Worklaw 2015 Labour Law Update

Contents

Page

Key Questions – the new LRA 'non standard' employment provisions

The 2014 LRA Amendment Act became law from 1 January 2015. Many of the new provisions in the new sections 198A-D dealing with 'non standard' employment (labour brokers, fixed term contracts and part time employees) were subject to a 3 month window period and came into effect from 1 April 2015. They will make fundamental changes to how these persons can then be employed.

In this newsflash, we attempt to answer the 12 most important questions we think arise from these complex new provisions. Check if you agree with us!

Summary of the new provisions

First, a quick summary of what these provisions are saying:

- **TES employees** (ie labour broker employees) should provide *'temporary services'* to the client, failing which they will be deemed to be the client's indefinite employees and must be treated 'on the whole not less favourably' than other employees performing similar work, unless '*justifiable reasons'* exist.

- **Fixed term contracts (FTCs)** may not be longer than 3 months, unless the work is of limited or definite duration, or a '*justifiable reason'* exists; failing this, employees will be deemed to be employed on an indefinite basis. In any event, employees on contracts longer than 3 months must not be treated less favourably than permanent employees performing similar work, unless '*justifiable reasons'* exist.

- **Part time employees,** after 3 months, must be treated 'on the whole not less favourably' than a comparable full-time employee doing similar work, unless '*justifiable reasons'* exist.

Note: Definitions of the words in *italics* above are contained in a schedule at the end of this newsflash.

The 12 Key Questions

1. Do these new provisions apply to employees at all levels?

No. They only apply to employees earning below the BCEA earnings threshold– currently R205 433 per annum. See s198A(2), 198B(2) & 198C(2).

2. Are existing fixed term contracts affected by these new provisions?

Whilst this view has still to be tested, we think existing fixed term contracts in place before 1 January 2015 are not affected by the new s 198B(3) and (4), which result in the fixed term contract employee being 'deemed' a permanent employee if the contract is longer than 3 months and not for a 'justifiable reason'.

Our view is based on the specific wording of s198B(5) – only fixed term contracts '*concluded or renewed'* after that date must comply with these new provisions. This interpretation accords with the basic legal principle that you apply the law as it existed at the time a contract was entered into.

S198B(8)(b) however makes it clear that the obligation to treat employees on contracts longer than 3 months 'not less favourably' than permanent employees performing similar work (unless '*justifiable reasons'* exist) applies from 1 April 2015 to contracts entered into before 1 January 2015. Our interpretation of these provisions is that only this aspect is to be applied retrospectively.

3. Do all employees on fixed term contracts now have to be paid severance pay if their employment lasts more than 24 months?

No. S198B(10)(a) states that severance pay under the BCEA is only payable if the employee is employed on a fixed term contract for more than 24 months, *"to work exclusively on a specific project that has a limited or defined duration"* in terms of s198B(4)(d). We are uncertain why this particular category was singled out for special treatment.

4. If I employ different people consecutively on 3 month contracts to do the same job, will this be in breach of the new provisions?

Surprisingly, this particular method of attempting to circumvent the intention of s198B is not specifically prohibited under the amendments, in the same way that similar methods of circumventing the new TES provisions have been outlawed by s198A(4) - this provides that the termination of a TES employee's service with a client, for the purposes of avoiding the deeming provisions in the Act, will be regarded as a dismissal.

It is likely that the above practice will be regarded as an abuse of these new provisions by arbitrators and courts, and they will look to find a way to prohibit this. For example, it is possible that the amended definition of a 'dismissal' under s186(1)(b) will be interpreted to prohibit this. This subsection effectively provides that the meaning of a dismissal will include the situation in which a fixed term contract employee reasonably expects the employer to renew the fixed term contract or retain the employee in employment on an indefinite basis', but does not do so.

5. What's the effect of a TES employee being deemed a client's employee?

This is a complex question. It does <u>not</u> mean that the TES is no longer the employer – for example s198(4A) makes it clear that the TES does not fall out of the picture, and the employee may institute legal proceedings against either the

TES or the client, or both of them. A labour inspector enforcing the BCEA can do likewise. Once deemed the client's employee, the client also has an obligation to treat the employee '*on the whole not less favourably'* than other employees of the client doing similar work.

Whilst in a practical sense the TES may in many instances, having employed the person initially, continue to act the role of the employer, – eg paying the salary, UIF, PAYE etc – the employee can sue either of them *as if* they are the employer. In a labour dispute, the employee may prefer to take action against the client if employment prospects there are better.

6. Does a 'rolling' replacement for temporarily absent employees provided by a TES constitute a *"temporary service"?*

S198A(1) defines a temporary service to include *"a substitute for an employee of the client who is temporarily absent*". The importance of this is that as long as that work for the client falls within the definition of a temporary service, there is no risk that TES employee will be deemed to be the client's employee.

But what if an employer with a large labour force has a standing arrangement with a TES to fill the gaps caused by ongoing absenteeism? The effect of this could be that a TES employee remains continually employed at the client's premises for extended periods, even years, as a replacement for various employees of the client who are temporarily absent. Is this TES employee providing a '*temporary service'* in terms of the Act?

Whilst there is no specific answer to this in the Act, we think the above practice will at some stage cease to be a temporary service, depending on the facts of each case. The intention of this section is likely to be interpreted to mean a service of a temporary nature, as opposed to a semi permanent arrangement of this sort. It does not mean that the temporary replacement is necessarily limited to only one specific absentee, and that as soon as the replacement employee is continuously employed as a replacement for more than one temporarily absent employee, this ceases to be a temporary service. But in the same way that continued extensions of fixed term contracts at some point are likely to create a reasonable expectation of continued employment, continued employment as a replacement for various temporarily absent employees will at some stage be seen to no longer be a temporary service.

7. What do I do about existing TES arrangements that are not 'temporary services' and will result in their employees being deemed to be my employees?

S198A(9) provides, in respect of TES arrangements in place before January 2015, that any such employee not in a temporary service will only acquire rights to be deemed the client's employee from 1 April 2015. This meant that employers affected by this had a window period to adapt to the changes, but this period has now passed. Employers should audit their operations and if they have TES employees on their premises who are not providing 'temporary services' as defined, they should consider the following options (or a combination thereof):

- Consult with the TES about the possibility of restructuring the service provided by it to one of a genuine service provider or independent contractor arrangement. The new provisions only apply to TES arrangements, and they do not affect genuine service provider or independent contractor arrangements. Subject to the terms of existing contractual obligations, employers may not necessarily limit these discussions to the current TES provider. Alternative arrangements can be made to fulfil the functions previously performed by those TES employees through other service providers falling outside the ambit of s198A or by directly employing other people to do that work.

- Subject to the terms of existing TES contracts, negotiate with the TES and the affected employees (through their representatives) the transfer of their employment to the client. The TES would then fall out of the picture. Kindly note the obligation under s198A(5) to remunerate these employees not less favourably than other employees performing similar work.

- Negotiate an indemnity from the TES in respect of any claims brought by their employees who may be deemed to be your employees. But importantly, you should recognize the practical limits of any such indemnity. For example, it is possible for an arbitrator or court to order reinstatement or re-employment of deemed employees as your permanent employees, which you would then have to comply with.

- Whilst we do not recommend this option, it is possible to do nothing and deal with any disputes that may arise out of these new provisions if and when they arise.

Clearly we believe there is a need to revisit existing TES contractual arrangements in the light of the new provisions. It does appear that the amendments will render unworkable many TES relationships that provide 'non temporary services' below the BCEA earnings threshold.

8. How do I interpret and apply these new provisions when they overlap – eg a fixed term contract employee provided by a TES?

Whilst the new provisions are neatly drafted in the Act into different categories, it is highly likely that they will overlap in their implementation. For example, many TES employees are employed with a client on a fixed term contract basis. In that instance, s198A will have to be interpreted in conjunction with s198B, which makes things more complicated.

Let's take 2 practical examples to illustrate the point:

(a) Assume a TES employee is placed on a fixed term contract with a client that is for a 'justifiable reason' contemplated in s198B(4) but outside the definition of a 'temporary service' as contemplated in s198A(1). Such an employee will be 'deemed' to be the client's employee and have to be treated 'no less favourably', but for what period? The answer lies in s198A(3)(b)(ii), in that it is "subject to the provisions of s198B". This means that such an employee will be deemed not as an indefinite employee but limited to the fixed term contract negotiated.

(b) Assume a TES employee is placed with a client on a 6 month contract as a substitute for a temporarily absent employee: does that employee have a right to 'not less favourable' treatment, and if so, from whom and in comparison with which employees? This employee is providing a 'temporary service' as defined, and so has no right to be deemed the client's employee – he remains solely the employee of the TES. But he is on a fixed term contract of more than 3 months and thus has the right to be treated 'not less favourably' by his employer – which in this case is (only) the TES. Against which other employees would the comparison for 'not less favourable' treatment be made? Again, it would be against the employer's (TES) other employees in comparable positions, and not the client's employees.

9. Are my arrangements with service providers and independent contractors covered by these new provisions?

In short, the answer is 'no', provided these are genuine service provider / independent contractor arrangements. Sections 198 and 198A only apply to labour broking arrangements as defined in the Act, and the amendments to the definition of a *'temporary employment service*' in s198(1) highlight this distinction by having removed *'persons who render services to the client'* from the TES category.

Service providers and independent contractors themselves as employers, will have to comply with the requirements of the new Act, but there is no risk that genuine arrangements of this sort will result in their employees being deemed to be your employees.

10. Do these new provisions require me to equalize employment conditions between my permanent employees, employees on fixed term contracts, part time employees and TES employees?

Yes, subject to certain conditions.

- S198A(5) requires a **TES employee** 'deemed' to be the client's employee, to be treated not less favourably than the client's other employees doing similar work, unless '*justifiable reasons'* exist. The definition of '*justifiable reasons'* in the schedule at the end of this newsflash shows that job related factors such as seniority, experience, length of service, merit, and the quality or quantity of work performed, may justify working conditions being different

- S198B(8) requires employees on **fixed term contracts** longer than 3 months to not be treated less favourably than permanent employees performing similar work, unless '*justifiable reasons'* (see above) exist.

- S198C(3) requires **part time employees** to be treated not less favourably than the client's comparable full time employees doing similar work, unless '*justifiable reasons'* (see above) exist.

Note: it is not clear from s198B(8) whether the obligation to equalise employment conditions for employees on fixed term contracts longer than 3 months, arises from the time the contract commences or only from the 4th month. To be safe, we suggest employers equalise conditions from the time such contracts commence.

A problem may also arise in the interpretation of the above sections, as for some inexplicable reason different wording was used in the different sections. Sections 198A(5) for TES employees and 198C(3) for part time employees state the employer's obligation as being to treat employees *"on the whole not less favourably*". Section 198B(8) for fixed term contract employees on the other hand, describes the obligation as being to "*not treat employees less favourably*." It remains to be seen whether the different wording is interpreted differently by arbitrators and courts.

11. Am I permitted to negotiate something different to what is stated in the Act, if these new provisions are unworkable for me?

The Act provides limited opportunities to negotiate variations to the stated provisions through collective agreements. For some reason, these are limited in some instances to collective agreements negotiated through bargaining councils, and in others not.

- For **TES employees,** s198A(1)(c) provides that parties to a bargaining council may agree in a collective agreement what constitutes a 'temporary service'. These parties are accordingly not stuck with the definition of a temporary service in the Act.

- For **fixed term contracts, s**198B(2)(c) provides that registered trade unions and employers may, through a collective agreement, exclude the application of the amendments to specified fixed term contracts. These parties may also, in terms of section 198B(10)(a), vary through a collective agreement the obligation to pay prescribed severance pay on the termination of a contract exceeding 24 months.

- For **part time employees,** whether by design or not, no similar provisions provide for the variation through collective agreements of rights under section 198C.

Whilst these may be difficult collective agreements to negotiate, it must be recognized that opportunities do exist to vary these new provisions to suit the needs of parties seeking creative solutions.

12. How are disputes most likely to arise from these new provisions?

Disputes are likely to arise in one of two circumstances:

- Allegations by employees (eg a group of TES employees, fixed term contract workers or part time employees) that they are receiving **less favourable treatment** than similar permanent employees;
- Attempts by an employer to **terminate the employment or services** of one or more employees.

Once a dispute is declared, many of the legal issues discussed above may then have to be determined (eg whether the employee is 'deemed' to be an indefinite employee of the client, or whether there is a 'justifiable reason' for less favourable treatment).

S198D(3)-(5) provide that disputes arising from the interpretation or application of sections 198A to 198C, may be referred to the CCMA or applicable bargaining council for conciliation, within 6 months after the cause of action arose. If these disputes involve an alleged unfair dismissal, this will have to be interpreted in relation to the standard 30 day referral time limit under s191(1)(b).

A dispute unresolved after conciliation, may be referred to arbitration within 90 days.

SCHEDULE OF KEY DEFINITIONS – NON STANDARD EMPLOYMENT

- '***Temporary services'*** in relation to TES employees, means work for a client-

(a) for a period not exceeding 3 months;
(b) as a substitute for a temporarily absent employee; or
(c) as determined by a bargaining council collective agreement, a sectoral determination or the Minister.

- '***Justifiable reasons'*** for treating the employees in question *'not less favourably*' than comparable employees doing similar work, include –

(a) seniority, experience or length of service;
(b) merit;
(c) the quality or quantity of work performed; or
(d) other criteria of a similar nature.

- A '***justifiable reason'*** for having fixed term contracts longer than 3 months include being employed –

(a) to replace a temporarily absent employee;
(b) due to a temporary work increase, not expected to last beyond 12 months;
(c) as a student/ recent graduate, to get training or work experience;
(d) to work exclusively on a specific project of limited / defined duration;
(e) as a non-citizen in terms of a work permit for a defined period;
(f) to perform seasonal work;
(g) on an official public works or job creation scheme;
(h) in a position funded by an external source for a limited period; or
(i) past the normal or agreed retirement age.

Equal Pay for Equal Work: Understanding the Employment Equity Regulations

The Employment Equity Act has been in force since 1998 and despite the prohibition on workplace discrimination there have been very few cases on wage discrimination. Of the cases that were brought, most were unsuccessful because the aggrieved employee could not produce evidence of another employee earning more for doing the same job. This other employee is known as a comparator – a 'similarly situated' employee who is being treated differently to the grievant.

And yet we know that wage discrimination *does* exist and persist, particularly on grounds of gender and race, but also on grounds of disability and foreign nationality. The Employment Equity Regulations of 2014 are an attempt to give guidance to employers and employees, prescribing the criteria and methodology for assessing work of equal value contemplated in section 6(4) of the EEA. They arise from South Africa's obligations as a signatory to the ILO Equal Remuneration Convention 100 of 1951.

The intention is for employers to take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on race, gender or disability, as well as other arbitrary grounds.

Meaning of work of equal value

In many situations it is easy to see if employees are doing the same job, but often an employee is in a specific job with no obvious comparators. The Regulations say work is equal where it is:

- the **same** as the work of another employee of the same employer, particularly if their work is *identical* or *interchangeable*;
- is **substantially the same** as the work of another employee employed by that employer, if the work performed by the employees is *sufficiently similar* that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
- is **of the same value** as the work of another employee of the same employer in a different job, if their respective occupations are *accorded the same value* in accordance with the methodology set out below.

Methodology

Regulation 5 says that when applying section 6(4) of the Act –

(1) it must **first** be established **(a)** whether the work concerned is of equal value in accordance with regulation 6 (below); and **(b)** whether there is a difference in terms and conditions of employment, including remuneration.
(2) it must **then** be established whether any difference constitutes unfair discrimination.

Assessing whether work is of equal value

Regulation 6 says that in considering whether work is of equal value, the relevant jobs must be *objectively* assessed taking into account the following criteria:

(a) the **responsibility** demanded of the work, including responsibility for people, finances and material;
(b) the **skills, qualifications**, including prior learning and **experience** required to perform the work, whether formal or informal;
(c) **physical, mental and emotional effort** required to perform the work; and
(d) if relevant, the **conditions** under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.

In addition to these criteria, *any other factor* indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is **relevant** to assessing the value of the work.

The assessment undertaken must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of the EEA .

Factors justifying differentiation in terms and conditions of employment

Regulation 7 deals with the situation where employees perform work that is of equal value but there is a difference in terms and conditions of employment, including remuneration. This difference will *not* be regarded as unfair discrimination if the difference is **fair and rational** *and* is based on any one or a combination of the following grounds:

(a) the individuals' respective **seniority** or **length of service**;
(b) the individuals' respective **qualifications, ability, competence or potential** above the minimum acceptable levels required for the performance of the job;
(c) the individuals' respective **performance, quantity or quality of work**, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;
(d) where an employee is **demoted as a result of organisational restructuring** or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
(e) where an individual is **employed temporarily in a position for purposes of gaining experience or training** and as a result receives different remuneration or enjoys different terms and conditions of employment;
(f) the existence of a **shortage of relevant skill, or the market value** in a particular job classification;
and

(g) **any other relevant factor** that is not unfairly discriminatory in terms of section 6(1) of the Act.

Notice that there are **two questions**: Is the difference fair and reasonable? **AND** Is it based on one of the grounds? The 'fair and rational' test is satisfied if it can be shown that the application of one of the grounds above is not biased against an employee or group of employees based on race, gender or disability or any other listed ground **and** it is applied in a proportionate manner.

Monitoring

A designated employer must submit an Income Differential Statement using the EEA4 form to the Employment Conditions Commission (ECC), unless the employer is completing the prescribed forms on the Department of Labour's EE Online Reporting System. The purpose of the EEA4 form is for the employer to audit and the ECC to check if there are any unjustified differences in remuneration.

Because of the potential for misunderstanding about the difference in remuneration, the Regulations state what must be included and what must be excluded in an employee's remuneration for the purposes of calculating pay in order to complete the EEA4 form.

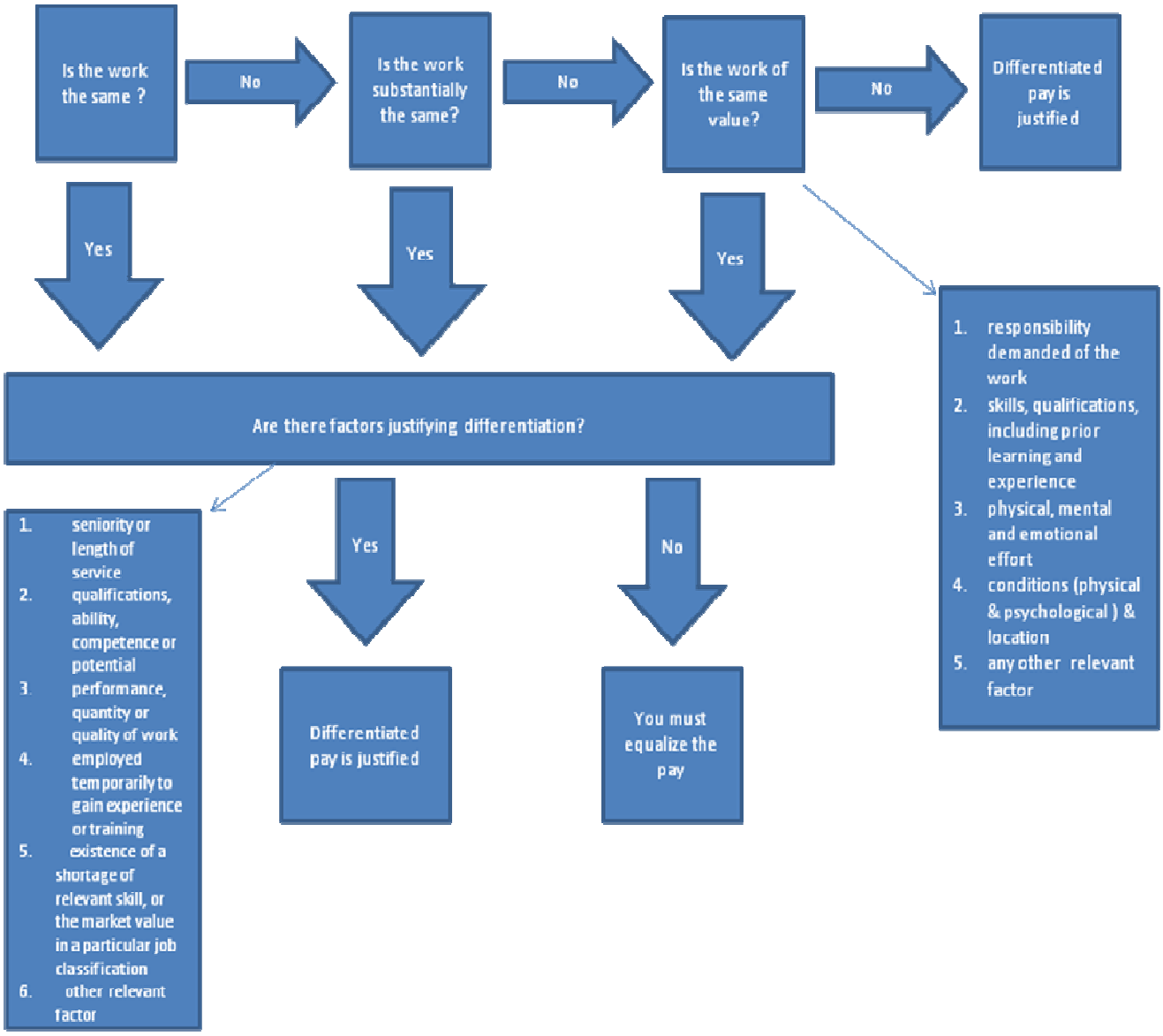
Will the Regulations make a difference?

We see that the main value of the Regulations will be to stop gender or race-based differences in remuneration in a group of employees where there is little dispute that they are doing the same or similar work. For example if an employer recruits several graduates with BCom degrees for similar entry-level positions, there can be little justification for paying them differently. But if one of them has a MBA or offers a scare skill, the Regulations allow a difference in remuneration.

For employers who pay women less than men, the difference has to be 'fair and reasonable' AND based on one of the grounds listed above. Gender, race and disability are automatically suspect grounds, placing the onus on the employer to justify any difference.

But we do not think that the Regulations are radical in any way. They preserve past advantage. Those who have long work experience, proved their ability and competence or who possess a scare skill, can be paid in a way that recognises what is often past privilege. That is how the market works in a capitalist society. The Regulations signal a start in regulating remuneration of the new generation.

EQUAL PAY FOR EQUAL WORK: DECISION CHART



INDEX OF CASES **PAGE**

THE EMPLOYMENT RELATIONSHIP

Department of Home Affairs and Another v Ndlovu and Others (DA11/2012) [2014] ZALAC 11 (27 March 2014)

Principle:

1. A misrepresentation by an employee (as to his qualification and skills etc.) before the commencement of employment is sufficient to warrant dismissal even if it is discovered some time later and the employee has rendered satisfactory performance.
2. It is obligatory that an employer should produce such evidence to justify a dismissal unless of course that conclusion of a broken employment relationship is apparent from the nature of the offence and/or the circumstances of the dismissal.

Facts:

In September 2006, when applying for a job the employee represented in his CV that his degree was complete but it later emerged that he had not even completed all the requirements for the Bachelor of Technology Marketing Degree nor had the degree been conferred upon him. In fact he completed the degree at the end of 2008.

When applying the employee signed this statement: *"I declare that all the information provided (including any attachments) is complete and correct to the best of my knowledge. I understand that any false information supplied could lead to my application being disqualified or my discharge if I am appointed."* He was charged with gross dishonesty alternatively gross negligence; misrepresentation; and a breach of the obligation of good faith, trust and confidence owed to the employer.

The employee contended that he had disclosed to the interviewing panellists that he had not completed the degree but was unable to explain why he misrepresent the factual situation in his CV. He challenged his dismissal at the bargaining council but the arbitrator found the dismissal to be fair.

The Labour Court did not uphold the arbitrator's award, finding that the evidence *"indicates without doubt that the applicant indeed disclosed to the panelists that he did not have a Bachelor of Technology Marketing Degree"*.

The Labour Appeal Court held there was no evidence on which the Labour Court could reach its conclusion and held that the misrepresentation was so serious that dismissal was a fair sanction.

Extract from the judgment:

Dlodlo AJA:

[11] Why did the first respondent list the Bachelor of Technology Marketing Degree in his CV? I would be slow in concluding that he did not intend this to have certain consequences. Clearly he listed this degree amongst his "Academic Qualifications" with the sole intention of impressing the panellists. He was creating a false impression that he was in fact in possession of such a qualification. Undoubtedly based on common cause facts alone, in my view, the appellant proved the charge of gross misconduct on the part of the first respondent. We bear in mind though that because this was not a criminal case in that sense

it was hardly necessary to prove that the first respondent's misrepresentation induced the first appellant to appoint him to the post as it did.
.....

[14] The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his CV that which is untrue? He knew how to describe MBA degree which was then unfinished. He could have described the Bachelor of Technology Marketing Degree similarly if he found it necessary to mention it at all in his CV.
.....
[16] Courts and commissioners frequently use the 'test' in assessing whether dismissals are appropriate and the effect that the employee's misconduct would have on the employment relationship. See, for example, Korsten v Macsteel (Pty) Ltd and Another [1996] 8 BLLR 1015 (IC). It is appropriate to quote from the Award by the Commissioner in order to demonstrate this. At paragraph 5.8 of the award, the Commissioner had the following to say:
'5.8 Having found that respondent has proved the first aspect of the charge it remains to consider whether the sanction imposed was fair. Applicant occupied a very senior position in the Department of Home Affairs. He occupied it at the time when our society was being sensitized, daily, to the need for clean government and integrity on the part of officials. Applicant's behaviour in my view fell considerably short of what is required and expected of senior government officials. In the light thereof I am of the view that the sanction imposed was fair.'

There are many ways courts use in this regard. Sometimes it would be said that the employment relationship has been rendered intolerable. These are ways and means of establishing whether employer can reasonably be expected to continue with the contractual relationship with the employee concerned. In casu a larger employer of the size of the first appellant will certainly have fundamental difficulty if it does not adopt a very strict stance in misconducts similar to the one the first respondent was found guilty of. Virtually all its prospective and present employees will simply do the same. However, there is no evidence on record in the instant matter that the misconduct complained of has resulted in an irreparable damage to the employment relationship. It is obligatory that an employer should produce such evidence to justify a dismissal unless of course that conclusion of a broken employment relationship is apparent from the nature of the offence and/or the circumstances of the dismissal. See ***Edcon Ltd v Pillemer N.O. and Others (2008) 29 ILJ 614 (LAC)***.

Universal Church of the Kingdom of God v CCMA & Others [2014] 3 BLLR 295 (LC) (28 November 2013)

Principle:
Each matter must be considered on its own merits and its own facts, to establish if the parties intended an employment relationship. There need not be a written contract to establish an employment relationship.

Facts:
Steenkamp J, in deciding whether a pastor was an 'employee' of the church, had this to say:

". . .everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks like a duck, it probably is one."

The facts of this dispute were that a pastor had signed a document stating that he was in the voluntary service of the church. When he referred an unfair dismissal dispute to the CCMA, the church argued that he was not an employee for the purposes of the LRA. Both the arbitrator and the Labour Court disagreed, having regard to section 200A of the LRA (Presumption as to who is an employee).

Before the enactment of section 200A in 2002, case law generally took the view that the 'core' duties of the clergy did not give rise to a contract of employment. Later cases have recognised that such parties may have entered into an employment relationship for the purposes of the LRA, even though there was no signed contract of employment. The court looks at the particular facts of each case, in the light of the provisions of section 200A, in deciding whether a person is an 'employee' for the purposes of the LRA. The above quote embodies a practical, common sense approach to deciding the matter. Parties having to argue similar cases would be wise to take this into account, despite attempts to dress up an employment relationship as something else in a written agreement.

Extract from the judgment:
Steenkamp J

[28] More recently, the Labour Court again considered a similar relationship in Rev Petrus v Evangelical Lutheran Church & others The court reiterated that each matter must be considered on its own merits and its own facts to establish if the parties intended an employment relationship.

[29] And importantly, it added that there need not be a written contract to establish an employment relationship. That distinguishes the position in our law from that expressed in the English cases considered above.
.....

[31] The absence of a contract of employment does not mean that no employment relationship could be established. As Prof Paul Benjamin has noted, the definition in s 213 of the LRA does not use the language of contract. And when s 200A creates a rebuttable presumption "regardless of the form of the contract", that does not, in my view, presuppose the existence of a written contract. .....

[32] It remains to reconsider the relationship between the pastor, Myeni, and the church in the case before me on the particular facts of this case and in the light of the provisions of the LRA.

[33] As set out above, almost every presumption outlined in s 200A applies to this relationship:
33.1. The manner in which the pastor works was subject to the control or direction of the church.
33.2. The pastor's hours of work were subject to the control or direction of the church.
33.3. The pastor formed part of the Universal Church of the Kingdom of God.
33.4. The pastor worked for the church for at least 40 hours per month.
33.5. The pastor was economically dependent on the church. He earned no other income. And the church deducted pay as you earn (PAYE) and Unemployment Insurance Fund payments from his remuneration that it called a "stipend".
33.6. The pastor only worked for or rendered services to the church.
.....

Conclusion

[36] On a conspectus of all the facts, I am not persuaded that the church has succeeded in rebutting the presumption contained in s 200A of the LRA. To paraphrase Lady Hale in Preston, everything in this relationship looks like an employment relationship. If it looks like a duck, walks like a duck and quacks like a duck, it probably is one.

Phaka and Others v Bracks and Others (JA 3/2014) [2014] ZALAC 73 (18 December 2014)

Principle:

1. The legal relationship between the parties must be gathered primarily from a construction of the contract which they concluded. Where the contract places operational and necessary constraints and control over the independent contractor, this does not alter the relationship to one of employment.
2. The standard of review in ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*** that the applicant must establish that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction. The court on review in such an instance is required to determine whether that finding was correct.

Facts:

The company operates as a courier company on a fixed route basis, with regular and recurring collection times, primarily for financial houses. After a consultation process with the company's employees, the company introduced a scheme in the 1980's in the interests of productivity, empowerment and efficiency. Agreement was reached in terms of which existing employees were offered the opportunity to participate in an owner-driver programme. The programme was piloted in Cape Town and was later extended to other areas of the country. There was no objection to the scheme by either the unions or the regulatory authorities prior to the present dispute. The model was viewed favourably and its implementation encouraged by the bargaining council and the relevant government department.

The employees alleged an unfair labour practice had arisen out of this empowerment initiative using owner-drivers to render client services on behalf of the company. Their challenge arose out of their unhappiness with the empowerment initiative. The appeal to the LAC was a test of the integrity of the empowerment initiative and its acceptability as an industry practice. The employees were aggrieved about their status as independent contractor. They contended that a contract of employment existed notwithstanding the independent contractor relationship established in the explicit terms of the contract between each individual and the company.

The employees argued that despite their participation in the empowerment initiative, they remained employees on a par with other drivers employed by the company. Their reasons for taking that view is that the contract subjected them to significant control by the company and their activities were integrated into the company in such a way as to constitute an employment relationship.

At the bargaining council the arbitrator held that as there was no employment relationship there was no jurisdiction to hear the unfair labour practice claim. This

award was upheld in both the Labour Court and Labour Appeal Court, which rejected the employees' arguments.

In dealing with the review, the LAC also confirmed that the Sidumo review test of establishing that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction. The court on review in such an instance is required to determine whether that finding was correct.

Extract from the judgment:
Murphy AJA
[29] The appellants sought review of the award of the arbitrator on the basis that the conclusion reached by him was not a decision that a reasonable decision-maker or arbitrator in that position could have reached. This is an incorrect approach. When the jurisdiction of the arbitrator is in question the issue is whether he objectively had jurisdiction in law and fact. The arbitrator's finding was that as the appellants were not employees he had no jurisdiction to determine their referrals of unfair dismissal and unfair labour practice disputes to the bargaining council. The court on review in such an instance is required to determine whether that finding was correct. The arbitrator either had jurisdiction or he did not. A finding that he had jurisdiction because he might reasonably have assumed as much is wholly untenable in principle. No legal power may be exercised without authority. The standard of review enunciated in ***Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*** that in order to succeed in a review, the applicant must establish that the award was one that could not have been made by a reasonable decision-maker, applies only to the review of determinations of the fairness of a dismissal or labour practice. It has no application to the determination of jurisdiction.
.....

[32] In my view, the arbitrator and the court a quo reached the right conclusion for the right reasons. The repetitive references in the contract to the nature of the relationship, and the painstaking effort to define it, leave no doubt that the intention of the parties was to establish relationships overtly on a different footing to the previously existing employment relationships. This is confirmed not only by the express wording of the contract and the purport of its terms, but also by the fact that the appellants resigned their employment before embarking on the scheme. Add to these the facts that the appellants mostly conducted their dealings with the company (for a period of many years) through close corporations of which they were the principal member, and employed their own employees to render the contractual services, and the proposition that we have here to do with a *locatio conductio operis* is frankly unassailable.

[33] The levels of control and direction reserved to the company by the contract in relation to the routes, hours of performance, vehicle maintenance, branding etc. are all essential requirements of the contract intrinsic to the nature of the services to be performed by the company to its clients. The company transports sensitive financial information and does so in accordance with the needs of its clients. It is obliged to delegate those requirements to its sub-contractors. By virtue of its character, the business of couriering financial documents must be done efficiently during business hours on conditions that cannot be left to the discretion of the sub-contractors. These constraints do not in the operational circumstances of these peculiar contracts alter the relationship to one of employment, especially so in those instances where the contractor is a close corporation employing subordinate employees with no prior or existing relationship with the company. Insofar as the company deducts PAYE from the amounts payable to the owner-driver, it did so in pursuance of a responsibility

imposed upon it by the income tax legislation in relation to the taxation of independent contractors.

[34] Accordingly, in all of the circumstances, the appellants' relationship with the company as owner-drivers did not amount to a relationship of employment and the arbitrator as confirmed by the court *a quo* was correct to hold that he lacked jurisdiction.

Ethekwini Metropolitan Municipality: Durban Metropolitan Police Services v Khanya and Others (DA9/2012) [2014] ZALAC 48 (18 September 2014)

Principle:
It is the employer's prerogative to set the inherent requirements for a job but these may not conflict with the LRA or Constitution.

Facts:
A Code 15 licence to ride a motor cycle was listed as an inherent requirement for promotion to the rank of sergeant. Various unsuccessful applicants filed grievances that the process was unfair. A disabled applicant unable to ride a motor cycle grieved because this inherent requirement effectively prevented him from ever being promoted. Female applicants grieved because the weight of the motor cycles made it difficult (but not impossible) for them to get the required Code 15 licence.

The arbitrator found that the promotion was both substantively and procedurally fair, and this was confirmed by the Labour Court. On appeal to the LAC, it was confirmed that the LC correctly found that it remains the employer's prerogative to set the standard for its employees as long as these inherent requirements did not conflict with either the LRA or the Constitution.

Extract from the judgment:
Dlodlo AJA
[29] Seemingly it is a critical contention at the heart of the aggrieved employees who were not shortlisted that a motorcycle licence is not an inherent requirement for the job of Sergeant. The above contention is premised on what Joseph Khanya testified to as the primary responsibility of Sergeant at the Metro Police. Mr Khanya's evidence summarised above *inter alia* is to the effect that even Sergeants that supervise motorcycle patrols do not do so on motorcycles but they use motor vehicles. He referred to the group he called "most competent motorcycle riders" that are utilised to escort Presidents of the Country and the Premiers and testified that they too discharge their duties in motor vehicles. I undertake to deal with all this later on in this judgment.
.....

[34] The Court *a quo* correctly found that it remains the employer's prerogative to set the standard for its employees (although in this case the employers hand was forced by its employees who won an arbitration award requiring the employer to force the requirement of a code 15 motorcycle licence for the position of Sergeant). The setting of the requirement of code 15 licence for the position of Sergeant does also not conflict with the provisions of either the Constitution or the LRA. Certainly to require code 15 licence for the post of Sergeant as an essential requirement is and cannot amount to unfair labour practice as contended by the aggrieved employees. I share the view of the Court a quo that the essential requirement for the post of Sergeant cannot also be said to be aimed at excluding female candidates. In any event, that was not for the arbitrator to deal with as this also was an issue of discrimination which the arbitrator could not determine.

Rogers v Exactocraft (Pty) Ltd (C 1142/10) ZALCCT 16 April 2014.

Principle:
In calculating the length of service Section 84 of the BCEA does not mean that the period of service prior to retirement should be added to the period of service in a new and separate post-retirement contract of employment.

Facts:
The applicant worked for the employer for 21 years. He retired when he reached the compulsory retirement age of 65. The next day he entered into a fixed term contract for two years with the employer, terminable on three months' notice. The employer recognised him as a highly skilled and valuable employee and the fixed term contract after his retirement was in order to retain his skills.

The employer dismissed the applicant for operational requirements on three months' notice. He claimed that the dismissal was not for a fair reason or in accordance with a fair procedure as envisaged in s 189 of the LRA. He claimed compensation for unfair dismissal in terms of s 194 of the LRA, severance pay in terms of ss 41 and 84 of the BCEA, and damages for short notice. For the severance pay the employee argued that s 84 of the BCEA required his entire service to be taken into account.

The Labour Court departed from the literal interpretation of s 84 of the BCEA. The court held that it would be anomalous if a right to severance pay for the 20 years prior to retirement could be created simply by re-employment when there was never a right to severance pay on retirement. There was no need to compensate the employee on retirement because this was not a dismissal but a termination of the contractual relationship.

The LC awarded severance pay only on the period of service post retirement.

Extract from the judgment:
[29] The principal question remains whether an employee who has retired and then entered into a new contract of employment with the same employer, is nevertheless entitled to severance pay in terms of ss 41 and 84.

[30] In order to give effect to the intention of the legislature, the Court will have to adopt a purposive interpretation. ILO Convention 158 appears to contemplate either a severance benefit in the case of redundancy, or old-age benefits in the case of retirement. The BCEA must be interpreted in that context. It is common cause that the applicant received his retirement benefits, such as his provident fund pay-out, upon retirement. In my view, the legislature could not have contemplated that he should also benefit in the form of severance pay arising from his dismissal for operational requirements in circumstances where he entered into a subsequent and separate fixed-term contract of employment.

[31] In an early and insightful article, Alan Rycroft referred to a CCMA arbitration where the commissioner held that where an employee reaches retirement age and decides to retire on full benefit, but continues to work thereafter, the retirement can be construed as a termination of the employee's contract by effluxion of time and that the retirement does not constitute a dismissal. A decision to allow the employee to enter into a further employment contract therefore starts a new employment relationship. The period of service before retirement, the commissioner found, should not be taken into account when calculating the

employee's severance pay in accordance with s 41(2) and s 84 of the BCEA. Prof Rycroft appears to agree with that view. So do I.

THE DISCIPLINARY PROCESS

Absa Bank Limited v Naidu and Others (DA 14/12) [2014] ZALAC 60 (24 October 2014)

Principle:
Consistency on the part of an employer is an important but not decisive factor to take into account in the determination process of the fairness of a dismissal. The fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. The parity principle was never intended to promote or encourage anarchy in the workplace. There are varying degrees of dishonesty and, each case will be treated on the basis of its own facts and circumstances.

Facts:
The employee, an executive investment broker at Absa, she was charged with two counts of misconduct. In terms of her job description she advised and recommended to a client the best investment portfolio. She would then assist clients in investing their funds in various portfolios. With the consent of a client, she could move or "switch" funds from one investment portfolio to another. A "switch form" was used to implement the transfer of funds. The particulars of the client, the type of the investment and an original signature of the client had to be reflected on the switch form which was then faxed to the central point known as the Absa's Investment Management Services (AIMS), where the final transaction switch was to take place.

One of the employee's clients, on Ms Naidu's financial advice, deposited with a capital investment of R100 000 in a Property Market Fund. Unfortunately, it happened that there was volatility in the market which went so bad that the investment dropped to about R60 000, thus causing him a loss of some R40 000. He lodged a complaint with the bank against the employee. In due course, however, the bank sent him a letter advising him that after its preliminary investigation of his complaint, it found no fault on the part of anyone of its staff.

The client was not satisfied with this response and referred his complaint to the Ombud for Financial Service Providers, in terms of section 27 of the Financial Advisory and Intermediary Services Act (the FAIS Act). Consequently, the bank relented and agreed to refund his R40 000 loss. Thereafter, the employee advised and duly obtained consent from the client to move his investment from the Property Market portfolio to the Money Market portfolio. The client signed the prescribed switch form and the switch was finalised.

Some time later the employee had reason to believe, which indeed turned out to be correct, that the Property Market (which the client had previously switched from) was set to rise rapidly. Accordingly, she advised and duly obtained consent from a

number of her clients to move their investments from Money Market to Property Market in anticipation of that rapid rise. She had obtained signatures of those consenting clients. However, when she attempted to communicate with the client for the same purpose, she did not succeed to get through to him. He was reportedly out of the country. She then, without his knowledge and consent, proceeded to process the switch of his investment from Money Market to Property Market. As she did not have his signature, she used an old signed switch form from a previous transaction and attached it to the new investment transfer forms and transferred his funds from Money Market to Property Market without his knowledge and consent. She did this in violation of the bank's rules and the code of conduct under the FAIS Act. This was the crux of the misconduct charge preferred against her.

At the disciplinary enquiry the employee pleaded guilty to count one, as it pertained to the transaction involving the client. The employee had been in the bank's employ for some 20 years. She was dismissed. She lodged an internal appeal against the dismissal sanction, but was unsuccessful, on the basis that both transgressions were categorised as *"very serious offences"* in terms of the bank's disciplinary code, which prescribed a sanction of dismissal for any misconduct involving a misrepresentation or a false declaration of any kind. Over and above the dismissal sanction, the appellant reported the employee to the Financial Services Board which, in turn, found her misconduct to be sufficiently serious to have her debarred from practising as a Financial Advisor, a ban that would endure either for life or for a specific period.

The employee was not satisfied with her dismissal which she considered unduly harsh, on the basis that there were other employees who had previously committed similar transgressions but were not dismissed. On the misconduct charge and conviction, the commissioner found that the sanction of dismissal was *"too harsh"* in the circumstances of the case. Accordingly, the commissioner declared that the dismissal of Ms Naidu was procedurally fair but substantively unfair; and he ordered that she be reinstated with effect from the date of her dismissal.

The bank was not satisfied with the outcome of the arbitration process and escalated the matter on review before the Court a quo in terms of s 145 of the LRA. The Labour Court, acknowledging that dishonesty has a corroding effect to the trust which the employer is entitled to expect from its employees, nevertheless held that an employer who exhibits a propensity of condoning acts of misconduct performed under dishonest circumstances runs the risk of being ordered by courts to reinstate employees found guilty of acts of misconduct in line with the parity principle. In its judgment, the Labour Court accordingly dismissed the review application with costs.

The bank appealed to the LAC which took a different approach to the CCMA and LC, and upheld the appeal, and held the dismissal was fair.

Extract from the judgment:
Ndlovu JA
'[35] Our law requires that employees who have committed similar misconduct should not be treated differentially. .....

[36] This principle, also referred to as the 'parity principle', was aptly enunciated in *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A)* where the court stated at 1264A-D:

'Equity requires that the courts should have regard to the so-called "parity principle". This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey "The Dismissal of Strikers" (1990) 12 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word "equity" as used in the United Kingdom statute dealing with the fairness of dismissals, "comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment" *(Post Office v Feennell (1981) IRLR 221 at 223)*. The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice.'

[36] However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:

'[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'

.....

[42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.

South African Breweries Ltd v CCMA and Others (CA13/2012) [2014] ZALAC 26 (30 May 2014)

Principle:

A Commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the Commissioner. Dishonesty and lack of remorse are not decisive factors and must be balanced against all other factors.

Facts:

The CCTV footage used as evidence showed that an employee took a beer bottle from the employer's sample refrigerator and took a few sips. The employee then returned to work on the production line where he operated heavy machinery. When he was confronted with the CCTV footage, the employee came up with an elaborate and an untruthful defence. He stated that the bottle contained carbonated water and

not beer. Even at his internal disciplinary proceedings, an internal appeal hearing and the arbitration itself this remained his defence. This defence was, however, rejected by the Commissioner as untruthful. In effect, the employee was pronounced guilty of the charges.

Notwithstanding these findings, the Commissioner concluded that the misconduct was not serious enough to warrant dismissal. The Commissioner reasoned that (a) the breathalyzer test had measured o.oo% *"which implies that he was fit to work and hence did not place the business at risk"*; (b) the first charge (drinking on duty) was described by the Commissioner as a *"misdemeanour"* on the basis that the employee had only taken *"a few sips from the bottle of beer;"* (c) the second charge was referred to as *"the unauthorized taking of beer"*. The dishonesty displayed by the employee's failure to own up was contrasted by his long service and his generally unblemished disciplinary record. That led to the Commissioner's finding that he deserved a sanction short of dismissal. The Commissioner ordered reinstatement without back pay.

SAB, which had dismissed because of a zero-tolerance to alcohol consumption at work, applied to the Labour Court to review and set aside the award. (South African Breweries Ltd v Commission for Conciliation Mediation and Arbitration and Others (C 665/2011) [2012] ZALCCT 17 (24 May 2012)). This review application was unsuccessful primarily on the finding that the conclusion reached by the Commissioner was one which a reasonable decision-maker could have reached.
SAB was not willing to accept this and took the matter on to the Labour Appeal Court. The question that arose was whether the Commissioner improperly disregarded certain factors in mitigation or in aggravation, particularly the employee's lack of remorse and his on-going dishonesty. This question was answered in the light of the test formulated in *Sidumo* that there is a *"range of reasonable outcomes"* in any matter.

The LAC noted that the Commissioner clearly accepted that there are many authorities that "deem" all acts of dishonesty to cause a breakdown in the continuation of the employment relationship. But he appreciated that each case had to be treated on its own merits and that not all cases involving dishonesty deserved the ultimate sanction of dismissal. The LAC found that the Commissioner correctly stated that it was his duty to holistically assess these factors given the context of the matter and in accordance with the trite principle that dismissal will not be lightly resorted to but is and remains reserved only for the most serious misconduct. One of the factors that influenced the Commissioner's finding was the degree of consumption and the question of whether the drinking of a few sips of beer rendered the employee intoxicated.

The LAC relied on Edcon Ltd v Pillemer NO and Others (191/2008) [2009] ZA SCA 135 (5 October 2009), where the SCA expressed the view that an employee's dishonest conduct during an investigation could not be elevated to in effect become a new disciplinary charge. The LAC said; "Such conduct remained an aggravating factor, and as such, it is to be assessed holistically along with all other relevant factors. Ultimately it was for the employer to demonstrate what effect the employee's lack of candour had on the employer's business".

An additional factor was that there was no evidence led that the relationship of trust between had in fact been destroyed irretrievably. In fact all SAB's witness said was that there was *"disappointment"* with the employee given their lengthy history of working together.

The LAC held that the conclusion reached by the Commissioner was not one that no reasonable Commissioner could reach. It was certainly within the range of reasonable outcomes. The Commissioner had considered the lack of contrition and he took this factor into account when deciding the question of whether dismissal was fair and whether reinstatement was appropriate. He found that having balanced this factor with the other factors, reinstatement without back pay was a fair outcome to the dispute.

The appeal was dismissed with costs.

Extract from the judgment:
DLODLO AJA:
[15] I agree with the court *a quo* that the Commissioner's role is not akin to the role of the court sitting in review of the arbitrator's decision. The Commissioner decides whether the decision to dismiss was fair but the court reviewing the matter may only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. Therefore, in the instant matter, the only question that arises for determination is whether the Commissioner improperly disregarded certain factors in mitigation or in aggravation. Perhaps one needs to stress that it is not my understanding of the test per *Sidumo supra* to be whether the Commissioner attached deserved and/or appropriate weight to each individual factor or reached a conclusion that was (in the view of the Court) the correct one. The test formulated in *Sidumo supra* confirms earlier decisions of this Court that there is a "range of reasonable outcomes" in any matter.

[16] The Commissioner clearly accepted that there are many authorities that *"deem"* all acts of dishonesty to cause a breakdown in the continuation of the employment relationship. But he was then alive to the requirement that each case had to be treated on its own merits and that not all cases involving dishonesty deserved the ultimate sanction of dismissal. The Commissioner correctly stated that it was his duty to holistically assess these factors given the context of the matter and in accordance with the trite principle that dismissal will not be lightly resorted to but is and remains reserved only for the most serious misconduct. One of the factors that influenced the Commissioner's finding was the degree of consumption and the question of whether the drinking of this beer rendered Karstens intoxicated. Mr. Karstens had *"a few sips"* and this finding was based on the visual evidence contained in the CCTV recording. This in turn received some confirmation from the subsequent breathalyzer test.

[17] On behalf of the Appellant, it was submitted that it was unreasonable for the Commissioner to make a finding that only a few sips had been consumed whilst the probabilities showed that the entire 750 ml bottle had been consumed. It was pointed out that many hours had passed between the actual drinking of the beer and the use of the breathalyzer such that the blood alcohol level had diminished irrespective of how much Karstens had drunk. However, the fact of the matter is that the only evidence presented showed that Karstens drank a few sips from the bottle and not that he consumed all the contents of the bottle. There was thus no other evidence with regards to the balance of the contents of the bottle. I do not accept that the Commissioner should have concluded that the balance of the contents of the bottle had been consumed as well, probably outside of the area of view of the CCTV camera. There was simply no evidence to that effect. The Appellant remained burdened with the *onus* of proof. The results of the breathalyzer

negatived the possibility of intoxication on the part of Karstens. I hold the view that it was completely rational for the Commissioner to have found as he did that there was little, if any, risk posed to the Appellant or its employees by the conduct of Karstens. He also found that the degree of theft was serious.

[18] Indeed no evidence was led that the relationship of trust between the Appellant and Karstens had in fact been destroyed irretrievably. The high water mark in this regard is Macauley's (who gave evidence on behalf of the appellant) *"disappointment"* with Karstens given their lengthy history of working together. It is so that another Commissioner might have reached a different conclusion. But I remain of the view that the conclusion reached by the Commissioner in the instant matter is not one that no reasonable Commissioner could reach. It is certainly within the range of reasonable outcomes. The Commissioner considered Karstens' lack of contrition and he took this factor into account when deciding the question of whether dismissal was fair and whether reinstatement was appropriate. He found that having balanced this factor with the other factors, reinstatement without retrospectivity was a fair outcome to the dispute.

Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and Another v Seopela N.O and Others (JR 226 / 2012) [2015] ZALCJHB 22 (4 February 2015)

Principle:
To qualify as gross negligence the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care.

Facts:
Nyarhi Developers CC ('Nyarhi') was contracted by the Department to build 500 housing units in Malamulele, and would then sell these housing units, once completed, to persons that qualify as beneficiaries. Nyarhi would receive a subsidy of R4 100 000.00 from the Department in conducting this work. The work was to be completed in 18 months from conclusion of the contract. It appears that Nyarhi did some preparatory work on the contract for which it was paid R895 000.00. But, in the end, not one housing unit was completed under this contract.

The reason for the contract faltering was that as a result of the flood in Limpopo in 2000, the finance for this housing project was allocated to disaster relief and by agreement with Nyarhi, this agreement was terminated and replaced with a new contract for another project in which Nyarhi was contracted to construct flood relief housing units.

Nevertheless Nyarhi issued summons out of the High Court claiming a sum of R24 837 220. In addition, the sole member of Nyarhi was one M K Masingi ('Masingi'), who claimed, in his personal capacity, one sum of R1 095 000 he was liable to pay Nedcor Bank for vehicles he bought, and another sum of R2 000 000 being alleged damage to his creditworthiness. By 2005, the Nyarhi claims had become ripe for trial, and were set down for trial on 25 January 2005. The case was however postponed so as to enable the parties to explore possible settlement. The State Attorney (acting for the Department) informed the Department that Nyarhi would consider any

settlement proposal. The Department then established a negotiating team to also fully consider the claims by Nyarhi and, in particular, assess the prospects of successfully defending these claims, or whether the exploration of a settlement would be more prudent. Departmental employees (the third and fourth respondents) were part of the appointed members of this negotiating team, consisting of 5 senior managers. A 'final second legal opinion' regarding prospects of success in defending the claims was sought.

The Nyarhi claims were submitted to an advocate for this legal opinion. He said the claims were 'excipiable and bad in law'. He went further and said: 'It should be emphasized that I do not believe that the merits of the Department's case are weak. In my view, the close corporation's claims are going to be difficult to prove.' As to whether settlement would be prudent, the advocate said: 'Settlement of the matters can therefore not be promoted based on any weakness in the Department's case. This can only be promoted based on commercial considerations.' This was referring to the commercial reality of incurring legal costs in conducting the litigation, and his settlement recommendation was one simply aimed at avoiding the incurring of these further legal costs. The advocate's opinion was sent to the Department and the negotiating team on 23 March 2005.

On 26 April 2005, the State Attorney wrote to the Department, expressing his concern about political pressure that was being brought to bear to settle this matter at all costs. On 18 May 2005, the State Attorney informed the Department that the case has again been set down for trial on 25 August 2005, and recommended that the trial should proceed. The State Attorney was ready to proceed to trial and was satisfied with the Department's prospects of success in defending the claims.

The negotiating team then reported back to the Department on 2 August 2005, and presented a formal recommendation as to the conduct of the matter The conclusion by the team was that their analyses revealed that Nyarhi's case and the Department's defense were 'highly contestable'. In other words, the recommendation was that the Nyarhi claims had substance and merit. The opinion was also expressed in the recommendation that the most prudent course of action open to the Department was to conclude a settlement in order to eliminate this risk of losing. Importantly, the recommendation recorded that the quantum of the risk was R30 million. The team proposed that the department settle for R15 million. As the team was specifically appointed for the purpose of making such a recommendation, this recommendation was accepted without further ado by all the functionaries in the Department. On 24 August 2005, a settlement agreement was concluded in terms of which the actions by Nyarhi were settled on the basis of the payment of a sum of R15 million. This settlement payment was not disclosed in the Department's financial statements, and was discovered in an audit conducted by the auditor general in 2006 and reflected as fruitless and wasteful expenditure not disclosed. This report in turn led a further investigation.

On 7 December 2009, two employees, the third and fourth respondents, were notified to attend a disciplinary hearing on a charge of gross misconduct. The charge was specifically described as one of "gross negligence' in recommending the settlement of R15 million in the Nyarhi claims, and in doing so, they failed to exercise

reasonable care, resulting in fruitless and wasteful expenditure. They were found guilty of the charge and dismissed.

In arbitration, the arbitrator accepted that the employees did commit misconduct in the form of the negligent discharge of their duties on the negotiating team. But the arbitrator adopted the view that the dismissal of the employees was inappropriate and unfair. Reinstatement subject to a final written warning and no back pay was substituted as the penalty.

The employer took this award on review. The Labour Court was required to decide whether the conduct of the employees constituted gross negligence. It found that it was and held that the sanction of dismissal was fair.

Extract from the judgment:
Snyman AJ
[40] Based on all the above circumstances and considerations, the misconduct at hand is far more than just ordinary negligence, as the first respondent finds. Considering the complete lack of consideration of the legal opinions by the negotiating team (including the third and fourth respondents), I am convinced gross negligence in fact exists, as such failure can only be tantamount to a complete failure to take proper care, and failure to consider the actual consequences of the recommendation (being that it would result in fruitless and wasteful expenditure). In deciding what constitutes gross negligence, the Court in Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another said:

'…. it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. …. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. …. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence …. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross …. Dicta in modern judgments, although sometimes more appropriate in respect of dolus eventualis, similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (Central South African Railways v Adlington & Co 1906 TS 964 at 973); 'a total disregard of duty' (Rosenthal v Marks 1944 TPD 172 at 180); 'nalatigheid van 'n baieernstigeaard' or ''n besonderehoëgraad van nalatigheid' (S v Smith enAndere1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (Bickle vJoint Ministers of Law and Order1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (S v Dhlamini1988 (2) SA 302 (A) at 308D).” It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care ….'

Applying the above ratio in Stella Tingasin casu, the conduct of the third and fourth respondents would therefore be gross negligence because it demonstrates a complete failure to take care and give consideration to the consequences of their actions, in making

the recommendation. The fruitless attempts by the third and fourth respondents to distance themselves from their statutory duty aggravates the failure.

True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v CCMA and Others (D441/11) [2014] ZALCD 70 (28 November 2014)

Principle:
In the case of 'team misconduct' (just as in the case of derivative misconduct and common cause purpose) there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, the members of which have individually failed to ensure that the team meets its obligations to ensure that there is no stock loss.

Facts:
Continuous shrinkage (R80,000-R120,000 per month) persisted at a branch of KFC despite numerous and diverse steps taken and warnings given by the employer. (For example 518 cans of juice, 113 pieces of chicken and 32 kg of chips went missing during one shift). The Applicant contended that given these large volumes, it was literally impossible that all the team members would not have been aware of what was going on. Prior to the employees being suspended, they were spoken to by the Area Manager who gave each of them an opportunity to come forward and provide any information of how the stock losses were taking place. None of them accepted the offer.

A disciplinary enquiry was then held of all employees who worked in one shift when stock went missing, and they were all found guilty and dismissed. Since the dismissal of these employees, the stock position resolved itself and there were no longer any stock losses.

The employees referred the matter to the CCMA. The arbitrator determined that the employer had failed to prove that each of the employees were involved in causing the items to leave the store without it being paid for or that they knew or should have known who was responsible for it. He consequently found the dismissal of the employees substantively unfair and ordered six months compensation in respect of each employee.

The company took this decision on review. The Labour Court held that the arbitrator had misunderstood the legal principles relating to 'team misconduct', resulting in an outcome which fell outside the range of reasonable decisions a reasonable decision maker could make. The LC confirmed that in the case of 'team misconduct' (just as in the case of derivative misconduct and common cause purpose) there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, the members of which have individually failed to ensure that the team meets its obligations to ensure that there is no stock loss.

The LC accordingly found that the dismissals were substantively fair.

Extract from the judgment:
Shai AJ
[43] The disciplinary hearing chairperson found the Third Respondent guilty of theft on the basis of 'team misconduct' (team liability). It is clear from the finding of the arbitrator that the applicant was required to prove guilt on each of the Third Respondents, something that according to him they failed to do so.

[44] John Grogon, Dismissal, Juta & Co LTD, 2002 cited with approval the following paragraph from ***FEDCRAW v.Snip Trading (Pty) Ltd [2001] 7 BALR 669 (P)*** case:

''Team misconduct', according to the arbitrator, was to be distinguished from the kind of 'collective misconduct' dealt with in cases such as Chauke, in which the employer dismissed a group of workers because they refused to identify the individual perpetrator, whose identity was known to them. 'Team misconduct' is also distinguishable from cases in which a number of workers simultaneously engaged in conduct with a common purpose. In cases of 'team misconduct' the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to prove individual culpability, derivative misconduct or common purpose-the three grounds upon which dismissal for collective misconduct can otherwise be justified. The essence of team misconduct said the arbitrator, is that the employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer. The arbitrator concluded that dismissal for team misconduct is not inherently unfair. He said:

'as in many sports, productive and commercial activities depend for their success, not on the uncoordinated actions of individuals, but on team effort. In situations, when a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be apportioned among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent. It seems to me that the notion of 'team liability' underlies the line of cases in which it has been held that it is fair to dismiss the entire staff of a branch or store where 'shrinkage' reaches unacceptable levels'.

[45] In ***SA Commercial Catering and Allied Workers Union v PEP Stores (1998) 19 ILJ 939 (CCMA)***, the entire staff compliment in a particular store of the respondent were dismissed after an enquiry into stock loss of 81%. The arbitrator had found that the stock figure was so glaring that it could not possibly have escaped the attention and knowledge of every member of staff. It was further held that it was the responsibility of every staff member to protect the interest of their employer.

[46] What is clear to me is that in the case of 'team misconduct' just as in the case of derivative misconduct and common cause purpose there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, a team the members of which have individually failed to ensure that the team meets its obligations, in our given case, to ensure that there is no stock loss.

<u>Myers v The National Commissioner of the South African Police Service and others (ZALCCT 37/2013) 28 January 2014.</u>

Principle:
The word "reinstate" means that the employee must be put back into the same job or position that he or she occupied before the dismissal, on the same terms and conditions. This is irrespective of whether another employee now fills the post. If the post no longer exists because of restructuring, the employer must ask what the

employee's current position would have been, had the employer not unfairly dismissed him.

Facts:
This case arose as a consequence of the order of the SCA in 2012 to reinstate Lt-Col Ivan Myers into "the position he held before" his dismissal (Myers v National Commissioner of the SAPS (425/2012) [2012] ZASCA 185 (29 November 2012)). The retrospective reinstatement followed a lengthy court battle since his dismissal in July 2007. But the national and provincial commissioners of the SAPS did not reinstate him into the position he held before his dismissal. They said that was because the position no longer existed.

After reinstatement by the SCA, the Provincial Commissioner of SAPS instructed Myers to report for duty at the Ravensmead police station as Visible Policing Commander at salary level 10 with the rank of Lieutenant-Colonel. Myers argued that the SAPS had not complied with the order of the SCA. He returned to court to seek an order holding the national and provincial commissioners of the SAPS, in contempt of court.

At the time of his dismissal, Myers was employed at the level of a Superintendent as unit commander of the Maitland Dog Unit at salary level 10. At that stage, the SAPS operated two dog units – one at Maitland and one at Faure. After his dismissal and before the SCA judgment, the two units were amalgamated. The Maitland unit was classed as a "large dog unit" and the Faure one as a "medium sized unit". The amalgamated unit is now known as the Cape Town K9 Unit. It still operates from Maitland, but it covers a bigger geographical area with greater responsibilities. The commander post of the amalgamated unit has, according to SAPS, been upgraded to one at salary level 12 at the rank of Colonel (as opposed to the rank of Lieutenant-Colonel at salary level 10 that Myers occupied at the time of his dismissal). Yet the current commander of the K9 unit was still employed at salary level 10.

The SAPS argued that Myers was not entitled to be appointed to the newly created post of commander of the amalgamated K9 unit and that his previous post as commander of the Maitland unit no longer existed. Myers argued that the post still existed, but was now the bigger post of commander of the amalgamated dog unit. Level 10 is a salary level and not a "position". He argued that he should be reinstated into the position of commander of the Cape Town Dog Unit and if that position now attracts a higher salary, so be it. The present incumbent had been promoted to Superintendent – ie the same rank that Myers occupied at the time of his dismissal.

In order to consider whether there was contempt of court by SAPS, the Labour Court asked question whether SAPS has failed to comply with the order of the SCA; and, if so, whether the non-compliance is wilful and *mala fide* (in bad faith). But there was a prior question: how should the SCA order (to "reinstate" Myers into the position he held before his dismissal) be interpreted in the light of the subsequent restructuring of the dog unit?

The Constitutional Court in *Equity Aviation (Pty) Ltd v CCMA & Ors (2008) 29 ILJ 2507 (CC)* para [36] interpreted the word "reinstate" to mean that the employee must be put back into the same job or position that he or she occupied before the

dismissal, on the same terms and conditions. Reinstatement is aimed at placing the employee in the position he or she would have been, but for the unfair dismissal. Unlike an order to 're-employ' (in s 193 this means *either* in the work in which the employee was employed before the dismissal or in other reasonably suitable work), where reinstatement is ordered, there is no such discretion. In other words, the employee must be reinstated into the same position, and not re-employed in some other position.

The Labour Court found that SAPS could not give effect to the SCA's order by "placing" Myers in the position of Visible Policing commander at Ravensmead. Although that position may equate to "other reasonably suitable work", that is not what the SCA ordered.

The court got around this problem by asking what Myers's current position would have been had the SAPS not unfairly dismissed him. It held that there can be little doubt that, had Myers not been unfairly dismissed, he would have continued in the post of commander of the Cape Town Dog Unit at Maitland, albeit in the guise of the restructured unit. His post may have been upgraded but he would have remained the incumbent. In those circumstances, the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that that post attracts, coupled with retrospective back-pay.

But what about the contempt of court issue? The court concluded that the stance adopted by SAPS (to appoint Myers at Ravensmead) appeared to be a bona fide one, although it was not in compliance with the SCA order. This non-compliance was not wilful; SAPS did attempt to implement the order as it interpreted the order. Because the SAPS's non-compliance was not wilful or *mala fide*, it was not in contempt of court.

But the court took an extra step. Judge Steenkamp said it would not bring this long-running dispute to a satisfactory conclusion, if the Court was simply to dismiss the application to hold SAPS in contempt of court. Further guidance was needed. He concluded that it was in the interests of justice to order SAPS to comply with the order to reinstate Myers into the restructured post.

Extract from the judgment:
STEENKAMP J:
[14] The Constitutional Court in *Equity Aviation* interpreted the word "reinstate" to mean that the employee must be put back into the same job or position that he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is aimed at placing the employee in the position he or she would have been, but for the unfair dismissal.
.....

[16] What is immediately apparent, is the distinction between an order to "reinstate" and an order to "re-employ". Importantly for this case, a court may order the employer to re-employ the employee "either in the work in which the employee was employed before the dismissal or in other reasonably suitable work". In the case of reinstatement, there is no such discretion. In other words, the employee must be reinstated into the same position, and not re-employed in some other position.

[17] From the aforegoing it appears that SAPS could not give effect to the SCA's order by "placing" Myers in the position of Visible Policing commander at Ravensmead. That may be another position that equates "other reasonably suitable work" as contemplated in an order to re-employ; but that is not what the SCA ordered. It ordered the SAPS to reinstate Myers into the position he held before his dismissal, i.e. commander of the dog unit. But, argues SAPS, that position no longer exists.

[18] What would Myers's current position have been, had the SAPS not unfairly dismissed him?

[19] The dog unit was restructured in 2009. The amalgamated Cape Town Dog Unit (or "K9 Unit"), still operating from Maitland, was established as a single unit. It was headed by a Superintendent at salary level 10. On 1 March 2010 a new commander was appointed after the post became vacant and was advertised. The new incumbent, a Captain at the time, was promoted to Superintendent (Lt-Col at salary level 10) at the time of her appointment. SAPS says that that post was upgraded to that of Colonel at salary level 12 and, according to SAPS, "will be implemented during the second phase of the restructuring process". Yet it is common cause that the incumbent of the post, Lt-Col Du Plessis, is still employed at salary level 10.

[20] There is a difference between a "job" or a "position" and the salary level or grade that that position attracts. That much is confirmed by the distinction drawn in the SAPS Employment Regulations between a job, a grade and a salary level.

[21] There can be little doubt that, had Myers not been unfairly dismissed, he would have continued in the post of commander of the Cape Town Dog Unit at Maitland, albeit in the guise of the restructured unit. His post may have been upgraded in terms of the SAPS "Resource Allocation Guide"; but he would have remained the incumbent. In those circumstances, the SCA order must be interpreted to mean that he must be reinstated into the restructured post of commander of the Cape Town Dog Unit at Maitland at the current salary that that post attracts, coupled with retrospective backpay.

SEXUAL HARASMENT

SA Metal Group (Pty) Ltd v CCMA and Others (C350/13) [2014] ZALCCT 15 (15 April 2014)

Principle:

It is peremptory for commissioners to apply the 2005 Code on Sexual Harassment when they preside over arbitrations dealing with dismissals for misconduct involving alleged acts of sexual harassment. A commissioner must take into consideration the power imbalances between the complainant and the alleged harasser.

Facts:

A divisional director of a company was charged with sexual harassment of a subordinate female staff member. He was found guilty by the chairperson of an internal disciplinary hearing. At arbitration, the Commissioner found that the dismissal was substantively unfair and ordered the company to pay him eight months' compensation in the sum of R864,000.00.

There was a great deal of email banter that was flirtatious and reciprocated. The director hugged the employee, but he often hugged employees. She did not protest. He kissed her once on the cheek. She did not protest. When, on a second occasion,

while kissing he tried to insert his tongue into her mouth, she showed her displeasure and he backed off immediately.

One of the main arguments made on behalf of the director was this: “Until such time as the alleged offender is made aware that the conduct is unwelcome there can be no sexual harassment. It was therefore appropriate for the arbitrator to distinguish the events prior to the meeting at the end of August 2012 from the events thereafter as the third respondent had no indication prior to this that his conduct may have been unwelcome."

The Labour Court held that this proposition cannot be sustained given the definition of sexual harassment in the 2005 code. The failure to take proper account of the 2005 Code in dealing with the evidence led the Commissioner to arrive at a result which a reasonable decision maker could not make. The Labour Court therefore ruled that the award should be set aside. Having come to the conclusion that the director’s conduct constituted sexual harassment, the court found that the dismissal was fair.

Extract from the judgment:

[10] It is settled law as the jurisprudence stands presently, that the making of award by a CCMA Commissioner constitutes administrative decision-making. The administrator qua Commissioner is enjoined by the empowering statute, in this case the LRA and in particular section 186(6) of that Act, to apply a code such as the 2005 Code when presiding over and making a decision in arbitration proceedings. It is noteworthy that the 2005 Code specifically provides as follows:

“11.4 CCMA commissioners should receive specialized training to deal with sexual harassment cases.”

[11] It is peremptory then for a commissioner to apply the 2005 Code when they preside over arbitrations dealing with dismissals for alleged misconduct, in which alleged acts of sexual harassment constitute the said misconduct. This type of case rather than "unfair discrimination" matters is what CCMA commissioners in the main deal with. I now turn to consider whether the Commissioner did take the 2005 Code into account in this matter.

.....

[15] It is apparent on the face of the award in question that the Commissioner failed to have adequate regard to the power imbalances between the complainant and Beasley and her explanation in the arbitration that she failed to report the harassment earlier, as she was trying to ensure that she preserved her position as a newcomer in the applicant's employ. In Gaga v Anglo Platinum Ltd and others Murphy J held as follows:

"the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. The fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable."

I must agree with the submissions made on behalf the applicant company that the Commissioner ought to have considered that the behaviour and attention directed at the complainant by Beasley was inappropriate. The Commissioner does not seem to have taken into account that Beasley had an obligation placed on him in his senior managerial position

to refrain from any conduct which would contribute to a hostile work environment. This obligation became stronger in circumstances where the complainant signaled her discomfort and advised Beasley in August that contact was unwelcome. On Beasley's version of what happened on 26 November, he did hug the complainant (but denied kissing her). This evidence of should have been weighed taking the provisions of the 2005 Code into consideration. It was not.

Simmers v Campbell Scientific Africa (Pty) Ltd (C 751/2013) ZALCCT 9 May 2014

Principle:

1. The use of skype or the telephone in an arbitration to hear evidence does not automatically constitute an irregularity.
2. While a single incident of unwelcome sexual conduct can constitute sexual harassment, an inappropriate comment is not automatically sexual harassment where it a once-off incident, there is no workplace power differential, the parties are not co-employees, and the incident takes place away from work.

Facts:

In an arbitration where one of the charges was sexual harassment, the complainant (who was not an employee) was in Australia. The arbitrator allowed her evidence to be led via Skype. A video link could not be established and she testified and was cross-examined telephonically. There were a number of breaks in transmission. There were also pauses between questions and answers occasioned by the Skype link.

On review at the Labour Court the employee (who had been dismissed for the alleged sexual harassment) argued that he had been prejudiced by the fact that, when the complainant testified at the arbitration, she did so over a long-distance link by telephone, and not in person or even by Skype video as was initially indicated. He also argued that he was prejudiced by the fact that the complainant did not testify at the disciplinary hearing. He argued that the complainant had the benefit of delays, pauses, broken connections, time to compose herself, to think of her answers, to reconsider the questions whether in chief or in cross-examination, and that she did not have to face the man she had accused. The arbitrator, he argued, could also not test her demeanour – an important factor in a sexual harassment case.

The Labour Court held that it did not constitute a reviewable irregularity.

The court was also asked to decide if the employee's conduct constituted dismissable sexual harassment. The incident happened away from the workplace, after a business dinner, involving a complainant who was not an employee. The employee had suggested sexual intercourse but once the offer was refused, backed off.

The court pointed out that the Code on Sexual Harassment makes it clear that a person may indicate that sexual conduct is unwelcome by walking away. The court said that the words used were certainly inappropriate but the conduct did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment. The court recognised that a single incident of unwelcome sexual conduct can constitute sexual harassment. But it is trite that such an incident must

be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. The court held that this nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or *quid pro quo* harassment.

The court's order was to reinstate the employee retrospectively, coupled with a final written warning valid for 12 months – which related to other, unrelated misconduct.

Extract from the judgment:

[17] Simmers argues that he was prejudiced by the fact that, when Markides testified at arbitration, she did so over a long-distance link by telephone, and not in person or even by Skype video as was initially indicated. He also argued that he was prejudiced by the fact that Markides did not testify at the disciplinary hearing; but that is not a relevant factor, as the arbitration was a hearing *de novo*.

[18] Simmers further argued that Markides had the benefit of delays, pauses, broken connections, time to compose herself, to think of her answers, to reconsider the questions whether in chief or in cross-examination, and that she did not have to face the man she had accused. The arbitrator could also not test her demeanour – an important factor in a sexual harassment case.

[19] But it must be borne in mind that these are arbitration proceedings – designed to be informal and conducted with the minimum of legal formalities. Markides was in Australia. It would have been unacceptably costly and time-consuming for her to be flown back to South Africa to give evidence. The arbitrator allowed her evidence in the manner envisaged by section 138 (1) of the LRA. He conducted the arbitration in a manner that he considered appropriate in order to determine the dispute fairly and quickly. Simmers was represented by counsel who had the opportunity to cross-examine Markides telephonically. It was not an ideal situation, but it was one that is envisaged by the LRA. It did not prevent Simmers from having a fair hearing. It does not constitute a reviewable irregularity.

……..

[27] The Code makes it clear that a person may indicate that sexual conduct is unwelcome by walking away. That is what Markides did in this case. Simmers did not pursue her. Verbal conduct includes sexual advances – but it must be unwelcome, and the alleged perpetrator should have known that or the recipient of the advance should have made it clear.

[28] In this case, it is common cause that Simmers did not persist in his overtures once Markides told him that it was unwelcome. The words he used were certainly inappropriate, albeit uttered "more in hope than expectation", as *Mr Ackermann* remarked. But I agree with him that it did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment.

[29] It is true that a single incident of unwelcome sexual conduct can constitute sexual harassment. But it is trite that such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. This nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or *quid pro quo* harassment. In this case, it is common cause that the Commissioner dealt with a single incident. He found so. Once Markides made it plain to Simmers that it was not welcome, he backed off.

RETRENCHMENT

Edcon v Steenkamp and Others (JS648/13, JS51/14, JS350/14) [2015] ZALAC 2 (3 March 2015)

Principle:
Non-compliance with the procedural provisions of s 189A(8) of the LRA does not result in any subsequent dismissals being invalid and a nullity (as opposed to being unfair), entitling the employees to reinstatement.

Facts:
During April 2013, Edcon commenced with a process of restructuring based on operational requirements. The process resulted in the retrenchment of about 3000 employees (some of whom accepted voluntary severance packages). Edcon at the relevant time employed about 40 000 employees nationwide and the retrenchments occurred throughout the company.

None of the 1331 applicants challenged the substantive or procedural fairness of their dismissals. They all relied instead exclusively upon the '*De Beers* principle' (see ***De Beers Group Services (Pty) Ltd v NUM [2011] 4 BLLR 319 (LAC)*** and confirmed and applied in ***Revan Civil Engineering Contractors and Others v National Union of Mineworkers and Others* (2012) 33 ILJ 1846 (LAC)**) to assert a cause of action that their dismissals were invalid and sought reinstatement with full back pay. The cost of such orders, were they to be granted, would be substantial. They argued that the unprocedural dismissals were "invalid" within the meaning of that term as understood by the Labour Appeal Court in the *De Beers Group Services* case and confirmed and applied in the *Revan Civil Engineering Contractors* case. In these cases the LAC held that where an employer issues notices of termination before the period referred to in section 189A(8)(b) of the LRA has elapsed (ie prematurely), the ensuing dismissals are invalid, and accordingly of no force and effect.

Given the importance of the case, the Judge President, acting in terms of section 175 of the LRA, directed that the matter be heard by the LAC sitting as a court of first instance. The respondents in the matter are employees of Edcon affected by the retrenchments, NUMSA, the Minister of Labour and the Minister of Justice and Constitutional Development.

The LAC declared that the interpretation of s189A(2)(a) read with s 189A(8) of the LRA by the LAC in the *De Beers Group Services* and *Revan Civil Engineering Contractors* cases that non-compliance with these provisions results in the invalidity of any ensuing dismissal, is wrong and an erroneous interpretation. Non-compliance with these provisions does not lead to an invalid dismissal.

Extract from the judgment:
Murphy JA

[43] This case, as already explained, is concerned with whether non-compliance with the notice and procedural provisions of section 189A of the LRA should result in a declaration of invalidity and an entitlement to reinstatement on that ground. It will be

recalled that, unlike the situations in both the *National Union of Mineworker's* case and the *De Beers* case, no dispute was referred to the CCMA in this case. It is also common cause that there has been non-compliance with the time periods in both section 189A(8)(a) and section 189(8)(b) of the LRA. Should the remedies of specific performance and reinstatement be available for these lapses in the context of the scheme enacted by the LRA? The enquiry necessarily involves an examination of the right sought to be enforced and the wrong sought to be rectified. None of the applicants in the various referrals has alleged unfairness or unlawfulness beyond the stated non-compliance. Where one is concerned with the enforcement or breach of statutory duties, as opposed to mere contractual terms, the question must be resolved with reference to the provisions of the applicable statute, its purpose and any remedies which the statute has appointed to redress breach of the statutory obligations it has imposed. The general principle of our law, applied in the employment context by Innes CJ in *Schierhout*, that a thing done contrary to the direct prohibition of the law is void and of no effect, no longer applies in all cases. More recent cases have ruled that whether that is so will depend upon the proper construction of the particular legislation. In addition, our law now seeks to maintain a clearer divide between the law regulating administrative action and that applicable to unfair labour practices, as mandated by the discrete constitutional provisions and statutes applicable to such action.

.....

[52] It accordingly could not have been the intention of the legislature that a failure to comply with section 189A(8), read with section 189A(2)of the LRA, would result in the dismissals being invalid.

.....

[56] In the premises, we are persuaded that non-compliance with section 189A(8) of the LRA was not intended by the legislature to result in the invalidity or nullity of any ensuing dismissals. Consequently, we are of the opinion that the decisions in *De Beers Group Services (Pty) Ltd v NUM* and *Revan Civil Engineering Contractors and Others v NUM* were wrongly decided.

.....

[60] The following orders are issued:

> 1. It is declared that the interpretation of section 189A(2)(a) read with section 189A(8) of the LRA by this Court in *De Beers Group Services (Pty) Ltd v NUM* [2011] 4 BLLR 319 (LAC) and *Revan Civil Engineering Contractors and Others v NUM* [2012] 33 ILJ 1846 (LAC) that non-compliance with the provisions of section 189A(2)(a) read with section 189A(8) results in the invalidity of any ensuing dismissal is wrong and an erroneous interpretation and therefore that non-compliance with these provisions does not lead to an invalid dismissal.

2. The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved, such costs to include the employment of two counsel.

NUM and Another v Black Mountain Mining (Pty) Ltd (CA22/2012) [2014] ZALAC 78 (10 December 2014)

Principle:
A court in considering a dismissal for operational requirements is obliged to ask not only whether there was a *bona fide* commercial rationale to begin with, but also whether the reason for the dismissal was a fair one. An employer must establish on a balance of probabilities that the reason for the dismissal was fair. In doing so it must
(a) respond to alternative proposals put by the union and
(b) show the cost effectiveness or efficiency of the retrenchment option compared to alternatives proposed by the union.

Facts:
NUM, on behalf of its member, had referred an unfair retrenchment dispute to the Labour Court for adjudication and contended that their member's dismissal for alleged reasons of its operational requirements was substantively unfair. The court found that the dismissal was substantively fair. The matter was taken on appeal to the LAC.

The employee was employed as a mason in the employer's Town Engineering unit that conducts maintenance for the town and its various facilities. The Town Engineering unit is a non-mining or non-core function. Prior to the restructuring, the employee was one of eight artisans reporting to a foreman who in turn reported to the town engineer Kobus Zandberg. His duties involved general masonry work such as rebuilding and repairing walls, plastering, tiling, fixing potholes and paving, road signage, cement work and the like.

During pre-retrenchment consultations the union proposed that the employer should terminate contractors rather than retrench employees. The employer did not respond to this proposal and conceded that it did not consider removing the contractors as an alternative to retrenchment. Following the retrenchment, the employer engaged the services of various contractors in order to perform the type of work previously conducted by the township engineering unit. The employer conceded that the nature and the extent of work being performed had not changed in any fundamental way after the restructuring and it was really an operational decision which had been made by the employer to contract out that work. No evidence was presented by the employer to show the cost effectiveness of that strategy or whether it was a preferable option for an efficiency point of view. The union's position was that jobs could be saved if some contractor agreements were cancelled.

The LAC accepted that as a general rule an employer has a right to choose the way in which it will run its business provided it respects employees' contracts of employment and consults with them if it contemplates dismissing them for operational requirements. The LAC held that it is unfair for an employer, in selecting

a solution to deal with problems in its business to choose a solution that entails job losses if there is another solution which can satisfactorily address its problems without job losses. Dismissals must be a last resort and if they are not that renders them unfair.

The LAC confirmed that the employer bears the *onus* to prove that the dismissal was substantively fair. In this case it has failed to discharge that onus. It was clear from the evidence led that the dismissal of the employee was not a measure of last resort. The maintenance department was not closed down entirely. It still had to and was still rendering a service on behalf of the employer. The retrenched employee could easily have been accommodated in it. No cogent reasons were given why this option was not considered by the employer. The position might have been different if the entire maintenance department was closed. Based on the evidence led at the trial proceedings, the LAC was satisfied that the dismissal of the employee was not objectively justifiable nor did the employer appropriately consider the alternatives to the dismissal and that was the nub of the case put before the court *a quo*.

Extract from the judgment:
Francis AJA

[33] The deferential approach is no longer part of our law. It was called into question and rejected in BMD Knitting Mills (Pty) Ltd v SACTWU and in CWIU and Others v Algorax (Pty) Ltd. In BMD Knitting Mills, this Court observed at paragraph 18 that the test enunciated in Discreto was one amounting to the judicial review of an administrative action akin to that utilised in applications for review under section 145 of the LRA as then understood following Carephone (Pty) Ltd v Marcus NO and Others, namely that the courts should not impose value judgments or concepts of correctness on administrative bodies. The true test was whether the decision was rationally justifiable.....
.....

[42] I accept that as a general rule an employer has a right to choose the way in which he will run his business provided that in so far as workers are concerned, he respects their contract of employment and consults with them if he contemplates dismissing them for operational requirements. It is unfair for an employer, in selecting a solution to deal with problems in his business to choose a solution that entails job losses if there is another solution which can satisfactorily address its problems without job losses. Dismissals must be a last resort and if they are not that renders them unfair.

[43] A court in considering a dismissal for operational requirements is obliged to ask not only whether there was a bona fide commercial rationale to begin with, but also whether the reason for the dismissal was a fair one. An employer must establish on a balance of probabilities that the reason for the dismissal was fair.
.....

[45] The respondent bears the onus to prove that the dismissal was substantively fair. It has failed to discharge that onus. It is clear from the evidence led that the dismissal of the second appellant was not a measure of a last resort. The maintenance department of the respondent was not closed down entirely. They still had to and are still rendering a service on behalf of the respondent. The second appellant could easily have been accommodated in it. No cogent reasons were given why this option was not considered by the respondent. The position might have been different if the entire maintenance department was closed. Based on the evidence let at the trial proceedings, I am satisfied that the dismissal of the second appellant was not objectively justifiable nor did the respondent appropriately consider the alternatives to the dismissal and that was the nub of the case put before the court a quo.

Myburgh v Barinor Holdings (Pty) Ltd and Another (C 820/13) [2015] ZALCCT 1 (28 January 2015)

Principle:
In a retrenchment there must be a rational connection between the employer's scheme and its commercial objective. Through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means (for employees), or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances, allowing the employer to exercise its managerial prerogative.

Facts:
The applicant was appointed as financial manager in July 1998 and promoted to financial director in 2000. In 2005 he also assumed the title of deputy chief executive officer. Towards the end of 2011, the company experienced cash flow problems – it was “asset rich but cash poor”. It embarked on a cost-cutting exercise. After obtaining advice from a remuneration consultant, the non-executive directors decided to offer the four senior employees – including the applicant – reduced salaries. In the case of the applicant this would be alleviated by a substantial bonus if two pending property developments were realised.

The other three employees accepted the restructured remuneration packages. The applicant did not. The company then embarked on a consultation process in terms of s 189 of the LRA in 2013. The consultation process was conducted largely by way of correspondence between the parties’ attorneys. The parties could not reach consensus and the applicant was dismissed on three months’ notice. He referred an unfair dismissal dispute to the CCMA and, when conciliation failed, to the Labour Court.

The applicant admitted that there was a need in general to retrench. However, he claimed that his dismissal was substantively unfair because the company should have accepted either of the two alternative structures that he proposed (a combination of the positions of CEO and financial director; or the creation of a “junior CEO” position).The applicant also alleged that his dismissal was substantively unfair because the company did not consider him for the position of CEO in the new structure that it implemented.

The Labour Court found that the employer’s eventual decision to dismiss was a reasonable and fair one. It considered and rejected the proposals made by the applicant for good reasons. On the other hand, the applicant refused to consider the alternative proposed by the employer that would have saved his job whilst ensuring a substantial continued income, especially once the property development in the pipeline had been approved. There was an alternative to his dismissal, but he rejected that alternative. Seen holistically, the dismissal was substantively and procedurally fair.

Extract from the judgment:
Steenkamp J

[12] What can be gleaned from these authorities, it seems to me, is that the Court must not defer to the employer's decision; it must decide whether the decision to dismiss was fair under the circumstances. However, the Court need not decide whether dismissal was ultimately the only solution; it must merely decide whether the decision to dismiss was a fair one, given the circumstances that prevailed at the time and the process followed, i.e. whether the parties embarked on a meaningful joint problem-solving exercise or consensus-seeking process.

[13] Perhaps the most succinct summary is to be found in the *dictum* of Murphy AJ in SATAWU v Old Mutual:
"The test formulated by the legislature in the 2002 amendments [to s 189 of the LRA] harkens back to the principle of proportionality or the rational basis test applied in constitutional and administrative adjudication in other jurisdictions. As such, the test involves a measure of deference to the managerial prerogative about whether the decision to retrench is a legitimate exercise of managerial authority for the purpose of attaining a commercially acceptable objective. Such deference does not amount to an abdication, and as stated in BMD Knitting Mills (Pty) Ltd, the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer's scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer's margin of appreciation to the employer in the exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in Discreto and BMD Knitting Mills. The two decisions are not entirely at odds with one another. They are simply elucidations of the governing principle that the decision to dismiss must be operationally justifiable on rational grounds, which permits some flexibility in the standard of judicial scrutiny, depending on the context."

Mtshali v Bell Equipment (DA16/12) [2014] ZALAC 37 (22 July 2014)

Principle:

1. Bumping forms part of LIFO as a method for selection of employees to be retrenched. An employer is obliged to consult on its application, to determine whether it would be appropriate in the circumstances of each case.
2. An employer bears the *onus* to prove on a balance of probabilities that it applied the selection criteria as agreed and that its application was done fairly.

Facts:

Following a process of formal facilitation by the CCMA an agreement was reached between the employer and several unions to retrench certain employees, and the agreed selection criteria were formulated as follows: 'The parties agree that where positions are not critical to the operations of the Group in the short to medium term, the following criteria will be used:

a. The geographical location of the position;
b. Qualification, competency and experience;
c. Last-In-First-Out (LIFO).'

An employee did not dispute the fairness of the retrenchment process but the application of those criteria to him personally.

The employer had decided not to consider applying bumping at all or across the lines of production. No cogent evidence was presented to show that the employees that were retained were better skilled, qualified or capable than the appellant.

The Labour Court found that the appellant's dismissal was substantively fair and ordered the appellant to pay the respondent's costs. The LAC took a completely different approach. The LAC was clear that bumping forms part of LIFO as a method for selection of employees to be retrenched. It is therefore the employer's responsibility to consult on its application and to determine whether its application will be appropriate in the circumstances of each case. It is not for an employer to decide unilaterally that it will not be appropriate to apply bumping, especially where it was not specifically prohibited in the collective agreement. Put simply, this case requires employers to routinely consider and consult on bumping as part of a LIFO retrenchment.

The LAC declared the dismissal to be substantively unfair and reinstatement was ordered.

Extract from the judgment:
Tlaletsi ADJP
[22] The application of LIFO may also have the effect of longer serving employees being moved to take up positions of employees with less service and who were not necessarily targeted for retrenchment. This process is known as bumping. This Court had an occasion to consider bumping as a method of selection in our law in Porter Motor Group v Karachi. The Court summarised the principles applicable to bumping as follows:

1. It should be reiterated once again that fairness is not a one way street. It must accommodate both employer and employee. Section 189(2) of the Act requires both parties to attempt to reach consensus on alternative measures to retrenchment, so there is a duty on an employee as well to raise bumping as an alternative. An employer is obliged to consult with an employee about the possibility of bumping.

2. Bumping is situated within the "last in-first out" (LIFO) principle which is itself rooted in fairness for well-established reasons. Longer serving employees have devoted a considerable part of their working lives to the company and their experience and expertise is an invaluable asset. Their long service is an objective tribute to their skills and industry and their avoidance of misconduct. In the absence of other factors, to be enumerated hereinafter, their service alone is sufficient reason for them to remain and others to be retrenched. Fairness requires that their loyalty be rewarded.

3. The nature of bumping depends on the circumstances of the case. A useful distinction is that of dividing bumping into horizontal and vertical displacement. The former assumes similar status, conditions of service and pay and the latter any diminution in them.

4. The first principle is well established, namely, that bumping should always take place horizontally, before vertical displacement is resorted to. The bumping of an individual, in the absence of the other relevant factors, seldom causes problems and the fact of longer service establishes the inherent fairness thereof. Vertical bumping should only be resorted to where no suitable candidate is available for horizontal bumping.

Where small numbers are involved the implementation of horizontal or vertical bumping should present few problems.

5. Where large scale bumping, sometimes referred to as “domino bumping”, necessitates vast dislocation, inconvenience and disruption, consultation should be directed to achieving fairness to employees while minimising the disruption to the employer. Examples of disruption include difficulties caused by different pay levels, client or customer reaction to a replacement of employees and staff incompatibility. In evaluating the competing interests of the employer and the affected employees the consulting parties should carry out a balancing exercise. Where minimal benefits accrue to employees, while vast inconvenience is the lot of employers, fairness requires that fewer employees should move.

6. There will always be geographical limitations to bumping in that fairness will require that limits be placed on how far an employee is expected to move to bump another. Although prejudice to the employer in long distance relocation cannot be excluded, in practice this will be rare. Generally it will be the employee who will suffer as a result of being removed from a cultural and social environment he or she has become accustomed to. Second-guessing the desires of the employees is undesirable; if they are happy to translocate then bumping should take place whatever the distance involved.

7. The pool of possible candidates to be bumped should be established and the circumference thereof will depend on the mobility and status of the employees involved. The managerial prerogative entails moving employees to the best advantage of the company within the parameters if its activities, national or international; fairness requires that the same circumference should define the limits of potential candidates to be bumped. The career path of the employee in the company will often be a useful indication of scale of mobility.

8. The independence of departments as separate business entities may be relevant but the argument that a company’s departments are managed separately should be strictly scrutinised. Even if there is no past practice of transferring between branches or departments, the employer must consider interdepartmental bumping unless it is injurious to itself and to other employees.

9. Bumping does not apply to employees in a different grade if the longer-serving employees cannot do the work of the employee with shorter service in that grade. This limitation applies most frequently where competence, technical or professional knowledge or experience and specialised services are involved. Where the necessity arises of retaining those, who are transferred, this should be carried out, unless it places an unreasonable burden on the employer.

10. The status of the post into which an employee is bumped is relevant, as the employer’s prerogative to choose someone of managerial/supervisory level should be respected. Management concerns that downgrading an employee will be demoralising will not justify a decision not to bump downwards where the employee is prepared to accept downgrading. On the other hand the unwillingness of the affected employee to accept a lower wage may justify not bumping.”

……....

[30] It is clear from the authorities referred to above that bumping forms part of LIFO as a method for selection of employees to be retrenched. It was therefore incumbent on the respondent to have consulted on its application to determine whether its application would have been appropriate in the circumstances of this case. It was not for the respondent to

decide unilaterally that it would not be appropriate to apply bumping especially where it was not specifically prohibited in the collective agreement. Reasons why the respondent considered the application of bumping inappropriate or unfair should have been tabled for consideration by the consultation parties before a final decision could be taken. Any decision taken together with the consulting parties should have been reduced to writing and signed by the parties if it was to contradict the collective agreement.

TRANSFERS

TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd and Others (JA58/2014) [2014] ZALAC 39 (6 August 2014)

Principle:
In deciding whether a business has been transferred as a going concern, regard must be had to the *substance* and not the *form* of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employee, whether customers are transferred and whether or not the same business is being carried on by the new employer. This list of factors is not exhaustive and none of them is decisive individually.

Facts:
The first respondent (Unitrans) conducts the business of providing supply chain solutions for clients. This business is, in effect, the management of the “end to end” movements of goods. Third respondent (Nampak Glass) conducts a business as a manufacturer of a wide range of glass products. These glass products are stored on site in warehouses to await dispatch to customers.

In 2007, Nampak Glass changed its method of business by outsourcing the warehousing service. In 2011 Nampak Glass and Unitrans concluded a warehousing agreement which was terminated by the effuxion of time on 31 January 2014.

The staff who were employed to discharge Unitrans’s obligations under the warehousing agreement, from May 2011 were employed by the second respondent (Logistics (Pty) Ltd). This company is a wholly owned subsidiary of Unitrans, forming part of a specialised goods business unit within Unitrans; that is a business unit which specialised in providing management warehousing services to clients.

With the termination of the agreement between Nampak Glass and Unitrans by the effluxion of time on 31 January 2014, Nampak Glass entered into a relationship with the appellant (TMS Group Industrial Services) which commenced providing services to Nampak Glass on 1 February 2014. These services related to warehousing and distribution.

The Labour Court found that the termination of a warehousing agreement between Unitrans and Nampak Glass and the conclusion of an agreement for the provision of similar services between Nampak Glass and TMS Group Industrial Services constituted a transfer of an undertaking as contemplated in s 197 of the Labour Relations Act 66 of 1995 (LRA). The Labour Court held that the employment

contracts of employees who were employed by Logistics (Pty) Ltd transferred automatically to TMS Group Industrial Services with effect from the date of transfer, being 1 February 2014. The Labour Court held that the only reasonable inference to draw was that the services rendered by TMS Group Industrial Services and the assets used in the performance of these services were substantially the same as those which had been utilised by Unitrans in the performance of its obligations until the termination of its contract with Nampak Glass on 31 January 2014. The services could only have been performed at Nampak's production facility, at the same site and within the same premises as Unitrans had previously discharged its obligations under its contract with Nampak Glass. It was also reasonable to conclude that TMS Group Industrial Services would make use of the same equipment and IT systems that had been employed by Unitrans, including forklifts, furniture and a computer system that was driven by the software of Nampak Glass, enabling the movement of stock to be tracked. All of the assets were and remained the property of Nampak Glass.

The LAC upheld this judgment.

Extract from the judgment:
Davis JA:
[26] In my view, the approach adopted by the European Court of Justice in *Sodhexo, supra*, accords with the approach which has been adopted to s 197 by the Constitutional Court, both in *Aviation Union SA, supra* and in its earlier decision of *National Education Health and Allied Workers Union v University of Cape Town and Others*:

'In deciding whether a business has been transferred as a going concern, regard must be had to the substance and not the form of the transaction. A number of factors will be relevant to the question whether a transfer of a business as a going concern has occurred, such as the transfer or otherwise of assets both tangible and intangible, whether or not workers are taken over by the new employee, whether customers are transferred and whether or not the same business is being carried on by the new employer. What must be stressed is that this list of factors is not exhaustive and that none of them is decisive individually.' See also *Aviation Union of SA*, supra at para 50-51

[27] The indicated approach is thus not to apply s 197 section in a literal or formalistic fashion but rather to enquire into the substance of the transaction in question.....

AFFIRMATIVE ACTION

South African Police Service v Solidarity obo Barnard [2014] ZACC 23.

Principle:
Once an affirmative action policy passes the test in s 9(2) of the Constitution (that is, it must target a particular class of people who have been susceptible to unfair discrimination; it must be designed to protect or advance those classes of persons; and it must promote the achievement of equality) it is neither unfair nor presumed to be unfair. This does not however oust the court's power to interrogate whether the measure is a legitimate restitution measure. It must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else.

Facts:
During 2005 the SAPS created a new post of Superintendent of the NES, the function of which was to ensure optimal utilization of human, logistical and financial resources in the NES. Barnard was interviewed for the post together with six other candidates (four blacks and two whites). On assessment she received an average rating of 86,67%, the highest score obtained by any candidate. The difference between Barnard's score and that of a black candidate was 17,5 %. In its recommendation the selection panel stated that given the difference between the scores, service delivery would be adversely affected if the latter were to be appointed. The panel also stated that representivity in the NES would not be affected as Barnard was already a member thereof. The recommendation stated further: *"The panel agrees that the appointment of Captain Barnard will definitely enhance service delivery"*.

The panel's recommendation was discussed at a meeting with the Divisional Commissioner the following day. The upshot was that Divisional Commissioner Resegatla recommended that the post not be filled because "appointing any of the first three preferred candidates will aggravate the representivity status of the already under-represented Sub-Section: Complaints Investigation" and that "such appointment will not enhance service delivery to a diverse community". The post was left vacant and in fact withdrawn. The reason Barnard was not appointed to that post was that she was white.

The same position was advertised, again as a "non-designated post" and again Barnard applied for the post. She was again short-listed and was interviewed this time with seven other candidates, four African males, one African female, one "coloured" male and one white male. The panel recommended her appointment.
Again, a meeting was held at divisional level to discuss the panel's recommendations. The Commissioner supported Barnard's appointment but the National Commissioner did not approve the recommendation and withdrew the post because the appointment did not address representivity.

This decision was contested first in the Labour Court in Solidarity obo Barnard v SA Police Services (LC case no. JS455/07 dated 24/02/2010). The Labour Court held that provisions of the Employment Equity Act and an employment equity plan must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality and the need for operational efficiency. It is not appropriate, the court said, to apply numerical goals set out in an employment equity plan without considering all relevant factors. That approach is too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected.

This decision was appealed in South African Police Services v Solidarity obo Barnard (JA24/2010) [2012] ZALAC 31 (2 November 2012) and the LAC reversed the LC's decision. It held that it is misconstrued to implement restitutionary measures contained in the EEA and an employment equity plan, as being subject to an individual's right to equality. The employer is the only party answerable regarding service delivery matters, and it is not open to a court to 'second guess' a decision that not filling a post will or will not compromise service delivery.

This decision was itself appealed to the SCA in Solidarity obo Barnard v SAPS (165/2013) [2013] ZASCA 177 (28 November 2013).The SCA – in a unanimous judgment of 5 judges -held that the mechanical application of targets falls foul of the EEA; a flexible and 'situation sensitive' approach is required. The SCA held that the fact that no appointment is made does not necessarily mean no discrimination took place.

Finally the Constitutional Court had to consider the matter. The majority judgment (7 judges; 5 other judges wrote minority judgments) started with the constitutional requirements for an affirmative action measure: The measure must—

a. target a particular class of people who have been susceptible to unfair discrimination;
b. be designed to protect or advance those classes of persons; and
c. promote the achievement of equality.

Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. The constitution is explicit that affirmative action measures are not unfair. This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure. The manner in which a properly adopted restitution measure was applied may also be challenged - there is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. It must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else.

The court found that the SAPS affirmative action policy complied with these requirements. Further, the National Commissioner exercised his discretion not to appoint Ms Barnard rationally and reasonably and in accordance with the criteria in the affirmative action measure, in pursuit of employment equity targets envisaged in section 6(2) of the Act.

Extract from the judgment:
Moseneke ACJ:

[36] The test whether a restitution measure falls within the ambit of section 9(2) is threefold. The measure must—

a. target a particular class of people who have been susceptible to unfair discrimination;
b. be designed to protect or advance those classes of persons; and
c. promote the achievement of equality.

[37] Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Section 6(2) of the Act, whose object is to echo section 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2).

[38] The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity

Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.

[39] As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally…
.....

[70] In my judgment, the National Commissioner exercised his discretion not to appoint Ms Barnard rationally and reasonably and in accordance with the criteria in the Instruction, in pursuit of employment equity targets envisaged in section 6(2) of the Act. The attempt at reviewing and setting aside his decision would, in any event, have failed.

STRIKES AND LOCKOUTS

Mvelatrans (Pty) t/a Bojanala Bus Services v Jackson and Others (JA72/13) [2014] ZALAC 68 (23 October 2014)

Principle:
Where employees are not represented by a union and where there is no strike committee or discernible communication channels between and amongst the employees, there must be some indication that the employees were aware of an ultimatum. The employer must prove that the employees were aware of the ultimatum or that they would reasonably or in all likelihood have been aware thereof and that they did not comply therewith. Knowledge of the ultimatum is important for a finding that there was no compliance therewith.

Facts:
Employees embarked on an unprotected strike from 11am on 17 November 2009 to 20 November 2009. On 20 November 2009, the Labour Court declared the strike an unprotected strike and interdicted the strikers from participating in it. During the afternoon of 20 November 2009, the appellant issued an ultimatum requesting the strikers to return to their work-stations by 15h00. The strikers failed or refused to do so and they were subsequently issued with notices to attend a disciplinary hearing to face the following charges of failing to comply with a court order, and failure to adhere to an ultimatum.

The employees refused to take part in the hearing which proceeded in their absence and they were subsequently found guilty and dismissed. Conciliation at the South African Road Passenger Bargaining Council (SARPBAC) failed. The SARPBAC issued a certificate to the effect that the dispute was unresolved and that it may be referred to the Labour Court.

At the Labour Court it was conceded by the employees that the ultimatum was communicated to them at approximately 13h00 along with the fact that an interdict had been granted against the unprotected strike. They also agreed that the court order and ultimatum were read out to the striking employees at both depots, by

members of the SAPS who also translated the documents, and that copies of the ultimatum were also handed out to the employees. They also did not challenge the fairness of the ultimatum. They gave various reasons why some of the individual employees did not adhere to the ultimatum and that the others did adhere to the ultimatum, and returned to their workplaces after it was read out. They also contended that some adhered to the ultimatum but were locked out thereby making it impossible for them to report to their respective workstations. They alleged that their dismissal was substantively unfair because there was no valid basis for the employer to selectively dismiss them when other employees who participated in the strike were not dismissed.

The Labour Court found that even on the employer's version – that the ultimatum was read at approximately 13h00 – the dismissals were still unfair. The court was of the view that two hours to return to work was insufficient, because the strikers were not given proper opportunity to consider whether they should return to work and what the consequences of a failure to return to work would be. According to the court, the fact that the strikers were no longer union members required of the employer to give them time to consult with their families.

The employer appealed against the LC judgment. The Labour Appeal Court took the view that the evidence showed that some employees had time to report to work after the ultimatum was read and that some dismissed employees' evidence as to why they did not report to work was not plausible. Their dismissals were accordingly substantively fair. But those employees whose evidence was found to be plausible for not reporting to work, were reinstated. The appeal was accordingly partly upheld.

Extract from the judgment:
Musi JA

[55] It is beyond cavil that the purpose of an ultimatum is to get workers who are participating in unlawful industrial action back to work. Although the participation in an unprotected strike remains a serious misconduct, workers can avoid the ultimate sentence, which is dismissal, by complying with an ultimatum. Those who comply with the ultimatum may not be dismissed, because compliance is an act of atonement. Those who do not comply may be dismissed, after being heard, because non-compliance is an unacceptable act of defiance, especially where the employer had obtained a court order declaring the strike illegal and therefore unprotected. It has been said that an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one. See Modise and Others v Steve's Spar Blackheath [2000] 5 BLLR 496 (LAC) at para 149 and 150.

[56] The ultimatum must be fair and geared at achieving its primary purpose of getting the workers back to work. Whether an ultimatum was fair will depend on the facts of the particular case…

.....

[62] In any event, in circumstances like these, where the employees were not represented by a union and where there was no strike committee or discernible communication channels between and amongst the employees there must be some indication that the employees were aware of the ultimatum. The employer must therefore prove that the employees were aware of the ultimatum or that they would reasonably or in all likelihood have been aware thereof and that they did not comply therewith. Knowledge of the ultimatum is important for a finding that there was no compliance therewith. It would then be incumbent on the individual respondent to tender an explanation as to why s/he was not aware thereof and why s/he did

not comply therewith. Where the employees are represented by a union other considerations, which are not relevant for purposes of this judgment, will apply. I now turn to evaluate the evidence of the individual respondents…...

FAWU v In2food (Pty) Ltd (JA61/2013) [2014] ZALAC 31 (12 June 2014)

Principle:
Proof of contempt of a court order requires proof of the order, of due service on the relevant party, and of deliberate wilful disobedience. There must be proof beyond reasonable doubt that the union committed a breach of the order, as distinct from a breach by the individual union members on strike. The liability of a trade union for contempt of a court order is strictly determined by reference to what the court ordered the trade union, itself, to do and the presentation of evidence that it did not do as it was told.

Facts:
This appeal was against an order of the Labour Court which held the union in contempt of a court order and imposed a fine of R500,000. The single ground of appeal was that there was no evidence of a breach of the court order by the union. As such, the appeal turned on a finding of fact.

The court found no evidence that the trade union wilfully breached the court's order. The appeal was upheld. The whole of the order granted by the Labour Court was set aside.

Extract from the judgment:
Sutherland AJA:
[1] This appeal is against an order of the Labour Court which held the appellant union in contempt of a court order and imposed a fine of R500,000. The judgment is reported as *In2Food (Pty) Ltd v FAWU and Others (2013) 34 ILJ 2589 (LC)*. The single ground of appeal is that there was no evidence of a breach of the court order by the appellant. As such, the appeal turns on a finding of fact.
.....

[6] On the strength of the respondent's allegations the court *a quo*, on the return day of the rule nisi, held that "the union and its members are clearly in contempt of the order issued." The Court *a quo* then made this important policy statement:

'The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members. This in a context where the Labour Relations Act 66 of 1995, which has now been in existence for some 17 years and of which trade unions, their office-bearers and their members are well aware, makes it extremely easy to go on a protected strike, as it should be in a context where the right to strike is a constitutionally protected right.

However, that right is not without limitations. Firstly, the proper procedures set out in s 64 of the LRA should be followed. And secondly, it must be in line with the constitutional right to assemble and to picket peacefully and unarmed, as entrenched in s 17 of the Bill of Rights. Very simply, there is no justification for the type of violent action that the respondents have engaged in in this instance. And alarmingly, on the evidence before me, the union and its officials have not taken sufficient steps to dissuade and prevent their members from

continuing with their violent and unlawful actions. Instead, having confirmed that it represents and acts on behalf of its members, the union's organizer, Mr Ditjoe, merely stated that the unprotected strike was 'as a result of your refusal to bargain. We will not be held responsible nor our members held liable for such action'. These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.

The applicant has suffered losses of more than R16 million as a result of the respondents' actions. I cannot disagree with Mr Bekker when he says that a fine of R500,000 to be paid by the union is not unreasonable in these circumstances."

Was a Breach proven?
[7] Proof of contempt of a court order requires, in particular, proof of the order, of due service on the relevant party, and of deliberate wilful disobedience. Moreover, there must be proof beyond reasonable doubt. (*Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at [42]*).

[8] The true question for decision is whether the evidence adduced about the appellant union's conduct contributes to proving that the appellant committed a breach of the order, as distinct from a breach by the individual union members on strike. An examination of the order reveals that only orders 1.1 and 1.2 apply to the appellant. In essence the appellant, no less than the strikers individually, were forbidden to "continue" the strike. More specifically, they were forbidden from blocking access to the premises and inhibiting people entering and leaving. The question is therefore whether evidence exists of the appellant doing these things.
.....

[19] The sentiments expressed by the court a quo which are cited above have been rightly described by Alan Rycroft as a "…significant moment of judicial resolve". (Rycroft, A *"Being held in Contempt for non-compliance with a court interdict: In2food (Pty) Ltd v FAWU" (2013) 34 ILJ 2499*). Indeed, the sentiments deserve endorsement, and are adopted by this Court. Nevertheless, on the facts of this matter, the appellant has not been shown to have breached the order.

PUBLIC DISCLOSURES / WHISTLE BLOWING

Potgieter v Tubaste Ferrochrome and Others (JA71/12) [2014] ZALAC 32 (12 June 2014).

Principle:
Where an employee makes public disclosure of sensitive information concerning the employer, this in itself does not automatically render the employment relationship intolerable. If it did, this would seriously erode the protection that the legal framework seeks to grant to whistle-blowers. It is accepted that public interest may, in certain instances, outweigh the interests of protecting the reputation of an organisation.

Facts:
The employer operates a mine and the employee was a qualified engineer employed as a "project superintendent". One of his job responsibilities was to ensure that health and safety standards were maintained at the workplace.

On 20 August 2006, the employee sustained a fracture to his collarbone, as a result of which he underwent an operation. The injury was not sustained during the course of his duties. He was booked off work for an initial period of 1 week, but this period was extended by the employee from time to time.

On 03 October 2006, the employee received a letter from the employer informing him that his medical condition had been re-evaluated by the employer's resident doctor and instructed him to return to work for "restricted duty" with effect from 04 October 2006. The employee did not return to work. Another letter to the same effect was sent on 04 October advising the employee to resume duty on 05 October 2006. The employee sent an e-mail informing the employer that its request was not acceptable as he had a valid medical certificate booking him off until 15 October 2006.

On 6 October 2006, the employer sent an e-mail to the employee, informing him that by failing to return to work as instructed, he was failing to obey a valid instruction. He was subsequently served with a notice of a disciplinary hearing in terms of which he was charged with: Failure to obey a reasonable instruction; Being absent without permission, and Insubordination.

A disciplinary hearing was held and he was found guilty on all charges and dismissed. Subsequent to his dismissal but before the hearing of his appeal, the employee released a report to the media pursuant to which an article was subsequently published in a publication known as *Highland Panorama*. In that article, the employee was quoted as having alleged that the employer did not have adequate measures in place to address the water pollution that its mining operations had caused.

After his dismissal, the employee referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council (MEIBC). The commissioner who arbitrated the dispute found the dismissal to be procedurally and substantively unfair. With regards to the appropriate remedy, she granted the employee 12 month's compensation. She said it was impractical to reinstate him as the employment relationship has been irretrievably damaged by him disclosing a confidential report to the media after his dismissal. The employee's contention that this was a 'protected disclosure' made in terms of the Protected Disclosures Act was not plausible and probable. The commissioner held that it was not made 'in good faith', but by a vindictive employee who wanted to humiliate and embarrass his employer to get even. The employee applied to the Labour Court for a review of the commissioner's award pertaining to the commissioner's finding that the employment relationship had broken down and the resultant awarding of compensation instead of reinstatement. The Labour Court dismissed the review application on the basis that the commissioner's decision was one that a reasonable decision-maker could reach.

The employee appealed to the LAC against the judgment of the Labour Court. He argued that his disclosure was protected not only in terms of the Protected Disclosure Act (PDA) but also the South African National Environmental Management Act (NEMA). The LAC reinstated the employee, finding that the Labour Court erred when it found that the employee had not adduced evidence showing that the disclosure he made was in good faith.

Extract from the judgment:
Molemela AJA:

[30] The respondent contended that irrespective of whether it was the Golder report or the appellant's own report that was published, the fact remained that what was disclosed was information of a sensitive nature. This seemed to imply that an employee's disclosure of sensitive information concerning an employer in itself renders the employment relationship intolerable. Some extracts of what was reported can be gleaned from the articles that appeared in the *Highlands Panorama* and I have no hesitation in agreeing that what was disclosed falls in the category of sensitive information. The definition of whistle-blowing in the Thesaurus of the International Labour Organisation, is "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employer." The preamble to the PDA also refers to the curbing of "criminal" and "irregular" conduct of employers. Given the definition of whistle-blowing in the domestic legal framework and in terms of international standards, as well as authorities on whistleblowing, it seems to me that it is indeed envisaged that the information disclosed may well be information of a sensitive nature concerning an employer. While it is indeed so that not all disclosures are protected, I am not persuaded that the sensitivity of information disclosed ought to, without more, deny the whistle-blower of the protection granted by the prescripts already alluded to. Rather, a proper investigation of all the circumstances is warranted so as to ensure that the disclosure that has been made is not in contravention of the afore-mentioned prescripts.

[31] While due regard must be paid to the reputational damage that an organisation may suffer as a result of disclosure of adverse information which is prejudicial to its commercial interests, I am of the view that a finding that the mere disclosure of sensitive information renders the employment relationship intolerable would, in my view, seriously erode the very protection that the above-mentioned legal framework seeks to grant to whistle-blowers. It is accepted that public interest may, in certain instances, outweigh the interests of protecting the reputation of an organisation. See *Heinisch v Germany*.