Legislation & Case Law Update

May 2025

Index **Page**

Legislation update:
- **Nedlac labour law reform process 2**
- **Employment Equity amendments 3**
- **New Dismissal Code of Good Practice 4**

Case law update 12

LEGISLATION UPDATE

Nedlac labour law reform process

Nedlac negotiations between business, labour and government on a substantive labour law reform process have been ongoing since April 2022, and have now been concluded. What has emerged are draft amendment bills that propose 47 amendments to the LRA, 13 to the BCEA, 3 to the EEA and 2 to the NMW Act.

It is important however to contextualise the above within the framework of how legislation gets amended. Bills have to submitted through the parliamentary process and it is very difficult to predict the extent of opposition that might emerge to some of the suggested changes (bearing in mind the GNU), how long this process might take, and what the final versions will look like. For these reasons we do not suggest that Worklaw subscribers spend too much time examining the finer details of each proposed amendment, other than to be aware of some of the more important or contentious amendments that are on the table. With that in mind we have outlined some of the key changes proposed.

LRA

Some of the more important proposed amendments are the following:

- Highly paid employees earning above a prescribed amount not being entitled to reinstatement in unfair dismissal disputes other than in automatically unfair dismissals, with remedies limited to compensation which will be capped at a prescribed amount;
- A new section providing for reduced procedural fairness requirements in dismissals, with the test being whether "*the employee has been given a fair and reasonable opportunity to respond to the reason for dismissal*";
- Excluding unfair dismissal rights for new employees during the first 3 months of their employment or during a probation period that is reasonable and operationally justifiable, provided that they can bring automatically unfair dismissal claims;
- Amendments to the unfair labour practice definition to exclude disputes about promotion, demotion, probation, training and benefits, and a refusal to reinstate or re-employ former employees. This would limit unfair labour practice cases to disputes about unfair suspensions, unfair disciplinary action short of dismissal, and protected whistleblowing;
- Protected protest action to be limited within 2 years of notice having been served;
- Enabling the CCMA to assist employees earning below the BCEA earnings threshold in enforcing awards, including paying sheriffs' fees;
- Enabling the CCMA to hear unfair dismissal disputes together with unfair discrimination claims arising from the same issues;
- Defining "interpretation or application" disputes over collective agreements under section 24(2) to include enforcement disputes;
- Exempting new businesses employing less than 50 employees from bargaining council collective agreements during the first 24 months of their existence;
- Enabling arbitrators to award costs against the responsible party when the postponement of a hearing could have been avoided;
- Strengthening protections for workers in non-standard employment arrangements, including the provision of organisational and bargaining rights.

BCEA

Some of the more important proposed amendments to the BCEA include an increase in severance pay from 1 week to 2 weeks per year of service, provided that the increase only applies to service after the date of implementation of the amendments. The amendments would also confirm the CCMA's jurisdiction in respect of all severance pay claims, not just those involving the minimum statutory allowance.

EEA

The amendments to the EEA would enable low-paid employees to refer any harassment claims to the CCMA for arbitration, not just in cases of sexual harassment.

Employment Equity Amendments

Worklaw subscribers with long memories may remember that the Employment Equity Amendment Act 4 of 2022 was gazetted on 14 April 2023, and was to come into effect on a future date fixed by the President. It was finally anounced in December 2024 that this Amendment Act would come into effect on 1 January 2025.

In summary the 4 main aspects of Amendment Act are the following:

- **Empowering sector specific targets**

The Amendment Act empowers the Labour Minister to regulate sector-specific employment equity targets. 2 sets of (very different) draft 5-year targets for 18 different sectors have to date already been gazetted for public comment, the most recent in February 2024. The Department of Employment and Labour conducted public consultations with stakeholders across the 18 sectors during February 2025 on the targets, and it became clear during this process that a further revised set of targets will be published. These are expected in the near future.

We understand that provided these sector targets are finalised in the near future, it is intended that 'designated employers' (those with 50 or more employees) will have until 31 August 2025 to conduct a workplace analysis and develop new employment equity plans in alignment with the final targets. The 2025 reporting period will then run from 1 September 2025 to 15 January 2026, and the first assessment of a designated employer's annual goals in relation to the targets will commence with the 2026 reporting period (from 1 September 2026 to 15 January 2027).

- **Issuing compliance certificates**

The Amendment Act empowers the Labour Minister to issue compliance certificates to employers who have complied with the sector targets or who have reasonable grounds to justify their failure to comply, which will be required to do business with the state.

Clause 4.5 of the February 2024 draft sector target Regulations sets out justifiable/ reasonable grounds for not complying with the sector targets, which include factors such as insufficient recruitment/promotion opportunities, insufficient target individuals

from the designated groups with the relevant qualification, skills and experience, and impact on business economic circumstances.

Even where an employer has no intention of doing business with the state, the Dept. of Labour Director-General can make a recommendation to an employer on steps to be taken to become compliant with a sector target. If an employer fails to comply, the Labour Court can make an order directing the employer to comply, leading to significant fines for non-compliance.

- **Amending the definition of 'designated employers'**

Only 'designated employers' are required to submit employment equity reports. 'Designated employers' were previously defined as those employing 50 or more employees **or** those having an annual turnover above the threshold set by the EEA. The designated employer definition has now changed to exclude employers with fewer than 50 employees, irrespective of their annual turnover. This amendment will significantly reduce employment equity obligations for smaller employers with large turnovers.

- **Amending the definition of 'people with disabilities'**

The definition of *'people with disabilities*' is substituted to align with the definition in the United Nations Convention on the Rights of Persons with Disabilities, 2007. The new parts to the definition include "*people with an intellectual or sensory impairment"* which may substantially limit their prospects of entry into, or advancement in, employment.

This enhanced definition accords with a more expansive understanding of what constitutes disabilities. '*Sensory impairment*' is a term used to describe deafness, blindness, visual impairment, hearing impairment and 'deafblindness' (a combination of sight and hearing loss that affects a person's ability to communicate, access information and get around).

New Dismissal Code of Good Practice

A new draft Dismissal Code of Good Practice was gazetted in January 2025, and allowed for public comment up to 22 March. The Code is a significant improvement on the current version: it reads better, is well laid out and drafted under better headings, it's more comprehensive, and provides clearer guidance. There are still significant problems with the draft, which will become apparent from our comments below.

The good stuff

The new Code does a number of things well:

- It **incorporates the 3 reasons for dismissal**, being misconduct, incapacity and operational requirements, presumably leading to the deletion of the separate *Dismissal for Operational Requirements Code* in due course.
- It has a new section – clause 3 - dealing with **small businesses**, that emphasises a less formal approach to discipline for this sector.
- It has a far more comprehensive section on "**Dismissals and industrial action**" – section 12 – although there are problems with some of the contents.

- It has a far more comprehensive section on **probation** – see Part E.
- It provides guidance generally on a **less formal approach** to disciplinary procedures, but in our view falls short of the mark.

What can be improved

Whilst the new Code is a significant improvement on the current version, in our view it falls down in a number of respects. Having gone to the trouble of drafting a new Code, we think it needs to address the issues below.

1. Clarifying procedural fairness for small businesses

The Code makes clear that small businesses would be entitled to adopt a less formal approach to discipline, which is good. See sections 3 and 6(3). It even states (section 3(3)) that for example small businesses "*are not expected to engage in time-consuming investigations or pre-dismissal processes*". And yet section 188(1)(b) of the LRA and section 5(1) of the Code provide that (all) dismissals are required to be procedurally fair.

So what then does a small business have to do to comply with its requirements for procedural fairness? For example, give written notification of any disciplinary allegations to an alleged offender and allow for written representations before making a decision? The Code gives no guidance at present, and it needs to.

The Code also perhaps needs to attempt to define what constitutes a 'small business'.

2. Clarifying automatically unfair dismissals

Section 5(3) of the Code states that a dismissal is automatically unfair "*if the reason for dismissal infringes the rights of employees and trade unions or if the reason is one of those listed in section 187*." We query the use of the word "and" here, and it is also difficult to understand how infringing a union's rights can make an employee's dismissal automatically unfair? And is this referring to <u>any</u> employee or union rights? The Code can't expand the definition of automatically unfair dismissals contained in section 187 of the LRA. This includes an infringement of an employee's freedom of association rights under section 5 of the LRA, and presumably this is what is referred to in section 5(3) of the Code. If so, it needs to say so.

3. Guidelines for deciding a fair misconduct sanction

Section 7 of the existing Code provides the following tried and tested framework for deciding whether a misconduct dismissal is fair:

> *Any person who is determining whether a dismissal for misconduct is unfair should consider-*
> *(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and*
> *(b) if a rule or standard was contravened, whether or not-*
> *i. the rule was a valid or reasonable rule or standard;*

ii. *the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*
iii. *the rule or standard has been consistently applied by the employer; and*
iv. *dismissal with an appropriate sanction for the contravention of the rule or standard.*

Section 8 of the new Code updates this by making this framework applicable to <u>any</u> misconduct sanction, not just for dismissals, and by including the following additional questions to be answered if a rule or standard was contravened:

- *the importance of the rule or standard in the workplace;*
- *the actual or potential harm or damage caused by the employer's contravention of the rule or standard;*

Whilst these may be relevant factors to consider, we think they were effectively covered in the current framework and that it is unnecessary to add further overlapping questions. The first additional point would be covered by correctly assessing i and iv above, and the second by iv above.

Sections 7 – 9 of the new Code appropriately highlight that the key question in deciding whether a dismissal is fair, is whether a continuation of the employment relationship is intolerable or not. This is a good thing, and the existing Code in section 3(4) also highlighted this, albeit in a less obvious way. Having said that, section 9 of the new Code then goes on to provide a whole layer of further questions to answer in deciding this, <u>without providing any guidance on how to 'balance' those factors</u>. It states the following:

9. Generally, dismissal is only an appropriate sanction if a continued employment relationship is intolerable. Factors to consider when determining this include –
(1) the nature and requirements of the job;
(2) the nature and seriousness of the misconduct and its effect on the business;
(3) whether progressive discipline might prevent a recurrence of the misconduct;
(4) any acknowledgement of wrongdoing by the employee and willingness to comply with the employer's rules and standards; and
(5) the employee's circumstances (including length of service, disciplinary record and the effect of the dismissal on the employee).

<u>Take a practical example</u>: a supervisor with a clean record and long service and who is under pressure in his personal life, seriously assaults a manager who spends a month in hospital recovering. The supervisor acknowledges his wrong doing, apologises profusely and expresses a commitment to never behave in that fashion again. Applying the above factors, how does the employer decide on a fair sanction? There is no guidance in the Code on how to balance the above factors. There needs at least to be some statement that one or other of these factors may be sufficiently serious to outweigh the others, and a referral back to the statement in section 7(2) that a single instance of misconduct may justify dismissal.

Not providing guidance on how to balance these factors may lead to even more cases being referred to arbitration and court, thereby clogging up even further the dispute resolution system that is already over-burdened.

4. De- formalising procedural fairness requirements

In attempting to consider the thinking behind the need to redraft the Dismissal Code, we think the need to de-formalise procedural fairness requirements was probably foremost in mind. Various court judgments have suggested that employers have over formalised disciplinary procedures and that this was never intended by the existing Code.

The new Code suggests a less formal approach to disciplinary procedures that effectively does away with the standard disciplinary hearing provided for in many large employers' procedures. Section 11(1) states that the purpose of a fair procedure is to "*ensure a genuine dialogue and an opportunity for reflection before any decision is taken*". Section 11(2) states that a fair procedure is "*one in which an employee has been given an adequate and reasonable opportunity to respond to the allegation of misconduct*," and section 11(3) confirms that "*an investigation or enquiry does not have to be formal*." Section 11(4) then goes on to describe the suggested procedure to be adopted, which effectively requires the employee being given the opportunity to make (verbal or written?) representations on both the misconduct allegations and the appropriate sanction.

There is however no guidance given to employers on how to resolve the factual disputes that inevitably arise in many disciplinary cases, and which lie at the heart of many cases having to be referred to arbitration. Inevitably in our view, the best way to attempt to arrive at the truth of what might have happened is for witnesses to give their versions in front of each other, in a manner that they can be questioned on what they are saying. In other words, back to a disciplinary hearing of some shape or form. The failure to provide for this will, in our view, again lead to many more cases having to be referred to arbitration.

To the extent that the new Code is implemented and provides for a far less formal approach, most employers will have to rethink their internal procedures and decide whether to leave them as is, or to adopt the less formal approach suggested by the new Code. The *CCMA Guidelines on Misconduct Arbitrations* (Clause 58) prioritizes the existing in-house procedure as the measure of procedural fairness. This means that employers will be bound to comply with their existing disciplinary procedures until they redraft and simplify the procedures to accord to those suggested by the new Code.

5. Dismissals and industrial action

5.1 Section 12(1)(c) of the new Code contains essentially the same criteria the existing Code has in section 6(1) for evaluating the seriousness of an unprotected strike as misconduct, as follows:

a. the seriousness of the contravention of this Act;
b. attempts made to comply with this Act; and
c. whether or not the strike was in response to unlawful, unfair or unreasonable conduct by the employer.

The only change is that "*unlawful, unfair or unreasonable conduct*" replaces *"unjustified conduct"* in the existing Code. It seems to us that any unlawful, unfair or unreasonable conduct would be unjustified, so why the need to use three words to take the place of one? And what is the difference between *unfair* and *unreasonable* conduct? We would favour retaining the simpler, less confusing, existing wording of *"unjustified conduct."*

5.2 Section 12(2) provides factors relevant to assessing the seriousness of the contravention of the Act ((a) above), as follows:

a. *the conduct of the parties to the dispute related to the strike and the conduct by any other person that has a bearing on the seriousness of the contravention;*
b. *the legitimacy of the strikers' demands*
c. *the duration and timing of the strike;*
d. *the harm caused by the strike.*

The inclusion of *"(b) the legitimacy of the striker's demands*" seems problematic, as it opens up a broader debate about a potentially unprotected but legitimate strike. The limited circumstances of an unprotected strike provoked by an employer are already catered for under sections 12(1)(c) and 12(2)(a).

5.3 Section 12(3) usefully sets out the procedure an employer should follow before dismissing employees for participating in an unprotected strike. This entails the sequence of engaging with the union or other employee representatives, issuing an ultimatum, and considering any (collective) representations made on behalf of employees, before taking the decision to dismiss. Section 12(3)(e) provides that employees should be allowed sufficient time to reflect on the ultimatum and respond. We suggest further guidance on the sufficiency of time allowed for reflection should be provided, for example by stating an ultimatum should normally allow sufficient time for employees to reflect overnight, provided that this may not be possible due to circumstances facing the employer.

Section 12(3)(f) provides that if employees comply with an ultimatum, it may not be fair to dismiss them for participating in an unprotected strike. This section should make provision for circumstances in which employees have complied with ultimatums but have repeatedly participated in unprotected strike action, to the extent that their dismissal may be justified on that basis.

6. Incapacity poor performance dismissal guidelines

6.1 Guidelines for a fair dismissal for poor performance are contained in 2 separate frameworks in sections 19 and 20 of the new Code, which have largely been adopted from the existing Code which also locates them in different places. This is cumbersome and confusing, as they could easily be combined as follows:

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

a. whether or not the employee failed to meet a performance standard; and
b. if the employee did not meet a required performance standard whether or not-

i. *the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;*
ii. *the employee was given a fair opportunity to meet the required performance standard by –*
    a. *being given appropriate evaluation, instruction, training, guidance or counselling; and*
    b. *after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily;*
iii. *the required performance standard was reasonably achievable; and*
iv. *dismissal was an appropriate sanction for not meeting the required performance standard.*

The above (b)(iii) is a new addition to the framework contained in the existing Code. It is not really necessary, as it is implied by (b)(ii). If the required performance standard was not reasonably achievable, then the employee would not have been given a fair opportunity to meet the required standard.

6.2 Whilst most poor performance dismissals involved a pattern of behaviour over a period of time, the new Code fails to recognise and provide guidance on situations in which a dismissal may be fair for a single act of poor performance, for example a senior employee making a very poor strategic decision that affects the future viability of an organisation.

6.3 Procedural fairness requirements for poor performance dismissals are reflected in section 19(2), which state the following:

> *19(2) Before dismissing, the employer should give the employee an opportunity to respond to the allegations of unsatisfactory performance.*

We don't think these guidelines are sufficient. Firstly, there is no mention of the employee being assisted by a trade union representative or fellow employee, which is provided for in both ill health / injury cases (section 21(3)) and misconduct cases (section 11(4)(c)). Secondly, the same factual disputes that arise in misconduct cases are equally likely to occur in poor performance cases, over many of the issues listed in the framework in 6.1 above. For example, over whether the employee was made aware of a performance standard, or whether the employee was given a fair opportunity to meet the required standard, and so on. No guidance is provided for how an employer should deal with these situations.

Our comments in 4. above relating to misconduct cases, are equally applicable here. Where there are significant factual disputes, the best way to attempt to arrive at the truth of what might have happened is for witnesses to give their versions in front of each other, in a manner that they can be questioned on what they are saying. In other words, a hearing of some shape or form. The failure to provide for this will, in our view, again lead to many more cases being referred to arbitration.

6.4 Section 20(2) of the new Code makes the point that an employer may not be required to warn an employee that if their performance does not improve they might be dismissed, referring to managers and senior employees as examples. We suggest this section should be qualified by stating the norm that an employee <u>should</u> normally be warned that dismissal may follow if performance does not improve.

7. Incapacity ill health

7.1 The new Code contains useful frameworks for evaluating the key questions in deciding the fairness on dismissals for misconduct and poor performance, but omits such a framework in section 21 dealing with ill health/injury dismissals. The following framework does appear in the existing Code in section 11, and we suggest it should be included in the new Code:

> *Any person determining whether a dismissal arising from ill health or injury is unfair should consider-*
> *a. whether or not the employee is capable of performing the work; and*
> *b. if the employee is not capable-*
> *i. the extent to which the employee is able to perform the work;*
> *ii. the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and*
> *iii. the availability of any suitable alternative work.*

7.2 Section 21(6) does recognise that incapacity may be unrelated to ill health or injury, such as imprisonment. But it fails to note and provide guidance on the relatively frequent problem of a dismissal demanded by a third party that affects the capacity of an employee to do their job. For example, a client for various reasons refusing to have a contractor's employee on the premises, in circumstances in which the contractor has no other alternative employment to offer the employee.

7.3 Section 21(7) appropriately notes that 'incompatibility' may be a form of incapacity, but fails to provide any guidance on how these situations should be dealt with. Some of the learnings from case law could be used to provide guidance on these types of cases, for example *Zeda Car Leasing (Pty) Ltd t/a Avis Fleet v Van Dyk* - (2020) 29 LAC 1.11.26 also reported at [2020] 6 BLLR 549 (LAC)

8. Operational requirements

8.1 We support the inclusion of operational requirement dismissals into the new Code, which presumably will do away with the need for the existing separate *Dismissal for Operational Requirements Code*. But the new Code excludes important information contained in sections 5,6,7,8,10,11 and 12 of the existing Operational Requirements Code that should be included. For example, section 11 of the existing Code and section 41(4) of the BCEA provide that an employee who unreasonably refuses offers of alternative employment, is not entitled to severance pay. No mention is made of this in the new Code and it should be mentioned.

8.2 It is important that the new Code does not attempt to create greater rights than exist under the LRA. Section 189(2) of the LRA prescribes issues for consultation which are replicated in section 24(7) of the new Code. But section 24(7)(a) adds a further issue for consultation, namely the reasons why there is a need to retrench, which is not included in section 189(2) of the LRA. The reason why it was not included in section 189(2) was probably because by consulting meaningfully on appropriate measures to avoid retrenchments as required by section 189(2)(a)(i), the parties would inevitably have canvassed the reasons why there is a need to retrench. We suggest the issues for consultation described in the new Code should

be consistent with those described in the LRA.

8.3 Sections 24(1) and (2) and Annexure A provide the information to be provided in the written notice contemplating retrenchment that is given to employees and their representatives. It should contain a reference to section 189(3) of the LRA, which is where this information is derived from.

What's missing completely

1. **The overlap between incapacity and misconduct**

   Section 21(4) of the new Code appropriately raises drug abuse and alcoholism as examples of incapacity that may require counselling and rehabilitation. But no guidance is given for dealing with situations that may overlap between misconduct and incapacity, such as manifestations of drug or alcohol abuse during working hours by an employee who has an addiction. Guidance is needed in these areas, for example by stating that manifestations of incapacity in these instances can be treated as a form of misconduct.

2. **Protected strike dismissals**

   The Code provides no guidelines for the circumstances in which it may be fair to dismiss employees for operational requirements in the case of a protracted protected strike. This could be included as an additional clause under the operational requirements Part, cross referenced to section 12 on dismissals and industrial action.

Final comment

The Dismissal Code is intended to provide guidance for all parties on when and how a dismissal may be procedurally and substantively fair. This requires the Code to engage with some of the more complex areas of unfair dismissal, as decided by case law, and to provide guidance. It cannot avoid doing so and just ignore those complex situations. If we are going to the trouble of drafting a new code, then we need to use that opportunity to give clear guidance on all areas of unfair dismissal.

CASE LAW UPDATE

CONTENT **PAGE**

1. Misconduct:
1.1 Testing positive for cannabis
Enever v Barloworld Equipment (LAC) 13
1.2 Criminal records
O'Connor v Lexisnexis (LC) 16
1.3 False sick notes
Woolworths v CCMA & Others (LAC) 19
1.4 Counterclaiming damages
Mogale v National Health Laboratory Services (LC) 22
1.5 Charge sheets
Gauteng Dept of Ed. v GPSSC & Others (LAC) 24

2. Strike violence - common purpose
NUMSA obo Ramothibe & Others v CCMA (LC) 25

3. Evidence – trust breakdown
Algoa Bus Company v TASWU obo Mzawi LAC) 28

4. Retrenchment:
4.1 Fair & objective selection criteria
Umicore Catalyst v Numsa & Others (LAC) 30
4.2 Bumping
Fischer Tube Technik v Bayene (LAC) 32
4.4 When severance pay does not have to be paid
Khanya Cleaning v SATAWU & Others (LC) 34

5. Unfair labour practice: promotion disputes
Dept of Higher Ed & Training v Comm Bheki Smiza (LAC) 36

6. Unfair discrimination:
6.1 Affirmative action barriers
Solidarity obo Erasmus v Eskom (LC) 38
6.2 Proving pay discrimination
Prasa v Hoyo (LAC) 39
6.3 Accommodating religious beliefs
Sun International v Sayiti (LAC) 40
6.4 Retirement vs age discrimination
Landman & Solidarity cases (CC) 43
6.5 Compensation for not acting on grievances
Louw v Fourie N.O (HC) 46

7. Union acting outside its constitution
AFGRI Animal Feeds v Numsa & Others (CC) 48

8. Municipal official exceeding authority
Nzimande v Newcastle Municipality (LAC) 49

1. Misconduct cases

1.1 Testing positive for cannabis

***Enever v Barloworld Equipment South Africa, A Division of Barloworld South Africa (Pty) Ltd* (JA86/22) [2024] ZALAC 12 (23 April 2024)**

Principles:

(1) The use of a blood test alone, without proof of impairment, is a violation of an employee's dignity and privacy.
(2) A mere positive test for cannabis does not address the sobriety of the user or indicate whether they are impaired from carrying out their duties.

Facts:
The employee, a category analyst, challenged her dismissal in the Labour Court for regular cannabis use, arguing she had been unfairly discriminated against on arbitrary grounds.

The employer, Barloworld Equipment, has a 'zero-tolerance' approach in its Alcohol and Substance Abuse Policy to the possession and consumption of drugs and alcohol in the workplace. It applies random, voluntary and scheduled drug testing. When a test result is positive, the employee is sent home for a period of seven days, to be re-tested on returning to work. This process is repeated until the employee tests negative. Following a positive test, disciplinary action follows in line with the employer's zero-tolerance approach.

In April 2019 and in response to the Constitutional Court's decision in *Minister of Justice and Constitutional Development and Others v Prince* (CCT108/17) [2018] ZACC 30 (18 September 2018), the employer sent out a document titled "*Cannabis is strictly prohibited in the Workplace*". It stated that while cannabis use was decriminalised for adults in the privacy of their homes, the decision would not have any bearing on its zero-tolerance policy regarding the possession and use of cannabis, because the workplace was not a private space.

The employee suffered from severe migraines and anxiety. She was prescribed medication by her general practitioner, but this had side effects. Following the *Prince* judgment which decriminalised the private use of cannabis, the employee moved away from pharmaceutical pills to using cannabis oil and smoking cannabis as an alternative to achieve the same results. She smoked a cannabis cigarette (a "joint") every night and on weekends, along with daily use of cannabis-based products like cannabis oil.

The employee tested positive for cannabis on 29 January 2020. She was informed she was unfit to continue working and told to leave the premises. She was placed on a 7-day "cleaning up process", with the test to be repeated on a weekly basis until she was cleared by testing negative. She continued to test positive on 4 subsequent weekly occasions because she did not stop using cannabis.

The employee was charged with a breach of the employer's Alcohol and Substance Abuse Policy and required to attend a disciplinary hearing. She pleaded guilty to testing positive for cannabis but said she was never intoxicated or impaired at work, and reiterated her improved medical benefits from the cannabis use. It was not in

dispute that, at the time of undergoing the tests, she was not impaired in the performance of her duties or suspected of being intoxicated, that she worked in an office without operating dangerous machinery, and was not required to drive for the employer or perform any duty where impairment from cannabis would present a risk to her or others in the workplace.

The employee was dismissed, with the chairperson being of the view that a final written warning would not serve any purpose, as she had made it clear she would not stop using cannabis as it was her right to do so.

At the Labour Court the employee submitted that the employer's policies unfairly discriminated against her on arbitrary grounds and that her dismissal was automatically unfair. The LC found that all employees were treated in the same way under the Alcohol and Substance Policy, which the employee was aware of and which had been consistently applied. To have treated her differently would have created a dangerous precedent. The LC felt it did not matter that the employee was not impaired at the time of testing positive, and that she was obliged to comply with the employer's 'zero tolerance' policy which was justified by the employer's dangerous working environment.

The LC agreed that a final warning would have served no purpose, given the employee's refusal to stop using cannabis, and that her misconduct justified dismissal. The LC rejected the employee's claim that the employer's policy was discriminatory.

The Labour Appeal Court focussed on the employee's right to privacy which all employees have, and said an employer cannot disregard an employee's privacy when implementing or acting in terms of its policies. The employee had submitted that the discrimination she faced as a cannabis user seriously infringed on her dignity by violating her right to privacy and subjecting her to a humiliating process that portrayed her as a "junkie". The LAC said the effect of the employer's policies was that any employee who works for it cannot smoke cannabis *at all*, and the LAC affirmed "*overbroad, unwarranted and unjustifiable invasions of the right to privacy*" as being unconstitutional.

The LAC said the following [clause 38]:

> *"Within this context of the right to privacy, I can think of no more an irrelevant fact to the employer in this case than the Appellant enjoying a "joint" during her evenings in the privacy of her home. The use of a blood test alone without proof of impairment (our emphasis) on the work premises is a violation of the Appellant's dignity and privacy. This as the policy prevents her from engaging in conduct that is of no effect to her employer, yet her employer is able to force her to choose between her job and the exercise of her right to consume cannabis. The Respondent has not shown that she was "stoned" or intoxicated at work as a result, that her work was adversely affected or that she created an unsafe working environment for herself or fellow employees."*

The LAC commented that the outcome in this matter may have been different for an employee who was found to be "stoned," intoxicated or impaired during work hours or if it was an employee who works with heavy and dangerous machinery. The LAC recognised that a mere positive test for cannabis does not address the sobriety of the user or indicate whether they are impaired from carrying out their duties, and found

that the employee smoking cannabis at home cannot be considered, in the context of the facts of this case, to impair on her ability to perform her designated job. The LAC said there was no rational link between the employer's zero-tolerance policy against personal cannabis use by all its employees in the privacy of their homes and the maintenance of safety in its workplace.

The LAC emphasised that its judgment in this matter was "*fact specific*" and did not extend to employees performing drastically more dangerous jobs, and for whom not being able to smoke cannabis at all – should they wish to continue their employment – may be more justified.

The LAC concluded that the employer's policy was overbroad and infringed the employee's right to privacy. It found that her treatment as someone who was "intoxicated" when in fact she was not, was unfair discrimination because it singled out cannabis users compared to alcohol users, for what they do at home, even in situations where their conduct carries no risk for the employer.

The LAC overturned the LC judgment and found that the employee had been unfairly discriminated against, and that her dismissal was automatically unfair. The employee did not seek reinstatement and was awarded the maximum compensation of 24 months' remuneration, which amounted to R1,036,794.

Our comment: We cannot fault the Labour Appeal Court's recognition of the distinction between testing positive for cannabis and whether the employee in question may be 'under the influence' at the time, and we agree with its finding that the employee in the Barloworld case was unfairly discriminated against. But we do question 2 aspects of the judgment.

Firstly, is a request or an instruction to undergo a drug test, when there is no suspicion of impairment, really an invasion of that employee's privacy, in the context of the workplace and given the employer's legislated health and safety obligations? We question whether it was necessary to make that finding in coming to the conclusion that the employee in this case had been unfairly discriminated against. The Constitutional Court in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) commented (para 67) that "*privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly*."

Secondly, we don't understand why the LAC highlighted the distinction between the 'non-dangerous' work environment that the employee in this case had, and the potentially fair application of a zero-tolerance approach in cases of an employee in a dangerous work environment. We think the fact of the matter is that *any* employee testing positive in these circumstances may be fully capable of doing their work as normal, whatever that work entailed. Distinguishing between dangerous and non-dangerous work as the LAC appears to have done, could be problematic and not all types of work would fall neatly into one or other category.

Notwithstanding our concerns above, we think the outcome in this case will require employers to re-evaluate their substance policies. It will no longer be safe for employers to apply a 'zero-tolerance' approach in all cases, simply on the basis that an employee tests positive for cannabis. Employers will need to investigate whether an employee is 'under the influence', thereby justifying action being taken. Strangely

enough the Labour Court in this case, despite its conclusions, called for a *"scientifically validated test to assess if an employee is stoned at work and thus liable for disciplinary action"*. Until such a test is available, employers are going to have to use other factors to assess whether an employee's normal functions are impaired. The following physical, cognitive, and behavioural signs of a person being under the influence of cannabis are suggested in an article by John Botha of Global Business Solutions (*https://globalretailoutlet.co.za/blog/author/evidence-of-impairment-cannabis*)**:**:

Physical signs: bloodshot eyes, drowsiness or fatigue, lack of coordination or balance issues, delayed reaction times, increased appetite, dry mouth, and rapid heart rate.

Cognitive signs: difficulty concentrating, confusion, impaired memory, an altered sense of time, and slowed or nonsensical speech.

Behavioural signs: sudden mood changes (such as giddiness, anxiety, or paranoia), withdrawn or avoidant demeanour, inappropriate laughter or giddiness, decreased inhibitions, and unusual clumsiness.

Positive test results should be evaluated alongside observed signs of impairment to determine, on a balance of probabilities, whether an employee has contravened substance policies.

1.2 Criminal records

O'Connor v Lexisnexis (Pty) Ltd (P18/24) [2024] ZALCPE 11 (11 April 2024)

Principles:

(1) An expunged criminal record, in terms of section 271B of the Criminal Procedure Act, means that it would not be regarded as a previous conviction when sentencing criminals convicted of later offences. An expunged criminal record would represent something less than a "clear" criminal check, which means someone without any criminal history at all.
(2) Excluding an applicant from employment on the basis of a criminal history would constitute unfair discrimination on an arbitrary ground, if that criminal history is not relevant to the requirements of the job.

Facts:
LexisNexis, the well-known legal publisher, advertised a position of "*Senior Data Discovery and Enrichment Expert I*" in its taxonomy team in December 2023, which entailed organising and classifying information published in its various legal products. The applicant in this case (who we shall refer to as "the employee") applied for the position, and was told that his interview had been positive and that the employer required further information to continue processing his application. This included him filling out a "*RefCheck Consent and Indemnity Form*". In filling out this form, he responded "*yes*" when asked if he had ever been criminally charged, and in response to the section "*If yes, details of charge / conviction*", he entered "*For theft in 2001 which has been expunged…*". He provided fingerprints for a criminal background check to be conducted.

On 29 January 2024, the employer sent the employee an email containing an offer of employment effective 15 February 2024, on a 9-month contract until 31 October 2024. The position was an entirely remote position in which the employee would do all his

work from home. The email stated - "*This offer of employment is subject to RefCheck verifying all your credentials as valid, criminal checks being clear and a positive reference from a previous employer.*" The employee accepted the offer on the same day, and on 30 January 2024 the employer emailed him a contract of employment, which was signed electronically by both parties that same day. He was subsequently given access to the employer's "*work day schedule portal*" through which he would receive his daily work schedule.

On 6 February 2024, the employee received an email from the employer stating that it was "*retracting*" the "*conditional offer*" of employment because the criminal check had revealed six counts of theft, one count of fraud, and two counts of defeating the course of justice. He responded by explaining that these convictions took place 20 years ago and that his criminal record had in fact been expunged. He concluded by saying "*I plead with you [to] allow me the opportunity to explain*", but there was never any response from the employer.

The employee then referred a dispute to the CCMA. When conciliation was unsuccessful (the employer did not attend), the employee launched an urgent application in the Labour Court to compel the employer to honour its employment offer.

The employee claimed that the parties concluded a valid contract of employment and that the employer's conduct constituted an automatically unfair dismissal on the arbitrary ground of past criminal convictions under s187(1)(f) of the LRA, alternatively that he had been unfairly dismissed under s188. The employee also claimed that the employer unfairly discriminated against him on the arbitrary ground of past criminal convictions under s6 of the EEA, by retracting its employment offer.

The employee had brought his application on an urgent basis in the Labour Court, and accordingly had to justify the urgency of the matter. The Court said the test for urgency consists of two legs. **The first leg** requires a court to assess whether an urgent hearing is necessary because an applicant will not be able to obtain substantial redress in the normal course (ie using the normal dispute channels for relief). **The second leg** requires the court to assess whether it would be in the interests of justice to consider other factors that might nonetheless preclude an urgent hearing.

Applying the above test, the Court decided it was not prepared to hear the employee's unfair dismissal claim, as the unfair dismissal statutory remedy provided in the LRA is "*ex post facto*" (ie after the event) in nature, and he would be able to claim this remedy in due course. However the Court was prepared to hear the employee's application urgently in respect of his claim for specific performance (in compelling the employer to honour its employment offer) and in respect of his claim for unfair discrimination, due to his personal circumstances and the fact that a later remedy would not afford the same relief.

Immediately after signing his employment contract with Lexisnexis, he resigned from his previous employment and closed down his consulting practice. He also spent money upgrading his computer equipment, improving his internet speed, and setting up an uninterrupted power supply. If urgent relief was not granted, he would have no means to pay his rent, which would result in he and his family being left homeless, and without the ability to pay for his elderly mother's cancer treatment.

Having regard to the employee's **specific performance claim** (that the employer must honour its offer of employment), the Court said the employer was entitled to contractually revoke the offer of employment, on account of the employee failing to comply with the required condition of a "clear" criminal check. Whilst it was accepted that the employee's criminal record had been "expunged", all this meant in terms of section 271B of the Criminal Procedure Act was that it would not be regarded as a previous conviction when sentencing criminals convicted of later offences. The employer was entitled to regard an expunged criminal record as something less than a "clear" criminal check: a clear criminal check in this instance would mean someone without any criminal history at all. On that basis, the employee's specific performance claim was denied.

Having regard to the employee's **unfair discrimination claim**, the Court referred to the *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices*, which states in paragraph 7.3.32 that –

> "*An employer should only conduct integrity checks, such as ……. investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job."*

Further paragraph 17.3.6 of the Code states –

> "*An employer may not collect personal data regarding an employee's ……criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision."*

The Court said these provisions strongly suggest that excluding an applicant from employment on the basis of a criminal history would constitute unfair discrimination in circumstances where that criminal history is irrelevant to the requirements of the job. Such an exclusion would be arbitrary, because the decision would be without rational justification.

The Court recognised that the employee, having been convicted of a crime, had an inherent attribute that is intimately connected to how he is perceived by society, and that our criminal justice system is premised on the idea that once the criminal has paid their debt to society, that person must be allowed back into society. To deny that person their right to freely participate in society with dignity, is to deny them their Constitutional rights as a person.

The Court said that whilst previous convictions such as fraud or theft might preclude an applicant from taking up positions that require trust and honesty, the employer in this case had led no evidence that the position of Senior Data Discovery and Enrichment Expert I required any significant amount of trust and honesty, and certainly not so much that the possibility of the employee's rehabilitation after more than 20 years, should be completely disregarded. In this position he would conduct his work over the internet using his own resources from his home in Komani (previously Queenstown), whereas the employer's main offices are in Durban. The Court commented that "*it stretches credulity to imagine that the applicant will sit at home and maliciously miscategorise legal information for his own benefit*."

The Court therefore found that the employee's criminal history was not relevant to the position he had applied for, and that he had been unfairly discriminated against under

s6 of the EEA. The Court ordered the employer to employ him on a 9-month contract as a Senior Data Discovery and Enrichment Expert I within 10 court days of the date of its judgment, on the terms and condition set out in the written contract of employment concluded between the parties.

This judgment, in highlighting (probably a little known) Code of Good Practice, makes it clear that a blanket prohibition on employing anyone with a criminal record could well be regarded as unfair discrimination. Employers will have to lead evidence that the existence of the particular criminal record in question would be relevant to the position under consideration, and each case would have to be assessed on its own merits.

1.3 False sick notes

Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JA90/22) [2024] ZALAC 29 (13 June 2024)

Principles:

It cannot be that a qualified doctor who dabbles into some or other illegal activity of selling medical certificates is assumed to be disqualified from examining people and book them off sick untainted by the issues of illegally selling medical certificates.

Facts:
The employee, a store specialist at Woolworths, submitted a medical certificate in June 2018 from a doctor that a 'sister' store had warned the Company was issuing suspicious certificates. When her employee file was checked, the Company discovered another medical certificate from the same doctor in March 2016. When questioned about this, the employee claimed the certificates were not from the same doctor.

This led to a suspicion that those medical certificates might be irregular, as on the face of them they were issued by the same doctor. Both certificates had the same letterhead and appeared to have the same signature. As a result, an investigation was conducted which the Company believed confirmed its suspicion that the doctor was selling medical certificates. It was discovered that the doctor, a male, had two surgeries. The employee in March 2016 visited one of them and was attended to by a female nursing assistant who issued her with a medical certificate. The June 2018 certificate was issued by the male doctor.

Two Company managers visited the doctor's consulting rooms, which in their view did not look like a doctor's surgery. They observed people they concluded were negotiating the buying of medical certificates from the doctor's staff. People would go into the doctor's consultation room and would be out in less than a minute with medical certificates. But when they met with the doctor he confirmed he had seen the employee in June 2018 and had issued her a medical certificate. At the arbitration, one of the Company's witnesses testified that the doctor and the nursing assistant had been arrested for illegally operating a surgery, dispensing medicine and issuing illegal sick notes.

There was also a discrepancy between the Company's and employee's versions of who called the Company to advise that the employee was sick and would not be coming to work. This added to the Company's view that she was behaving dishonestly.

The employee was charged with misconduct, being in breach of company policies and procedures in submitting an irregular medical certificate to justify her absence from work. She was found guilty and dismissed.

The employee lodged an unfair dismissal dispute with the CCMA. The doctor gave evidence in the arbitration proceedings about his qualifications, experience and medical practice, and confirmed that his nursing assistant gave sick notes to patients, which he said was a common practice amongst doctors. He denied selling sick notes, and confirmed the employee had come to see him in June 2018 and he decided to give her 4 days' sick leave based on her condition at that time.

The arbitrator found there was no evidence to show the employee was not sick in March 2016 and June 2018 during the days on which she submitted medical certificates. Taking into account the employee had been dismissed for submitting an irregular medical certificate to justify her absence from work, he concluded that the medical certificates submitted by the employee were valid and regular, having been issued by a qualified and registered medical practitioner. They therefore complied with the Company's policies and procedures. On those bases, he found the employee's dismissal to be substantively unfair.

On review, the Labour Court concluded that the arbitrator's decision was not one that a reasonable decision maker could not reach, and that it was a reasonable decision which was justified by the evidence placed before him. The Company then took the matter on appeal to the Labour Appeal Court.

The LAC highlighted that the Company's appeal was largely based on its allegations of 'untoward happenings' at the doctor's medical practice, and said there was no evidence that the employee was not sick on the days she submitted medical certificates in March 2016 and June 2018. There was no evidence that the employee had knowingly obtained an irregular medical certificate to validate her absence from work. There was also no evidence to show she had tampered with a valid medical certificate by altering it or doing anything to change it from what the doctor intended to communicate to the Company.

The LAC said that to accept the Company's arguments, one would have to find that employees who may genuinely be sick and who may be totally unaware of any illegal activities being carried out by a doctor, should face disciplinary charges for visiting that doctor to obtain a medical certificate. The LAC commented as follows [clause 26]:

> *"……Put differently, a properly qualified doctor, even one whose conduct may be dubious in the manner in which they conducted their medical practice and issues sick notes to their patients, must result in all the employees who may genuinely be sick, who may not even be aware of the doctor's alleged unconventional methods and the alleged illegal issuing of sick notes, being subjected to a disciplinary process for using that doctor. This, on the appellant's approach, would be regardless of the employees' unawareness of the irregularities or illegal activities which may very well be taking place such as the selling of sick notes."*

The evidence of the doctor's qualifications and experience was not disputed. He was registered with the Health Professions Council of South Africa (HPCSA), the South African Medical and Dental Council and had a Dispensing Certificate issued by the

Health Science Academy. The LAC commented that an investigation into irregular conduct by doctors should include state entities such as the HPCSA and other regulatory bodies, after which employees could be warned about using that particular doctor once some valid grounds have been established.

For these reasons the LAC dismissed the Company's appeal.

The LAC's judgment highlights that even if a doctor may be involved in selling medical certificates, it does not mean that all certificates issued by that doctor are tainted. Misconduct allegations against an employee for misrepresenting sick leave claims must be substantiated by direct evidence of that employee's involvement in those irregular activities – it will not be sufficient to lead evidence generally about suspicions that the doctor in question may be involved in illegal activities.

Whilst we can't fault the overall logic of the LAC's decision, it does seem strange that the validity of the two medical certificates in this case were not interrogated more closely in relation to the requirements of section 23(2) of the Basic Conditions of Employment Act and rule 15 of the Medical and Dental Professions Board of the Health Professions Council of South Africa.

Section 23(2) of the BCEA recognises medical certificates signed by a medical practitioner "*or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament*." Whilst the March 2016 medical certificate was on a form pre-signed by the doctor, the doctor admitted in his evidence that the employee had been seen by his nursing assistant who had issued the medical certificate. Section 23(2) potentially opens the door to nurses "*certified to diagnose and treat patients"* and who are registered under the Nursing Act 33 of 2005, to issue medical certificates.

The South African Nursing Council (SANC), which is mandated in terms of the Nursing Act to regulate the Nursing and Midwifery professions by establishing and maintaining nursing education, training as well as practice standards, in a 2020 document signed by its CEO, declared that "*Professional Nurse Practitioners who possess an additional qualification in Clinical Nursing Science, Health Assessment, Treatment and Care and an additional qualification in Occupational Health Nursing are deemed competent to assess, diagnose, treat and issue sick notes to patients*."

There appears to have been no consideration by the court or any party in this case as to whether the nursing assistant who effectively issued the March 2016 certificate met these criteria? Whilst this does not prove in any way that the employee committed misconduct by submitting the certificate, there does seem considerable doubt whether it met the requirements of section 23(2) of the BCEA.

Rule 15 of the Medical and Dental Professions Board of the Health Professions Council of South Africa also provides specific requirements for what must be stated in medical certificates, and it does not appear from the judgment whether any consideration was given to these requirements in respect of the March 2016 or the June 2018 medical certificate.

It is also strange that there is one reference in the LAC judgment (clause 15) to the evidence of one witness who testified at the arbitration that the doctor in this case had been arrested for illegally operating a surgery, dispensing medicine and issuing illegal

sick notes, but there is no mention of formal complaints having been made against him to the HPCSA or the South African Medical and Dental Council. Given his evidence in this matter, we are surprised that the LAC did not make more mention of the need for this to happen.

1.4 Counterclaiming damages

Mogale and Another v National Health Laboratory Services (JS958/2019) [2024] ZALCJHB 362 (13 September 2024)

Principles:

In defending an unfair dismissal claim, an employer is entitled to counter-claim for damages it alleges it suffered as a result of the dismissed employee's negligence or breach of contract. The inquiry into whether the damages were caused by the breach, is a two-stage inquiry – first into factual causation and then into legal causation. The onus is on a plaintiff to prove the quantum of damages suffered.

Facts:

Case law is littered with examples of employers suffering significant damages as a result of employees' wrongdoing, and not being able to recover those losses. Section 34(1) of the BCEA effectively provides that an employer may not make any deduction from an employee's remuneration except when the employee agrees in writing, or unless permitted in terms of a law, a collective agreement, a court order or an arbitration award. There are further restrictions in section 34(2):

But can the employer counter-claim for damages resulting from wrongdoing, in the process of defending an unfair dismissal dispute? This is what happened in this case, with the employer suing the employee for R236 million for breach of contract.

The facts were that Ms Mogale was appointed as Chief Executive Officer (CEO) of the NHLS on a 5-year fixed term contract. Ms Mogale was suspended from her services at the NHLS, found guilty on various charges and was summarily dismissed. She subsequently referred an unfair dismissal dispute to the **CCMA** and, after conciliation failed, requested that the dispute proceed to arbitration.

Before arbitration could happen, the NHLS brought an application to the Director of the CCMA under section 191(6) of the LRA, consolidating two disputes and referring them to the Labour Court. The NHLS counter-claimed for damages of R236 million it said it suffered as a result of Ms Mogale's wrongdoing.

In the **Labour Court** the issues to be decided were:
(1) the procedural and substantive fairness of Ms Mogale's dismissal;
(2) whether she acted in breach of her contract of employment;
(3) and if so, whether the NHLS suffered the contractual damages claimed as a result of the alleged breach.

The Labour Court found the dismissal was fair. There was clear evidence that Ms Mogale had breached her contract of employment in several ways – dishonesty, a disregard of her obligation of due diligence, not complying with Board resolutions, failing to exercise any of the oversight and due diligence required of her position, not applying her mind to her contractual duties, placing the NHLS at great risk by signing

an open-ended contract, not applying her own mind and relying on what she was told without any process of independent verification, and concluding contracts without authority.

The court set out the following **principles for assessing and calculating damages**:

- The inquiry into whether the damages were caused by the breach is a two-stage inquiry – first into *factual* causation and then *legal* causation. Factual causation ('but for' causation) examines if the harm would not have occurred but for the employee's actions, while legal causation (proximate cause) assesses whether the harm was foreseeable and if the employee's actions were a substantial factor in causing it.

  [In this case the employee tried to blame others for the decisions she took, trying to shake the factual causation enquiry. But as CEO her fiduciary responsibilities did not allow her to base her decisions on what others told her. The court was clear that there was legal causation because the potential harm was foreseeable and yet the CEO still acted without checking her authority or the impact of the 3 major contracts she signed. As the court put it: she "abdicated her responsibility to exercise due diligence, which was her contractual obligation, which she was not entitled to abdicate or delegate. She followed her subordinates and she acted on what they told her, without any question whether they had considered the financial implications of the contracts or whether they were even qualified to do so."]

- The court must consider whether the damages claimed were proved. The onus is on the employer to prove the quantum of damages suffered: if they are not proved none will be awarded

  [In this case the NHLS' plea was that it suffered damages of R 236 million. But the court said that the damages suffered by the NHLS could not be calculated or awarded as it claimed. The damages could not simply be the entire value of the three contracts signed by the CEO. The court found that Ms Mogale was liable to pay the NHLS R 22 135 346.70 made up as follows: (a) The difference between what the Board approved and what Ms Mogale signed for, which was R 7 563 478.91; (b) The penalties levied due to Ms Mogale's signing the addendum to the contract containing the penalty clause, which amounted to R 14 571 867.82.]

- If the employee claims the employer obtained a benefit from her actions, that must be taken into account in quantifying the employer's damages. The benefit must be proved by the employee, unless admitted by the employer. Where the quantum of the benefit is uncertain the employer is required to assist the court in the quantification of the benefit and the extent to which the damages proved by the employer must be reduced.

  [In this case the NHLS conceded that the NHLS received value from the over-expenditure in the one contract - the NHLS did receive the items that were paid for and this benefit had to be deducted from the damages.]

The clearest lesson from this case is that the Labour Court is prepared to hold senior employees to account for a breach of their contracts. This is a sobering warning for those who accept appointment.

Another lesson is that employers, in defending an unfair dismissal case, can lodge a counter-claim for damages in the Labour Court. This possibility might give the dismissed employee pause for thought and may, where appropriate, be a basis for settling a dispute. Employers should however be aware that, despite a court order, they still have to take steps to recover the damages ordered by the court, the success of which may depend on whether the employee has the means to pay the damages awarded.

1.5 Charge sheets

Gauteng Department of Education v General Public Service Sectoral Bargaining Council and Others (JA141/2022) [2025] ZALAC 2 (22 January 2025)

Principles:

It is not necessary that an employee is given the precise and technical legal basis for a complaint of misconduct. Rather the employee must be informed in the appropriate manner of the allegation of misconduct, raised in sufficient detail to enable the employee to understand the complaint and answer to it.

Facts:
The employees were charged with misconduct at their workstations over a period of almost two years, relating to the appointment and payment of 'ghost' employees. One employee - who was later convicted criminally - used the other employees' Persal credentials (their user names and passwords) to perpetrate theft and fraud.

Following a disciplinary hearing the employees whose Persal credentials had been used, were found to have committed misconduct and were dismissed. They referred an unfair dismissal dispute to the **General Public Service Sectoral Bargaining Council**, challenging only the substantive fairness of their dismissals.

The arbitrator found that the employees were not charged "*in relation to the condition of their Persal credentials*" but with "*actual theft*", which was not proved; and that although the misconduct was said to have occurred at their workstations in Krugersdorp, it had been committed in Braamfontein, Johannesburg and Pretoria.

The arbitrator concluded that the evidence did not support a finding of fraud, and found their dismissals to be substantively unfair. The employees were reinstated retrospectively with backpay.

On review the **Labour Court** dismissed the employer's application on the basis that the employer's version was not probable, with the arbitrator found to have applied his mind to the facts, which did not prove that the employees were aware of or had participated in the fraud. The Court noted that although the employees' credentials were used to defraud the employer, no other evidence linked them to the commission of the offences. The employees were not charged with sharing their Persal credentials, there was no evidence that they had done so, and they did not know how their credentials had been obtained.

The Court therefore concluded that the arbitrator had reasonably found that the employees could not have been found guilty of the allegations against them.

On appeal the **Labour Appeal Court** confirmed that it is not necessary that an employee be given notice of the precise legal basis for a complaint of misconduct in a highly technical charge sheet. Rather, the employee must be informed in an

appropriate manner of the allegation of misconduct, raised in sufficient detail to enable the employee to understand the complaint and answer to it.

The LAC found that the arbitrator had taken an unduly narrow and technical approach to the charge sheet, finding that the employees "*were never charged in relation to the condition of their Persal credentials but were charged for actual theft*". Yet it had been apparent that the disciplinary complaint against the employees was that they had been involved in the fraudulent appointment and payment of 'ghost' employees through the use of their Persal credentials.

The LAC noted that the offences were committed over a two-year period, that the employees' Persal passwords were changed monthly, and that they were aware of the organisation's rules that they had to safeguard their passwords. The employees offered no explanation for how their changed passwords might have been used on an ongoing basis, and the LAC found that the probabilities supported the conclusion that the employees shared their passwords.

The LAC confirmed that a material error or irregularity by an arbitrator may have a "*distorting effect*" on the decision arrived at, to the extent that it may lead to an unreasonable result, in the sense that but for an error or irregularity, a different outcome would have resulted. Errors of fact or law may therefore not be enough to vitiate an award unless it is established that the arbitrator undertook the wrong enquiry, in the wrong manner or arrived at an unreasonable result.

In his approach to the arbitration, it was apparent to the LAC that the arbitrator committed a material misdirection in preferring certain aspects of the evidence over others, without having regard to whether such evidence was plausible or tenable and in the absence of a proper assessment of the probabilities. This had a clear distorting effect on the outcome at arbitration. It prevented a fair and proper determination of the issues from taking place and it caused the arbitrator to reach a conclusion which was one that a reasonable arbitrator on the material before them could not reach. It followed for these reasons that the award of the arbitrator fell to be set aside on review.

The LAC held that the Labour Court erred in its conclusion that the arbitrator's award was reasonable, and found the employees' dismissals to be substantively fair.

The judgment confirms that it is not necessary that an employee is given the precise and technical legal basis for a complaint of misconduct. It is enough that the employee is informed of the allegation of misconduct in sufficient detail to enable the employee to understand the complaint and answer to it. The judgment also gives guidance on the weighing of evidence in an arbitration.

2. Strike violence – common purpose

NUMSA obo Ramothibe and Others v Commission for Conciliation Mediation and Arbitration and Others (JR1655/22) [2024] ZALCJHB 300; [2024] 10 BLLR 1069 (LC) (5 August 2024).

Principle:

(1) To establish common purpose, evidence is required that individual employees associated themselves with the misconduct in some shape or form.

(2) Employers should look for creative opportunities to give employees the opportunity to be heard, before taking disciplinary action in cases where circumstances interfere with an employee's ability to be present.
(3) The purpose of back-pay is not to enrich an employee or punish an employer, but is intended to 'offset' the financial loss suffered by an employee as a result of a wrongful act.

Facts:
Employees at Universal Tissue embarked on a protected strike in February 2020, during which there were reports of violence, intimidation and harassment. This ultimately resulted in the dismissal of the 56 employees involved in this case. The employees were charged with a range of offences, including colluding with other striking employees in assaulting a staff member, intimidating and threatening the safety of non-strikers, threatening to burn down their homes, and barricading the company entrance gates. The company alleged that all of this brought the company's name into disrepute, caused financial loss and led to trust relationships with those employees breaking down irretrievably.

The employees attended their disciplinary hearing in a church hall, which was held during Covid times (but before any Covid Regulations had been issued), without face masks and without having sanitized. The chairperson ruled that the employees should leave the venue and observe the proceedings from the verandah, where they would be able to hear but not see what was happening. When the employees and their union refused to leave the church hall, the chairperson and the employer's representative left the venue and continued the hearing at the company's premises in the absence of the employees and their representative.

A CCMA arbitrator found the employees' dismissals to be procedurally and substantively fair. Regarding procedural fairness, the arbitrator found that the employees made the environment impractical to continue with the hearing, and by their own doing waived their right to be heard. Having regard to the reasons for their dismissal, the arbitrator found that the employees "*acted with complicity and invariably in collusion with each other,"* despite the video footage used in evidence not showing their direct involvement in the acts enumerated in the charges.

The award was taken on review to the Labour Court.

Regarding procedural fairness, the Labour Court was not persuaded by the employer's argument that the employees waived their right to be heard. The LC questioned whether it was reasonable for the chairperson to insist on the employees leaving the room, and when they refused, to then proceed in their absence while also excluding the union representative. The LC said the chairperson failed to consider alternatives to proceeding in their absence, such as offering them an opportunity to make written submissions, postponing the hearing to a larger venue that could accommodate Covid concerns, or continuing the hearing via a virtual platform. The Court said to simply proceed with the hearing in the employees' absence in the face of their clear intention to be present, unfairly deprived them of their right to be heard.

Regarding substantive fairness, the Labour Court criticised the arbitrator's finding that the employees associated themselves with the misconduct perpetrated by some individuals simply because they were all Numsa members, were singing strike songs and were all participating in the strike. The arbitrator in effect held that anyone participating in a protected strike can be dismissed for the transgressions committed

by another striking employee, on the basis of common purpose. The LC said this flies directly against the judgments of the Concourt in *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems* and the LAC in *South African Commercial Catering and Allied Workers Union and Others v Makgopela and Others.*

In *Marley Pipe Systems* the ConCourt said that to establish common purpose, evidence is required that the individual employees associated themselves with the violence, and that there is no obligation to dissociate oneself from acts of violence that one has not participated in – ie just being present 'at the scene of the crime' is not sufficient to establish common purpose, as confirmed in *Makgopela*.

In departing from this defective premise, the arbitrator committed a material error of law, which directly led him to the unreasonable decision that the employees acted in collusion and that their dismissals were substantively fair, even though none of them were identified as participating in or associating themselves with any of the transgressions.

The Labour Court overturned the arbitrator's award and ordered the employees' retrospective reinstatement, but limited their backpay to twelve months' remuneration on account of them having breached the picketing rules.

We think there are important learnings from this judgment. **Firstly**, the judgment drives home the point made by the ConCourt in *Marley Pipe Systems* that to establish common purpose, evidence is required that individual employees associated themselves with the violence in some shape or form.

Secondly, the judgment highlights that employers should look for creative opportunities to give employees the opportunity to be heard, before taking disciplinary action in cases where circumstances interfere with an employee's ability to be present. It may not be sufficient to simply default in a 'knee-jerk' manner to proceeding with the hearing in the absence of the employees involved, without considering possible alternatives.

And thirdly the Court, in discussing what back-pay should be awarded, highlighted its purpose. The Court commented that "*back-pay is not intended to enrich an employee, or to punish an employer, but is intended to 'offset' the financial loss suffered as a result of a wrongful act."* Taking into account its purpose should guide parties in deciding what factors to submit in arbitration to influence potential back-pay awards - eg whether dismissed employees claiming reinstatement have been employed in the interim. Remember also there is a distinction between back-pay and compensation, as recognised by the ConCourt in *Equity Aviation Services (Pty) Ltd v CCMA & others.* Section 194(1) of the LRA provides that compensation for unfair dismissal "*must be just and equitable in all the circumstances*", but may not be more than the equivalent of 12 months' remuneration.

3. Evidence – trust breakdown

Algoa Bus Company (Pty) Ltd v TASWU obo Mzawi and Others (PA05/23) [2024] ZALAC 42; [2024] 12 BLLR 1224 (LAC); (2025) 46 ILJ 89 (LAC) (10 September 2024)

Principle:
There is no obligation in law on an employer to lead evidence on the appropriateness or suitability of dismissal as a sanction for misconduct, as a necessary condition for any finding of unfair dismissal. An arbitrator making a decision on the appropriateness of dismissal as a sanction for misconduct must make a value judgment, taking into account all relevant facts and circumstances. A breakdown in trust or deterioration in the employment relationship may be inferred from the evidence regarding these facts and circumstances.

Facts:
The employee was a bus driver with the Algoa Bus Company with 6 years' service, who was dismissed on 17 March 2021 after being found guilty of reckless and negligent driving and causing an accident. She was involved in a serious collision with a minibus taxi after driving through a red traffic light at an intersection. She claimed the accident was not serious as nobody was injured, that the traffic light was amber and that the taxi caused the accident by going through a red light from her left, but video evidence and other witnesses confirmed it was red for her and the evidence showed she speeded up as she approached the intersection. The accident occurred in an area familiar to her and on a route that she frequently travelled.

The arbitrator concluded that the fact that the taxi also went through a red light did not exonerate her – she ought to have slowed down when the light turned amber. Had she had done so, the accident would not have occurred. As the arbitrator put it:

> *"This dispute is not about what the taxi did, it centres on the actions of the bus driver who hit another vehicle. In fact, one can conclude that both drivers acted irresponsibly. But it is the conduct of the applicant that I am dealing with and not the conduct of the taxi."*

The arbitrator noted that according to the video footage, there was ample distance to the intersection from the moment the traffic light turned amber for the employee to bring the bus to a stop. The footage however revealed that far from attempting to do so, the employee accelerated from that distance to where the accident occurred.

The employee also challenged the consistency of the employer's application of discipline, in that the disciplinary code provided for a final written warning for driving through a red traffic light, unless there were consequences, in which case the prescribed penalty was dismissal. The comparator employees to whom the employee referred had received final written warnings for driving through red traffic lights, but none had caused an accident. The employee's reliance on inconsistency was therefore dismissed.

The arbitrator found that the employee was not remorseful about her behavior but continued to conjure up elaborate reasons for her actions. Her insistence that she did not do anything wrong despite overwhelming evidence to the contrary gave an impression that she would most likely repeat this behaviour. The arbitrator concluded

that she was involved in gross misconduct, that a sanction of dismissal was appropriate and that her actions had undermined the required trust relationship.

When the matter was taken on review to the Labour Court, the Union argued that the taxi was ultimately responsible for the collision, and that the employee's position should have been evaluated in the same light as other employees who jumped red lights but didn't cause an accident, and she should just have received a final written warning.

The LC accepted the employer's version of the facts in this case, but found that the employer failed to lead evidence to sustain the allegation that dismissal was an appropriate sanction, which for example requires evidence that the trust relationship between the employer and employee had broken down. The LC stated the following [clause 17]:

> *"It is difficult to fathom how a dismissal is substantively fair in a matter where no evidence, showing that the employment relationship has been rendered intolerable, was led."*

While the LC accepted that there are certain acts of misconduct of a more serious nature such as gross dishonesty and assault which would not require evidence about the effect of the misconduct on the employment relationship to justify dismissal, the Court was not satisfied that the employee's misconduct in this case fell within that category.

For the above reasons the LC found the dismissal to be unfair and ordered the employee's reinstatement retrospective to the date of dismissal. The employer then took this decision on appeal to the Labour Appeal Court.

The LAC found that the LC erred and incorrectly decided that the award should be set aside on account of the employer's failure to lead evidence at arbitration about the suitability of dismissal as a sanction. The LAC disputed the LC's view that the employer had led no evidence on these issues. Witnesses had testified that the incident was serious, that the employee had deliberately accelerated rather than applying her brakes, and the potential consequences of her misconduct were serious, if not fatal. It was clear from the award that the arbitrator had regard to the seriousness of the employee's misconduct, its actual and potential consequences and importantly, the employee's untruthful denial of any misconduct.

The LAC commented on the employee's conduct at the arbitration, where she showed no remorse for her conduct and instead dishonestly persisted with the false version that she had crossed the intersection on an amber traffic light. The LAC said the acknowledgement of wrongdoing is the first step towards rehabilitation, whereas in this case the employee refused to take even that first step, and the arbitrator's assessment of the evidence regarding the appropriateness of dismissal as a sanction could not be faulted.

The LAC had this to say about the LC's view that the arbitrator had committed a reviewable irregularity by upholding the employee's dismissal, without specific evidence about a breakdown of trust in the employment relationship [clause 17]:

> *"In sum: contrary to what the Labour Court held, there is no obligation in law on an employer to adduce evidence on the appropriateness or suitability of dismissal as a sanction for misconduct, as a necessary condition for any finding of unfair dismissal. An arbitrator making a decision on the appropriateness of dismissal as a sanction for misconduct must make a value judgment, taking into account all relevant facts and circumstances. A breakdown in trust or deterioration in the employment relationship may be inferred from the evidence regarding these facts and circumstances."*

The LAC set aside the LC judgment, confirming the fairness of the employee's dismissal.

We think the above extract from clause 17 of the LAC judgment correctly sums up the correct legal position. What this is effectively saying is that leading evidence about the nature and extent of an employee's misconduct and the surrounding circumstances, will inevitably provide the basis for a finding on the fairness of a dismissal, where this is justified. It is not necessary to 'top this up' with additional evidence with specific reference to a breakdown in the trust relationship, which can be inferred from the totality of evidence.

4. Retrenchment

4.1 Fair & objective selection criteria

***Umicore Catalyst South Africa (Pty) Ltd v National Union of Metalworkers of South Africa and Others* (PA3/23) [2024] ZALAC 37 (29 August 2024)**

Principles:

An employer who does not use agreed selection criteria to select the employees to be dismissed may not depart from 'fair and objective' selection criteria. To do so would render the dismissals substantively unfair. Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Whilst generally the test for fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO), there may be instances where the LIFO principle or other criteria need to be adapted. Exceptions may also include "*the retention of employees based on criteria which are fundamental to the successful operation of the business,*" although these exceptions should be treated with caution.

Facts:

Umicore, a manufacturer of catalytic converters, acquired the business of Delphi (Pty) Ltd as part of a global acquisition. It operated from premises in Gqeberha leased by Delphi as well as at its own premises. Umicore subsequently restructured and relocated the Delphi operations to its own premises, which resulted in a duplication of functions that affected 52 positions.

Umicore embarked upon a lengthy pre-retrenchment process in accordance with s 189A of the LRA, which included various meetings facilitated by a CCMA commissioner. The 52 employees that were retrenched worked in various departments. In the case of laboratory employees, Umicore departed from the 'last in, first out' (LIFO) selection criteria that it adopted in other departments, and introduced what was termed a 'laboratory assessment'. A panel comprising the laboratory

manager and two senior managers from other departments was appointed to conduct behavioural assessments.

Laboratory employees were invited to participate in the assessments, but the four employees who challenged the fairness of their retrenchment before the Labour Court refused to do so. The panel conducted the assessment in their absence and, based on the outcome, included them in the employees to be retrenched. For the employees who refused to complete the assessment, management's evidence was that the panel "*had to use as best as possible our knowledge or prior knowledge, our experience, based on what we observed about each incumbent … and put in our answer down for the incumbents …*"

CEPPWAWU, who represented the employees at the time, objected to the assessment during the consultation process. In response, Umicore decided to include three additional considerations in the form of individual performance appraisals, disciplinary records, and attendance records for the previous two years, each to be afforded the same weight as the results of the assessment. Ultimately, however, there was no agreement on selection criteria and Umicore proceeded with the assessments unilaterally.

NUMSA, who represented the employees in the court proceedings, accepted that the relocation of operations resulted in a duplication of functions and presented a fair economic rationale for retrenchments, but complained that Umicore had acted opportunistically by deliberately selecting employees who had historically earned higher salaries for retrenchment, which Umicore denied. NUMSA also contended that the assessments were unfair, based on their subjectivity and because they were linked to Umicore's ulterior motive.

Umicore's justification for using the assessments was that the employees to be retained would be required to work independently and, on occasion, without supervision. The behavioural assessment questionnaire afforded employees the opportunity to highlight aspects that might enhance their prospects of retention, and had posed the questions covering the importance of (1) a strong analytical mind in the laboratory; (2) multi-tasking/coordination of own work; (3) good communication skills and handling 'difficult' colleagues; (4) initiative / innovation; (5) enthusiasm and determination to achieve objectives; and (6) attendance and unexpected absences.

The **Labour Court** found the dismissals to be substantively unfair and ordered the reinstatement of the employees. On appeal the **Labour Appeal Court** held that Umicore failed to prove that the employees were selected based on "fair and objective criteria" as required by section 189(7) of the LRA, and refused the employer's appeal. The LAC referred to para 9 of the *Code of Good Practice: Dismissals based on Operational Requirements*, which provides that selection criteria that are generally accepted to be fair include **length of service**, **skills** and **qualifications**. Whilst generally the test for fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO) principle, there may be instances where the LIFO principle or other criteria need to be adapted. Exceptions may also include "*the retention of employees based on criteria which are fundamental to the successful operation of the business,*" although these exceptions should be treated with caution.

The LAC highlighted when selection criteria become unfair and subjective, and its views can be summarised as follows:

- While the inclusion of individual performance appraisals, disciplinary records and attendance records for the previous two years may constitute fair and objective components of the chosen selection criteria, past appraisals should however be checked with on-the-job evaluation.
- While 'skills' may be an appropriate way to determine which employees are to be retrenched, the fairness of this method of selection is influenced by how it is implemented. There is a difference between grading employees based on the opinion of their superiors and an objective assessment based on observations of their actual performance.
- Personality characteristics, including initiative, enthusiasm and determination, are inherently subjective considerations and, without agreement, ought not be included.
- In questionnaires, questions must be crafted to avoid ambiguity. The ability to explain the importance of certain skills is not a substitute for assessing employees for their competence in performing that work.

We recognise an employer's interests in retaining the best employees to ensure the long-term survival of its business. LIFO is a blunt criterion using only one dimension of employment - length of service - to decide who should remain. Whilst this judgment opens to door to alternatives to LIFO such as skills, qualifications or other criteria which may be fundamental to the successful operation of the business, they must be shown to be 'fair and objective'. The LAC's judgment is firm on what are subjective elements, and that an employer may not address poor performance through retrenchment (see also *King v Doughlasdale Dairy (Pty) Ltd (LC Case No: JS69/07)*).

4.2 Bumping

Fischer Tube Technik SA v Bayene and Another (JA100/23) [2024] ZALAC 25 (21 May 2024)

Principles:

1. Bumping forms an integral part of applying LIFO in retrenchment. An employer applying LIFO must raise and discuss the question of bumping with parties during the consultation process. In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically within a defined selection pool. Ultimately, any requirement to bump is a matter of fairness to the employer, the employee selected for retrenchment and the displaced employee.

2. Bumping can take 2 forms. **Horizontal bumping** occurs when a redundant employee displaces another employee with shorter service at a similar level. **Vertical bumping** occurs when a redundant employee replaces another employee with shorter service in a lower position within the organisation. Horizontal bumping assumes similar status, conditions of service and pay, while vertical bumping assumes a diminution in status, conditions of service and pay.

Facts:
The employer operates in the motor industry and manufactures steel tubing including exhaust pipes. The two employees in this case were welders. In 2016 a client closed its South African operations, which meant that the specialised welding they performed

was no longer required, and they were issued with retrenchment consultation notices under section 189(3) of the LRA. They were represented by Numsa during the consultation process.

The employer advised Numsa it was willing to accept LIFO and bumping in respect of lower positions (with lower pay) in the cutting and calibration departments, as retrenchment criteria. The union agreed subject to the employees being bumped keeping their current salary levels. The employer did not agree to this, as it would mean they would be earning a higher salary than other employees in that department at the same level, and the employer also said it could not afford the higher salaries. When the union did not accept this, the employees were retrenched.

The **Labour Court** accepted there was a commercial rationale for the need to retrench but found the retrenchments to be substantively unfair. The Court made reference to the concepts of vertical and horizontal bumping, describing horizontal bumping as a transfer to "*a position of similar status, conditions of employment and remuneration*", whereas vertical bumping contemplated a transfer to a position "*with less favourable status, conditions of employment and remuneration*". The Court said no persuasive evidence had been led by the employer that horizontal bumping was not a viable option, and awarded the employees compensation equivalent to ten months' salary each.

On appeal the **Labour Appeal Court** said bumping forms an integral part of the application of LIFO in retrenchment. While there is no absolute obligation on an employer applying LIFO to bump, it is a matter that ought properly to be canvassed during the consultation process when LIFO is agreed. The LAC said the following [clause 17]:

> "*an employer applying LIFO must raise and discuss the question of bumping with consulting parties during the consultation process. In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically, within the selection pool that it has defined. Ultimately, any requirement to bump is a matter of fairness, both to the employer (who faces the disruptive consequences of bumping), the employee selected for retrenchment (whose job security is at risk in the absence of bumping) and the displaced employee (whose job security is equally prejudiced on account of the application of bumping).*"

The LAC said the Labour Court erred in finding the employer failed to lead persuasive evidence as to why horizontal bumping was not a viable option, and the fact that the employees rejected the employer's vertical bumping option accompanied by lower pay levels, did not necessarily mean their subsequent retrenchment was unfair. Whilst the employees were entitled to decline the vertical bumping proposal, vertical bumping is inevitably accompanied by a diminution in salary. The LAC found that the employer had led evidence that it had considered horizontal bumping, but there were no positions on a horizontal level in which the employees could be accommodated.

The LAC concluded that it was not unfair for the employer to refuse to agree to Numsa's demand that the employees retained their higher wages in the transferred positions, and their ultimate retrenchment was not unfair. The LAC granted the employer's appeal against the Labour Court judgment.

We think the following key learnings can be drawn from this LAC judgment, which clearly highlights the distinction between horizontal and vertical bumping:

- Bumping forms an integral part of applying LIFO in retrenchment. An employer applying LIFO must raise and discuss the question of bumping with parties during the consultation process.
- Horizontal bumping assumes similar status, conditions of service and pay, while vertical bumping assumes a diminution in status, conditions of service and pay.
- The fact that the employees may reject an employer's vertical bumping proposal accompanied by lower pay levels, did not necessarily mean their subsequent retrenchment may be unfair.
- In the absence of any agreement on the issue, the employer must be in a position to justify its decision not to bump, or to bump either horizontally or vertically within a defined selection pool. Ultimately, any requirement to bump is a matter of fairness to the employer, the employee selected for retrenchment and the displaced employee.

4.3 When severance pay does not have to be paid

Khanya Cleaning Group (Pty) Ltd v South African Transport & Allied Workers Union and Others (PR32/2023) [2024] ZALCPE 39 (2 October 2024)

Principle:

(1) It is not essential for the retrenching employer to negotiate with a new company to employ the redundant employees, for the retrenching employer to escape liability for severance pay under section 41(4) of the BCEA. One has to have regard to all the facts of the case in deciding this. The emphasis should be on whether there has not only been collaboration between the retrenching and acquiring employer, but also whether the retrenching employer has moved with urgency to assist the acquiring employer with whatever information it requires to offer alternative employment to the employees being retrenched.

(2) The purpose of severance pay is to cushion an employee from the loss of employment, and the purpose of section 41(4) of the BCEA is to incentivise employers to ensure that their employees secure alternative employment.

Facts:

An employee on being retrenched is entitled to severance pay at least equal to one week's remuneration for each year of completed service, in terms of section 41(2) of the Basic Conditions of Employment Act. But this right is qualified by section 41(4) that states the following:

> *An employee who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2).*

In this case the employer, Khanya Cleaning, claimed that it had arranged alternative employment for its retrenched employees, and therefore they were not entitled to severance pay under section 41(4). This was disputed by the employees, and the dispute was ultimately referred to the Labour Court for determination.

Khanya Cleaning, is a contract cleaning services company that rendered services to a tyre fabrication factory in Kariega. When this contract came to an end and was not renewed, it initiated a section 189 retrenchment process as the employees previously working on that contract became redundant.

The employer claimed its supervisor liaised between its affected employees and Supercare, the new cleaning company awarded the contract at the tyre factory, with the purpose of Supercare offering alternative employment to affected employees. Khanya's managing director met with the regional manager of Supercare to discuss the possibility of Supercare employing these employees, and Khanya shared their contact details with Supercare. Khanya arranged a venue for interviews to be conducted by Supercare, gave the employees paid time-off to attend interviews, circularised Supercare employment application forms and correlated their responses on those forms.

30 employees were offered and took up alternative employment with Supercare, and there was no gap between their employment with Khanya ending and them starting with Supercare. Khanya was able to absorb a further 130 of its employees in different positions and locations within its own group, and an additional 11 employees were retrenched and paid severance pay. The 30 employees who were employed by Supercare were not paid severance pay, and referred a dispute over this to the CCMA. They claimed that Khanya was not instrumental in securing them employment at Supercare, and played "*no more than a minor administrative role*" in Supercare employing them. They also claimed notice pay under the BCEA from Khanya.

At the CCMA the arbitrator ruled that the employees were entitled to severance pay because they had secured for themselves the alternative employment with Supercare. He also found that the employees were entitled to notice pay *in lieu* of a termination notice, in terms of section 38 to the BCEA. The arbitrator highlighted that, unlike the facts in *Irvin & Johnson,* where the (outgoing) employer had negotiated with the new company that it would employ all the affected employees, this had not happened in this case. Using the authority of *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO and Others* (P301/08) [2009] ZALC 165; [2010] 3 BLLR 260 (LC) (4 December 2009), the arbitrator said that the mere fact that the interviews were conducted during Khanya employees' working time cannot be equated with an offer of alternative employment.

The employer took the arbitrator's award on review to the **Labour Court**. Whilst recognising that the (outgoing) employer in *Irvin & Johnson Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 935 (LAC) had negotiated with the new company that it would employ all the affected employees, the Labour Court found that this was not an essential feature for an employer to be entitled not to pay severance pay under section 41(4). One had to have regard to a range of facts. The LC said the CCMA commissioner had misconstrued *Irvin & Johnson* as requiring, to a point of principle, that in order for an employer not to pay severance pay, that it had to negotiate a special term with another employer to offer alternative employment to its retrenched employees.

The LC noted the extent of the collaboration between Khanya and Supercare, and that Khanya had moved with some urgency to provide Supercare with whatever information it required in order to offer alternative employment to Khanya's redundant employees. The LC commented that Khanya "*did not just sit on their hands and*

impassively watch the world go by: They assisted the acquiring employer who offered their retrenched employees' alternative employment."

The LC accepted that the purpose of severance pay is to cushion an employee from the loss of employment, whilst in this case the employees were at no stage unemployed, and that the purpose of section 41(4) is to incentivise employers to ensure that their employees secure alternative employment. The LC agreed with the notion that an employee should not be able to obtain both alternative employment and severance pay, which was the effect of the arbitration award.

The LC overturned the arbitrator's award and found that the affected employees were not entitled to severance pay or notice pay.

Having regard to the employee's **notice pay claim**, we agree with the outcome that the affected employees, after agreeing to no break between the ending of their employment with Khanya and the commencement of their employment with Supercare, should not be entitled to notice pay. But we question some of the LC's reasoning in coming to that conclusion. The LC commented that, having notified employees in terms of section 189(3) of the LRA, it would amount to a "*double notice of termination*" if the employer was also required to give employees notice in terms of section 37(1) of the BCEA.

This reasoning in our view fails to understand the distinct purposes of notice under sections 189(3) of the LRA and 37(1) of the BCEA. Section 189(3) requires a notice to consult on a range of topics in advance of a possible retrenchment that may or may not take place - in this case 130 employees who presumably received the section 189(3) notice were not subsequently retrenched and were re-absorbed elsewhere into the employer's business. Section 37(1) of the BCEA on the other hand, serves to give the employee formal notification that his/her employment is being terminated from a specified date.

This judgment makes it clear the LAC judgment in *Irvin & Johnson v CCMA* did not say, as a matter of principle, that the (outgoing) employer had to negotiate an agreement with the new company to employ the affected employees, in order for that employer to escape liability for severance pay under section 41(4) of the BCEA. Whether or not section 41(4) applies, will depend on all the facts of each case in deciding whether the outgoing employer has done enough to be seen to have 'arranged' alternative employment for the affected employees with another employer.

5.Unfair labour practice – promotion disputes

Department of Higher Education and Training v Commissioner Bheki Smiza and Others (JA53/2022) [2024] ZALAC 5 (22 February 2024)

Principle:

To succeed in an unfair labour dispute concerning promotion, the employer must be shown to have acted in bad faith, with ulterior motive, arbitrarily, capriciously or in a manner which was grossly unreasonable in relation to the employee applying for the promotion.

Facts:

In September 2016 the Department of Higher Education and Training advertised a vacancy for the post of Deputy Principal: Corporate Services in Tshwane North. An extensive number of applications were received for the post, including that of the applicant employee.

Given the number of applications received and in order to reduce the number of candidates to be interviewed, the selection committee introduced an additional selection criterion related to additional years of relevant work experience required beyond the five-year period advertised. It was common cause at arbitration that the employer's selection policy permitted the committee to introduce such an additional selection criterion. The applicant was not shortlisted, given that he lacked the years of experience required by this additional criterion, and he was not shortlisted or interviewed for the post.

Aggrieved, he referred an unfair labour practice dispute to the **General Public Service Sectoral Bargaining Council (GPSSBC)**. At arbitration, the employee contended that he had been treated unfairly in not being shortlisted for the post although a less qualified employee with fewer years' experience than him, was shortlisted and interviewed. This candidate was not unsuccessful in his application and was not promoted to the post. The arbitrator found that, in not shortlisting and interviewing the applicant employee, the employer had committed an unfair labour practice against him and the employer was ordered to pay him eight months' compensation.

Dissatisfied with the award, the employer sought a review by the **Labour Court**. The Court dismissed the review application on the basis that the arbitrator's decision was a reasonable one; and that an unfair labour practice in terms of section 186(2)(a) of the LRA had been committed by the employer when it failed to shortlist the employee.

On appeal the **Labour Appeal Court** confirmed that -

- an employer is required to act lawfully and adhere to the objective standards of fairness and the criteria that it has set for promotion, including its own policies, in order to ensure that an eligible employee is provided with a fair opportunity to compete for the post;
- conduct that does not allow an employee such a fair opportunity will usually be found to constitute an unfair labour practice; and
- the evaluation of the suitability of a candidate for promotion is required to be assessed fairly, rather than mechanically, with a justifiable element of subjectivity or discretion reserved for the employer.

The LAC held that the evidence before the arbitrator did not show that the employer had committed an unfair act or omission or engaged in unfair conduct in relation to the employee in the context of a promotion. Neither the shortlisting process nor the decision taken not to interview the employee was unfair. There was no dispute that the selection committee was entitled to impose the additional criterion, which it did to limit the number of applicants shortlisted and interviewed, and there was nothing irrational or unfair in the additional criterion imposed. There was also no dispute that the employee lacked the years of experience required by the selection committee in terms of its additional criterion imposed. Even if there was an erroneous shortlisting of another applicant who was not appointed to the post, this was not sufficient to prove unfairness on the part of the employer against the employee.

The employer was therefore not shown to have acted in bad faith, with ulterior motive, arbitrarily, capriciously or in a manner which was grossly unreasonable in relation to the employee in undertaking the promotion.

The LAC granted the employer's appeal and overturned the arbitrator's award that the employer had committed an unfair labour practice against the employee.

This case sets restrictive requirements: to succeed in an unfair labour dispute concerning promotion, the employer must be shown to have acted in bad faith, with ulterior motive, arbitrarily, capriciously or in a manner which was grossly unreasonable in relation to the employee applying for the promotion. This means that errors committed by the employer in the selection and recruitment process will not necessarily result in an unfair labour practice finding.

5.Unfair discrimination

6.1 Affirmative action barriers

Solidarity obo Erasmus v Eskom Holdings SOC Ltd (C1001/18) [2024] ZALCCT 18 (24 May 2024)

Principle:

An employment practice to not shortlist any members of the non-designated group amounts to an absolute barrier to employment under section 15(4) of the EEA, and cannot be regarded as an affirmative action measure in terms of the EEA.

Facts:

Eskom is a designated employer in terms of the EEA and is required to prepare and implement an employment equity plan that will achieve reasonable progress towards employment equity in the workplace.

The employee, a white male, had been employed by Eskom since 1988. He was employed as Senior Advisor Outage Coordinator and applied for the post of Manager: Site Outage Execution at Peaking Power Station for the Group Technology Division. Neither the employee nor any of the other applicants were appointed at the end of the recruitment process, despite a senior manager in the department wanting to appoint him. When he was not appointed, he referred an unfair discrimination dispute to the Labour Court.

Based on the evidence led, the **Labour Court** found that Eskom's intention was to only shortlist members of the designated group (Black applicants and females) at the shortlisting stage. Whilst the employee was shortlisted and interviewed, he had described himself as "African" on the application form, as he said this was how he regarded himself

The Court found that Eskom's intention to only shortlist members of the designated group constituted an absolute barrier to employment for non-members of that group, which was prohibited under section 15(4) of the EEA. The Court stated as follows (clause 69):

> *"It appears to the Court that the inflexible and blunt instrument practiced at the shortlisting stage must be recognised as an absolute barrier to the ability of members (of) non-designated groups to compete with employment equity*

candidates from the inception of a recruitment process. No nuance in the practice is observable."

In support of this view, the Court referred to the Constitutional Court judgment in *South African Police Service v Solidarity obo Barnard [2014] ZACC 23* in which Moseneke ACJ stated - **"***'Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by s 15(3) of the Act*.'

The Court said whilst there were many ways to take equity targets into account during interviews of suitable candidates for a position, without blocking categories of persons from proving their worth to an employer and in the process infringing their rights to dignity and equality, in this case Eskom's employment practice amounted to an absolute barrier to non-designated groups.

The Court ordered that Eskom must take remedial steps to put a stop to its practice of not shortlisting members of non-designated groups for advertised posts, and awarded the employee compensation equal to 18 months of his salary at the time that he applied for the post.

It is clear from this judgment that employers should not, in implementing affirmative action measures, create absolute barriers to employment at the shortlisting stage. A more nuanced or flexible approach is required, allowing members of non-designated groups to compete with employment equity candidates.

Although it did not refer to the case, this judgment aligns with the SCA decision of *Magistrates Commission and Others v Lawrence (388/2020) [2021] ZASCA 165 (2 December 2021)* where it was held that at the shortlisting stage of an appointment process, legislation does not permit a targeted group approach. A process which is inflexible, quota-driven and mechanistic excludes one group, which amounts to not considering an application at all.

6.2 Proving pay discrimination

Passenger Rail Agency of South Africa v Hoyo (CA04/2023) [2024] ZALAC 57 (6 November 2024)

Principle:
A pay discrimination claim requires proof that the difference in pay between employees who perform the same work or work of equal value is as a result of a specific listed ground for differentiation which is prohibited by law. Evidence of a comparator must take the form of at least one other employee who performs that same work or work of equal value.

Facts:
The employee was a Production Manager who lodged a grievance with PRASA in which he took issue with the fact that he earned a salary which was less than that earned by two of his subordinates who, compared to him, performed lesser roles with reduced responsibilities. He claimed to have been discriminated against on the basis of race and/or in not receiving equal pay for work of equal value. After conciliation at the **CCMA** was unsuccessful, he referred an unfair discrimination claim to the Labour Court for adjudication.

The **Labour Court** rejected PRASA's contention that the pay disparities between the employee and his subordinates were not based on race. The Court noted that PRASA had not taken the steps required of it in terms of section 27(2) of the EEA to progressively reduce income differentials, with the employee's two subordinates being the "*beneficiaries of collective bargaining*". The Court therefore concluded that PRASA had not proved that unfair discrimination did not take place or that the discrimination was rational or otherwise justifiable, with the employee, as an African man, found to have been hurt by the fact that PRASA had not attempted to redress the injustices of the past.

On appeal at the **Labour Appeal Court**, the court said that the evidence showed clearly that disproportionate income differentials existed - which impacted directly on the employee. But his case was one of unfair discrimination under section 6(1) read with section 6(4) of the EEA. A pay discrimination claim requires proof that the difference in pay between employees who perform the same work or work of equal value is as a result of a specific listed ground for differentiation which is prohibited by law. Evidence of a comparator must take the form of at least one other employee who performs that same work or work of equal value.

The LAC concluded that there was no evidence before the LC that the work undertaken by the employee was the same, identical or interchangeable with that of his two subordinates, nor that it was substantially the same or sufficiently similar. The comparators relied upon did not show that the pay differential between the employee and the two comparators raised by him constituted discrimination on the ground of race.

The appeal succeeded, with the judgment of the Labour Court set aside.

The LAC's requirement that there must be evidence of a comparator - which must take the form of at least one other employee who performs that same work or work of equal value – can be difficult to find. There may be no-one who is an exact or close comparator and who then substantiates that the disproportionate income differentials are based on the grounds listed under section 6(1). In this case the employee was a manager with subordinates earning more than him. It could be that unfair discrimination was not the best basis for this claim. An unfair labour practice might have been easier to establish as a comparator is not needed.

6.3 Accommodating religious beliefs

Sun International Management Limited v Sayiti (JA 13/23) [2024] ZALAC 52 (21 October 2024)

Principle:
An employer must take reasonable steps to accommodate an employee's religious beliefs, before terminating employment on the basis of the inherent requirements of the job. The defence of an inherent requirement of the job for the purposes of s 187(2)(a) of the LRA requires the employer to demonstrate that the requirement in issue is rationally connected to the performance of the job, that the requirement is necessary for the fulfilment of a legitimate work-related purpose, and that it is not possible to accommodate the employee without imposing undue hardship or insurmountable operational difficulty.

Facts:
The employee in this case was employed by Sun International as Marketing Manager: for its operations in East Africa and the Southern African Development Community (SADC) on 16 March 2015. The employee's employment contract contained a 'job flexibility requirement' clause, which required employees to perform work within their specific skills and capability level, to accept any training and be prepared and willing to move from job to job, both within and between departments. The employee did not raise any challenges concerning the hours of work and/or working days during his interviews. Significantly, he did not mention any impediment for him to attend to weekend work.

Almost two months after commencing his employment, the employee disclosed that he was a member of the Seventh Adventist Church and therefore could not travel or attend events on the Sabbath (commencing on sunset Friday until sunset Saturday). The disclosure was prompted by the employee being required to attend the Tourism Indaba, an annual trade show in Durban. The employee did attend the Tourism Indaba - but only on Sunday and Monday.

After that the employee did not attend any events that took place on the Sabbath. The employer argued that it earnestly attempted to accommodate the employee by excusing him from work during the Sabbath for a period of about 16 months. However, it became unsustainable because another employee, who had to step in most instances, endured substantial pressure which became unbearable as her own responsibilities increased.

In July 2016, the employer initiated an **incapacity inquiry** against the employee. The outcome was that the employee could not perform the role of Marketing Manager based on the inherent requirements of the job. It was recommended that he be given the option to take up alternative work which would not require him to work on the Sabbath. He was offered the position of Co-ordinator: International Sales, but declined it as it would have meant a salary reduction of almost 45% of what he was currently earning. The employer then terminated his employment.

The employee challenged his dismissal as automatically unfair in terms of section 187(1)(f) of the LRA. Following a failed conciliation at the **CCMA**, he referred the dispute to the **Labour Court.** The court found that "*it was common cause*" that the employment contract did not explicitly state that the weekend work constituted an inherent requirement of the job of Market Manager. Thus, the employer failed to demonstrate that the weekend work was rationally connected to the performance of the job to pass the inherent requirement test. It went further to consider the issue of reasonable accommodation and found that the employer failed to demonstrate that it was impossible to accommodate the employee without imposing undue hardship on its operations. The LC upheld the employee's automatically unfair dismissal claim and ordered his reinstatement.

On appeal to the **Labour Appeal Court**, the majority judgment agreed that the weekend work requirement was rationally connected to the performance of the job of marketing manager and necessary to the accomplishment of a legitimate work-related purpose.
The LAC confirmed that the test for whether a requirement is inherent or inescapable in the performance of the job is essentially a proportionality enquiry (ie what proportion of the total job was affected by the requirement?). The court said that the requirement

must be strictly construed. A mere legitimate commercial rationale will not be enough. In general, the requirement must be rationally connected to the performance of the job.

Turning to s 187(2)(a) of the LRA - "*a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job*" – the court held that what this formulation suggests is that successfully establishing that a particular requirement is an inherent requirement of the job is not a complete defence – there may be other factors or circumstances that justify a finding of unfair dismissal.

The defence of an inherent requirement of the job for the purposes of s 187(2)(a) of the LRA requires the employer to demonstrate that -

- the requirement in issue is rationally connected to the performance of the job,
- the requirement is necessary for the fulfilment of a legitimate work-related purpose, and
- that it is not possible to accommodate the employee without imposing undue hardship or insurmountable operational difficulty.

The scope of the requirement of reasonable accommodation, by definition, can extend only to those adjustments or measures that are reasonable in the circumstances for the employer to make or implement. This is a factual enquiry, and is an objective test that engages with considerations of practicability and cost, the availability of suitable alternative employment, available resources, and so on. The LAC noted that the employee was uncooperative and uncompromising in the search for alternatives, and simply remained adamant in his denial that he had failed to perform an inherent requirement of the job.

Applying these principles, the LAC held that the employer had established that it took such steps that were reasonably available to it in the circumstances to accommodate the employee's inability to engage in weekend work on account of his religious beliefs. The reason for the employee's dismissal was based on an inherent requirement of the particular job, and was therefore not automatically unfair. For these reasons the LAC granted the appeal against the LC judgment.

The LAC said the facts of this case were "entirely distinguishable" from those in *TDF Network Africa (Pty) Ltd v Faris (CA 4/17) [2018] ZALAC 30 (5 November 2018)* which held that:

- Where an employee, for religious reasons, refuses to perform part of her/his contractual duties, the employer bears the burden of proving that it could not accommodate the employee.
- The employer has a duty to reasonably accommodate an employee's religious freedom unless it is impossible to do so without causing itself undue hardship.
- It is not enough that it may have a legitimate commercial rationale that it seeks to protect.

In *Sun International* the employee sought employment in a capacity that manifestly required the availability to engage in weekend work, in circumstances where he failed to disclose prior to his appointment the limitations that would be presented by his religious beliefs. In *TFD Network* the Court concluded on the facts that the employer had been unable to show that it would suffer any hardship, were the employee to be absent from a Saturday stocktake on account of her religious beliefs. There was no indication that her absence impacted on the employer's ability to complete stocktakes.

In particular, there was no evidence to suggest that the employee's absence from stocktakes would impede or delay the stocktaking process.

In *Sun International,* the employer adduced undisputed evidence of accommodation over a period of more than a year. The LAC in *TFD Network* found that there had been no attempt to accommodate the employee.

In *Sun International* the employer demonstrated that the requirement of working over weekends was rationally connected to the performance of the job, that the requirement was necessary for the fulfilment of a legitimate work-related purpose, and that it was not possible to accommodate the employee without imposing undue hardship or insurmountable operational difficulty.

In *TFD Network*, the LAC said that modification or adjustment to a job or the working environment was required, so as to enable the employee to continue to work under the constraining tenets of the employee's religious beliefs. But in *Sun International* the court said that the scope of the requirement of reasonable accommodation, by definition, can extend only to those adjustments or measures that are reasonable in the circumstances.

There are clear distinguishing features between the two cases, allowing both rulings to survive side-by-side. Together they show that the courts will respect religious belief and require employers to make reasonable accommodation where possible, when the belief impacts on the inherent requirements of the job.

6.4 Retirement vs age discrimination

Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Limited (CCT298.22; CCT346/22) [2024] ZACC 29 (20 December 2024)

Principle

These two cases concern the interpretation of section 187(2)(b) of the LRA. The Court has been unable to reach agreement on the matter. The result is that there is no majority on the interpretation of the section.

Facts

Two cases were consolidated on appeal to the ConCourt, one from the Labour Appeal Court and the other from the Labour Court. The central issue in both cases was whether section 187(2)(b) entitles an employer to terminate an employee's employment on the basis of retirement not only when the employee reaches retirement age, but at any time thereafter. Section 187(2)(b) reads as follows:

> "*A dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity*."

The Landman case

In *Motor Industry Staff Association and Another v Great South Autobody t/a Great South Panel Beaters* (referred to in the ConCourt judgment as the '**Landman case'**), Mr Landman (the employee) was not retired when he reached 60, the employer's

retirement age, and he continued working. 9 months later the employer wrote to him to say his services were being terminated as he had reached retirement age.

The employee referred an automatically unfair dismissal dispute to the **Labour Court**, contending that his dismissal constituted unfair discrimination in terms of section 187(1)(f) of the LRA, because it was based on his age. The Labour Court held that since the employee had already reached the agreed retirement age of 60 at the time of his dismissal, section 187(2)(b) of the LRA applied, and dismissed the employee's automatically unfair dismissal dispute.

The **Labour Appeal Court** dismissed the employee's appeal against the LC judgment. The LAC confirmed that section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age, at any time after the employee has reached his or her agreed or normal retirement age. This right accrues immediately on the employee's retirement date and can be exercised at any time after this date.

The Solidarity case

In *Solidarity obo Strydom & 5 others v State Information Technology Agency* (referred to in the ConCourt judgment as the '**Solidarity case'**), the 6 employees were employed by SITA, whose employment conditions provided that employees' retirement age was regulated by the employees' retirement or pension fund. The employees were members of the Alexander Forbes Pension Fund, which provided a retirement age of 60. Notwithstanding this, the employees were allowed to work beyond the normal retirement age of 60. SITA's employment conditions did provide for written consent for employees to work beyond 60 until 67, but it disputed that written consent was provided in these cases.

In September 2017, SITA attempted to enforce the retirement age in terms of the pension fund rules, and the employees were served with individual notices of retirement. At that time, the ages of the employees in this case ranged between 62 and 65, as they had been allowed to continue working beyond their retirement age.

The **Labour Court** agreed with the contention that, in terms of section 187(2)(b) of the LRA, where an employee works beyond an agreed or normal retirement age, the harsh reality is that such an employee is in effect working on 'borrowed time'. The employer, unless it can be proven that the employer specifically waived its rights to apply the retirement age, would remain entitled, at any point after the employee had attained the normal or agreed retirement age, to place the employee on retirement.

For these reasons the Labour Court rejected the employees' contentions that their dismissals were automatically unfair.

ConCourt's views

As stated above, the central issue in these cases before the ConCourt was whether section 187(2)(b) entitles an employer to terminate an employee's employment on the basis of retirement not only at the time the employee reaches retirement age, but at any time thereafter. Astonishingly, the ConCourt (with no less than 9 judges sitting) was unable to reach consensus or come to a majority decision on this issue, and admitted as such in its judgment. It stated the following in paragraph 1 on its judgment:

> *"These two cases concern the interpretation of section 187(2)(b) of the Labour Relations Act (LRA). The delay in delivering judgment is in part*

attributable to the fact that the Court has been unable to reach agreement on the matter. The result is that there is no majority on the interpretation of the section."

4 members of the Court concluded (the 'first judgment') that a dismissal on the basis of age is fair in terms of section 187(2)(b) only if the employee's employment is terminated on the date upon which the employee attains his or her normal or agreed retirement age, and a termination on the basis of age at a later date is automatically unfair.

A fifth member of the Court held (the 'second judgment') that the employer has an election whether to terminate the employee's employment on the basis of age when he/she reaches retirement age. Whilst this decision may take place on a date later than the employee's normal or agreed retirement age, it must be made within a reasonable time, failing which an employer may be found to have elected *not* to terminate the employee's employment. This also depends, though, on whether the employer had knowledge of the correct legal position.

The remaining 4 members of the Court agreed with the decision in *Schweitzer v Waco Distributors* (1998) 19 ILJ 1573 (LC) and held (the 'third judgment') that once an employee has reached his or her normal or agreed retirement age, section 187(2)(b) permits the employer then or at any time thereafter, to terminate the employee's appointment on the basis of age, subject to giving reasonable notice. This third judgment was also in favour of finding that a fair hearing should be granted the employee prior to the employer deciding to place the employee on retirement.

Whilst the ConCourt, based on the above, could not agree on the interpretation of section 187(2)(b), it was able to make a majority decision on the outcome of the 2 cases referred to it, due to the specific facts of those cases.

In the **Landman case**, due to the majority decision resulting from the reasoning in the second and third judgments on the facts of the case, the Court dismissed the employee's appeal against the Labour Court's decision that his dismissal had not been automatically unfair. The employee in this case had his services terminated 9 months after reaching retirement age, which was found to be within a reasonable period of reaching the normal or agreed retirement age.

In the **Solidarity case,** due to the majority decision resulting from the reasoning in the first and third judgments on the facts of the case, the Court upheld the 6 employees' appeal, found their dismissals to be automatically unfair, and awarded each of them compensation of 24 months' remuneration. A reminder that at the time the employer attempted to place them on retirement, the employees' ages ranged between 62 and 65, as they had been allowed to continue working beyond their retirement age.

It is important to note that the ConCourt's third judgment (which effectively said that section 187(2)(b) permits the employer at any time after the employee reaches retirement age, to terminate the employee's appointment on the basis of age) nevertheless still found the dismissals of the 6 employees to be automatically unfair. This was due to the fact that, based on the evidence led, the judgment found that the contractual arrangements entered into between the parties showed that if the employer consented to an employee working beyond 60, a new retirement age of 67 came into operation. As the employer allowed the 6 employees to work beyond 60,

this meant they could not be placed on retirement until they all reached the age of 67. As they were all dismissed well before that age, the Court agreed that their dismissals were automatically unfair.

Conclusion: where does this leave us?

We think the confusing situation we find ourselves in, as a result of the ConCourt being unable to agree on the interpretation of section 187(2)(b), is unacceptable. Simply put, we think the ConCourt shirked its responsibility to provide clear guidance on a disputed area of our labour legislation, which will have serious repercussions for employers and employees.

In trying to make sense of this messy situation, the overriding message, we think, is that employers can no longer rely with confidence on the *Waco* judgment that has stood for some 26 years, and which effectively found that section 187(2)(b) permits the employer at any time after an employee reaches retirement age, to terminate the employee's appointment on the basis of age (ie the reasoning accepted in the third ConCourt judgment).

It is worth considering 3 scenarios and potential outcomes, in applying section 187(2)(b):

- an employer terminating an employee's employment on the date the employee reaches retirement – not an automatically unfair dismissal;
- an employer terminating an employee's employment on the basis of having reached retirement age, within a reasonable period of having done so – not an automatically unfair dismissal;
- an employer terminating an employee's employment on the basis of having reached retirement age, at a later stage – whether this constitutes an automatically unfair dismissal will depend on the facts of each case.

A consequence of the above confusion may mean many more employees may now be retired closer to reaching their normal or agreed retirement age than would otherwise have been the case, a concern expressed in the third ConCourt judgment about the application of the first 2 judgments. Employers, fearing they will lose the ability to apply section 187(2)(b) at a later stage and seeking to avoid having to prove incapacity at a later stage as a fair basis for dismissal, may well be inclined to enforce the normal or agreed retirement age more strictly.

6.5 Compensation for not acting on grievances

Louw v Fourie N.O and Another (3074/2016) [2024] ZAFSHC 211 (8 July 2024)

Principle:

The failure by an employer to take seriously and act upon grievances may constitute a failure to comply with the standard of care expected of a reasonable employer.

Facts:

When the employee started her job as theatre manager at the Netcare hospital she was warned by the then hospital manager, amongst others, that one of the surgeons, who conducted a private practice at Netcare and performed surgeries at the hospital, had an "aggressive type of personality". The employee soon encountered Dr Grobler

and his temper tantrums - as did numerous other employees who worked with him in theatre.

During the period 2005 to 2016 Dr Grobler continually verbally abused her by hurling profanities, racist and sexist insults, blasphemous language and gross obscenities at her while in the presence of other operating theatre staff and members of the public. Examples of the revolting language used included calling her a “poes”, a “kont”, a “fokken bitch” and that he wanted to “bliksem” her.

Astonishingly, the employee filed grievances over an 8-year period on behalf of herself and other employees with senior management at Netcare, but the complaints remained largely unanswered. She was informed on numerous occasions that Dr Grobler was untouchable because he was a “money spinner” for Netcare.

The employee instituted 2 actions, the first a defamation case against Dr Grobler himself, which was settled by Dr Grobler’s estate (he had since passed away) in terms of a confidential settlement agreement. The second action was against Netcare, a delictual claim based on Netcare’s failure to take reasonable care, in that it failed to come to her assistance despite her numerous requests and complaints. Netcare had failed to create a working environment in which its employees were protected and not subjected to verbal abuse. As a result of Netcare’s failure to act, the employee was humiliated and degraded and suffered severe psychological and psychiatric trauma, manifesting as post-traumatic stress syndrome and major depressive disorder, for which she required psychotherapy treatment.

Just before the **High Court** trial, an open tender was made by Netcare. The employee accepted the offer of R300 000 for damages and past and future medical expenses, but did not accept the offered apology. She felt that the wording (“*We apologise sincerely that you felt that Netcare did not sufficiently support you in the execution of your duties*…”) showed that Netcare did not accept responsibility for failing to act, but rather apologized that she subjectively felt unsupported.

The employee had relied on a delictual action called the *actio iniuriarum* which is available where a person has wrongfully and intentionally injured the bodily integrity, dignity or reputation of another. She had argued for an expansion of the *actio* to include a published apology, however the High Court accepted Netcare’s argument that the amount tendered and accepted by the employee vindicated her rights without a published apology. The remedy of an apology is applicable in slandering or defamation cases, and this was not the employee’s case against Netcare - which was based on a failure to protect her.

Worjklaw does not often deal with delict cases in the High Court as they generally fall outside of labour law. But this case is valuable because it highlights an employer’s potential liability when ignoring the grievance process and failing to protect employees. The case also illustrates how powerful a sincere apology can be in restoring relationships, and how destructive an insincere or evasive apology can be.

It is also worth noting that the case against Netcare could equally have been brought under section 60 of the EEA, which provides that the employer becomes liable for harassment or unfair discrimination perpetrated against an employee, if the employer has not taken “the necessary steps” to prevent such misconduct.

7. Union acting outside its constitution

AFGRI Animal Feeds (A Division of PhilAfrica Foods (Pty) Limited) v National Union of Metalworkers South Africa and Others (CCT 188/22) [2024] ZACC 13 (21 June 2024)

Principles:

1. Where a trade union performs any act that deviates from or is contrary to its constitution, that act is *ultra vires* (beyond its powers) and null and void. To allow unions to operate outside their constitutions, at their discretion, would go against core constitutional values such as accountability, transparency and openness. There can be no suggestion of an infringement of the rights contained in section 18 and 23 of the Constitution, where the union itself has chosen to circumscribe its scope of operation in its constitution.

2. There is no ground for drawing a distinction between a trade union's representation of employees when enforcing organisational rights and representation in an unfair dismissal dispute. That distinction is both illogical and at odds with the principle that a trade union has no powers beyond those conferred by its constitution.

Facts:

The employer, AFGRI Animal Feeds (AFGRI), is a private company that manufactures and distributes animal feeds. AFGRI had dismissed employees for misconduct after they participated in an unprotected strike following its refusal to grant organisational rights to NUMSA. Consequently, NUMSA referred an unfair dismissal dispute to the Labour Court.

In the **Labour Court** AFGRI raised a preliminary point that NUMSA had no legal standing because the employees could not become members of NUMSA in terms of its constitution, and therefore could not represent AFGRI's former employees. In terms of NUMSA's constitution, membership is confined to "*workers in the metal and related industries*" whereas AFGRI manufactures and distributes animal feeds.

The Labour Court found in AFGRI's favour. It held that NUMSA's referral of the dispute under section 200 of the LRA was invalid since AFGRI operates in the animal feeds industry and not the metal industry. The Labour Court upheld the preliminary point and dismissed the unfair dismissal application with costs.

NUMSA appealed to the **Labour Appeal Court**, essentially on the grounds that the case concerned the rights of employees to representation by their trade union under section 200(2) of the LRA. The LAC in *National Union of Metalworkers of South Africa (NUMSA) and Others v AFGRI Animal Feeds (PTY) Ltd (JA29/2021) [2022] ZALAC 147 (17 June 2022)*) held that where a trade union has admitted to membership employees outside of its constitutionally-prescribed scope of operation, the union is limited to representing those employees in court, but it would not be able engage in collective bargaining on their behalf.

The LAC held that in an unfair dismissal dispute, different considerations applied, namely fairness, the right to representation and effective access to justice. Consequently NUMSA was entitled to represent the employees in terms of section 200(2) of the LRA, despite them being employed in an industry outside the bounds of the Union's constitution. The LAC upheld the appeal and set aside the Labour

Court's order.

The employer appealed this decision to the **Constitutional Court**. In a unanimous decision, the ConCourt addressed several issues regarding NUMSA's legal standing and the interpretation of the relevant provisions of the LRA. The central question was whether NUMSA could legally represent employees ineligible for membership under its constitution.

The Court referred to section 200 of the LRA which allows a registered trade union to act in its own interest in a dispute, on behalf of its members, or in their interest. The Court referred to its decision in *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others (CCT 172/19) [2020] ZACC 7 (26 March 2020)* which established that a trade union is bound by its constitution and cannot admit members outside its defined scope. The Court held that NUMSA lacked legal standing to represent the dismissed employees in the Labour Court because their employment in the animal feeds industry placed them outside NUMSA's registered scope. For this reason NUMSA had no authority to act on behalf of the employees.

The Constitutional Court upheld the employer's appeal and set aside the LAC's order.

The following principles are made clear from this judgment:

- Where a trade union performs any act that deviates from or is contrary to its constitution, that act is *ultra vires* (beyond its powers) and null and void.
- To allow unions to operate outside their constitutions, at their discretion, would go against core constitutional values such as accountability, transparency and openness.
- There is no ground for drawing a distinction between a trade union's representation of employees when enforcing organisational rights and representation in an unfair dismissal dispute. That distinction is both illogical and at odds with the principle that a trade union has no powers beyond those conferred by its constitution.
- There can be no suggestion of an infringement of the rights contained in section 18 (freedom of association) and 23 of the Constitution where the union itself has chosen to circumscribe its scope of operation in its constitution.

This decision in no way limits a trade union's ability to amend its constitution or change its name in terms of s 101 of the LRA.

8. Municipal official exceeding authority

Nzimande and Another v Newcastle Municipality (DA1/2022) [2024] ZALAC 34 (10 July 2024)

Principles:

The principle of legality requires all exercises of power to be, at a minimum, lawful and rational. The conduct of a public official must not be *mala fide* or based on ulterior or improper motives. A court is obliged to intervene on review if an official did not apply their mind or exercise their discretion at all, or if they disregarded an express provision of a statute.

Facts:

On 11 October 2017, the Newcastle Municipal Council resolved that all fixed-term contracts that were due to expire in 2018 and 2019 for managers and directors would indeed terminate at the end of their fixed term. The resolution added that the affected positions were to be re-advertised on a permanent basis at least three months prior to the expiry of the contracts.

The two employees in this case both received correspondence confirming the termination of their contracts in accordance with the resolution. Mr Nzimande's last day of service was 31 October 2018. On that day, the municipal manager at the time (Mr Mswane) decided to extend Mr Nzimande's contract for a period of six months, ostensibly because there were two vacant positions in that particular unit, and to enable the department to prepare for the recruitment process. Mr Mswane later withdrew that decision by way of a memorandum dated 30 November 2018 and informed Mr Nzimande that his previous fixed-term contract had been extended for a further period of five years. Mr Mswane and Mr Nzimande both signed an addendum giving effect to this arrangement.

The second employee (Mr Shozi) was treated similarly and also entered into a written agreement with the Municipality, represented by Mr Mswane, purporting to extend his fixed-term contract of employment for a five-year period.

Mr Mswane was suspended on 13 December 2018 pending an investigation into his conduct. The acting municipal manager informed the two employees that their appointments were unauthorised and that they were to vacate their positions immediately, which resulted in them referring an unfair dismissal dispute to the **South African Local Government Bargaining Council**. Before this dispute could be finalized, the Municipality instituted a legality review in terms of s 158(1)(*h*) of the LRA.

The **Labour Court** reviewed and set aside Mr Mswane's decision to extend both fixed-term contracts. The contracts entered into with the appellants on 30 November 2018 were declared invalid and void *ab initio.*

On appeal to the **Labour Appeal Court**, the appeal considered the legality of a municipal manager's decision to extend the fixed-term employment contracts of employees contrary to a municipal council resolution.

The employees argued that the Labour Court ought not to have considered the review application given the unfair dismissal dispute that was pending at the time. They submitted that the Labour Court erred in dealing with the application as a common law review and in finding that Mr Mswane lacked actual or ostensible authority to contract with them on 30 November 2018. They claimed that the Labour Court also erred in holding that they were aware of Mr Mswane's lack of authority to contract with them. Finally, it was argued that any finding of invalidity ought not to operate retrospectively and should not impact on pending unfair dismissal proceedings.

The LAC held that the council had expressed itself clearly on the issue of fixed-term contracts for managers and directors due to expire during 2018 and 2019. It was resolved that these contracts were to be terminated at the end of the term and re-advertised on a permanent basis at least three months prior to the date of expiry. Mr Mswane acted arbitrarily and violated the principle of legality by extending the appellants' contracts in contravention of the resolution.

The significance of this case is, firstly, that the principle of legality requires all exercises of power to be, at a minimum, lawful and rational. The conduct of a public official must

not be *mala fide* or based on ulterior or improper motives. A court is obliged to intervene on review if an official did not apply their mind or exercise their discretion at all, or if they disregarded an express provision of a statute.

The second important aspect is that a party to a contract that has been declared invalid due to illegality cannot rely on the constitutional right to fair labour practices in order to insist that an appeal should succeed purely because the review interrupted arbitration proceedings.