criteria of justice and equity.

It is also possible that the courts will revert, at least in part, to the approach which the Industrial Court, a tribunal with an equity jurisdiction under the 1956 LRA,²¹³ adopted to compensation. Under that Act compensation was regarded as being akin to damages, the ordinary sense of the meaning 'the value, estimated in money, of something lost...'. The sum of money claimed or adjudged to be paid in compensation for loss sustained.²¹⁴

²¹³ Act 28 of 1956. the High Court of Appeal commented that the 1995 LRA retains and builds upon concepts and principles developed by the courts under the 1956 LRA, with reference to Unfair Dismissal- see in this regard *Fedlife Assurance Ltd v Wolfaard* (2001) 22 ILJ 2407 (SCA) at 2412A.

²¹⁴ See *Russel NO and Loveday NO v Collins Submarine Pipelines Africa* 1975 (1) SA 110 (C) at 145 D-E and *Mphosi v Central Board for Co-operative Insurance* 1974 (4) SA 633 A at 642-643.

Under the old Act, the unfair dismissal claim was considered similar to a claim for delictual damages.²¹⁵ The factors to be taken into account in awarding compensation were set out in *Ferodo v De Ruiter*²¹⁶ as follows-

- '(a). there must be evidence before the court of actual financial loss suffered by persons claiming compensation;
- (b). there must be proof that the loss was caused by the unfair labour practice;
- (c). the loss must be foreseeable, i.e. not too remote or speculative;
- (d). the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;
- (e). in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
- (f). there is a duty on the employee (if he is seeking compensation) to mitigate his damage by taking all reasonable steps to acquire alternative employment;
- (g). any benefit which the applicant receives- e.g. by way of severance package-must be taken into account'.

²¹⁵ *Food piper CC t/a Kentucky Fried Chicken v Shezi* (1993) 14 ILJ 126 (LAC).

²¹⁶ (1993) 14 ILJ 974 (LAC).

It is clear that these factors need to be modified in the light of the 1995 LRA, as amended; firstly, it is clear from the judgment of the LAC in the *Fernandez* case that the court may grant compensation in certain circumstances, even in the absence of proof of actual financial loss.

Secondly, the words 'reasonable and fair' in (e) to be read as 'just and equitable' in the light of section 194 of the LRA.

Thirdly, factor (g) must be seen in the light of section 195, which provides that compensation is in addition to any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

What this means is that the payment of a severance package, notice pay, leave pay, or pension or provident fund benefits as required by law or agreement cannot be taken into account in determining what is just and equitable compensation. However, if an employer paid more severance package than was required by statute or agreement, this could be taken into account in the assessment of compensation under section 194 of the LRA.

The circumstances that might be considered in deciding what is just and equitable may include:

- (a). the degree of unfairness of the dismissal, including whether the dismissal was both procedurally and substantively unfair;

- (b). the employee's length of service;
- (c).the employee's prospects of finding new employment;
- (d). the financial position of the employer and employee;
- (e).the employee's efforts to mitigate his or her loss;
- (f). whether the employer has already provided the employee with substantially the same kind of redress to the unfairness;
- (g). whether the employer's willingness to make such redress was frustrated by the conduct of the employee.

This cannot be a closed list of factors. It is suggested that full conspectus of all factors relevant to the justice and equity of the case should be considered in order to give effect to section194.

7.3 The purpose and importance of compensation

The LRA and the Constitution, protect against unfair dismissal and in appropriate circumstances, the LRA makes provision for the awarding of compensation to the employee for the unfairness.

In *Minister for Justice and Constitutional Development and Another v Tshishonga*,²¹⁷ the applicant appealed against the judgment of Pillay J, in which it was ordered to pay Tshishonga 12 months compensation.

²¹⁷ (2009) BLLR 862 (LAC).

The factual background to the appeal was as follows: Tshishonga was suspended and called to appear before a disciplinary inquiry after he had made certain allegations to the media. These allegations included, *inter alia* that:

- The former Minister, Mr. Maduna, had a 'questionable relationship' with a Mr. Motala, to act as provisional liquidator in the liquidation of the retail Apparel Group;
- The Minister was guilty of nepotism;
- The Minister was guilty of abuse of the infrastructure and staff of the Department of Justice; and,
- The Minister was guilty of endangering the South African Criminal System.

Following these disclosures, Tshishonga was suspended and called before a disciplinary inquiry. The inquiry commenced on 12 December 2003 and concluded on 2 June 2004. The Chairperson submitted his findings on 20 June 2004. He held that Tshishonga's disclosures were protected in terms of the Protected Disclosures Act 26 of 2000 (PDA), and Tshishonga was found not guilty. Tshishonga thereupon sued his employer on the basis that his suspension and disciplinary proceedings constituted an 'occupational detriment.'

The Labour Court, per Pillay J, found for Tshishonga and ordered the appellants to pay him 12 months compensation. In justification of this award, Pillay J set out a number of considerations as follows:

- 'compensation is a redress for both patrimonial and non-patrimonial loss';
- 'subjection to an occupational detriment for whistle blowing is a very serious form of discrimination and as such, warrants a 'very high award;'
- 'a whistle-blower takes risk when making disclosures and this must be acknowledged; and,
- 'the more serious the nature of the occupational detriment the greater the compensation' being suspended and subjected to disciplinary proceedings 'are a step away from being dismissed,' thus an award for 12 months and not 24 months compensation was deemed appropriate.'

The Appellant appealed and argued that Pillay J had erred in awarding 12 months compensation. They submitted that at no time did Tshishonga suffer dismissal and that he received his normal remuneration for the entire time during the disciplinary proceedings. Subsequently, Tshishonga's services were terminated by mutual agreement in terms of which Tshishonga would receive up to retirement age, taking into account projected salary increases and inflation. In addition, he would receive his pension benefits, also to retirement age.

The court held that while the principles developed in the cases dealing with *solatium* are important, the actual amount to be awarded is a discretionary act of the court; there is no tariff to which recourse can be made. The respondent was awarded compensation in the sum of R277 000.00.

7.4 Prescription of a claim of compensation

The concept prescription is used mostly in civil claim cases. The term 'prescription' is very much important in employment claims where compensation is awarded. This is apparent from the definition of the word 'debt' as referred to in terms of the Prescription Act 68 of 1969 ('the Act'). This Act clearly states that for the purposes of the Prescription, a 'debt' refers to an obligation to do something either by way of payment or by delivery of goods or services or not to do something. Where compensation has been ordered as a form of remedy,²¹⁸ it may run a risk of prescription, where the employee neglects or fails to enforce the award timeously.

The question of prescription within the labour law parameters was considered by the Labour Court in *Mampuru and Others v Maxis Strategic Alliance (Pty) Ltd*,²¹⁹ in this case the applicants were retrenched by their employer, *Maxi Security (Pty) Ltd (Maxi)* in 2002, they concluded an agreement with Maxi in terms that they would receive their full

²¹⁸ Section 193 of the LRA.

²¹⁹ (2009) 8 BLLR 762 (LC).

salary on 31 July 2002 and payment of outstanding leave, severance pay and bonuses by 30 August 2002.

The applicants alleged that they never received their severance pay and applied to the Labour Court for an order directing the respondent to comply with the terms of the agreement. The respondent raised two points *in limine*, namely;

(a). that it had been wrongly cited as a party to the agreement and to the application; and

(b). that by virtue of the provisions of sections 10 and 11 of the Prescription Act 68 of 1969, the applicants' claim had prescribed.²²⁰

The applicants argued that the retrenchment agreement was a document that stipulated the rights and obligations of the parties and that it was therefore not about a 'claim' but merely the enforcement of rights, accordingly, the Prescription Act did not apply.

The Labour Court, per Molahlehi J, disagreed and held that the provisions of Prescription Act were applicable. For purposes of the Prescription Act, a 'debt' refers to an obligation to do something either by way of payment or delivery of goods or services, or not to do something. The learned judge, held in this matter that a 'debt' namely, the entitlement to severance monies, arose on 30 August 2002 when the severance had to be paid. The claim for payment of these monies prescribed three years after this date and the application was accordingly dismissed.

²²⁰ The claim lapsed, therefore is not enforceable at law.

7.5. No automatic right to compensation for an unfairly dismissed employee

An unfairly dismissed employee who refuses reinstatement may not attract court's sympathy. Compensation-hungry and reinstatement-resistant employees may be in for a shock after the Supreme Court of Appeal denied an award of compensation to an employee who had unreasonably refused a genuine offer of reinstatement by her employer after she had been unfairly dismissed.²²¹

Having been denied compensation despite her dismissal being deemed unfair by the Labour Appeal Court, the appellant appealed to the Supreme Court of Appeal.

The facts of this case²²² were largely common cause; the appellant was employed as a medical doctor at the respondent's satellite practice and prior to going on maternity leave she was dismissed. The appellant had, subsequent to her dismissal, obtained employment at a higher salary than what she earned prior to her dismissal. It was not in dispute that the respondent had on different occasions during conciliation and litigation process offered to reinstate the appellant as from the date on which she was due to return to work following her maternity leave, and the appellant had either ignored or categorically refused to accept the offer made. Notwithstanding the offer of

²²¹ Unpublished article by Mohammed Chavoos, of *Deneys Reitz Attorneys*. Article placed on the internet on the 25 November 2010, see *Denys Reitz*, website. www.deneysreitz.co.za.

²²² *Dr. BM Rawlins v Dr. DC Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA).

reinstatement and her improved earnings, the Labour Court awarded the appellant 12 months compensation.

On appeal, the only issue before the Labour Appeal Court was whether or not the appellant was entitled to compensation. The respondent argued that he offered to reinstate the appellant on two occasions, the first being after her dismissal and the second being at the conciliation process but she declined. The court held that her unwarranted refusal did not entitle her to compensation.

The Labour Appeal Court held that an employer has the 'right to right a wrong' and that the employee's unreasonable refusal to accept a genuine offer of reinstatement, which is the primary remedy the law provides for, could render the employee, not deserving of any compensation in the face of an unfair dismissal.

In elaborating on this point the Labour Appeal Court through Zondo JP said the following:

'if an employer unfairly, dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation.'

The Supreme Court of Appeal firstly noted that the decision by the Labour Appeal Court had its basis on what is termed a 'value judgment.' The court went on to say that as the

labour Appeal Court as a specialized court, any findings based on a value judgment would continue the development of its jurisprudence and hence higher courts should not easily interfere with such findings. On the merits, the court did, however, concur with the Labour Court's decision.

Paragraph 18 of the Supreme Court of Appeal judgment reads as follows:

'whatever view we might have taken on the matter it seems to me that we would be remiss if we were not to defer to that court's value judgment in a matter of this kind. In any event I agree with the conclusion of the majority. No doubt, the appellant genuinely felt that there had been a breach of trust. But these are two professional people who might be expected to resolve any acrimony that might earlier have existed. No objective grounds were advanced why any perceived breach of trust between them was capable of being restored. The appellant (Dr. Rawlins) chose not even to explore that possibility but rejected it out of hand. That is not how labour relations should be conducted and I agree that the rejection of the repeated offers of reinstatement was unreasonable and she has only herself to blame for her financial loss. The appeal was dismissed.'

This case highlights some important aspects relating to unfair dismissals and the remedies provided for in our labour legislation. These can be summarized as follows:

- An unfairly dismissed employee only has a right to be considered for remedial measures and has no automatic right to compensation or any other remedy.
- An employer has the right to right a wrong, accordingly once an employer has seen the error of its ways it is within that employer's right to make a genuine offer of reinstatement to an employee to remedy the situation.
- Should an employee unreasonably refuse the offer or fail to show that the working relationship had broken down and as a consequence cannot accept reinstatement, the employee runs the risk of not being awarded any compensation.

8. Compensation as a remedy for unfair dismissal in Australia

In the arbitration of an unfair dismissal claim, the FWA can order reinstatement, re-employment to another position, or payment of an amount in lieu of reinstatement. In assessing whether a remedy is appropriate,²²³ the FWA must have regard to all of the circumstances of the case, including the effect of the order on the viability of the employer's business, the employee's length of service, how much the employee would have earned had she or he remained in employment, what efforts, if any the employee has taken to mitigate their loss and any other matter the FWA considers relevant.²²⁴

²²³ The FWA may be guided by the 'fair go all round' principle: *Mollinger v National Jet Systems Pty Ltd* (18 March 1999, AIRC, Giudice J, Polites SDP and Gregor C, Print R3130).

²²⁴ Section 392(2) of the Fair Work Act, 28 of 2009.

Only if it considers that reinstatement is inappropriate may the FWA make an order requiring the payment of an amount *in lieu* of reinstatement.²²⁵ There is a cap on the amount of any such order.²²⁶ In assessing the appropriate amount the FW must have regard to the viability of the employer's business,²²⁷ the employee's length of service, the remuneration that the employee would have been likely to receive had the employment not been terminated,²²⁸ the employee's efforts to mitigate his or her loss²²⁹ and any other matter the FWA considers relevant.²³⁰ The FWA must make the assessment of appropriate amount independent of the statutory limit and, if the assessment is over the statutory limit, then apply the statutory limit.²³¹ The FWA has taken the view that it is prepared to consider any shock, humiliation and distress

²²⁵ Section 390 of the Act: *Rutherford v Melbourne's Cheapest Tyres Pty Ltd* (17 September 2001, AIRC, Lacy SDP, Print PR909034).

²²⁶ The compensation cap is the lesser of half the amount of the high income threshold (\$100,000 for full-time employee, indexed by earnings from 27 August 2007 and annually each year after that on 1 July) and the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before dismissal. Section 392(5) of the FW Act.

²²⁷ In respect of which the onus is on the employer to bring relevant evidence: *Moore v Highpace Pty Ltd* (18 May 1998, AIRC, Boulton J, Watson SDP and Whelan C, Print Q0871).

²²⁸ This involves an assessment of how long it was likely that the employment would have continued: *Fastida Pty Ltd v Goodwin* (2000) 102 IR 131 (likely improvement in performance if warning given).

²²⁹ Section 392(2)(d) of the Act, the behaviour of the employee is clearly relevant to the assessment of the compensation: *GH Operations Pty (trading as The Grand Hyatt Melbourne) v Smith* (14 May 2001, AIRC, Giudice P, O' Callaghan SDP, Smith C, Print PR 904136).

²³⁰ Section 392(2)(g) of the Act.

²³¹ *Perrin v Des Taylor Pty Ltd* (1995) 58 IR 254 at 258; *Cox v South Australian Meat Corporation* (1995) 60 IR 293 at 302. In *Sprigg v Pauls Licensed Festival Supermarket* (24 December 1998, AIRC, Munro J, Duncan DP, Print R0235), a Full Bench of the Commission adopted the principles set out by Ross VP in *Shorten Australian Meat Holdings* (28 November 1996, AIRC, Ross VP, Print N6928).

suffered by the employee as a result of the termination, when it assesses an appropriate amount *in lieu* of reinstatement. However the evidence must demonstrate that the employee has suffered damage of that kind.²³²

9. Recommendations and concluding remarks

Compensation as a remedy for unfair dismissal in South Africa and Australia is regarded as a secondary remedy. In Australia, the FWA has the power under the FW Act to order reinstatement. This is usually a difficult remedy to obtain. Alternatively, it can award compensation up to 6 months salary. A six months payout would usually only be reserved for an employee of an unusually long period of service and who was terminated under egregious circumstances.

In South Africa, where reinstatement or re-employment is not possible, based on the exceptions listed in section 193(2) of the LRA namely, where the dismissed employee does not wish to be reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued employment relation would be intolerable; it is not reasonably practicable for the employer to reinstate or re-employ the employee; the dismissal is unfair only because the employer did not follow a fair procedure.

An employee who was unfairly dismissed does not have an automatic right to compensation, should such employee unreasonably refuse a genuine offer of

²³² *Liu v Coms 21 Ltd* (25 February 2000, AIRC, Giudice P, Duncan DP, and Larkin C, Print S3571).

reinstatement.²³³ This should serve as a caution to compensation-hungry and reinstatement-resistant employees.

In both jurisdictions compensation to be awarded is calculated from the date of dismissal. The date of dismissal plays an important role in determining compensation that is just and equitable.

The adjudicator of an unfair dismissal dispute in both jurisdictions is required to take into account when awarding compensation applicable criteria and to exercise discretion. In South Africa the adjudicator is required to exercise discretion judicially.

The South African legislature should take steps to amend the LRA in order to be able to take decision on compensation or to enact regulations to the LRA to govern the criteria for deciding amounts on compensation to be awarded.²³⁴ In determining the amount for the purposes of awarding compensation that is just and equitable the following factors or circumstances are recommended:

- the effect of the order of compensation on the viability of the employer's enterprise;
- the length of the employee's service with the employer;
- remuneration that the employee would have received, or would have been likely to receive, if the employee had not been dismissed;

²³³ *Dr BM Rawlins v Dr DC Kemp t/a Centralmed* (2010) 31 ILJ 2325 (SCA)

²³⁴ In Australia the provisions of section 392(2) of the FW Act apply.

- the efforts of the dismissed employee to mitigate the loss suffered as a result of the dismissal;
- the amount of remuneration earned by the employee from his or her work after the dismissal (provided he or she found new employment);
- the amount of any income reasonably likely to be so earned by the employee during the period between the making of the order of compensation and actual compensation;
- the degree of unfairness of the dismissal;
- the employee's prospects of finding new employment;
- whether the employer has already provided the employee with substantial redress;
- whether the employer's willingness to make such redress was frustrated by the conduct of the employee.²³⁵

The enactment of these regulations would limit the number of reviews which are brought before the Labour Courts by the aggrieved parties, who challenge the decision of the adjudicator alleging failure to exercise discretion judicially and thereby failing to apply his or her mind to the case.

In conclusion the South African jurisprudence approach on compensation as a remedy for unfair dismissal can stand international standards scrutiny.²³⁶

²³⁵ The list should not be regarded as exhaustive.

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²³⁶ Section 193 and 194 of the LRA.