

**A LEGAL ANALYSIS OF INCOMPATIBILITY AS A GROUND FOR  
DISMISSAL IN THE SOUTH AFRICAN LABOUR LAW**

By

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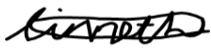
**UNIVERSITY OF LIMPOPO**

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## DECLARATION

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



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**Mushwana RE**

**Date: 10 July 2021**

**(A legal analysis of incompatibility as a ground for dismissal in the South African labour law)**

## Declaration by Supervisor

I hereby declare that I have supervised the student's dissertation and in my opinion, this dissertation is suitable in terms of scope and quality for examination.

A handwritten signature in black ink, appearing to read 'CI Tshoose', is displayed within a rectangular frame. The signature is fluid and cursive, with a large initial 'C'.

CI Tshoose

17 July 2021

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## **Abstract**

This study discusses a legal analysis of incompatibility as a ground for dismissal in the South African labour law. Incompatibility refers to the inability of an employee to maintain a harmonious relationship with his or her employer, or unable to adapt to the corporate culture of the workplace. The corporate culture is associated with the values, beliefs and behaviour to determine how employees interact with each other in the workplace. Therefore, in cases where the employer contemplates dismissing an employee on the ground of incompatibility, procedural fairness and substantive fairness should be implemented in order for the employer/s to make informed decision and ensure that the dismissal of such an employee is effected in accordance with the procedural and substantive fairness couched in the Labour Relations Act 66 of 1995 ('the LRA').

Section 23 of the Constitution of the Republic of South Africa, 1996 provides broadly the right of everyone to fair labour practices. Consequently, the LRA was established to give effect to this constitutional provision. In terms of section 185 of the LRA everyone has the right not to be unfairly dismissed. Be that as it may, incompatibility is not clearly defined in section 188 of the LRA. In fact, there are no guidelines nor corrective measures implemented in the workplace to deal with incompatibility. Hence incompatibility is dealt with under dismissal based on incapacity. In most cases employers use their discretion in dismissing employees, thereby using improper procedure to end disharmony in the workplace. In summation, the central thesis of this study focuses on a legal analysis of incompatibility as a ground for dismissal in the South African labour law.

**Key words:** Incompatibility, unfair dismissal, disharmony, conflict, personality in the workplace and organisational culture.

## **List of Abbreviations**

CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief Executive Officer
IC	Industrial Court
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act

## **Table of cases**

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*Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422 (IC).

*Mabry v West Auckland Living Skills Home Trust Board* (2002) 6 NZELC.

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## CHAPTER 1

### INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 Introduction

The Labour Relations Act,<sup>1</sup> (hereinafter “the LRA”) recognises three types of dismissals, namely, dismissal based on misconduct, incapacity and operational requirements.<sup>2</sup> Each ground elicits a distinctive procedure before a fair dismissal can be effected. Incompatibility as a ground of dismissal can be marred with glitches if it is not effected or applied correctly.<sup>3</sup> Henceforth, it is important to note that the LRA does not list incompatibility as a ‘stand-alone’ ground for dismissal; rather incompatibility has been incorporated within the framework of dismissal based on incapacity.<sup>4</sup> Be that as it may, incompatibility is generally defined as inability of an employee to reasonably work in harmony with other employees.<sup>5</sup> This constitutes a ground for dismissal relating to either incapacity or operational requirements. Debate is still intense over which between the two, incompatibility falls as a ground of dismissal.

Be that as it may, it is imperative to note that the employer has the authority to establish appropriate workplace norms for harmonious interpersonal interactions.<sup>6</sup> Consequently, many employees in the private and public sector have been dismissed based on incompatibility.<sup>7</sup> In its purest form, incompatibility refers to a personality conflict in the workplace that makes it difficult for the employer and employee to work together productively.<sup>8</sup> Employees that exhibit uncontrollable behaviour, employees who fail to conform to and adapt to workplace standard practice and

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<sup>1</sup> Labour Relations Act 66 of 1995 (hereinafter ‘the LRA’).

<sup>2</sup> Section 188 of the LRA.

<sup>3</sup> *Subrumuny and Amalgamated Beverages Ltd* (2000) 21 ILJ 2780 (Arb) 2789D-G.

<sup>4</sup> Le Roux and van Niekerk *The South African Law of Unfair Dismissal* 285-286.

<sup>5</sup> *Jabari v Telkom SA (Pty) Ltd* [2006] 10 BLLR 924 (LC) page 29 at para 1 (hereafter ‘*Jabari case*’).

<sup>6</sup> *Jabari case* page 29 at para 2.

<sup>7</sup> Workman-Davies <https://www.bizcommunity.com/Article/196/548/162582.html>.

<sup>8</sup> Grogan, *Workplace Law* 262.

employees who treat other employees in an inappropriate manner are all examples of incompatibility in the workplace.<sup>9</sup>

The employee's inability to follow the employer's rules and procedures during working hours, and often even after work, is best described as misconduct.<sup>10</sup> To discipline an employee for misconduct, an employer must show that the employee violated a rule or standard governing workplace behaviour, as defined by the Code.<sup>11</sup> Incapacity is a significant part of our labour laws and one of the internationally recognised grounds for dismissal.<sup>12</sup> Every individual is at danger of being unsuitable for work due to illness or injury at any time. The preceding is an essential consideration that should be thoroughly studied.<sup>13</sup>

Employees who are unable to execute their duties due to illness or injury must be handled fairly when deciding whether they may be accommodated in a different role or whether they are truly suitable for their existing post if changes are made.<sup>14</sup> Economic, technological, and structural considerations all have a role in dismissal based on operational requirements.<sup>15</sup> Economic factors are those that have to do with the company's financial management.<sup>16</sup> Technological reasons refer to the introduction of new technology that has an impact on work relationships by obviating the need for existing occupations or requiring employees to adapt to the new technology.<sup>17</sup> Structural considerations it relates to the implementation of current business strategies and future strategies, to maintain sustainability in the workplace.<sup>18</sup>

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<sup>9</sup> Grogan, *Dismissal* 534-535.

<sup>10</sup> Grogan (n 8 above) 112.

<sup>11</sup> Schedule 8 Code of Good Practice: Dismissal.

<sup>12</sup> Basson and Mischke *et al Essential Labour Law* 135.

<sup>13</sup> Section 188 of LRA 66 of 1995.

<sup>14</sup> Burger *Incapacity as a dismissal ground in South Africa Labour Law* 13.

<sup>15</sup> Grogan, *Workplace Law* 317.

<sup>16</sup> Grogan, *Dismissal, Discrimination & Unfair Labour Practices* 431.

<sup>17</sup> Grogan (n 16 above) 432.

<sup>18</sup> Grogan (n 15 above) 317. See also Tshoose and Letseku 2020 *SA Mercantile Law Journal* 156.

Employer-employee relationships are frequently based on the principles of confidence and trust.<sup>19</sup> In *Erasmus v BB Bread Ltd*,<sup>20</sup> the court determined that incompatibility is a rule that governs the basic key to a peaceful employment environment. According to a brief historical context of incompatibility, the notion was developed in 1987 and was accompanied by a lack of legislative strategy that instructed the employer on how to handle incompatibility in the workplace. Furthermore, the emergence of incompatibility necessitates a reasonable investigation into every key element before dismissing an employee, including whether the person is to blame, which was an important criterion in justifying dismissal under those circumstances.<sup>21</sup>

Incompatibility in the workplace can be catastrophic, resulting in wasted production, low morale, and the loss of valuable management time.<sup>22</sup> Nonetheless, the employer must weigh the potential harm to the company from the approaching threat against the potential unfairness or inconvenience to the employee in question.<sup>23</sup>

The Industrial Court (IC) reinstated a senior manager who had been dismissed for incompatibility in *Lubke v Protective Packaging (Pty) Ltd*.<sup>24</sup> In the Lubke case, the problem of incompatibility arose when the employer recruited a new managing director in an attempt to strengthen the company. It was the way in which the new managing director implemented the changes that irritated the subordinates, not the changes themselves. The subordinates then complained that the new managing director was attempting to modify the organisation's culture.<sup>25</sup> Prior to dismissing

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<sup>19</sup> Grogan (n 9 above) 555.

<sup>20</sup> *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 at 544C.

<sup>21</sup> Thiarth 2018  
<https://www.vdslegal.co.za/NewsResources/NewsArticle.aspx?ArticleID=2392>.

<sup>22</sup> Grogan (n 9 above) 555-557.

<sup>23</sup> *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 544C-E (hereafter '*Erasmus case*').

<sup>24</sup> *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ 422 (IC) at 429D-E (hereafter '*Lubke case*').

<sup>25</sup> *Lubke case* page 422 at E.

employees for incompatibility, the court decided that the effective norm is to make a reasonable, practicable, and genuine effort to mend interpersonal ties.<sup>26</sup> According to the court, the employer must carry out all tasks in a transparent manner in order to maintain the company's reputation.<sup>27</sup>

It is deemed foolish when an employer makes an excuse to get rid of employees that are incompatible.<sup>28</sup> It was demonstrated in *Nathan v The Reclamation Group (Pty) Ltd*,<sup>29</sup> that conflict can appear in ways that obscure the underlying source of the problem. The applicant in this case sold his scrap metal business to the respondent's company and became the company's director. Complications began to arise once he assumed his duties as a task director. The new operations director took away the director's authority, humiliated him, and jeopardised his position within the organisation. He also put his son-in-law in charge of some of the director's responsibilities. The director was eventually dismissed, with the reason given as incompetence and poor work performance.<sup>30</sup>

When the matter was sent to arbitration, the arbitrator found no evidence of poor performance or incapacity, and that the true reason for the dismissal was incompatibility between the new operations director and the company's director.<sup>31</sup> The employer was ordered to compensate the employee for being dismissed unfairly.<sup>32</sup> Incompatibility is characterised by insubordination, a lack of reverence, and poor performance, as demonstrated in this case.<sup>33</sup> The traits listed above may constitute

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<sup>26</sup> *Lubke case* page 422 at G-H.

<sup>27</sup> *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) para 1 (hereafter '*Fijen case*').

<sup>28</sup> Legal Wise 2020 <https://www.legalwise.co.za/help-yourself/quicklawguides/dismissals>.

<sup>29</sup> *Nathan v Reclamation Group (Pty) Ltd* (2002) 23 ILJ 588 (hereafter '*Nathan case*').

<sup>30</sup> Israelstam 2017 <https://www.labourlawadvice.co.za/when-can-you-dismiss-for-incompatibility/>.

<sup>31</sup> *Nathan case* at 601 C-D.

<sup>32</sup> *Nathan case* page 588 at G.

<sup>33</sup> *Nathan case* page 588 at H-J.



incompatibility, but only if they result in disharmony, conflict in the workplace, and a disruption of the organisational culture.<sup>34</sup>

The cause for dismissal in the aforementioned case was poor work performance. The dismissal was based on incompatibility originating from a quarrel between the two parties, according to the Commission for Conciliation, Mediation, and Arbitration's findings.<sup>35</sup> On the basis of manufactured bad work performance, the operational director was accused and found guilty. As a result, the arbitrator determined his dismissal to be unjust.<sup>36</sup>

As previously mentioned, the LRA recognises three types of dismissal: misconduct, incapacity, and operational requirements. Unfair dismissal occurs when an employer fails to follow proper procedures while dismissing employees, so violating the employee's constitutional right to fair labour practice entrenched in Section 23 of the Constitution.<sup>37</sup> When an employer decides to dismiss an employee, procedural and substantive fairness must be taken into account. Procedure fairness comprises making sensible decisions in a fair and proper manner, whereas substantive fairness determines whether there is a solid basis to dismiss an employee in a fair manner.<sup>38</sup>

The Code of Good Practice for Dismissal addresses procedural fairness, as outlined in Schedule 8.<sup>39</sup> The LRA's Code of Good Practice for Dismissal establishes the limits of unfair dismissal, which happens when proper procedures are not followed. The processes listed include natural justice principles such as procedural and substantive fairness.<sup>40</sup> When it comes to dismissal at work, the rights granted by the Constitution and the

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<sup>34</sup> Donovan 2017 <https://www.markdonovan.co.nz/what-is-incompatibility/>.

<sup>35</sup> Mischke 2005 *Contemporary Labour Law Review* 74.

<sup>36</sup> *Nathan* case.

<sup>37</sup> The Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution').

<sup>38</sup> Grogan (n 8 above) 263.

<sup>39</sup> Schedule 8 of the LRA Code of Good practice: Dismissal.

<sup>40</sup> Schedule 8 of the LRA Code of Good practice: Dismissal.

Labour Relations Act are crucial. In addition, proper procedures such as the principles of natural justice need to be adopted in the workplace in order to make effective decisions.<sup>41</sup>

In addition, section 188(1)(f) of the LRA promotes workplace equity by defining the basis for unjust dismissal. The issue of incompatibility, when employers have the capacity to maintain a collective standard in the organisation, is the subject of a lengthy legal investigation.<sup>42</sup> It is proposed that while dismissing employees, suitable procedure and criteria should be employed in order to improve workplace harmony. One of the cases where an employer was found to have wrongfully dismissed an employee for incompatibility in South Africa was *Wright v St Mary's Hospital*.<sup>43</sup> The applicant was appointed as a medical superintendent at St Mary's Hospital in this instance. The basic problem was that the hospital was mismanaged, and Wright was entrusted with improving it. Wright's arrangements did not sit well with his superiors, and he was eventually dismissed, citing incompatibility as the reason.<sup>44</sup>

If the employer can show that the working relationship has irreversibly broken down due to the employee's actions, the Industrial Court determined that incompatibility must be demonstrated.<sup>45</sup> The court reached a conclusion, deciding that the issue will only be classified as incompatibility if it can be proven that the relationship between the employer and employee has breakdown irretrievably.<sup>46</sup>

Section 186(1) of the LRA, which defines dismissal, is critical in determining incompatibility. In *Jabari v Telkom SA (Pty) Ltd*, the employee's dismissal was based on corporate culture. An employee was dismissed for incompatibility after a disciplinary investigation in *Jabari v*

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<sup>41</sup> Grogan (n 8 above) 263-264.

<sup>42</sup> Grogan (n 9 above) 532.

<sup>43</sup> *Wrights v St Mary's Hospital* (1992) 13 ILJ 987 (IC) (hereafter '*Wrights case*').

<sup>44</sup> *Wrights case* at 1004B.

<sup>45</sup> *Wrights case* at 1004H.

<sup>46</sup> *Wright case* at 1004A.

*Telkom SA (Pty) Ltd.*<sup>47</sup> The employee claimed that his dismissal was unjustified because it was hastened by a grievance procedure against management and his unwillingness to accept a voluntary retrenchment package. The Labour Court concluded that the employer had failed to show that the employment relationship between the parties had irreversibly broken down to the point where dismissal was justifiable.<sup>48</sup> The court further determined that the employee's dismissal amounted to unfair treatment for exercising his legal rights, resulting in an automatic unfair dismissal under section 187(1)(d) of the LRA.<sup>49</sup>

Because it emphasises the topic of corporate culture in the workplace, the *Jabari* case relates to incompatibility. As incompatibility might also involve cases where the employer's beliefs differ from the employee's. Incompatibility was defined by the LC in *Jabari* as "the inability or failure to maintain cordial and harmonious relationships with his peers." According to the court incompatibility has the following characteristics: Firstly, incompatibility is a form of incapacity; secondly, incompatibility is an "amorphous, nebulous concept, based on subjective value judgments".<sup>50</sup>

Accordingly, Israelstam avers that the workplace with specific corporate culture may be inconvenient for employees who hold alternative beliefs, potentially leading to scenarios in which the non-traditionalist employee is perceived as "incompatible" with the employer's needs.<sup>51</sup> Thus, the breakdown of the relationship should be caused by the employee. In this case, an employee claimed that the employer's decision violated the Constitution's section 23 right (the right of everyone to fair labour practices).<sup>52</sup>

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<sup>47</sup> *Jabari case.*

<sup>48</sup> *Jabari case* page 31 at para 10.

<sup>49</sup> *Jabari case* at para 4.

<sup>50</sup> *Jabari case* at page 29 at para 1.

<sup>51</sup> Israelstam 2017 <https://www.skillsportal.co.za/content/dismissalgrievants-incompatible-law>.

<sup>52</sup> The Constitution.

## **1.2 Problem statement**

In South Africa, there is no legal framework in place to govern incompatibility. In addition, there are no corrective mechanisms in place to deal with incompatibility in the workplace. It is said that there are no policies in place in the workplace to address workplace incompatibility-related conflict. In reality, it is sometimes asserted that when considering dismissing an employee, the employer does not follow the LRA's section 188 protocol; instead, they exercise their own discretion in dismissing an employee in circumstances of incompatibility.

## **1.3 Aims and objectives**

The primary purpose of the study is to analyse the procedures which is used to dismiss employees' when there is disharmony in the workplace. This research is done to answer the question, as to what extend can the natural justice principles assist in resolving challenges of incompatibility. In other words, the research aims to investigate whether the employer use proper regulations when dismissing employees' who are not compatible with the corporate culture in the workplace.

To this end, the main objectives of the study are as follows:

- To outline the principles applicable in a question of whether disharmony amounts to dismissal.
- To assess whether the employer use proper measures to dismiss the employees.
- To assess whether the LRA gives recognition to incompatibility in the workplace.
- To scrutinise the jurisprudence of the courts on the interpretation and application of the notion incompatibility as a ground for dismissal.

#### **1.4 Research question**

This study explores how the courts have dealt with cases of incompatibility in the workplace. The study further examines the approach that the courts have adopted in dealing with this thorny issue (incompatibility) in the workplace.

#### **1.5 Scope and limitation of the study**

The focus of the study is based on incompatibility as a ground for dismissal in the South African labour law, read in line with section 188 of the LRA.

#### **1.6 Research methodology**

In conducting this study the qualitative method will be used. The study will identify the nature and consequence of incompatibility. In conducting this assessment legal principles will be used, consisting of case law, books, statutes, journal articles and other materials dealing with incompatibility. Many legal scholars have given their views regarding disharmony. Furthermore; courts have expressed their opinion by using articles and case law.

#### **1.7 Literature review**

It is proposed that a Code of Good Practice on managing Incompatibility in the workplace be developed, which will assist organisations in dealing with incidents of incompatibility effectively and efficiently.<sup>53</sup> In addition, academics have stated their views on the topic of incompatibility in the workplace when it comes to dismissal.<sup>54</sup>

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<sup>53</sup> Jordaan *Effective Workplace Solutions* 73.

<sup>54</sup> Burger (n 14 above) 15.

According to Grant,<sup>55</sup> when an employer dismisses an employee due to incompatibility, the disharmony that causes workplace disruption should have lasted for a longer period of time to demonstrate that the parties are unable to resolve the issue. In reality, proof that there is no likelihood of the employment relationship being restored is required. In reality, there should be evidence that the working relationship cannot be restored.<sup>56</sup>

In *Lubke v Protective Packaging (Pty) Ltd*,<sup>57</sup> the court categorised incompatibility as a rule of first application when the employer must make a definitive decision on whether to keep the employees or dismiss them. Because the employee's presence creates a disturbance, such disruptive behaviour affects other employees, and the management structure is stressed as a result of the employee's refusal to change and adapt to the corporate culture.<sup>58</sup>

According to Grogan, incompatibility occurs when an employee or employees are unable to operate in harmony with their colleagues or adapt to the employer's corporate culture.<sup>59</sup> There is currently no test or criteria in place in South Africa to determine whether an employee is incompatible. Because there is no legal definition of incompatibility, the term is often used to characterise any employee who does not share the beliefs of their colleagues, resulting in a low success rate for employers when cases are sent to external dispute resolution agencies.<sup>60</sup>

Because incompatibility is a problem in the workplace and no procedures are affected, employers treat persons who are unable to complete their duties as incompatible employees at their choice.<sup>61</sup> Because the employer is unaware of the incompatibility, the employees are labeled. As a result,

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<sup>55</sup> Grant *Defining incompatible behaviour in an employer or employee relationship* 81.

<sup>56</sup> Holland and Burnett *et al Employment* 234.

<sup>57</sup> *Lubke case*.

<sup>58</sup> *Lubke case* at para 3.

<sup>59</sup> Grogan (n 8 above) 262-263.

<sup>60</sup> Green 2005 *California Law Review* 630.

<sup>61</sup> Mokumo *The dismissal of managerial employees for poor work performance* 58.

it is almost always necessary for an employee to be disruptive in the workplace in order for his or her superior to notice his or her existence.<sup>62</sup> When an employee is damaging the business image and thus incompatibility is not entirely protected, employers frequently use incapacity to dismiss employees, following the legal framework requirements.<sup>63</sup>

The court in *Subrumuny and Amalgamated Beverages Ltd*,<sup>64</sup> stated that the term "incompatibility" is not well defined.<sup>65</sup> Incompatibility in the workplace, on the other hand, might arise as a result of displaying personality qualities that are incompatible with the organisation's culture and being unable to operate in harmony with other employees.<sup>66</sup> According to the court, if a disruptive employee cannot be controlled and is causing damage to the company's image, that employee must be dismissed from the workplace.<sup>67</sup>

When it comes to managerial roles and personality differences, Mokumo expressly indicates that the employer will utilise substantive fairness to assess, for acceptable incompatibilities.<sup>68</sup> In the majority of cases, the employer assigns dismissal to the employee who is disruptive in the workplace.<sup>69</sup> Incompatibility has been recognised as a reason for dismissal by the courts and tribunals, and it must be decided on its own merits.<sup>70</sup> It was also noted that unacceptable behaviour is susceptible to the accomplishment of incompatibility, which means that an employee can be considered as incompatible based on his or her actions.<sup>71</sup>

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<sup>62</sup> Green (n 60 above) 630-631.

<sup>63</sup> Grogan (n 9 above) 533-534.

<sup>64</sup> *Subrumuny and Amalgamated Beverages Ltd* (2000) 21 ILJ 2780 (hereafter 'Subrumuny case').

<sup>65</sup> *Subrumuny case* at 2789G-H.

<sup>66</sup> Green (n 60 above) 631.

<sup>67</sup> Grogan (n 8 above) 262.

<sup>68</sup> Mokumo (n 61 above) 58.

<sup>69</sup> Grogan (n 9 above) 555.

<sup>70</sup> Grant (n 55 above) 12.

<sup>71</sup> Grogan (n 9 above) 534.

Nonetheless, dismissal is broad in the LRA and it specifies that operational requirements and incapacity are the primary grounds for dismissal. Because there is no formal mechanism for incompatibility in the workplace that is indicated in the legislation or other legal framework activities, it was concluded that the best way to define incompatibility is to use the term incapacity.<sup>72</sup>

The board of directors and the Labour Court concluded that the dismissal in *Miyeni v Chilibush Communications*,<sup>73</sup> where the company's director resigned and continued to work at a lower level of management with other colleagues, was fair. The CCMA applied procedural and substantive fairness standards while deciding on workplace fairness.<sup>74</sup> The LRA's Schedule 8 clearly specifies that the investigative process is the most important factor in determining whether or not an employee would be dismissed for incompatibility.<sup>75</sup>

In terms of substantive workplace fairness, the arbitrator suggests that when dealing with incompatibility, an employer should exercise caution and carefully evaluate the employee's behaviour without causing a ruckus among the other employees.<sup>76</sup> According to Grogan, incompatibility is more likely to develop in the executive department than in lower management teams.<sup>77</sup> Employees fail to comply with the organisation's culture, according to study done by the arbitrator on the basis of dismissal. Disharmony is more likely to occur in the workplace since people have various personalities.

De Kock, on the other hand, explains the legal framework that an employer must follow when dismissing an employee, as well as the

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<sup>72</sup> Holland and Burnett *et al* (n 56 above) 262.

<sup>73</sup> *Miyeni v Chilibush Communications (Pty) Ltd* (2010) 31 ILJ (hereafter '*Miyeni case*').

<sup>74</sup> *Miyeni case* at para 42.

<sup>75</sup> Schedule 8 of the LRA Code of Good Practice: Dismissal.

<sup>76</sup> *Miyeni case* at para 42.

<sup>77</sup> Grogan (n 9 above) 533.



principles that must be followed in the workplace when dealing with incompatibility.<sup>78</sup> Before an employee can be dismissed, the employer is required by law to inform all employees on acceptable workplace behaviour.<sup>79</sup> Before any disagreement arises, the usual procedure for dismissing employees on the basis of incompatibility must be informed to the employee. A fair criterion must be established between the two parties, in order for the other party to be given the opportunity to respond, to the allegation and submit his version in order to guarantee dismissal.<sup>80</sup>

Accordingly Olivier, emphasise that incompatibility is a serious issue in the workplace, and cautions needs to be exercised in order to make wise decisions.<sup>81</sup> In other instance, the court determined that incompatibility exists when the business director's administrative style clashes with the company's goals and the director is unable to work amicably with employees.<sup>82</sup>

Therefore, employees are often given tasks that are not within the scope of the organisation by their superiors. The courts, on the other hand, have concluded that it is the responsibility of the workplace forum to investigate how the directors conduct their duties, ensuring that the workplace regulations are followed. When the employer is abusing his position, the employees has a right to report him/her to the workplace forum so that dismissal can be effected, demonstrating that the director is untrustworthy and that the legal environment is being treated as a playground.<sup>83</sup>

In South Africa, according to Mgudlwa,<sup>84</sup> there is no law that governs incompatibility. He went on to say that incompatibility is frequently

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<sup>78</sup> Landis and Grossett *Employment and the Law* (2008) 216.

<sup>79</sup> Mokumo (n 61 above) 59.

<sup>80</sup> Holland and Burnett *et al* (n 56 above) 262-263.

<sup>81</sup> Mokumo (n 61 above) 60.

<sup>82</sup> Landis and Grossett (n 78 above) 216.

<sup>83</sup> Landis and Grossett (n 78 above) 216-217.

<sup>84</sup> Mgudlwa 2013 <https://Journals.co.za/doi/abs/10.10520/EJC145093>.

classified as a sort of occupational incapacity.<sup>85</sup> The procedure for dismissing senior employees differs significantly from that for dismissing staff in lower management levels. In *Somyo v Ross Poultry Breeders (Pty) Ltd*,<sup>86</sup> the Labour Appeal Court determined that the court's findings elucidate two main factors. To begin with, the issue of incompatibility affects top employees. When a manager's behaviour is incompatible with the company's culture, the situation is handled quietly without notifying the employees.

Discrimination occurs when employees are treated differently depending on their seniority. Where conflict is caused by a supreme employee among the lower level management, there is a risk that the senior employer will misuse their influence by turning a blind eye.<sup>87</sup> Last but not least, the lower management team considers whether or not to act in compliance with the law, as failure to do so may result in dismissal. The topic of dismissal is then debated in respect to senior management dismissals, as well as lower-level management dismissals, by weighing the rights of each and determining whether or not the dismissal of the employee is unjust.<sup>88</sup>

Employees who work in the hierarchy's senior management team are classified as employees who can "judge for himself/herself whether or not he/she is meeting the standards," Considering the employees' duties and how the incompatible employee communicates with other employees.<sup>89</sup> It would be unjust if the employer undertook his own investigation, training methods, and counselling for senior executive employees at the Chief Executive Officer level, who constitute the foundation of a company's operations and are responsible for them. Because he is the sole person with access to all of the facts that will guarantee his dismissal, this strategy

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<sup>85</sup> Holland and Burnett et al (n 56 above) 264.

<sup>86</sup> *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC) (hereafter 'Somyo case').

<sup>87</sup> *Somyo case*.

<sup>88</sup> *Somyo case*.

<sup>89</sup> Lewis and Sargeant *Essential of Employment Law* 178.

for the incompatible CEO is regarded unjust because the employer will ensure that any evidence of discord evaporates.<sup>90</sup>

Because the employer is supreme, and has the legal ability granted by statutes to make decisions that will allow the business to flourish. Therefore, cognisance should be considered when attempting to dismiss an employee.<sup>91</sup> The most crucial element is that the employer must demonstrate that the employee is the primary cause of workplace disharmony and that such behaviour cannot be condoned; such an employee must be dismissed.<sup>92</sup>

The information gathered throughout the investigation should be verified by an unbiased source who will utilize strategic measures to assess workplace incompatibility, allowing the employer to learn about the possible causes of incompatibility. It's vital to assess whether an employee was presented with regulations and norms of conduct that he or she needed to become familiar with in order to collaborate with other employees when determining if they failed to adapt to the workplace culture.<sup>93</sup>

When dealing with an incompatible employee, the employer has the right to prove that there is a dispute in the workplace and that the employee is to blame. Employers, without a doubt, require additional flexibility in dealing with issues involving the discharge of employees due to incompatibility. The adjustments made under section 188B of the LRA aim to give employers more freedom.<sup>94</sup>

Employees and employers, on the other hand, must keep their personal lives out of the workplace and conduct their task ethically. An employer has the responsibility to tell an employee about the procedure that will be

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<sup>90</sup> Lewis and Sargeant (n 89 above) 178-179.

<sup>91</sup> Landis and Grossett (n 78 above) 218.

<sup>92</sup> Grogan (n 9 above) 556.

<sup>93</sup> Van Jaarsveld and Van Eck *Principles of Labour Law* 175.

<sup>94</sup> Section 188B of the LRA 66 of 1995.

used in the dismissal process, as directed by the natural justice system's standards.<sup>95</sup> In most cases we start by the confrontational route which leads to ending the employment contract.

The parties may mutually agree to part ways as a result of the peaceful resolution, with the employee receiving an *ex gratia* payment. Whichever path is taken, the parties are given the opportunity to tell their side of the story, including the causes for the workplace stress.<sup>96</sup> Furthermore, the employee must be aware of the employer's corrective activities in order to rescue the business from disharmony. The employer is required to act fairly in the interests of the company while also making judgments that do not infringe on the employees' rights.<sup>97</sup>

Where the employer is prepared to behave in the best interests of all parties involved by using a non-confrontational strategy that leads to an amicable separation. It is critical to make it plain to the employee that no definitive decision regarding his or her future has been made at the company's expense, and that an outcome is sought sooner rather than later, either through proper methods or a mutually negotiated process.<sup>98</sup>

As numerous aspects affecting personality clashes that result in work dismissal have been put in place, many authors have given their own insights to the literature study. As a result, the fact that incompatibility is not protected under the Code of Conduct and that the Labour Relations Act only handles incompatibility as a type of incapacity was questioned.<sup>99</sup> Employees are just dismissed without completing any proper procedure

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<sup>95</sup> Mischke (n 35 above) 72-74.

<sup>96</sup> Mayer and Louw 2009 *South African Journal of Contemporary Management* 173-180.

<sup>97</sup> Mayer and Louw (n 96 above) 175.

<sup>98</sup> Mischke (n 35 above) 72-74.

<sup>99</sup> Landis and Grossett (n 78 above) 215.

when problems develop due to a lack of defined rules on how to deal with incompatibility in the workplace.<sup>100</sup>

### 1.8 Definition of key concepts

Incompatibility refers to clashing of personality, where employees' causes conflict in the workplace thereby causing tension towards the corporate culture.<sup>101</sup> Dismissal refers to the dissolution of the employment relationship between the employer and employee.<sup>102</sup> Workplace is a place where people perform their duties.<sup>103</sup>

### 1.9 Chapter outline

This study has five chapters which are summarised briefly below:

**Chapter One** gives a brief background about the study, operating as an introductory chapter. **Chapter Two** elaborates on the rights of the employer and employees' in the workplace. **Chapter Three** elaborates on the legal framework: guidelines to use for incompatibility in the workplace. **Chapter Four** specify the measures which can be adopted in the workplace in order to minimise dismissal arising from incompatibility. **Chapter Five** is the conclusion of the research and contains the recommendations.

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<sup>100</sup> Landis and Grossett (n 78 above) 215-216.  
<sup>101</sup> Bryan, *Black's Law Dictionary* 780.  
<sup>102</sup> Bryan (n 101 above) 502.  
<sup>103</sup> Bryan (n 101 above) 1638.

### **1.10 Summary**

Therefore, in view of the above discussion, it is obvious that the study focuses on incompatibility and how it affects the working relationship between parties in the workplace. With reference to the Labour Relations Act and the South African Constitution, the courts and conflict settlement tribunals have expressed their opinions on how to handle incompatibility. In the next chapter, the rights of employers and employees will be discussed.

## CHAPTER 2

### THE RIGHTS OF THE EMPLOYER AND EMPLOYEES' IN THE WORKPLACE

#### 2.1 Introduction

People with diverse cultural beliefs and traditions work in South African companies. As a result, if no appropriate steps are taken, conflict is likely to erupt at any time. As a result, rather than utilising their discretion to dismiss incompatible employees, employers should follow correct procedure when considering dismissal based on incompatibility.<sup>104</sup> In actuality, dismissing disruptive employees is not a problem; nevertheless, a problem occurs when an employee is dismissed unfairly without following correct protocol or providing grounds for the removal. The employer should be aware of the typical method for dismissing an employee fairly. To justify dismissal, such an employee's behaviour must be intolerable and, to some extent, impede productivity owing to workplace personality incompatibilities.<sup>105</sup>

#### 2.2 The rights of employees not to be unfairly dismissed

The employer has a responsibility to guarantee that the workplace is stable, growing, and sustainable.<sup>106</sup> The classification of incompatibility is not explicitly established by the legislation, but the LRA fully recognises poor work performance and operational requirements. The courts have argued that incompatibility qualifies as a ground for dismissal provided it is done honestly and in conformity with substantive and procedural fairness.<sup>107</sup> When confronted with incompatibility, employees should not

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<sup>104</sup> Mayer and Louw (n 96 above) 182-183.

<sup>105</sup> Mayer and Louw (n 96 above) 183-184.

<sup>106</sup> *Jabari case*.

<sup>107</sup> Grogan (n 9 above) 534.

become defensive when confronted by their employer regarding disruptive behaviour that is causing workplace stress.

### **2.3 The relationship between corporate culture and incompatibility**

It is imperative to distinguish the scenarios of workplace misconduct. Misconduct under the LRA emphasizes the basis of fault as an employee disobeying the organization's regulations, either purposefully or negligently.<sup>108</sup> Employee failure to accomplish their responsibilities is not a factor in incompatibility; rather, it is based on the ideal component of an employee failing to adhere to the workplace's corporate culture.<sup>109</sup> Understanding mission statements, values, beliefs, personality traits, and business objectives are all important aspects of company culture.<sup>110</sup>

The corporate culture of incompatibility is directly linked to the continuous and vital disharmony that is founded on the employee.<sup>111</sup> In terms of organisational culture, incompatibility refers to situations in which the employer's beliefs differ from those of the employees.<sup>112</sup> It may be challenging or even uncomfortable for individuals with various values and views, to comply to such norms in a company where specialised corporate culture practices are employed. The employee's right to freedom of expression or belief, as well as freedom of conscience, may be violated when the employer hopes that the employee's friendly behaviour will extend to commanding the employer's value system.<sup>113</sup>

It was confirmed in *Zabala v Gold Reef City Casino*,<sup>114</sup> that displeasure with extramarital affairs may qualify as an attribution of "belief," and it was also accepted that a dismissal based on incompatibility will automatically uphold the dismissal as unfair. The Court went on to say that bringing up

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<sup>108</sup> Grossett *Discipline and Dismissal A Practical guide for South African Managers* 8.

<sup>109</sup> Grogan (n 16 above) 179.

<sup>110</sup> Grossett (n 108 above) 8-9.

<sup>111</sup> Grogan (n 16 above) 180.

<sup>112</sup> Landis and Grossett (n 78 above) 187.

<sup>113</sup> Landis and Grossett (n 78 above) 188.

<sup>114</sup> *Zabala v Gold Reef City Casino* [2009] 1 BLLR 94 (LC) (hereafter '*Zabala case*').



incompatibility would be insufficient if the employer had trouble proving that the employees did not fit in with the corporate culture. The employer must prove that the employee is to blame for the disharmony in terms of ethical conflicts. The corporate culture has a tremendous impact on employee productivity, which in turn attracts more investors to participate in such a company.<sup>115</sup>

William ascribed the topic of corporate culture by attempting to provide an appropriate meaning in that work culture is rooted in human growth, elaborating on the cultural feature that a person perceives in relation to his or her lifestyle.<sup>116</sup> He went on to say that a person's attitude is influenced by their behaviour. According to the author, culture is a basic term used in every organisation where an employer has its own distinct corporate culture that governs how business is conducted without infringing on employees' rights.<sup>117</sup>

Similarly, Ouchi focuses on the subject of culture in the same way that the business has progressed through the decades. He goes on to say that culture is used as a business tool in the workplace, which helps to restore the organisation's normal functioning.<sup>118</sup> Deal and Kennedy, on the other hand, argue that "taking corporate culture seriously as a business problem entails attempting to shape and strengthen that culture".<sup>119</sup>

## **2.4 Forms of incompatibility in the employment relationship**

When an employee causes a workplace disruption, he or she is described as incompatible. As a result, incompatibility is described as the inability to coexist or collaborate with another person due to fundamental

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<sup>115</sup> *Zabala case* at para 6.  
<sup>116</sup> Green (n 60 above) 630.  
<sup>117</sup> Green (n 60 above) 631.  
<sup>118</sup> Green (n 60 above) 632.  
<sup>119</sup> Green (n 60 above) 634.

differences.<sup>120</sup> Consequently, dismissal may be the only viable option in cases where the employee' display uncontrollable behaviour, and also in cases where the employee fails to follow and adapt to conventional processes in the legal environment, and treats other colleagues in an undesirable manner.<sup>121</sup> Even if incompatibility qualifies as a reason for dismissal to end the working relationship, the court noted in *Stevenson v Sterns Jewelers*,<sup>122</sup> that proof of a breakdown of trust and confidence between the employer and employee should be raised.<sup>123</sup>

Although incompatibility has been defined as a nebulous notion, it refers to the breakdown of trust between an employer and an employee, which is caused in part by personality clashes and results in employees failing to work in harmony with the employer.<sup>124</sup> It is critical that the employer address the challenges of incompatibility when an employee continues to cause tension despite being warned about unacceptable behaviour. However, if the employee continues to engage in such unacceptable behaviour, the employee must be dismissed in accordance with the LRA's substantive and procedural requirements.<sup>125</sup> When there is disharmony in the workplace, it leads to lower production and division among employees.

Mr Jardine was discharged from his duties in *Jardine v Tongaat Hullet Sugar Ltd*,<sup>126</sup> after insulting his senior employer for arriving late at work, resulting in his conduct amounting to a sense of ignorance, ill-mannered insulting behaviour towards his superior.<sup>127</sup> Therefore, if an employee refuses to be dishonest in order to please his or her senior employer,

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<sup>120</sup> Cambridge Dictionary  
<https://dictionary.cambridge.org/dictionary/english/incompatibility>.

<sup>121</sup> Grogan (n 9 above) 534-535.

<sup>122</sup> *Stevenson v Sterns Jewelers* (1986) 7 ILJ 318 IC (hereafter 'Stevenson case').

<sup>123</sup> Grogan (n 8 above) 263; On the issue of the breakdown of the trust relationship to qualify as a ground of dismissal see Tshoose and Letseku 2020 *SA Mercantile Law Journal* 156-174.

<sup>124</sup> Grogan (n 8 above) 263.

<sup>125</sup> Grogan (n 8 above) 264.

<sup>126</sup> *Jardine v Tongaat Hullet Sugar Ltd* (2003) ZALC 33 (hereafter 'Jardine case').

<sup>127</sup> Grogan (n 8 above) 513.

incompatibility cannot be utilised as a basis for dismissal.<sup>128</sup> In most circumstances, determining the type of workplace dismissal would be difficult. The court, on the other hand, may attempt to conduct research in order to identify incompatible individuals and assess their problems with working in an inappropriate manner.<sup>129</sup>

## **2.5 The presence of irretrievable breakdown of the employment relationship**

There must be a breakdown in the working relationship, in the sense of a lack of peace, trust, and confidence between the employer and the employee, for incompatibility to qualify as a reason for dismissal in the workplace.<sup>130</sup> In other areas of life, employees are expected to be reasonably tolerant of others. On the other hand, there are instances where employees become incompatible with their colleagues as a result of wrongdoing. In *SARU v Watson*,<sup>131</sup> the respondent employee, who worked for the appellant as the general manager in charge of referees, was charged with misbehaviour and dismissed after an arbitration convened under section 188A of the LRA.

The Labour Court concurred on review that the employee was guilty of the counts for which the CCMA commissioner had dismissed him, and that his behaviour was exceedingly improper, unprofessional, and unbecoming. The court also acknowledged that his managerial approach was rude, insulting, and, to some extent, abusive.<sup>132</sup> The court decided that dismissal was the proper punishment. In other scenarios, an employee's incompatibility could cause a problem with the company's operations.

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<sup>128</sup> Schedule 8 of the LRA Code of Good practice: Dismissal.

<sup>129</sup> Grogan (n 8 above) 264-265.

<sup>130</sup> Grogan (n 8 above) 265.

<sup>131</sup> *SARU v Watson* (2019) 40 ILJ 1052 (LAC) (hereinafter '*SARU case*') paras 5-20.

<sup>132</sup> Cf *SARU case* paras 30-31.

The employer retrenched a manager in *Zeda Car Leasing t/a Avis Fleet v Van Dyk*,<sup>133</sup> after merging the jobs of two managers who could not get along. After that, the company encouraged each employee to apply for the single position, and the unsuccessful candidate was retrenched.<sup>134</sup> The Labour Court agreed that the situation amounted to a retrenchment, but stated that it could not be handled as a retrenchment rather than a case of incapacity.<sup>135</sup> The Labour Appeal Court agreed with the Labour Court that this was essentially a case of incompatibility and that the best approach would be to treat the situation as a "species of incapacity".<sup>136</sup> It went on to say that the employer had treated the issue as one of incompatibility but had not followed the natural justice principles. Although the LAC found that the employee's discharge was procedurally unreasonable in this case.<sup>137</sup>

In view of the aforementioned LAC ruling in the *Zeda Car Leasing t/a Avis Fleet* case, it is obvious that dismissing is only acceptable where the disharmony is so severe that employees are unable to cooperate and work together efficiently.<sup>138</sup> It is improbable that the dismissal of an employee with whom the departing employee was incompatible would be justifiable, if the other party to the disharmonious relationship would have left the employee's services or been transferred to another position in any case.<sup>139</sup>

It is vital to remember that an employer should only dismiss someone for incompatibility if they have followed natural justice rules, which include procedural and substantive fairness. Furthermore, the company should conduct a disciplinary hearing, counseling, and training first, and if those procedures fail, an employee can be dismissed, especially if the person's

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<sup>133</sup> *Zeda Car Leasing t/a Avis Fleet v Van Dyk* (2020) 41 ILJ 1360 (LAC) (hereinafter '*Zeda Car Leasing t/a Avis Fleet case*').

<sup>134</sup> *Zeda Car Leasing t/a Avis Fleet case* paras 6-31.

<sup>135</sup> *Zeda Car Leasing t/a Avis Fleet case* paras 32-37.

<sup>136</sup> *Zeda Car Leasing t/a Avis Fleet case* paras 38-40.

<sup>137</sup> *Zeda Car Leasing t/a Avis Fleet case* paras 47-56.

<sup>138</sup> The LRA.

<sup>139</sup> Grogan (n 9 above) 515.

behaviour causes workplace discord.<sup>140</sup> It is trite law that such dismissal ought to be procedurally and substantively fair.

In *Wright v St. Mary's Hospital*,<sup>141</sup> the Industrial Court (as it was then) succinctly elaborated on this principle when it stated that:

The employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to dismiss the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to dismiss the cause for disharmony.<sup>142</sup>

The court stated in *Wright v St. Mary's Hospital*, that dismissal for incompatibility should be considered a sort of dismissal for operational reasons. Although, given the restrictive definition and application of operational requirements dismissal in section 213 of the LRA 1995, this decision cannot be upheld. However, it clarifies the procedural and substantive requirements that an employer must meet before dismissing an employee for incompatibility.

In practice, and as evidenced by case law, incompatibility occurs more frequently at the executive and management levels. Subjective and unfair reasons frequently distort the perception of an employee as incompatible with the employer, or as lacking the ability to get along well with the employer, as a result of the employee's conduct being unsatisfactory to the management team's operational functioning.<sup>143</sup> The working relationship, could lead to a situation in which the employer believes an employee is incompatible or no longer fits at all levels. He or she may be

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<sup>140</sup> The LRA.  
<sup>141</sup> *Wright v St. Mary's Hospital* 1992 13 ILJ 987.  
<sup>142</sup> *St Mary's Hospital* case.  
<sup>143</sup> Grogan (n 9 above) 534.

causing problems in the management team's interpersonal relationships, or he or she may have fallen from grace and "needs to go".<sup>144</sup>

In *Hapwood v Spanjaard Ltd*,<sup>145</sup> It was emphasised that if an employee causes workplace discord, the employee does not need to be dismissed right once because dismissal is regarded a last resort in the workplace. The employer should speak with the employee and try to figure out why he or she is causing a commotion in the workplace.<sup>146</sup> After the employee has told his or her side of the story, the company will determine whether to provide training or counselling to help the employee fit into the corporate culture. If an employee has failed to retain peace despite the employer's best efforts, the employer may dismiss the employee if the employee's behaviour is sufficiently detrimental to the workplace environment.<sup>147</sup>

## **2.6 The measure used in identifying incompatible employees' in the working environment**

As previously discussed, some cases regard an incompatibility dismissal as a termination for operational reasons, necessitating a section 189 approach, while others regard it as a form of incapacity, necessitating an employer to follow the LRA's Code of Good Practice on Dismissals' incapacity requirements.<sup>148</sup>

The executive level is where the employer operates, and it is the responsibility of the executive to communicate to employees what they are required to do or not do. As a result, the employer has the right to require that the employees work in a harmonic, stable, and peaceful environment.<sup>149</sup> As stated in *Erasmus v BB Bread Ltd*, an employer has the authority to address an issue, and if an employer wants to dismiss an

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<sup>144</sup> Grogan (n 8 above) 265.

<sup>145</sup> *Hapwood v Spanjaard Ltd* (1996) 2 BLLR 187 (IC) (hereafter '*Hapwood case*').

<sup>146</sup> Cf *Hapwood case* at para 197.

<sup>147</sup> Cf *Hapwood case* at para 198C-D.

<sup>148</sup> The LRA.

<sup>149</sup> Donovan 2017 <https://www.markdonovan.co.nz/what-is-incompatibility/>.

employee, corrective methods should be observed rather than using their discretion. Dismissal should only be used as a last resort, as stated in *Erasmus v BB Bread Ltd.*<sup>150</sup>

## **2.7 The need of effective procedures in place to create harmony in the workplace**

Judge Molahlehi acknowledges that the principles put forth in *Mgijima v Member of the Executive Council Gauteng Department of Education and others*,<sup>151</sup> apply to the termination of employment contracts. Section 188 of the LRA, according to the courts, defines a variety of methods for dismissing employees as well as how each employee is to be dismissed. The factors considered by the courts in dismissal based on incompatibility include, among other things, operational requirements and workplace strife.<sup>152</sup> Despite the fact that the LRA does not recognise incompatibility as a reason for dismissing incompatible employees. Several courts and tribunals have recognised incompatibility as a cause of incapacity, particularly where the working relationship has breakdown irretrievably.<sup>153</sup>

In the instance of *Miyeni v Chillibush Communications*,<sup>154</sup> when the parties' faith and assurance had deteriorated, incompatibility before the CCMA was once deemed a dismissal criterion. Given that parties frequently fail to establish incompatibility as a basis for dismissing employees fairly, various courts have concluded that incompatibility does qualify as a ground for dismissal under South African law, as long as fair standard procedures are implemented in the workplace and followed gradually when dismissing a disruptive employee.<sup>155</sup> As previously noted,

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<sup>150</sup> *Erasmus v BB Bread Ltd* 8 (1987) ILJ 537.

<sup>151</sup> *Mgijima v Member of the Executive Council Gauteng Department of Education and Others* (2014) ZALCJHB 414 (hereafter '*Mgijima case*').

<sup>152</sup> *Mgijima case* at para 68.

<sup>153</sup> *Mgijima case* at para 69.

<sup>154</sup> *Miyeni case* para 39.

<sup>155</sup> Grogan (n 8 above) 266.

the court in *Wright v St. Mary's Hospital*,<sup>156</sup> created a different approach to dealing with incompatibility as a cause for dismissal in the legal area, based on the principle of natural justice.

As a result, as established by the industrial court in *Wright v St. Mary's Hospital*, an employer has an obligation to warn an employee of undesirable workplace behaviour and the actions to be done in order to deal with incompatible employees. Furthermore, when an incompatible employee is notified about his or her disruptive behaviour at work, the employee must be given time to prepare and respond to the complaints made against him or her. If the employee offers his version of events and is judged to be guilty of disharmony, correct procedures must be followed to effect dismissal.<sup>157</sup>

In *Subramuny v Amalgamated Beverages Industries Ltd*,<sup>158</sup> it was found that evidence of incompatibility must come from an independent source, in the sense that the employer must show and justify why the employee is the source of conflict in the workplace.

In *Visagie en Andere v Prestige Skoonmaakdienste (Edms) Bpk*,<sup>159</sup> the court decided on the most effective procedure for the incompatibility process. The court confirmed that employee behaviour should be evaluated in light of the employee's failure to conform to the organisation's corporate culture. This problem might occur as a result of a lack of respect or a sensation of being controlled by superiors who are unsure on how to carry out their responsibilities.<sup>160</sup>

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<sup>156</sup> *Wright case*.

<sup>157</sup> Grogan (n 8 above) 266.

<sup>158</sup> *Subramuny case*.

<sup>159</sup> *Visagie en Andere v Prestige Skoonmaakdienste (Edms) Bpk* (1995) 16 ILJ 421 (IC) (hereafter '*Visagie en Andere case*').

<sup>160</sup> *Visagie en Andere case* at 418,423J.



*Watson v South African Rugby Union and Others*,<sup>161</sup> decided in 2017, offered much-needed clarity on the subject by declaring that: “The onus is on the employer alleging incompatibility to demonstrate that the employee in question, was responsible substantially for the disharmony or breakdown of relationships at the workplace, and that incompatibility as proven constituted a fair reason for the dismissal in the circumstances of a given case”.<sup>162</sup>

Employee incompatibility has a detrimental influence not only on the employer, but also on the reputation of the business. The magnitude of the offense that creates workplace conflict is an important factor to consider while dealing with the issues that lead to dismissal.<sup>163</sup>

Before an employee can be dismissed for creating workplace conflict, he or she should be given a second chance to change his or her attitude toward the corporate culture. To handle the issue of incompatible employees, there should be training and counselling systems in place to help the employee overcome his or her problems. The counselling procedure will also enable the employer and employee to assess whether mutual trust and the creation of a productive working environment are still achievable.<sup>164</sup>

In *Miyeni v Chillibush Communications*,<sup>165</sup> an employee who was a director resigned from his top management position and expressed a desire to continue working as an employee without holding any managing positions. The employee's decision was confirmed by the board of directors and the resolution committee. Because the director requested to be removed from the management hierarchy, the Labour Court found that

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<sup>161</sup> *Watson v South African Rugby Union and Others* (C672/15) (2017) ZALCCT 42 (hereafter ‘*Watson case*’).

<sup>162</sup> *Watson case* at Para 13.

<sup>163</sup> Grogan (n 9 above) 515-516.

<sup>164</sup> The LRA.

<sup>165</sup> *Miyeni case*.

such dismissal did not make the decision unreasonable.<sup>166</sup> In order to ensure that the dismissal procedure resulted in a reasonable and equitable decision, the CCMA evaluates the principle of natural justice utilising the basic elements of substantive and procedural fairness.

To evaluate the efficacy of the procedure to be utilised when dismissing employees using procedural fairness, the arbitrator relied on the Code of Good Practice: Dismissal, Schedule 8 of the LRA. This allows the employer to use inquiry methods and the *audi alteram partem* rule to take corrective actions.. Before making a ruling about disruptive employees, the courts must first hear both sides of each party's arguments.<sup>167</sup>

In South Africa, incompatibility is legally recognised as a reason for dismissal, and the Code of Good Practice elaborates on how dismissal is handled.<sup>168</sup> In *Erasmus v BB Bread Ltd*,<sup>169</sup> it was found that an employer may expect an employee to cultivate harmonious relationships within the workplace while evaluating the problem of incompatibility within the employment relationship. Where there is disharmony, the employer should address the problem, and if there are no changes, the employer may dismiss the employee.<sup>170</sup>

The factors to consider when faced with incompatible staff are outlined in Article 4 of the ILO Convention 158.<sup>171</sup> If there are no valid causes for the discord, if it cannot be demonstrated that the employee does not fit into the corporate culture, or if the person is acting out of control because they have no understanding what is expected of them in the workplace, the employment relationship should not be terminated.<sup>172</sup>

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<sup>166</sup> *Miyeni case*.

<sup>167</sup> The LRA.

<sup>168</sup> Schedule 8 of the LRA Code of Good practice: Dismissal.

<sup>169</sup> *Erasmus case*.

<sup>170</sup> Mokumo (n 61 above) 60.

<sup>171</sup> The International Law Convention 158 of 1982.

<sup>172</sup> Mokumo (n 61 above) 60.

Although the LRA does not recognise incompatibility, such dismissal will be considered fair if proper procedures are followed and employers ensure that they have the legal framework in place, such as policies, codes of conduct, and guidelines to follow in the event that employees become incompatible.<sup>173</sup>

## 2.8 The effect of international law

When interpreting the Bill of Rights, international law must be considered, according to section 39 of the Constitution of 1995.<sup>174</sup>

As a result, incompatibility is regarded differently in the United Kingdom when it comes to dismissal under international comparative law. The European Union considers common law to be a contractual duty of the employment relationship since it controls the maintenance of harmony in the workplace.<sup>175</sup> While an employer fails to follow proper standard procedure when dismissing an employee, this is considered a breach of the employment contract. The Court of Appeal in *New Zealand Reid v New Zealand Fire Services Commission*,<sup>176</sup> confirmed that the employer can rely on trust and confidence if the employment relationship between the parties is irreversible. The *onus* of incompatible employees' therefore lies within the employer.<sup>177</sup>

In *Mabry v West Auckland Living Skills Home Trust Board*,<sup>178</sup> the board of directors arranged a meeting with an employee and explained the different complaints regarding her behaviour toward the workplace's corporate culture. When the employee was notified of the workplace conflict she was generating, she became enraged. She ended up insulting her superiors,

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<sup>173</sup> The LRA.

<sup>174</sup> Section 39 of the South African Constitution.

<sup>175</sup> The Constitution.

<sup>176</sup> *Reid v New Zealand Fire Services Commission* (2010) 19 PRNZ 923 (hereafter '*Reid case*').

<sup>177</sup> Grogan (n 8 above) 266.

<sup>178</sup> *Mabry v West Auckland Living Skills Home Trust Board* (2011) (hereafter '*Mabry case*').

telling them that they do not know how to carry out their duties responsibly and that they should stop instructing her how to act.<sup>179</sup> The employer gave the employee warnings and went through the counselling and training process, but nothing appeared to work out. Ms Mabry's behaviour was always on and off, causing more tension in the workplace. The Employment Tribunal decided that the parties' trustworthiness and assurance could not be restored in their judgement. The employee's dismissal was a fair choice made in the best interests of the company.<sup>180</sup>

According to Doaks and Maxfield, in *Walker v ProCare Health Limited*,<sup>181</sup> the Employment Court found that incompatibility is based on the *audi alteram partem* rule. In its ruling, the New Zealand court established the fundamental key methods for supporting the employer in dealing with incompatible employees without jeopardising the business operation's reputation. The court also stated that incompatibility as a ground for dismissal must be justified, and that the employer bears the burden of establishing that the work relationship has irreversibly broken down.<sup>182</sup>

## 2.9 Summary

As shown from the discussion above, the employer shall be obliged to meet the legislative requirements evolving around the idea of natural justice, including substantive fairness and procedural fairness, when dealing with incompatibility in the workplace. When dismissing incompatible employees, normal process should be followed gradually, and such dismissal should not be seen as a discriminatory rule that violates the employees' rights. When a court makes a ruling, the rights of both the employee and the employer must be considered. In the next chapter, the guidelines for incompatibility in the workplace will be discussed.

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<sup>179</sup> *Mabry case*.

<sup>180</sup> *Mabry case*.

<sup>181</sup> *Walker v ProCare Health Limited [2012] NZEmpc 90* (hereafter '*Walker case*').

<sup>182</sup> Rudman New Zealand *Employment Law guide* (2013) 263.

## CHAPTER 3

### THE GUIDELINES FOR INCOMPATIBILITY IN THE WORKPLACE

#### 3.1 Introduction

The LRA recognises three categories of dismissal, as detailed in Chapter one. This includes dismissal due to incapacity, misconduct, or operational requirements. As a result, incompatibility is not defined as a form of dismissal in the LRA.<sup>183</sup> Procedures for dismissal are protected, and each has its own standard approach that works in the workplace. Since incompatibility is not recognised, there has been debate regarding whether it can lead to incapacity or be seen as a form of operational requirement dismissal.<sup>184</sup> As a result, a complicated scenario is produced. Simply expressed, the question is whether incompatibility occurs when a person lacks the necessary expertise to complete his or her duties or when there is a workplace disagreement.

Regardless, the Erasmus decision affirmed the idea that incompatibility is linked to disharmony in the workplace, including behaviour that cannot be condoned.<sup>185</sup>

#### 3.2 The rights of the employee

In terms of section 185 of the LRA provides that "every employee has the right not to be unfairly dismissed". In order for a dismissal based on incompatibility to be fair, the employer must follow procedural and substantive fairness requirements, as well as natural justice principles.<sup>186</sup> The fair criteria should rule out any type of favouritism or discrimination against a specific employee based on race or age. When gathering information to evaluate whether or not an employee is incompatible, the

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<sup>183</sup> The LRA.

<sup>184</sup> Landis and Grossett (n 78 above) 216-217.

<sup>185</sup> Landis and Grossett (n 78 above) 218.

<sup>186</sup> Grogan (n 8 above) 262.

investigative technique should be employed as a last resort. Instead of deviating from the research and drawing its own conclusions, the employer should focus on the issues that serve as confirmation of the disharmony.<sup>187</sup>

Dismissal is recognised as a last resort in law, and it will only be used against an incompatible employee if the person is responsible for the irreversible employment link to the corporate culture.<sup>188</sup> The dismissal for incompatibility cannot be carried out if the employer has not observed the process of training and counselling his or her employee to find a solution.

The employees and Larcombe were judged to be incompatible in the workplace in *Larcombe v Natal Nylon Industries (Pty) Ltd*,<sup>189</sup> but the employer assured Larcombe that his position was safe and that he would be protected if others were dismissed. When analysing how employees were dismissed, it was discovered that a finance manager had not carried out his duties ethically, in that not all employees were exposed to a disciplinary hearing and counselling, and that such a decision was deemed to be biased when it came to the right to equality.<sup>190</sup>

### **3.3 The legal framework regulating incompatibility in South African workplace**

When considering terminating employees due to incompatibility, it is critical for the employer in the workplace to take corrective action. As previously said, incompatibility as a reason for dismissal should be used only as a last resort. The employer has a responsibility to explore the problem that is causing disharmony, adapting to procedural fairness, substantive fairness, and the counselling process in order to resolve

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<sup>187</sup> Grogan (n 8 above) 263.

<sup>188</sup> Grogan (n 8 above) 263-265.

<sup>189</sup> *Larcombe v Natal Nylon Industries (Pty) Ltd, Pietermaritzburg* (1986) 7 ILJ 326(IC) (hereafter '*Larcombe case*').

<sup>190</sup> *Larcombe case* at para 10.

disagreements, since they have a duty to preserve a harmonious working relationship with their employees.<sup>191</sup>

### **3.3.1 The South African Constitution**

The case *Erasmus v BB Bread Ltd*,<sup>192</sup> served as a springboard for the consideration of incompatibility as a reason for dismissal. The principle mentioned caused conflict in the workplace by causing personality clashes, which led to disharmony. Employers must follow standard process in order to carry out their tasks ethically, considering substantive and procedural fairness.<sup>193</sup> Section 23(1) of the Constitution should be used as a primary criterion in all incompatibility decisions. Employees should be subjected to disciplinary hearings, counselling, and training procedures in order to achieve a fair procedure. Attempting to accommodate employees in a department that will enhance their confidence in their ability to work effectively without causing unnecessary conflict and tarnishing the business image.<sup>194</sup>

Because the constitution is supreme, it ensures that everyone is treated equally and that no discriminating practices are used against different racial groups. The Constitution protects both the employer and the employee in the workplace to ensure fair labour practices.<sup>195</sup> The relationship between the LRA and the Constitution is imperative, and any business activities should comply with constitutional rights in order to maintain peace.<sup>196</sup> In the past, the concept of "unfair labour practice" was known as "residual unfair labour practice," which recognised incompatibility as a type of dismissal.<sup>197</sup> Since the ratification of the Constitution in 1996 and the promotion of fair labour practices for all, any

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<sup>191</sup> Landis and Grossett (n 78 above) 218.

<sup>192</sup> *Erasmus case*.

<sup>193</sup> The Constitution.

<sup>194</sup> Section 23 (1) of the Constitution.

<sup>195</sup> Section 23 of the Constitution.

<sup>196</sup> The LRA.

<sup>197</sup> The LRA.

employee whose right has been infringed on, has been provided constitutional protection.<sup>198</sup>

### **3.3.2 The policies in the workplace**

Policy considerations should be affected. The employer should have policies in place for dealing with situations that cause discord. The workplace policy should be designed in a way that is consistent with the business's values and lays out a clear approach for dealing with problems.<sup>199</sup> Employers must keep the value of workplace trust in mind while designing and implementing policies in the workplace. In order for policies to work in the workplace, the management team should play a role in assisting with their implementation.<sup>200</sup>

The employer is responsible for identifying the policy's terms and developing the policy in a courteous manner. By posting the policy in the workplace, the policy should be written in such a way that the employee understands what is expected of them. Each employee should be provided a copy of the policy, in order to understand what is expected of them in order to continue the employment relationship.<sup>201</sup> When establishing policies in place, the employer can take the necessary measures by conducting training sessions to educate employees on how the policy works. Furthermore, a policy demonstrates to employees what behaviour is appropriate in the workplace.<sup>202</sup>

### **3.3.3 The Code of Good Practice for dismissal**

When the offence is so serious, the employer has no choice but to prosecute the employee and launch a disciplinary process, particularly when dealing with charges of incompatibility. The operational aspects of

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<sup>198</sup> The Constitution.

<sup>199</sup> NSW Government date unknown  
<https://www.industrialrelations.nsw.gov.au/employers/workplace-policies>.

<sup>200</sup> Mischke (n 36 above) 71-74.

<sup>201</sup> Mischke (n 36 above) 74-75.

<sup>202</sup> Mischke (n 36 above) 76-77.



such a disciplinary investigation are dishonesty, gross carelessness, and operating in a manner that is inconsistent with the employer's corporate culture standards and regulations.<sup>203</sup>

It should be noted, however, that this is not intended to be a full list of violations; workplace disharmony must exist in order for a dismissal to be justified. As will be seen later, the courts have also allowed for dismissal for a variety of other violations, such as competing with the business employer, gross carelessness, drinking while on duty, and failing to follow corporate policies. In certain circumstances, even relatively minor violations can be seen as significant. If a manager is involved and there is racial segregation, for example, verbal abuse may justify dismissal.<sup>204</sup>

#### **3.3.4 The common law factor**

The parties' trustworthiness and confidence in their capacity to carry out their tasks ethically could be impacted by a single absence from work. If an employee has actively avoided work in defiance of the employer's precise instructions, then his or her absence has the potential to destabilize the workplace.<sup>205</sup> Nonetheless, the Code of Good Conduct on Dismissal recommends that the employer allow the employee to explain why he or she created a hostile work environment.

When there is a less serious offense causing the discord, the employer should meet with the disruptive employee and settle the issue first, rather than wasting time on counseling and training, which requires the business to take other actions before dismissal.<sup>206</sup> For many incidents of the same offense, most disciplinary codes include a verbal warning, a written

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<sup>203</sup> Landis and Grossett (n 79 above) 218.

<sup>204</sup> Landis and Grossett (n 79 above) 218.

<sup>205</sup> Burger (n 12 above) 14.

<sup>206</sup> Lewis and Sargeant (n 90 above) 179.

warning, and a final written warning. Only after all of these steps have been completed can dismissal be justified in most cases.<sup>207</sup>

### **3.4 Incompatibility impacting on the trust and confidence relationship between the employer and employee in the workplace**

Incompatibility can have a negative influence on the parties' trust and confidence in the organisation. The employer will have to dismiss the employee, if working there is no longer trust and confidence between the parties.<sup>208</sup> In *Cutts v Izinga Access (Pty) Ltd*,<sup>209</sup> the reasons for dismissing an employee for disharmony were attributed, where the Labour Court advised the employer to be cautious of utilising their own discretion in dismissing employees rather than focusing on the real issue that warranted disharmony. In the eyes of the courts, the employer must establish the blame basis principle that the tension is generated by the employee's failure to conform to the workplace's corporate culture.<sup>210</sup>

Furthermore, workplace disruption arises as a result of employees attempting to demonstrate that they are not under the influence of senior management. The factor of disruption emphasises how individuals conduct themselves at work and how their personality qualities affect the company's performance. The employer is viewed as the organisation's leader, and all decisions should be made with the goal of increasing the company's productivity and ensuring that such disharmony does not deter potential investors or hurt the workplace's reputation. All decisions should be taken with the purpose of enhancing the company's productivity and ensuring that such discord does not deter potential investors or tarnish the workplace's reputation.

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<sup>207</sup> Lewis and Sargeant (n 90 above) 179.

<sup>208</sup> Van Jaarsveld and Van Eck (n 94 above) 175.

<sup>209</sup> *Cutts v Izinga Access (Pty) Ltd* [2004] 8 BLLR 755 (hereafter 'Cutts case').

<sup>210</sup> *Cutts case*.

### **3.5 The relationship between unfair labour practice and incompatibility**

When it comes to demonstrating incompatibility, it is not enough for senior management to point out incompatible individuals who do not meet the criteria set in accordance with the employer's corporate culture or legislation. It must be demonstrated that the disruption that produces disharmony is attributable to the employment relationship's clashing values.<sup>211</sup>

#### **3.5.1 The Labour Relations Act**

It could be claimed that there should be a link to fair labour practices when reading legislation. The constitution and the LRA, for example, both emphasise the need of fairness. According to section 23 of the constitution, everyone has the right to fair labour practice. The LRA, on the other hand, emphasises that its goal is to promote social justice and workplace harmony.<sup>212</sup> In the workplace, the classification of unfair labour practice is important, and it must be implemented when developing standard procedure for dismissing incompatible employees.

In *Darries v Hollandia Life Insurance Co Ltd*,<sup>213</sup> "it was held that where the employee is deemed a misfit, proper warning and counselling are required before the contract can be fairly terminated". *Jardine v Tongaat Hullet Sugar Ltd*,<sup>214</sup> developed natural justice principles. When the incompatibility was based on substantive fairness, the employer had to show that there was a justifiable reason to dismiss the employee who was causing workplace conflict. The LRA's provision for unjust dismissal, which was

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<sup>211</sup> Ramsey 2003 *Supervision* 14-16.

<sup>212</sup> Grogan (n 15 above) 8.

<sup>213</sup> *Darries v Hollandia Life Insurance Co Ltd* [2014] ZAWCHC 87 (hereafter '*Darries case*').

<sup>214</sup> *Jardine case*.

codified by the old LRA of 1956, is included in the establishment through the industrial courts.<sup>215</sup>

### **3.6 The classification of incompatibility**

Since incompatibility falls under the category of dismissal for misconduct, which emphasises that when an employee commits an offense for the first time, the employer cannot dismiss the employee at the outset. However, if the employee's behaviour is so egregious that it is damaging the employer's business culture and reputation, the incompatible employee must be dismissed.<sup>216</sup> Natural justice standards, such as substantive and procedural fairness, are governed by the LRA. The employer bears the burden of proving that the employee acted inappropriately in order to justify dismissal. If an employer fails to provide grounds for dismissing an employee, the dismissal will be considered unfair.<sup>217</sup>

In the context of employment, every employee has the right to a fair dismissal in practice. The reasons for dismissal include factors that can lead to the termination of the employment relationship, whether in writing or verbally.<sup>218</sup> Improving management and employee interactions based on a shared understanding of what constitutes fair labour practices could help to reduce the occurrence of wrongful dismissal. Employees regularly allege that the management uses the disciplinary procedure to terminate employees and victimise them.<sup>219</sup> As a result, an unhealthy climate of mistrust develops between employees and management. It also casts doubt on the disciplinary process's legality. These issues may be greatly lessened if the norms of the process were better understood and applied with more sensitivity, professionalism, and consistency. In addition to

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<sup>215</sup> The LRA.

<sup>216</sup> Landis and Grossett (n 78 above) 214-215.

<sup>217</sup> Bowers and Honeyball *Labour Law* 113.

<sup>218</sup> Bowers and Honeyball (n 217 above) 114.

<sup>219</sup> Weeks 2010 *ActaCommercii* 43-45.

increasing discipline, such an approach could improve the interaction between management and employees.<sup>220</sup>

### **3.7 Unfair labour practice in the context of dismissal based on incompatibility.**

Incompatibility can lead to a significant issue, including the possibility of strike action. There is a thin line between incompatibility and misconduct, at least where incompatibility is the result of the employee's wilful behaviour.<sup>221</sup> When colleagues, subordinates, or superiors are unable to accept their behaviour, employees become incompatible. As a result, incompatibility indicates a breakdown in interpersonal relationship.<sup>222</sup>

Thus, incompatibility is rarely the result of a single incident, unless the employee's behaviour on that particular occasion was so egregious as to permanently destroy the working relationship.<sup>223</sup> For example, this could be the outcome of racist or other insulting comments. The company may treat the situation as misconduct or dismiss the employee for operational reasons in such instances.<sup>224</sup>

*Jardine v Tongaat Hullet Sugar Ltd*,<sup>225</sup> provided a good example of incompatible employees. Mr Jardine was dismissed after describing a senior manager's mild reprimand for being late as "arrogant, churlish, degrading, depreciative, ill-considered, ill-mannered, insensitive, offensive, harsh, and wholly inappropriate".<sup>226</sup> Despite the fact that no more insubordinate or rude statement could be conceived, both the employer and the commissioner chose to regard the subsequent collapse of

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<sup>220</sup> Weeks (n 219 above) 46.

<sup>221</sup> Grogan (n 8 above) 533.

<sup>222</sup> Grogan (n 8 above) 533-534.

<sup>223</sup> Grogan (n 16 above) 511.

<sup>224</sup> Grogan (n 16 above) 512.

<sup>225</sup> *Jardine case*.

<sup>226</sup> Inlexso date unknown <https://inlexso.co.za/incompatibility-in-the-work-place/>.

relations between Jardine and his supervisor as a case of incompatibility.<sup>227</sup>

### **3.8 Summary**

Courts and dispute resolution tribunals have expressed their opinions on how to deal with incompatibility in light of the LRA and the Constitution. As a result, incompatibility is a reason for dismissal. Thus, before an employer can dismiss an employee for incompatibility, a specified procedure must be followed, taking procedural and substantive fairness into account. Employers will be better able to make informed decisions about dismissal if rules are implemented with the support of the legal framework. Measures that can be taken in the workplace to cope with incompatibility will be covered in the next chapter.

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<sup>227</sup> As above n 226.

## CHAPTER 4

### THE MEASURES THAT CAN BE ADOPTED TO MINIMIZE DISMISSAL ARISING FROM INCOMPATIBILITY IN THE WORKPLACE

#### 4.1 Introduction

The process of dismissing an employee based on incompatibility has become a contentious issue in South Africa, due to the limitation in the LRA, which categories grounds for dismissals as misconduct, incapacity and operational requirements.<sup>228</sup> A further thorny issue arises regarding the substance of the matter in terms of whether the incompatibility relates to the incapacity of the employee or the operation of the organisation.<sup>229</sup> The complex question that then arises is whether incompatibility can be attributed to something related to the employee and his/her ability to do the work, or whether it is related to the employer's right to relatively peaceful and harmonious relationships within the workplace, that would justify the ultimate sanction of dismissal.<sup>230</sup>

#### 4.2 The South African Constitution as a protective measure

The constitutional right of everyone to fair labour practice contained in section 23 of the Constitution, emphasises that an employee should not be treated unfairly, including not to be unfairly dismissed. The LRA establishes grounds for dismissing an employee, and one of those grounds is misconduct. However, an employee may not be dismissed unless both substantive and procedural requirements have been met. This is to ensure fairness and respect for human dignity, which are in line with both the Constitution and the ethos of *Ubuntu*.

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<sup>228</sup> The LRA.

<sup>229</sup> Burger (n 14 above) 9.

<sup>230</sup> Mischke (n 35 above) 77.

As the country's supreme law, it is critical that the Constitution recognises workplace equality.<sup>231</sup> Section 23 of the Constitution establishes the equality principle, which states that "everyone has the right to fair labour practice".<sup>232</sup> In the case of *National Educational Health and Allied Workers Union v University of Cape Town*,<sup>233</sup> the court dealt with the problem of employer-employee discrimination. The court emphasised the importance of contextualising the subjective rights enshrined in section 23(1) of the constitution in order to safeguard employees other than the employer.<sup>234</sup> It was so clear that the term "everyone" as employed in section 23 (1) relates to human beings rather than the legal person.<sup>235</sup>

To promote peace, growth, and stability, the LRA was established to ensure that fairness is practiced while also improving the working environment. The LRA upholds the rule of law in decision-making, as stipulated by Section 23 of the South African Constitution.<sup>236</sup> In *NEHAWU*,<sup>237</sup> the court exercised its discretion in interpreting the Bill of Rights in conformity with the Constitution and taking into account international law, as required by section 39 of the Constitution. The court held that "when interpreting the Bill of rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".<sup>238</sup>

In the past, incompatibility was used as a reason for dismissal in the workplace because it was associated with inability. The approach followed by several courts amounted to the employer claiming inability due to a lack of procedure to follow based on the incompatibility principle. The employer lacked the basic understanding of the differences between incapacity and

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<sup>231</sup> Section 9 of the Constitution.

<sup>232</sup> The Constitution.

<sup>233</sup> *National Educational Health and the Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) (hereafter 'NEHAWU Case').

<sup>234</sup> *NEHAWU Case* at para 13.

<sup>235</sup> *NEHAWU Case* at para 36.

<sup>236</sup> Section 23 of the Constitution.

<sup>237</sup> *NEHAWU Case* at para 13.

<sup>238</sup> Section 39 of the Constitution.



incompatibility. When there is disharmony in the workplace, rather than addressing the problem, employees will be dismissed because they are unable to do their tasks adequately.<sup>239</sup> Furthermore, when dismissing an employee, they should be provided with sufficient and acceptable explanations as to why the dismissal is necessary. The employee has the right to make a case for why he is to blame for the workplace discord.

### **4.3 The protective measures in the workplace**

The fairness of dismissing an employee aids in establishing the seriousness of the conduct in employment relationships that have irreversibly broken down in terms of reliability and certainty. If the parties' relationship cannot be repaired, dismissal may be enacted in accordance with the Constitution and the LRA. The constitution is extremely important since it is ultimate, and any decision made by the courts or the employer must be consistent and not infringe on any rights.<sup>240</sup>

### **4.4 The relationship between substantive fairness and procedural fairness**

Natural justice concepts, which play a role in efficiently dismissing employees, are recognised by the South African legal system, which is sufficiently advanced. In order for incompatibility to be considered a valid ground for dismissal, the courts have ruled that reasonable procedures must be utilised to dismiss employees who are incompatible with the corporate culture of the workplace.<sup>241</sup> In the legal setting, the extent to which the employer failed to follow the procedural imperatives while dismissing employees would be regarded as unjust. In view of the common law requirement that any employee accused of misconduct must

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<sup>239</sup> Wilsenach 2012 <http://www.hrpulse.co.za/employment-termination/dismissal/227654-can-you-fire-someone-for-being-a-square-peg-in-a-round-hole>.

<sup>240</sup> Section 2 of the Constitution.

<sup>241</sup> Grogan (n 8 above) 587.

be heard before a court. It must be noted that, procedural fairness is a crucial condition of all disciplinary hearing.<sup>242</sup>

The Labour Appeal Court addressed fairness in *Unitrans Zululand (Pty) Ltd v Cebekhulu*,<sup>243</sup> taking procedural and substantive fairness into account. When dismissing employees, the two principles of natural justice must be applied to aid the employer in making effective decisions about individuals who are disruptive to the corporate culture. Procedural fairness focuses on the procedure that must be followed in dismissing the employee, while substantive fairness deals with the reasonable element of dismissing the employee.

Substantive fairness is demonstrated by providing evidence to be used in dismissing an employee; such proof can be in the form of disciplinary records.<sup>244</sup> While procedural fairness is a protocol, if an employee acts unethically, the employer must first issue a warning, indicating that disciplinary action will be taken if the employee receives three warnings.<sup>245</sup> When an employee fails to meet the aforementioned criteria, the counselling process is considered. The company can then decide that the employee must be dismissed since his unethical conduct is impacting on the business productivity and the well-being of other employees.<sup>246</sup>

If concrete information is presented to the court to justify the dismissal of such an employee, the court will assess the factors and come to the decision that such a dismissal is substantively fair. When there is workplace disharmony and proper procedures are followed to dismiss an

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<sup>242</sup> Grogan (n 9 above) 587-588.

<sup>243</sup> *Unitrans Zululand (Pty) Ltd v Cebekhulu*, [2003] 7 BLLR (LAC) (hereafter 'Unitrans case').

<sup>244</sup> *Unitrans case* at para 25.

<sup>245</sup> *Unitrans case* at para 25.

<sup>246</sup> Mischke (n 35 above) 75.

incompatible employee, the dismissal is considered as just since the dismissal was conducted in line with procedural fairness.<sup>247</sup>

#### **4.4.1 Substantive fairness**

The basis for the dismissal must be established in order for substantive fairness to occur, which implies that proof of disharmony in terms of incompatibility must be proven on a balance of probabilities. When it comes to substantive fairness, the question for employers is whether they followed the proper disciplinary procedure and acted in compliance with the court-ordered restrictions.<sup>248</sup> As a result, it is wrong to dismiss an employee who has acted dishonestly at first, unless there are exceptions to the law, such as when the misconduct is so serious that sustaining the working relationship would be unpleasant. Courts have mandated that each case can be viewed on its own merits, with the primary focus on the employer's egregious mismanagement and administration of the business' activities.<sup>249</sup>

In addition, the employer must assess the possibility that the undesirable behaviour occurring in the workplace will be treated with respect. The progressive discipline method adopted in the workplace should be followed when dealing with dismissal. Because dismissal is viewed as a last resort, the Constitution's and LRA's principles are significant in determining the success of dismissing employees in an ethical manner.<sup>250</sup> The most important guideline in "Schedule 8 of the Code of Good Practice: Dismissal" indicates that in order to maintain growth and stability in the employment relationship, respect must be applied. When an employer asks an employee to perform tasks that result in *mala fide*, the employee has a right to be safeguarded against malicious components, thus the

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<sup>247</sup> Holland and Burnett *et al* (n 56 above) 234.

<sup>248</sup> Holland and Burnett *et al* (n 56 above) 235.

<sup>249</sup> Holland and Burnett *et al* (n 56 above) 235.

<sup>250</sup> Landis and Grossett (n 79 above) 216.

employer should make decisions that affect the operational environment in good faith.<sup>251</sup>

The Constitutional Court established the link between employer and employee in the determination of fairness to be done through the arbitrator in *Sidumo & others v Rustenburg Platinum Mines Ltd & others*.<sup>252</sup> The Commissioner went into greater detail about the circumstances in which natural justice standards are important.<sup>253</sup> The considerations could include the employee's disharmony; this could have occurred in the form of counselling or training efforts to ensure the organisation's interest before dismissing employees.<sup>254</sup>

The court supports progressive discipline, in which employees are given the opportunity to correct their behaviour before being dismissed. As a result, the employer offers the employee a chance by issuing warnings and engaging in a counselling procedure to assist the employee in resolving the disharmony concerns. When a dismissal is made without providing a reasonable basis for the dismissal, it is considered an improper factor. When the courts consider the impact of the employer's handling of the situation, they will particularly invoke the principle of natural justice, which is complex and can lead to an unjust and significantly unfair ruling.<sup>255</sup>

#### **4.4.2 Procedural fairness**

The procedural aspect utilised to dismiss an incompatible employee clearly involves procedural fairness. The LRA's Schedule 8 is the primary source of protocol for determining if an employee is causing a workplace disruption. If the employer used such a procedure to evaluate the

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<sup>251</sup> Breed date unknown <https://www.barnardinc.co.za/substantive-and-procedural-fairness/>.

<sup>252</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 12 BLLR 109 (CC) (hereafter '*Sidumo case*').

<sup>253</sup> Landis and Grossett (n 79 above) 216-217.

<sup>254</sup> Landis and Grossett (n 79 above) 217-218.

<sup>255</sup> Landis and Grossett (n 79 above) 218.

employee, the dismissal will be regarded as reasonable.<sup>256</sup> The notion of fair reasons for dismissal governs the *audi alteram partem* rule, which ensures that proper procedures are followed when dismissing employees. Before going to court, each side should be given a reason to clarify the matter at hand. If there is a lack of procedure followed, the decision to dismiss the employee will be regarded procedurally unfair.

Procedural fairness can be attributed to the notion of disciplinary hearing, which asserts that each employee should be given the opportunity to tell his version of the disruptive behaviour and explain why through the principle of the courts in the form of the *audi alteram partem rule*. If the employer followed the legal framework for disciplinary hearings, it can be determined that the dismissal for incompatibility was procedurally fair.<sup>257</sup> In the sense that the International Labour Organization Convention (ILO) and the Constitution control the protection of individual rights, the disciplinary hearing between the employer and the employee is regarded an informal disciplinary hearing. An informal disciplinary hearing is often used to decide on the procedural fairness of a workplace dismissal.<sup>258</sup>

The Commissioner's Codes in dealing with incompatibility as a reason for dismissal does not take the place of the remedial legal framework, that the employer implements in the workplace to follow in the case of workplace disharmony or conflict.<sup>259</sup> However, because the employer lacks a disciplinary mechanism in place, they are required to follow the elements mentioned in Schedule 8 of the LRA, which must be implemented in a gradual manner when dismissing incompatible employees.<sup>260</sup>

The Code of Good Practice's legislative framework, enacted in item 4, lays out the main points of procedure to follow when an employee has

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<sup>256</sup> Bowers and Honeyball *Labour Law* 114-115.

<sup>257</sup> Finnemore and Rennie *et al Contemporary Labour Relations* (2002) 305.

<sup>258</sup> Finnemore and Rennie *et al* (n 257 above) 305-306.

<sup>259</sup> Finnemore and Rennie *et al* (n 257 6above) 306-307.

<sup>260</sup> Finnemore and Rennie *et al* (n 257 above) 307.

committed an offense and must be dismissed. The investigative process done by the employer determines the reasons for dismissal. When justifying the dismissal, an employer should provide grounds for the dismissal and ensure that the information is presented in a way that is easy to understand by the employees. In the event of dismissal, the employee must present his case.<sup>261</sup>

The outcome of the disciplinary hearing, in which the company takes action against the employee who failed to conform to the corporate culture standard, determines the employee's service termination. It is mandatory to follow the LRA's regulations in order to implement a fair dismissal that is both just and equitable.<sup>262</sup> The Labour Courts have recognised the procedural fairness standards, and the court's restoration of fairness is a center play where they address the issue of dismissal prior to following the correct method and presenting a valid explanation of employees who are dismissed due to their disruptive behaviour.<sup>263</sup>

#### **4.5 The disciplinary records of the employees**

All of the employee's unethical behaviour should be logged and maintained as evidence for future use by the employer in a book of records. Employees might be dismissed if they have persistently disrupted the working environment and have showed no remorse for their actions. Policies and Codes of Conduct are also important in ensuring the long-term viability of a business.<sup>264</sup>

The employer has the right to advise employees about what is expected of them in terms of ethical behaviour, and the employee, on the other hand, has the responsibility to follow all of the standards set forth in the organisation's legal framework, such as policies. When a dismissal

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<sup>261</sup> Bowers and Honeyball (n 217 above) 115.  
<sup>262</sup> Van Jaarsveld and Van Eck (n 93 above) 175-176.  
<sup>263</sup> Jaarsveld and Van Eck (n 93 above) 176-177.  
<sup>264</sup> Pons and Deale *Labour Relations Handbook* 16.

situation arises, employers need to inform the employee as soon as possible, giving the employee time to reply to the charge levelled against them. In the workplace, the disciplinary record procedure should be progressive without favouritism, functioning in the best interests of the organisation.<sup>265</sup>

#### **4.6 Summary**

When it comes to workplace disharmony, the idea behind incompatibility is to avoid misclassifying dismissal and dismissing employees without taking due safeguards. Because it involves workplace dispute between employees and employers, incompatibility is a legal reason for dismissal in South Africa. It is clear from the foregoing that courts have voiced their views on incompatibility. It was also confirmed that, in order to take initiatives to reduce workplace dismissals, the employer must follow natural justice, substantive fairness, and procedural fairness requirements in all dismissal processes.

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<sup>265</sup> Pons and Deale (n 265 above) 16-18.

## Chapter 5

### RECOMMENDATIONS AND CONCLUSION

#### 5.1 Introduction

The issue of incompatibility as a ground for dismissal is specifically not dealt with as stand-alone subject in the LRA, but it is categorised as a ground of incapacity in the workplace.<sup>266</sup> Therefore the study has shown that dismissal is preserved as a measure of last resort in the workplace.<sup>267</sup> As laid down in *Erasmus v BB Bread*,<sup>268</sup> there are no guidelines, nor corrective measures implemented in the workplace to deal with incompatibility. When the relationship has broken down irretrievably, it means that trust and confidence between the employer and employee cannot be restored.<sup>269</sup> As a result, it must be deemed that section 188 of the LRA does not define incompatibility clearly. Consequently, the question which remains unanswered relates to the extent to which one can deal with conflict in the workplace.

Chapter one of this study has shown that the establishment of the LRA, was to give effect to the constitutional provision of section 23 of the constitution. It provides that “everyone has the right to fair labour practice”. It elaborated more on the LRA that incompatibility is dealt with under dismissal based on incapacity.

Chapter two, dealt with the rights of employer and employees in the workplace. This chapter has highlighted that the workplace consist of people with different personalities, and conflict is more likely to occur. It further stressed the importance of corporate culture. And acknowledged the fact that the employer has the duty to provide employees with the code of good practice and employees having the responsibility to adhere to the

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<sup>266</sup> The LRA.

<sup>267</sup> *Hapwood* case at para 198C-D.

<sup>268</sup> *Erasmus* case.

<sup>269</sup> See also Tshoose and Letseku 2020 *SA Mercantile Law Journal* 157.



rules in the workplace. The impact of international law was considered in line with section 39 of the constitution.

Chapter three of the study has shown the guidelines that can be used for incompatibility in order for a dismissal to be fair. Thus the constitution as the supreme law of the country plays a fundamental role in the workplace. The principle of *audi alteram partem* plays a vital role when dismissing the employee, to first hear both side of the story. The Code of Good Practice was also highlighted to ensure that the decisions made are just.

Chapter four of the study, focused on the measures that can be adopted in the workplace to minimise dismissal. The rules of natural justice ought to be complied with in order to dismiss the employees fairly. Such rules include substantive fairness (dealing with the reason for the dismissal) and procedural fairness (dealing with the procedure followed when dismissing employees).

This chapter addresses incompatibility as provided under incapacity as a form of dismissal. When it comes to dismissing employees, employers exercise their discretion in misclassifying the issue of incompatibility with incapacity, resulting in the employees being dismissed unfairly.

## **5.2 Incompatibility in the workplace**

In order to maintain a united front in the legal environment, the South African Constitution recognises the fundamental rights enshrined in the Bill of Rights. The employer's first responsibility is to investigate the causes of workplace disharmony, particularly if the employee is a contributing factor. The results of the investigation will help the company decide whether to dismiss the employee or put in place appropriate measures. To examine the problem and come up with remedies, the employee must go through training and counselling procedure. Because the fundamental duty is to ensure that the employment relationship is established on the concepts of

trust and confidence, dismissal is viewed as a last resort.<sup>270</sup> Employees should not be dismissed just because of a legal misclassification, thus identifying the problem is a good start.

### 5.3 Recommendations

Section 23 of the Constitution should be implemented in accordance with the LRA.<sup>271</sup> As a result, section 188 of the LRA lays forth the fundamentals of dismissing employees. In terms of the LRA, incompatibility is classified as incapacity. As a result, the LRA should be amended to include incompatibility as a ground for dismissal under section 188. Employers will be less likely to dismiss employees based on their own discretion if incompatibility is included in the LRA.<sup>272</sup>

When an employee fails to follow the corporate culture, the issue of incompatibility should not be regarded as a question of dismissal at first. Employee behaviour should be evaluated, and appropriate counselling procedures should be used. As dismissal is based on the grounds of fairness, the employer must follow proper procedures when dismissing incompatible employees. Because the employer has a legal obligation to ensure that there is peace and stability in the workplace, if an employee's behaviour is threatening the company's long-term viability, correct procedures should be implemented before the company's reputation is ruined.

Therefore, when an employee fails to adhere to the corporate culture, proper measures need to be taken into consideration before dismissing the employee. Since dismissal is considered as a matter of last resort, the employer has a duty to follow the procedural and substantive fairness in order to make wise decisions. When an employee is employed by a

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<sup>270</sup> Grogan (n 8 above) 266.

<sup>271</sup> The Constitution.

<sup>272</sup> The LRA.

company, the employment contract should include provisions for operating in a cooperative manner and fostering trust and confidence. Incompatibility will be less of an issue and the working relationship will be free of personality clashes when employees are aware of what is expected in the workplace.

Thus, unfairness will result from employers failing to conduct their research involving workplace disharmony and using their discretion in dismissing employees. Dismissal that results in discrimination is a violation of the right to equality enshrined in section 9 of the constitution. Before dismissing an employee, the employer must demonstrate that the basis for dismissing is due to the individual's disruptive behaviour in the workplace.

#### **5.4 Conclusion**

It is evident that in assessing the primary factor, it is clear that dismissing employees without following required procedures amounts to unfair dismissal. In light of the constitutional legal framework, the employer should develop procedures that allow employees to recognise incompatibility and take corrective action to avoid dismissal. As a result, it is proposed that the Labour Relations Act be amended in accordance with section 188 to cater for incompatibility, in particular to establish guidelines for employers on how to deal with incidents of incompatibility in the workplace.

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